

**IN THE HIGH COURT OF TANZANIA
DODOMA SUB REGISTRY
AT DODOMA**

MISCELLANEOUS CRIMINAL APPLICATION NO. 37905 OF 2023

*(Arising from Criminal Session No 137 of 2023 in the High Court of
Tanzania Dodoma Sub-Registry)*

MWINYI SOSYO @KATAWA APPLICANT

VERSUS

THE REPUBLICRESPONDENT

RULING

Date of last order: 15/02/2024

Date of Ruling: 28/02/2024

LONGOPA, J.:

Mwinyi Sosyo@ Katawa, the applicant stand charged in Criminal Session No. 137/2023 with an offence of accessory after the fact to murder contrary to section 213 of the Penal Code, Cap 16 R.E. 2022. He is a co-accused with other two accused persons who are facing a charge of Murder c/s 196 and 197 of the Penal Code. On 23rd November 2023, the applicant filed this application under Section 148(3) of the Criminal Procedure Act, Cap 20 R.E. 2022 for an order, namely:

(a) that, this Honorable Court be pleased to grant bail to the Applicant charged with the offence of accessory after the fact to murder which is bailable pending hearing and determination of the Criminal Session No 137 of 2023 pending in this Court.

This application is supported by an affidavit of Mr. Mwinyi Sosyo@ Katawa, the applicant. The affidavit states that the applicant is facing a bailable offence thus applying to this Court to grant bail pending hearing and determination of the charges he is facing in the forthcoming Criminal session. The applicant's affidavits states as follows:

- 1. That, I the applicant in this application thence conversant with the facts I am about to depose hereunder.*
- 2. That, I am the accused person in Criminal Session Case No137 of 2023 which is pending in this Court whereby I am charged with offence of accessory after the fact to murder. The copy of information is attached as annexure M1 to make part of this affidavit.*
- 3. That, since the offence charged is bailable, I am humbly applying for bail of the same while awaiting for the same to be fixed in the Court Criminal session.*
- 4. That, I have reliable sureties in the vicinity of this Court, and I promise to attend Court session as I will be required and promise to abide to the bail conditions to be set by this Court.*

5. That, under such circumstances if the prayers set forth under the Chamber Application will not be granted it will occasion injustice to me as the offence I have been charged is bailable.

On 15th February 2024 when this application came for hearing, the applicant enjoyed the legal services of Mr. Fred Kalonga, learned advocate and the Republic was represented by Ms. Neema Taji, assisted by Ms. Patricia Kipagile, both learned State Attorneys. The Counsel for application adopted the affidavit of the applicant to form part of the submission and reiterated that the applicant has reliable sureties within the jurisdiction of the Court. Further, it was argued that the applicant is willing to adhere to all conditions set by this Court including appearance to court on dates set for the forthcoming Criminal session. The Counsel urged this Court to find merits on this application given that the offence the applicant is charged with is bailable.

The application was not resisted by the Respondent's State Attorney. The learned State Attorney reiterated the need for this Court to set appropriate conditions that are equal to the severity of the alleged offence. That was all from both learned counsel for applicant and respondent.

I have dispassionately considered the affidavit supporting the application and submissions from both applicant and respondent. The

respondent is not objecting to the grant of this application and admission to the bail to the applicant.

Bail is an important aspect of criminal trial that accords an accused person temporary release from police custody or remand prison pending trial or determination of his appeal. It is governed by the provisions of Section 148 of the Criminal Procedure Act, Cap 20 R.E. 2022. The Act provides that:

148.-(1) Where any person is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail the officer or the court, as the case may be, may, subject to the following provisions of this section, admit that person to bail; save that the officer or the court may, instead of taking bail from that person, release him on his executing a bond with or without sureties for his appearance as provided in this section.

(2) The amount of a bail shall be fixed with due regard to the gravity and other circumstances of the case, but shall not be excessive.

(3) The High Court may, subject to subsections (4) and (5) of this section, in any case direct that any

person be admitted to bail or that the bail required by a subordinate court or a police officer be reduced
(Emphasis added).

The law allows generally a person to be admitted on bail when such person is under custody of the police or other means of detention. The Police officer or the Court is enjoined to satisfy that a person is eligible to bail in the sense that such person should be charged or facing allegations in a bailable offence.

The bail restrictions are set out in Section 148(5) of the Criminal Procedure Act, Cap 20 R.E. 2022. The offence of accessory to the fact of murder is not one of those offences whose bail is restricted. It is a bailable offence under the laws of Tanzania.

The instant application on bail is a step towards applicant enjoying his freedom of movement that is temporarily curtailed. The application for bail is a realization of the provisions of Article 13(6) (b) of the Constitution of United Republic of Tanzania on presumption of innocence which forms crucial element of principle of equality before the law. However, it should not be over-emphasized that restriction of individual's freedom through detention either at a police station or remand prison pending hearing or appeal serves a critical aspect of criminal justice too. The importance/objective of temporarily curtailing freedom of movement in criminal justice has been stated in clear terms in the case of **Attorney**

General vs Dickson Paulo Sanga (Civil Appeal 175 of 2020) [2020] TZCA 371 (5 August 2020), at p.36; [2020] 1 T.L.R 61 [CA], at pp.99-100, where the full bench of Court of Appeal stated as follows:

Thus, the detention pending trial is undoubtedly the necessary restriction for attainment of the desired objective which include among others, the interests of public safety and public order, defence and protection of those involved in judicial proceedings such as witnesses.

Having in mind of the objectives of remanding an accused person in custody pending trial, a Court exercising powers to grant bail or otherwise must be fully versed with jurisdiction before it embarks on determination of an application for bail. In the case of **Director of Public Prosecutions vs Farid Hadi Ahmed & Others** (Criminal Appeal 96 of 2013) [2013] TZCA 260 (20 November 2013), at pp.18-19, the Court of Appeal distinctively stated that:

In disposing of this crucial ground of appeal, we have found it instructive to begin by stating categorically that it is now trite law that the issue of jurisdiction for any court is basic. As this Court succinctly stated in Fanuel Mantiri Ng'unda v. Herman M. Ng'unda and Others, Civil Appeal No. 8 of 1995 (unreported), "it goes to the very root of the authority of the court to adjudicate upon cases of different nature" The Court went on to hold that "the question of

jurisdiction is so fundamental" such that "it is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case". We are accordingly of the settled view that jurisdiction to adjudicate must not be presumed or taken for granted. It must be traced to unequivocal statutory provisions and in some rare cases from the Constitution.

The Court without being clothed appropriately with jurisdiction shall not be seized with powers to grant bail. Any exercise of such powers would amount to nullity of the decision. All cases involving committal proceedings prior to a committal order are not within the mandate of the High Court to grant bail. This was the principle in the case of **DPP vs Bookeem Mohamed @ Ally & Others** (Criminal Appeal 217 of 2019) [2021] TZCA 188 (7 May 2021), at pp 12-13, the Court of Appeal lucidly stated:

Guided by the above cited authority, it is our view that, if the High Court, in Dodoli Kapufi's case (supra) was found to have no powers to grant bail to the applicants on a matter which was still under committal proceedings without prior order which could have vested jurisdiction on it, the matter at hand is even more serious. We say so because, one, there was no illegality, incorrectness or improprieties which ought to be corrected in terms of section 372 of the CPA. Neither was there any order,

finding or sentence which needed to be corrected in terms of section 373 (1) (a) of the CPA. [See also Domiano Qadwe's case (supra)]. Two, there was no committal order by the subordinate court as the matter was still in pre-committal state which the High Court was prohibited even to take cognizance of it.

It goes without saying that in circumstances where there are ongoing committal proceedings it is the committal court that would be versed with proper jurisdiction to grant bail to the accused person for bailable offences at the time of processing committal order. This is in line with the decision in the case of **The Republic Versus Dodoli Kapufi and Patson Tusalile**, Criminal Revision No.1 of 2008, while interpreting sections 148(1), 148(5)(a), 244, 245(1), 245(4) and 248(4) of the Criminal Procedure Act, the Court of Appeal held that:

*a subordinate court at the stage of committal proceedings has power to grant bail for any bailable offence. The Court added that, the High Court, in those cases has only got powers of superintendence with regard to bail as provided for in section 148(3) of the Criminal Procedure Act. The powers of superintendence are emphasized in section 149 of the Criminal Procedure Act. Similar holding was arrived at in the case of **The DPP Versus Bashiri Waziri and***

Mugesi Antony, Criminal Appeal No.168 of 2012, CAT, at Mwanza.

The first aspect for resolution by this Court is whether it is versed with proper jurisdiction to grant bail on the instant application. Determination of this aspect related to jurisdiction is crucial before embarking on circumstances that would assisting in setting appropriate terms of the bail. The accused person is standing charged with two others in a Murder case involving two main charges: namely, murder contrary to section 196 and 197 of the Penal Code, Cap 16 R.E. 2022 for the 1st and 2nd accused; and the offence of accessory after the fact to the Murder contrary to Section 213 of the Penal Code, Cap 16 R.E. 2022 for the 3rd accused who is the applicant herein.

That being the case, the applicant and two others were subject to committal proceedings. It is important to ascertain if there exists a committal order. My perusal of the record in the Court file reveals two main aspects. First, there exists a committal order of Preliminary Inquiry (P.I) No. 12 of 2023 from the District Court of Chemba dated 01/11/2023 which committed the applicant with the other two accused persons to the High Court for trial. The order committed the applicant and his co -accused persons and ordered them remanded in custody pending their trial to the High Court during session at it shall be scheduled. Second, that the High Court has already invited the applicant and his co-accused to enter plea.

The applicant pleaded not guilty to the offence of accessory after the fact to Murder. A plea of Not Guilty (PNG) was entered on 19/01/2024.

It is clear from these facts that this Court is now seized with proper jurisdiction to determine the application for bail as the applicant has already been committed to the High Court for trial. This application for bail pending trial is thus within a proper mandate of this Court to determine.

Having ascertained that this Court has jurisdiction to determine an application for bail, the second aspect is whether it is appropriate to grant the application for bail and under what terms should bail be granted.

The applicant is charged with accessory after the fact to offence of murder allegedly for assisting the then suspects of the commission of the offence by providing safe abode for them to escape criminal liability. If proved, the offence attracts penalty of custodial sentence of seven years. It is a serious offence. As a result, any conditions set for bail should be sufficient to ensure that the applicant attend his case once the session is scheduled.

In the affidavit supporting this application, the applicant sets three important averments. First, that the offence he is charged is bailable offence. Second, the applicant has reliable sureties within the jurisdiction of the Court. Third, the applicant promises to abide to conditions to be set by this Court including attending the court session on date set for appearance.

It is my settled view that conditions set should be sufficient to enable proper administration of justice by balancing the interests of justice administration on one hand, and freedoms of the applicant on the other hand. The conditions should adequately safeguard and ensure appearance of the applicant to Court on all dates fixed by the Court for the pending trial.

In view of the above, the application for bail pending trial is hereby granted. The applicant is admitted to bail on the following conditions:

1. Applicant should not travel outside Dodoma Region without prior approval of the Deputy Registrar of the High Court of Tanzania Dodoma Sub Registry.
2. The applicant should sign a bail bond in sum of Tshs 20,000,000/=.
3. The applicant should have two reliable sureties with fixed abode within the jurisdiction of the trial Court;
4. Each surety shall execute a bail bond in the sum of Tshs. 10,000,000/=. Each surety should deposit to the custody of the Court, a title deed or evidence satisfactorily to prove existence of an immovable property valued at Tshs. 10,000,000/=.
5. Each surety shall produce an introductory letter from his or her employer or local authorities and a copy of recognized identity card.

6. The applicant to surrender his passport or any travelling documents in his name (if any);
7. The Applicant must attend in Court on every date his case is scheduled unless prevented by reasonable cause.
8. The Deputy Registrar of the High Court of Tanzania Dodoma Sub-Registry to ascertain compliance with these conditions.

It is so ordered.

DATED at DODOMA this 28th day of February 2024



Longopa
E.E. LONGOPA
JUDGE
28/02/2024.