

TANZANIA / JUDGMENT

20070403 TZHC Mwanza

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. ...-· IN THE HIGH COURT OF TANZANIA ATMWANZA APPELLATE JURISDICTION HC.
CRIMINAL APPEAL NO. 129 OF 2006 (Original Cr. Case No.1268 of 2005 of the District Court of
Nyamagana District at Mwanza Before: S.D. MSUYA, Resident Magistrate}

1. DAVID SHARUA }
2. EMMANUEL RAYMOND. APPELLANTS Versus THE
REPUBLIC ...•.....RESPONDENT 19/3/2007 & 3/4/2007

RULING

RWEYEMAMU, I: This is an application for bail pending appeal. The two applicants were charged and convicted on three counts, Conspiracy to commit offence c/s 384; Threatening to kill c/s 89(2) and intimidation c/s 89(2)(a). They were sentenced as follows: "SENTENCE The accused person, one DAVID s/o SHAURA and EMMANUEL s/o RAYMOND are first offender and I have gone through their mitigation, and the court is hereby sentence the 1st to five years Imprisonment for all counts, and zid accused fiver years for all counts. The punishment to ran concurrently'~ It is so ordered. Sgd: S. D. MSUYA - RM 18/7/2006° Dissatisfied, they filed Misc. Cr. Appeal 129/2006 in this court, followed by an application subject matter of this ruling for bail pending appeal. Their application is supported by an affidavit sworn by their counsel Mr. Munna advocate who has stated among other grounds that; "6. That, the Appeal said herein above stands a overwhelming chances of success, on the grounds raised in the Memorandum of Appeal. The copy of Memorandum of Appeal is hereto attached to form part of this Affidavit and marked as Annexure •~ '~ The application is opposed by Mr Kiria state attorney for the republic/respondent. He submits that it is too premature to consider the appeal's chances of success as no special circumstances have been adduced to support a prayer for bail pending appeal. In support of his proposition that to succeed in such application one has to show special circumstances, he relies on this court's decision by Masanche J. in Engelibert Emmanuel V R, Misc. Cr. Appl.3/2002 (Bukoba registry

- unreported), and a copy of which he supplied to the court. He further submits that in view of the special circumstances of the offence, bail should be refused; and as regards sentence, that the same was proper, as the 'appellants were adjudged to serve 5 years to all counts~ The issue for decision is whether or not this is a case fit for granting bail pending appeal.

Principles to be considered in such applications have been developed in a number of decisions and I find my brother Masanche, J's itemization (in the above cited authority) adequately comprehensive that I reproduce them below. He stated as follows:- 2 :r;' "1. We start from the premise that while bail pending trial is a right to the accused person, bail pending appeal is not. The applicant in a bail pending appeal, it should not be forgotten, is a convict already. The onus is, therefore, on him to prove that iustice demands that he be out on bail rather than inside.

2. Bail pending appeal should only be granted for "exceptional and unusual reasons"~ Courts of law have not tabulated what these exceptional and unusual reason~ could be. Each case, therefore, would have to be considered on its own merits and circumstances (Raghibir Singh Lambe V R (1958) EA. 337)
5. Bail pending appeal could be granted if there are overwhelming chances of success in the intended appeal (see cases Re R v. Sakerbai M. A. Gangi (1967) H.CD. n.243 Hassanali Wa/ji V R. (1968) H.CD. n.174; Atilio s/o Mosoa R V (1968) H.CD. n.295 Mipawa V R (1971) H.CD. n.62;)
6. But it cannot be said, where an argument on the facts of a case would need a careful analysis at the appellate level, that it would be easy to say that an appeal has overwhelming chances of success'~ "6. The task of deciding whether a person who has been convicted should be granted bail involves balancing the considerations of the liberty of the individual and proper administration of iustice - citing Samatta J. as he then was in Abel Mwangande v R. Misc. Criminal Cause 326/88 (Dodoma registry - unreported)'~(all emphasis mine) 3 ~ Further, in considering the issue, I find it proper to borrow a leaf from civil practice (on the aspect of stay of execution pending appeal), although I am aware that the procedure governing civil cases is different from those governing criminal ones. By extrapolation, - some of the principles used in deciding such applications where 'overwhelming chances of success' has been submitted as a ground in support of the application, can be safely applied to applications for bail pending appeal - they all deal with suspension of a right/liability already accrued. Let me consider some of these. In Zanzibar Insurance Corporation V Paulo Mwita Chacha, Civil Appl.64/2006, (Dar es Salaam registry - unreported), the TCA reasoned that; ":.....I may add here that in exceptional cases such as where the intended appeal is - based on the ground that the court which decided the case against which the appeal is preferred did not have jurisdiction, or that the period of limitation was a factor in the intended appeal, the result in such intended appeal may be obvious. In such a case stay of execution can be readily granted. But where the result of the intended appeal is not so obvious, the practice of this Court has been to disregard a claim about chances of success of an intended appeal. In the Linus Furaha Shao case cited by Mr. Bwana, also on an application for stay of execution, it was argued that the intended appeal had overwhelming chances of success. This Court, Kisanga, J.A, said:- "..... this court has said on many occasions that the a/legation that the intended appeal has overwhelming chances of success is 4 not ground for granting stay because, among other things, there is often no material on

which the Court can at this stage ascertain that allegation'~ 'And in TANESCO V Israel Kwayu, Civil Appl.118 'A/2005 basically the TCA held that a stay would be granted where the 11 intended appeal has prima facie likelihood of success" a principle derived after the court considered the _gist of its decision in the University of Dar es Salaam V Richard Kajuna .Mazo - a para which I find useful to reproduce below; "On a number of occasions, this Court has held that one of the circumstances in which stay of execution is granted is a situation where on the face of the record, prima facie, the appeal stands reasonable chances of success. It is however, not in every case. or situation· that it is apparent on the face of the record that it can with certainty be stated that· the appeal has great chances of success. Depending on the facts and circumstances, the picture crystallizes later when arguments for both parties are heard. It is however possible in certain situations ... to gauge the prospects of the appeal on the face of the record. For instance, where from the record it is shown that the law was wrongly used or misplaced, or that there was lack of ;urisdiction it is possible to gauge the chances of success on appeal'~ From the above, the following principle can be deduced that; a decision in an application for bail pending appeal involves 'balancing consideration of liberty of an individual and proper administration- of Justice'. That is, it should be granted where there are unusual/exceptional circumstances, such as where chances -of intended appeal are so obvious, because the appeal raises issues obvious on the face of the record like lack jurisdiction, wrong use of 5 .) . . ., . . :i.' the law etc. And it should be refused where chances of success can only be gauged after hearing arguments of both sides/re-evaluation of evidence and/or judgment. In the present application, counsel for the applicant submits in his affidavit under the ground quoted above, that the appeal has overwhelming chances of ·success but does not state grounds for . . . such overwhelming chances, as rightly submitted by counsel for the respondent. Although counsel annexed· the would be memorandum of appeal to his affidavit under which he submits that the trial court decision did not meet the requirements of a proper judgment, such a conclusion (save in respect of the sentence which is clearly ambiguous), is not obvious on the face of the record. A decision on the issue would require going through the impugned judgment which in my opinion, would amount to pre- judging the appeal. True, the grounds in the attached memorandum of appeal if valid would lead to a nullification of proceeding and may be ordering a re-trial. That however, can not be decided at this stage. In view of my said conclusion, I dismiss the application but in view of the obvious err in respect of sentence I order that hearing of this appeal should be at the earliest opportunity. Sgd: R~ M. RWEYEMAMU JUDGE 3/4/2007 6 ; Date: 3/4/2007 Coram: Hon. R. M. Rweyemamu, J '7 For Applicant: Mr. Munna Advocate - Absent For Republic: Mr. Makwega - State Attorney - Present ·s/Clerk: Judith Court: Ruling delivered this 3/4/2007 as per coram above. Sgd: R. M. RWEYEMAMU JUDGE 3/4/2007 7

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