

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MOROGORO DISTRICT REGISTRY  
AT MOROGORO**

**MISC. CRIMINAL APPLICATION NO. 40076 OF 2023**

(Originating from the decision of the Kilombero District Court at Ifakara in Morogoro,  
Criminal Case No. 108 of 2023 delivered by Hon. OBASI, S.J., SRM on 16/11/2023)

**ALOYCE MPOLE @ KIGODOI ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

16/01/2024 & 23/01/2024

**KINYAKA, J.:**

By way of chamber summons supported by an affidavit sworn by Idd Ally Mrema, Counsel for the Applicant, the Applicant moved the Court to grant an order to release him on bail, pending hearing and determination of his Criminal Appeal No. 39826 of 2023 pending before the Court. According to the affidavit, the Applicant was charged and convicted of committing unnatural offence to a boy of seven years contrary to section 154(1)(a) and (2) of the Penal Code Cap. 16 R.E. 2022. On 16/11/2023, the trial Magistrate sentenced the Applicant to mandatory life imprisonment.

On 16/01/2024, when the application was called for hearing, the Applicant who appeared remotely through Court's video conference facility that was

linked from Ukonga Prison, was duly represented by Mr. Idd Mrema, learned Advocate, and the Respondent was duly represented by Mr. Shabani Kabelwa, learned State Attorney.

Supporting the Applicant's application, Mr. Mrema began by adopting the contents of the affidavit sworn by Idd Ally Mrema, Counsel for the Applicant as forming part of the Applicant's submissions in chief. He submitted that the Applicant's appeal has high chances of success as the prosecution failed to prove that it is the Applicant who sodomized the victim. He argued that the prosecution's oral evidence was not corroborated. He pegged the application on the grounds of the Applicant's old age and medical condition, that is, being diagnosed as having diabetic mellitus and Blood Pressure. He contended that the Applicant is suffering from blood pressure and diabetes and his health is deteriorating due to absence of sufficient medical services and attention.

Citing Article 15(1), (2) (a) and (b) of the Constitution of the United Republic of Tanzania of 1997 as amended from time to time, (hereinafter, the "Constitution") and section 368 of the Criminal Procedure Code Cap. 20 R.E. 2022 (hereinafter, the "CPA"), he urged the Court to balance between the liberty of the Applicant and proper administration of justice. He viewed that



the grant of bail will not prejudice justice in any way as justice calls for suspension of sentence of the Applicant until his appeal is determined. He urged the Court to exercise its discretion to grant bail with or without sureties for the Applicant to seek medical attention.

Mr. Mrema referred the Court to the case of **Lawrence Mateso v. R. (1996) TLR 118** which dealt with the right of an old man to be granted bail, setting out four grounds of granting bail pending hearing and determination of an appeal. He cited Article 107A (2) (b) and (e) of the Constitution urging the Court to avoid technicalities. He argued that despite the fact that the Applicant was sentenced to serve life imprisonment, it should not be a reason for the Court to deny the Applicant bail pending his appeal.

Mr. Kabelwa opposed the application by adopting the contents of the counter affidavit sworn by Shabani Abdallah Kabelwa, learned State Attorney as forming part of the Respondent's submissions. He submitted that the criminal charges emanated from the Applicant's sodomizing a boy of seven years old. He contended that the prosecution proved the offence beyond reasonable doubt that led to the Applicant's conviction, which is a proof that the Applicant's appeal has no chances of success. He argued that the

Applicant's grounds of appeal are based on facts and not on points of law. He cited the case of **Amon Mulotwa Mwalupimbi v. DPP, Criminal Application No. 9/6 of 2020**, where the Court of Appeal set four principles in granting or not granting bail pending appeal, including the requirement for the Applicant to demonstrate a point of law which is contested in the pending appeal. He stated that the decision was subscribed by the High Court in the case of **John Steven Lubele v. R, Criminal Application No. 36 of 2022**.

He submitted that justice will not be done as the Applicant has lost his right to be presumed innocent upon his conviction and sentence to life imprisonment. He urged the Court to assess the best interest of the child who was sodomized by the Applicant considering that the Applicant and the victim were living in the same house. He argued that if bail is granted, it will affect the victim who used to live in the same house with the Applicant. He argued further that the Applicant has not provided any evidence to prove if the victim is no longer living in the same house or vicinity, or will not be affected by his presence in the house or vicinity.

Mr. Kabelwa submitted that the ground of old age and sickness are unmeritorious as no proof of his age and no any documentary evidence has

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been provided to prove the kind of disease the Applicant suffers, but he admitted that the Applicant looks old. He referred to the case **Ally Buruani Macho v. R., Misc. Criminal Application No. 191 of 2020** where the High Court held that the ground as to old age in application for bail pending appeal must be determined depending on the merit of each case. He submitted that even if the Applicant was sick, all prisons in Tanzania have medical facilities and doctors to take care of sick prisoners.

He further argued that the exception to Article 15 the Constitution fall in the present application as the Applicant has lost the presumption of innocence due to his conviction and sentence. He argued that Article 107A (d) and (e) of the Constitution does not apply in the present dispute as there is no technicality. He argued further that appeals are currently disposed of timely and hence, the present application is not necessary. Counsel prayed for dismissal of the application.

In his rejoinder, Mr. Mrema reiterated that the Applicant has high chances of success in the appeal as the prosecution failed to prove the offence against the Applicant beyond reasonable doubt. He submitted that the Applicant's grounds of appeal are based on points of law. He argued that no prejudice or injustice will be occasioned if the Applicant is granted bail. He

contended that the fact that the Applicant has been sentenced to serve life imprisonment does not preempt the Court's exercise of its discretion to grant bail. He submitted that the victim and his parents are no longer living in the house and the grant of the application will not deprive the victim's welfare and interest.

He went on submitting that the admission by the Counsel for the Respondent that the Applicant is old is sufficient and does not need further proof. He contended that his client was 69 years old last year when he was tried at the District Court. He contended further that the Applicant could not attach documents evidencing his sickness as the medical certificates are at the Applicant's home while he is in jail. He argued that on a mere glance at him through the video conference facility, the Applicant looks sick. Counsel opposed the Respondent's mere contention that there are sufficient medical facilities in the prison being a statement from the bar with no proof.

Mr. Mrema submitted that the exception under Article 15 of the Constitution must be read together with section 368 of the CPA which gives discretion to Court to suspend the Applicant's sentence until his appeal is determined. He admitted that the Applicant lost the presumption of his innocence upon



conviction and sentence, but that does not remove his right to live as a free person awaiting hearing and determination of his appeal.

Following closure of the Parties' submissions, I now turn to determine whether the Applicant demonstrated sufficient reasons for the Court's exercise of its discretion to grant bail pending hearing and determination of his appeal pending before the Court. In exercising the discretion whether or not to grant bail, I am guided by section 368(1) of the CPA that empowers the Court for reasonable cause, to order the release of a person sentenced to imprisonment on bail, with or without sureties. In analyzing the reasonable cause(s) for the grant of the application, I shall assess whether the Applicant's old age and medical condition, as well as the high chances of success of his pending appeal are reasonable, and have been sufficiently established to warrant the grant of the application.

Bail application pending appeal is different from bail application pending trial. While the latter entails presumption of innocence which require prosecution to establish why it should not be granted, the former entail the Applicant's loss of presumption of innocence upon conviction, which require him to satisfy the court as to why bail should be granted. It involves the balancing of the individual's liberty with proper administration of justice. In this case,



the Applicant was obliged to demonstrate unusual and exceptional circumstances to warrant the court to grant bail pending his appeal. However, each case is determined on its own merit and based on conditions set by the courts in various cases.

In the case of **Lawrence Mateso v. R. (1996) TLR 118**, the High Court set four conditions for the grant of bail pending appeal, namely:-

1. That bail pending appeal is the discretion of the court;
2. On deciding whether to grant or not, the court must balance the liberty of the individual with proper administration of justice;
3. That the applicant must prove beyond reasonable doubt that justice will not be jeopardized by his liberty and there are unusual and exceptional reasons for granting bail; and
4. That the appeal has an overwhelming chances of success.

In the case of **Amon Mulotwa Mwalupimbi v. DPP, Criminal Application No. 09/06 of 2020 [2021] TZCA 85** (31 March 2021), the Court of Appeal set guidance to courts when considering to grant or not to grant bail, to abide by the following principles:

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is essential for ensuring transparency and accountability in the organization's operations.

2. The second part outlines the various methods and tools used to collect and analyze data. This includes the use of surveys, interviews, and focus groups to gather qualitative information, as well as the application of statistical software for quantitative analysis.

3. The third part describes the process of identifying and measuring key performance indicators (KPIs). It highlights the need to select metrics that are relevant to the organization's strategic goals and to establish a baseline for comparison.

4. The fourth part details the implementation of a data management system. This involves setting up a secure database to store all collected information and ensuring that access is restricted to authorized personnel only.

5. The fifth part discusses the importance of regular reporting and communication of findings. It stresses that stakeholders should be kept informed of progress and any emerging trends or issues.

6. The sixth part addresses the challenges of data collection and analysis, such as incomplete data, bias, and the complexity of interpreting results. It offers practical advice on how to overcome these obstacles.

7. The seventh part concludes by summarizing the key takeaways and providing a final recommendation on the best practices for effective data-driven decision-making.

1. The onus is on the applicant, to satisfy the Court that justice will not be jeopardized by being granted bail pending appeal.
2. In deciding whether bail should be granted involves balancing liberty of the individual with proper administration of justice.
3. The applicant must show existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.
4. If it appears *prima facie* from the totality of circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued.

Based on the above, I shall now determine the extent to which the Applicant's application has met the conditions and or the principles set by the Court of Appeal.

In respect of whether there appears *prima facie* from the totality of circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued, Mr. Mrema argued that the Applicant's appeal has high chances of success as the grounds involve points of law. However, he did not point out substantial points of law to be argued in the appeal. I have read the grounds of appeal attached to the affidavit as



**Annexure AM-2.** All six grounds of appeal challenge the decision of the trial court to convict the Applicant without sufficient evidence, based on failure by the prosecution to prove the offence against the Applicant beyond reasonable doubt, failure by the prosecution to prove elements of offence, failure by the trial court to properly record proceedings and evaluate evidence, the trial court's reliance of evidence of PW2, the child of tender age, without any proof, and the trial court's error by ignoring the evidence of the defence.

It is clear that the above grounds will require the appellate court to assess evidence adduced before the trial. Although there might be an arguable appeal in the Applicant's appeal before the Court, I do not find any point(s) of law in the grounds of appeal attached to the affidavit. I am therefore convinced by the submission of Mr. Kabelwa and find that the Applicant has failed to establish on the face of record of the application and his submissions that the appeal has high chances of success.

The affidavit in support of the application does not disclose the age of the Applicant. There has been no proof of the age of the Applicant. As hearing of the application was conducted through video conference facility, I have had an ample time to observe the Applicant and found that he is old. Both

Counsels admitted that the Applicant is an old man. However, despite the Applicant's old age, I am of a settled position that old age alone does not constitute unusual or exceptional circumstance to warrant the grant of bail pending his appeal. I am fortified by the decision in **Amon Mulotha Mwalupimbi** (supra) where in the last paragraph of page 11 through to 12, the Court of Appeal held:-

*"With regard to the age of the applicant, there is hardly any proof of the age other than the medical chits reflecting that the applicant's age is 73 years old. Be it as it may, we are not prepared to consider the age shown as constituting exceptional or unusual circumstance to warrant the exercise of the Court's discretion to grant bail pending appeal."*

With regard to the ground of ill health, the affidavit of the Applicant state in paragraph 5 and 6 that:-

- 5. That, the applicant since the trial court's judgement pronounced on 16/11/2023, left his wife and children and his houses and he is an old man who is suffering from diabetic mellitus and blood pressure.*
- 6. That, the applicant being suffering from diabetic mellitus and blood pressure need time free to concentrate for his health for the whole time of life remaining in this world.*

There is no any evidence provided to prove that the Applicant is suffering from diabetic mellitus and blood pressure, be it medical certificate or other



evidence. The affidavit does not disclose how serious the alleged medical condition is to the extent that it cannot be taken care when the Applicant is in prison. I agree with Mr. Kabelwa that the prisons in Tanzania have health facilities to take care of sick prisoners. The Applicant ought to have demonstrated, by at least submitting an affidavit from the Prison officer, that his medical condition cannot be handled when in prison. Based on lack of proof of the Applicant's ill health and failure by the Applicant to prove that his ill health, if any, cannot be best handled when he is in prison, I find no unusual or exception circumstance to exercise the Court's discretion to grant bail pending his appeal.

I further find that there is no any technicality in the present application that would require the Court to invoke Article 107A (2) (e) of the Constitution. Article 107A (2) (b) of the Constitution is inapplicable in the present application as it require the courts not to delay dispensation of justice without reasonable ground. There has been no delay in determination of the Applicant's present application. Although Article 15(1) and (2) of the Constitution guarantee the right to freedom, I find the exceptions provided under Article 15(2) (a) and (b) operate against the Applicant. The Applicant has been convicted by a competent court upon being found guilty and



sentenced to life imprisonment. His freedom has been curtailed by his conviction of a criminal offence in accordance with procedures prescribed by the law.

Balancing between liberty of the Applicant and proper administration of justice, especially in the circumstance of the present application where the Applicant has failed to sufficiently establish the grounds for the grant of bail, I find that justice lies on the upholding of proper administration of justice.

From the above findings, I hold that the Applicant has failed to meet the conditions for the grant of bail pending hearing and determination of his appeal. I accordingly dismiss the application for lack of merit.

It is so ordered.

**DATED** at **MOROGORO** this 23<sup>rd</sup> day of January 2024.



*H. A. Kinyaka*  
**H. A. KINYAKA**

**JUDGE**

**23/01/2024**