

TANZANIA / JUDGMENT

harry amulike mwambene another vs republic 2019 tzhc 194 19 december 2019

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TZHCDECIDED
19 December 2019

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
MISC. CRIMINAL APPLICATION NO. 240 OF 2019 (Originating from the decision of the Resident
Magistrate's Court of Morogoro at Morogoro in Economic Case No.72 of 2019). HARRY AMULIKE
MWAMBENE.....1st APPLICANT ZUHURA OMARY @ MZEE..... 2nd
APPLICANT VERSUS THE REPUBLIC..... RESPONDENT

RULING

Date of Last Order: 13.12.2018 Date of Ruling: 19.12.2018 KALUNDE, J. This is an application of bail pending trial. The application is made under sections 29(4) of the Economic and Organised Crimes Control Act, [Cap. 200 R.E.2002] (EOCCA). The applicants have been arraigned before the Resident Magistrate Court of Morogoro at Morogoro in Economic Case No.72 of 2019. The applicants are being charged with one count of conspiracy to commit and offence contrary to section 384 of the Penal Code, [CAP. 16 R.E. 2002]; three counts of forgery contrary to sections 333, 335(d)(i), (iii) and (iv) and 337 of the Penal Code, [CAP. 16 R.E. 2002]; and one count of occasioning loss to a specified authority contrary to paragraph 9(1) of the First Schedule to and section 57(1) and 60(2) of EOCCA. Hearing of the application was conducted orally whereas Miss. Florida Wenceslaus, learned State Attorney appeared for the Respondent/Republic and Mr. Ignas Punge, learned advocate, represented the applicants. Addressing the bail application, Mr. Punge urged for the applicants' affidavit to form integral part of the applicants submission. He added that offences under which the applicant is charged under EOCCA is above Tshs. 10 million and the Resident Magistrate Court of Morogoro had no power to grant bail. He submitted that under section 29(4)(d) of EOCCA this Court is empowered to grant bail. Moreover the learned counsel submitted that the applicants are entitled to bail making reference to the Constitution of the United Republic of Tanzania, 1977 Article 13(6)(b) on presumption of innocence and Article 15(1) and (2) on personal freedom and liberty. He also referred to the case of Republic vs. Paulo Kilua & Another (1977) TLR at page 21. He added that, the process towards establishing the applicants guilty or otherwise will take long and the health of the first applicant, who is fifty eight (58) years old, is deteriorating day after day. He prayed that the applicants be granted bail since they were ready to meet bail conditions as would be set by the court. Objecting the application Miss. Florida submitted that, the nature and seriousness of the offences; and the value of the fifth count (Tshs.

24,996,800) connotes that, once granted bail, the applicants may fail to enter appearance. She further submitted that the applicants have failed to demonstrate justifiable reasons to be granted bail. She argued that the applicants have failed to demonstrate or produce evidence that they have been denied access to medical care while in custody. She further submitted that, should the Court grant bail to the applicants, it should be guided by the provisions of section 36 of EOCCA and that verification of the bail conditions should be done by the trial court in Morogoro. In his rejoinder Mr. Punge submitted that the offences for which the accused are charged are bailable and that bail is a constitutional right of the applicants and that no medical proof is required for them to be granted bail. He enjoined the court to impose bail conditions as set out by law. I would like to point out that, under the Article 13(6) (b) of the Constitution of the United Republic of Tanzania, 1977 there is a presumption of innocence. This position was reiterated in *Geoffrey Eliawony & 3 others vs Republic* [1982] TLR 190, where the Court held that: - "A person charged with a criminal offence must be presumed innocent until his guilt is proved." [emphasis mine] 3 It is not disputed that the offence with which the applicants are charged with are bailable and as such whilst awaiting trial the applicants, as of right, are entitled to bail. (See *Patel v R* [1978] HCD). In *Nguyen Van Chat v Republic*, Misc. Cr. Appn. No. 72 of 2013 (HCT at Dar es Salaam) Mureke, J observed that: - "It is now settled law that the proper test of whether bail should be granted or refused to an accused person is whether it is probable that he will, if released, appear for trial up to the conclusion of the proceedings." The applicants, therefore, were not under the obligation to demonstrate, "justifiable reasons" or "exceptional circumstances" for them to be granted bail, as alluded to by the counsel for the respondent. They were only required to comply with the mandatory requirements of the respective laws. It is important to note that bail is a right and should not be considered as a privilege to an accused person. See *Douglas Lyimo vs. R.* [1978] TLR). Mindful of the conditions set by section 36 of EOCCA which, inter alia, requires the accused person (applicants) to pay cash bond or submit to court the security (preferably title deed) whose value is at least half of the value of the property (subject matter in question) and the rest be executed by promissory bond. Cognizance of the fact that the fifth count for which the applicants are charged with carries a subject matter valued at Tshs. 24,996,800/=, the said amount should be split into half, that is, Tshs. 12,498,400/= of which can be executed as stated above. Applying the principle of sharing as demonstrated in *Silvester Hillu Dawi & Stephen Leons Mwambene v The Director of Public Prosecutions*, Criminal Appeal No. 250 of 2006 (Unreported), (Dar es Salaam Registry), the amount due for each of the applicant is Tshs. 6,249,200.00/=. I hereby grant bail to the applicants upon fulfilling the following conditions; (1). Each applicant shall deposit in the trial court a sum of Tshs. 6,249,200.00/= in cash or in the alternative, he shall deposit to the custody of the trial court, a title deed of an immovable property to the equivalent amount; (2). Each applicant should have two credible and reliable sureties; with fixed abode within the jurisdiction of the trial court; Each of the two sureties shall execute a bail bond in the sum of Tshs. 3,124,600.00; (3). Each applicant shall immediately surrender his passport or any travelling documents in his name to Principal Resident Magistrate In Charge at Morogoro Resident Magistrate's Court; (4). Each applicant shall be duty bound to appear in court on all dates that shall be scheduled by the court in Economic Case No.72 of 2019 pending before Morogoro Resident Magistrate's Court; (5). Each applicant is hereby restricted to move outside

the jurisdiction of the trial court without a prior permission of the Principal Resident Magistrate In Charge at Morogoro Resident Magistrate's Court; and (6). Bail conditions to be verified by the Magistrate at Morogoro Resident Magistrate's Court assigned with the case. DATED at DARES-S^LAAM this 19th December, 2019. JUDGE =1-^ 19/12/2019 Court: Ruling delivered in chambers in the presence of the Mr. Ignas Punge, learned counsel for the Applicants and Candid Nasua, learned State Attorney for the Respondent. mips 4kKaiSSa£ — JUDGE 19/12/2019 6

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