

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

CRIMINAL APPLICATION NO 000004148/2024.

STEPHEN TUMAIN MDUMAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING:

12th & 17th April, 2024.

KIREKIANO, J:

Before this court in criminal session no 17/2022, the applicant herein was charged and consequently convicted of the offence of Manslaughter c/s 195 and 198 of the Penal code Cap. 16. In the end, he was sentenced to serve a custodial sentence of seven years term of imprisonment in jail. Dissatisfied the applicant has lodged notice to the Court of Appeal intending to challenge both conviction and sentence. Momentarily, the applicant seeks this court to grant bail pending the determination of the appeal before the Court of Appeal.

The application is brought under section 10 (1) of the Appellate Jurisdiction Act Cap 141 [RE 2019] and section 368 (1) (a) (c) of the Criminal Procedure Act Cap. 20 [RE 2022] supported by the affidavit of Mr. Ashiru Hussein Lugwisa, the applicant's Counsel.

In the affidavit, the deponent stated facts leading into applicant incarceration and reasons he seeks bail pending his determination of appeal in the court of appeal. For reason to be known shortly, I take liberty to indicate at this stage substantial grounds advanced in support of the application as indicated in paragraphs 5, 6, 7, 10 11 and 12 of the affidavits *thus*;

- 1. There is an error on the face of record on the judgment of this court thus appealing with overwhelming chances of success.*
- 2. The Applicant was convicted with a bailable offence, and he was out on bail all along throughout his trial.*
- 3. Since his incarceration, the Applicant has made so much effort to seek permission from the prison authorities to allow him to attend physiotherapy sessions. But all his efforts were in vain; the prison authorities informed him that they did not have enough facilities (transport and other*

logistical means) to take sick prisoners to attend to their medical needs.

- 4. The applicant has been a patient at Muhimbili National Hospital suffering from long-standing lower back pains associated with lower limb weakness. He has been treated by Dr Julius M.K. who conducted some clinical tests and the results revealed that the Applicant suffers from a condition known as "Disc Degenerative lumbar spine with disc extrusion at L4/L5". Simply put, a patient with this condition experiences severe back pains, particularly lower back pains.*
- 5. The Ukonga prison does not have the physiotherapy facilities.*

When this application was called for hearing the respondent through Miss Florida Wenceslaus, posed a preliminary objection thus;

This court is functus official and thus not vested with jurisdiction to try the application.

The applicant was represented by Mr. Ashiru Hussein Lugwisa while as indicated, the respondent was represented by Miss Florida Wenceslaus learned state attorney.

Miss Florida, in her brief submission, pointed out that, this court has no jurisdiction because the applicant has once applied to this court on the same prayer before and the same was dismissed. This was in, "**Stephen Tumain Mduma v. Director of Public Prosecution (Misc. Criminal Application No. 316 of 2024)** [https://tanzlii.org/ 2024-01-08](https://tanzlii.org/2024-01-08). It was Miss Florida submission that, this court is functus official to reconsider the same application. If the applicant was aggrieved, he ought to have preferred an appeal before the court of appeal. According to Miss Florida, this court is functus official.

On his part, Mr. Lugwisa conceded that the applicant had file a previous application before this court which was refused. He said the facts in this application are different from the facts in the previous application. According to him, the application was refused because there was an issue of lapse of time in medical report in support of the application. As such the final order was "refusing" not "dismissing" the application thus this court can entertain the current application.

I have considered the parties' contending submission, it is undisputed that this court on 08th January 2024 determined the applicant's similar application, this was in the cited case of **Stephen Tumain Mduma**.

In that application the applicant under rule 10 (1) of the Appellate Jurisdiction Act, Cap 141 [RE 2019] and section 368 (1) (a) (i) of the Criminal Procedure Act, Cap 20 [RE 2022], in that application the applicant sought this court to grant bail pending hearing of Criminal Appeal No. 342 of 2023 in the Court of Appeal of Tanzania against the decision of this **court in Criminal Session No. 17 of 2022**. In the end, this court (Mtembwa J) is held on page 7.

*"I am unable to endorse the ill health of the applicant as an exceptional and unusual reason in the circumstance of this case. In the event, I find that the Applicant has not advanced exceptional and or unusual circumstances or reasons warranting a grant of bail pending appeal. **In the end, the application for bail pending appeal is hereby refused.**"*

What this means is that, **one** the application for bail pending appeal was in respect of the appellant's conviction and sentence in criminal Session No. 17 of 2022 the same as this current application. **Two**, the application was determined on merit.

I have considered Mr Lugwisa's submission that the facts deposed in the previous application are different from the incumbent application. I have gone through the decision before Hon Mtembwa J but also the applicant's supporting affidavit as indicated above. The same revolves around the applicant's alleged ill health as grounds to grant bail.

Whatever facts may be stated, the vital issue here is whether this court having entertained an application for bail pending appeal in respect of **criminal Session No. 17 of 2022** may again do so on alleged new facts. When addressing this I have taken note the previous application was determined on merit after considering the parties' grounds and submission.

When considering the doctrine of functus official I have considered the decision by the Canada Supreme Court in **Canadian Broadcasting Corp. v. Manitoba, 2021 SCC 33** wherein it was observed that the doctrine of functus officio provides that a final decision of a court that is susceptible to appeal cannot be reconsidered by the court that rendered it. In the case of **Manitoba**, the Supreme Court of Canada reasoned that; its jurisdiction was exhausted once it had decided the merits of the case and entered its formal judgment.

Again, the high court of South Africa, in **Naransamy v Wasserman NO and Others (LCC06R/2021) [2022] ZALCC** citing Daniel Malan Pretorius's "*The Origins of the Functus Officio Doctrine, with Specific Reference to its Application in Administrative Law*" **(2005) 122 SAU 832.**

At page 832; held;

"A person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

In this application, I wish to say briefly that I do not subscribe to Mr. Lugwisa that, the order "refusing" the application did not mean "dismissal". In any case, what is certain is that this court is vested with the power to consider granting bail pending appeal against the decision had exercised its powers in **Criminal Application No. 316 of 2024 Mtembwa J.** and the decision was rendered on merit.

Given the above and based on the cited decisions which I found highly persuasive; I agree with Miss Florida that this court is functus official to entertain this application and thus lacks jurisdiction.

In passing, I have also taken note with concern that the previous application Miscellaneous i.e. Criminal application NO. 316 OF 2024 was made by the applicant's counsel yet this fact was not divulged in this application. I shall pause here and assume without deciding that it was an honest contemplation that the application could be brought on new facts. In the end, the application is struck out.



A.J. KIREKIANO

JUDGE

17.04.2024

COURT Ruling delivered in presence Miss Florida Wenceslaus learned state attorney for Republic and in presence of the applicant and his advocate Mr. Ashiru Hussein Lugwisa.

Sgd

A.J. KIREKIANO

JUDGE

17.04.2024