

TANZANIA / JUDGMENT

MCA 42742 OF 2024 IDDY OMARY VS REP

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1 January 2024

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM
MISC. CRIMINAL APPLICATION NO. 32742 OF 2024 (Arising from Criminal Appeal No. 28884 of
2024) IDDY OMARY APPLICANT VERSUS
REPUBLIC..... RESPONDENT

RULING

16th December & 30th January, 2025 BWEGOGGE, J. This is an application for grant of bail pending the determination of an appeal lodged by the applicant named herein above. The application herein is brought under the provisions of article 13 (6) (b) and 15 of the Constitution of the United Republic of Tanzania of 1977 (as amended); and sections 148 (3), (5) (a) (ii) and (iii) of the Criminal Procedure Code [Cap. 20 R.E. 2022]. The application is supported by the sworn affidavit of Ms Faudhia Akbar Vilgi, the applicant's counsel. 1 At the hearing of this case, the applicant was represented by Ms. Faudhia Akbar Vilgi, learned advocate; and Mr. Adolf Veladumi, learned state attorney, entered an appearance for the respondent Republic. In substantiating the application herein, Ms. Vilgi submitted that the appellant herein has filed an appeal against the conviction and sentence of the trial court and prayed for bail pending the determination of the respective appeal. The counsel asserted that the appellant has a high chance of succeeding in the intended appeal on the ground that the conviction and sentence were based on the defective charge. The counsel directed the mind of this court to the charge sheet upon which the trial court based its conviction. Further, the counsel submitted that the accused was charged with a bailable offence. Hence, the applicant is entitled to be bailed out pending appeal. And, in persuading this court the counsel asserted that the appellant was previously under police bail for three months before he was charged. Hence, the same is not a flight risk. Moreso, the counsel submitted that the appellant has a wife and a child who solely depend on him. That the appellant's wife is now sick and incapable of working to earn the necessities of life for herself and the 2 child. The counsel referred the case of Sudi Khalfan vs. Republic, Misc. Criminal Application No. 17 of 2016, HC (unreported) to buttress her point. On the above premises, the counsel prayed this court to grant the application herein. Submitting in reply, Mr Veladumi contended that having gone through the application and supporting affidavit he contests this application on the ground that no reasonable cause has been advanced for the grant of bail pending appeal. The counsel argued that bail pending appeal is governed by section 368 (1) (a) (1) of the Criminal Procedure Code [Cap. 20 R.E. 2022] which obliges the applicant to furnish reasonable cause for grant of bail pending appeal. To

the contrary, the counsel argued, the application herein has been brought under section 148 of the Act which provides for bail pending trial, a constitutional right based on the presumption of innocence. Based on the above argument, the counsel asserted that bail pending appeal is statutorily provided but not guaranteed. That there should be special reasons advanced by the applicant for grant of bail pending appeal of which the applicant failed to discharge. In the same vein, the counsel contended that the purported chance of success has not been demonstrated herein. Further, the counsel contended that family commitment is not a reasonable cause. The case of John Steven Lubele vs. Republic (Criminal Appeal 36 of 2022) [2022] TZHC 11503 was cited to bolster the point. Moreso, the counsel contended that no proof of the purported sickness of the applicant's wife has been brought to the attention of this court. Hence, based on the foregoing, the respondent counsel opined that the application herein should fail for being devoid of substance. In rejoinder, Ms Akbar maintained that the appellant herein was convicted on the defective charge. Hence, the appeal has a high chance of success which amounts to exceptional circumstances. That the appellant being not a flight risk, coupled with his wife's ailment, cannot amount to special circumstances for grant of bail pending trial. The question before this court is whether the application herein has substance. 4 It is settled law that one of the factors to be considered by the court in granting bail pending determination of the appeal is the ground that there is an existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail. See the cases; Lawrence Mateso vs. Republic [1996] TLR 118 and Amon Muletwa Mwalupimbi vs. DPP (Criminal Application No. 09 of

2020) [2025] TZCA 89. In particular, in the case of Amon Muletwa Mwalupimbi vs. DPP (supra), the Apex Court had this to say: "Bail pending appeal may be granted not as a matter of right, but subject to the proving that there are exceptional circumstances and overwhelming chance for the appeal to succeed." See also the case of Jivraj Shah vs Republic [1986] eKLR in the same vein. In the case of Lawrence Mateso vs. Republic (supra) the Apex Court expounded factors to be considered by the court in granting bail pending determination of appeal as thus: " 1. The onus is on the applicant, to satisfy the Court that justice will not be jeopardised by being granted bail pending appeal.

2. In deciding whether bail should be granted involves balancing the liberty of the individual with the proper administration of justice.
3. The applicant must show the 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 5 likely to be successful on account of some substantial point of law to be argued." I have gone through the supporting affidavit sworn by the applicant's counsel which is the mainstay of her submission in this court. In substance, it is deponed that the applicant was charged and convicted on two counts of traffic offences coached under the provisions of sections 40 and 63 (2) (a), read together with section 27 (1) (a) of the Traffic Act [Cap. 168 R.E. 2019] which are bailable offences under the law of this land. In the same vein, it is deponed that the applicant herein has a constitutional right under article 13 (6) (a) of the Constitution to be

presumed innocent until proven guilty. That the applicant has reliable sureties willing to bail him out. Likewise, it was asserted that the applicant has no criminal blemish, and is without a record of jumping bail; hence, not a flight risk. In tandem with the above, it is deponed by the applicant that he has a family solely depending on him for their daily bread and his wife is sickish, requiring medical attention. Lastly, it is deponed that the appellant remaining in custody, might render the appeal lodged herein nugatory. 6 Respecting the purported constitutional right to bail based on the principle of presumption of innocence guaranteed under Article 13 of the Constitution, I am on all fours with Mr. Veladumi in that the principle invoked herein is patently misconceived. The applicant herein having been convicted of the offences he was charged with, the same is precluded from invoking the principle of the presumption of innocence. In this respect, I am constrained to borrow a leaf from the case of *Amon Mlotwa Mwalupimbi vs. DPP* (supra) wherein, citing the decision of the High Court of Kenya in *Chimambhai vs. Republic* (No. 2) [1971] EA 343 at 345, aptly stated: "The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, mainly presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one-time unknown, the possibility of the conviction being erroneous or the punishment excessive .." [Emphasis supplied]. In the same vein, restating the holding in the decision rendered by the erstwhile High Court of Tanganyika in *Raghbar Singh Lamba vs. Republic* [1958] 1 EA 337 the Court had this to say: "Where a person is awaiting trial, the onus of proving his guilt is on the prosecution and consequently the onus is also on the prosecution of showing cause why bail should not be allowed. On the other hand, when a person has been convicted, the onus is on him to show cause why the conviction should be set aside and similarly the onus on him to show cause why as a convicted person he should be released on bail. If that is so, it follows that the reasons must be exceptional, otherwise bail would be granted in the majority of cases, which would clearly offend against the principle." [emphasis mine] Hence, as rightly argued by Mr. Veladumi, it was wrong for the applicant herein who has been convicted by the trial court, now seeking bail pending appeal, to invoke the provision of section 148 of the Criminal Procedure Act which in substance provides for procedure applicable in grant for bail pending trial. The same should have invoked the applicable procedure provided forth under the provision of section 368 of the relevant Act which obliges the applicant to furnish reasonable cause for grant of bail pending appeal. Apart from the above, in validating this application, it is the applicant's deposition in the supporting affidavit that the appeal filed in this court has high chance of succeeding. The same stance features in the submission of the applicant's counsel in this court. I find it prudent, at this juncture, to refrain from delving into this issue, lest I prejudice the merit of appeal preferred by the appellant and, or technically pre-empt the same. See in this respect the cases: *Amon Mlotwa Mwalupimbi vs. DPP* (supra); 8 The Registered Trustees of Kanisa Pentekoste Mbeya vs Lamson Sikazwe And 4 Others, Civil Application No. 191/06 of 2019 (unreported); and *Tanzania Posts & Telecommunication Corporation vs M/S H. S. Henritta Supplies* [1997] T.L.R. 141. Otherwise, as rightly contended by Mr Veladumi, the applicant being not a flight risk; having a family solely depending on

him and his wife being sick, do not amount to special circumstances in the eyes of the law cited above to warrant grant of bail pending trial. Lastly, I am alive of the fact that one of the grounds advanced by the applicant's counsel for grant of this application is the allegation that the applicant was convicted on the defective charge. No particulars were given to substantiate the allegation. Having scrutinized the respective charges on which the applicant was arraigned and pleaded guilty thereto, I found no fatal defect upon which this court would be constrained to peg the grant of appeal pending trial. Suffice it to say that I find no unusual and special circumstances constraining this court to grant bail pending appeal. Hence, I find that granting bail at this juncture would jeopardise justice and would be contrary to the proper administration of justice. 9 Given the foregoing, I find the application herein bereft of substance. Consequently, the application herein is hereby dismissed. I so rule. DATED at DAR ES SALAAM this 30th January, 2025. O. F. BWEGOGGE
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Prepared on 14 October 2026 · Esheria