

TANZANIA / JUDGMENT

lucia maria mboje v republic

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IN THE HIGH COURT OF TANZANIA TABORA DISTRICT REGISTRY AT TABORA MISC. CRIMINAL APPLICATION NO. 34 OF 2023 (Originating from the District Court of Kalina in P.I Case No. 18 of 2022) LUCIA MARIA @ MBOJE..... APPLICANT VERSUS REPUBLIC..... . RESPONDENT

RULING

Date of Last Order: 29/11/2023 Date of Ruling: 04/12/2023 KADILU, J. This is an application for bail pending trial of attempted murder contrary to section 211 of the Penal Code. The application is filed under section 148 (3) of the Criminal Procedure Act, [Cap. 20 R.E. 2022] and supported by an affidavit sworn by Ms. Stella Thomas Nyakyi, Advocate for the applicant. Although the applicant had never appeared before this court, in the charge sheet and affidavit sworn by her Advocate, it was shown that she was arraigned before Kalida district court in Preliminary Inquiry Case No. 18 Of 2022 and has been in remand custody since November 2022. It was stated further that she has reliable sureties to stand for her bail. She, therefore, implores this court to grant her bail pending the trial of her criminal case which is still pending in the Registry of this court. The respondent, Republic did not counter the applicant's application by filing a counter affidavit. During the hearing, Mr. Salehe Makunga and Ms. Stella Nyakyi, both learned Advocates appeared for the applicant while Ms. Aziza Mfinanga, learned State Attorney represented the Republic. Mr. Makunga submitted first by praying for the court to consider the applicants application and release her on bail pending trial and determination of her criminal case. The learned Advocate argued that the offence which the applicant stands charged is one of the bailable offences, hence the applicant is entitled to bail, the right guaranteed by the Constitution of the United Republic of Tanzania, 1977 as amended from time to time. The learned Counsel for the applicant explained that the applicant has relatives who are readily available as sureties and are reliable persons who are not likely to influence the applicant to jump bail or breach any condition of bail if granted. The Advocate guaranteed that the applicant and her relatives would be available whenever required to appear before the court for the trial whenever scheduled. On the other part, Ms. Aziza learned State Attorney informed the court that the Republic is resisting the application because though the offence the applicant stands charged with is bailable under the provisions of Section 148 of the Criminal Procedure Act, it is a serious offence which is likely to tempt the applicant to

abscond bail. In addition, she submitted that the applicant had an opportunity to apply for bail in the District Court, which she did not utilize. The learned State Attorney referred to the case of *Dodoli Kapufi v Republic*, Misc. Criminal Application No, 15 and 16 of 2007, in which the Court of Appeal stated that the committal court has the power to grant bail to the applicant. Finally, she urged this court to examine the application carefully to ensure that its grant does not facilitate the collusion between the applicant and the victim (her husband) to escape justice. By way of rejoinder, the Advocate for the applicant argued that since the respondent did not file a counter affidavit, she cannot afterward be allowed to refute matters of facts rather, she is allowed to contest the application on the points of law only. He added that failure to controvert the appellant's affidavit amounted to admitting all that was stated by the applicant in her affidavit. After having heard the arguments by the parties' Advocates and consideration of the available records, the issue for determination is whether the respondent's failure to file a counter affidavit opposing the application vitiates her right to be released on bail. It is not disputed that the applicant herein is charged with the offence of attempted murder, which is bailable. The point raised in the applicant's affidavit and argument by her Advocates was that of the constitutional right to be presumed innocent. The argument is generally that a bail application should be dealt with through the legal prism of the Constitution. In a South African case of *Mate v S* [2022] ZAWCHC 108, it was stated that the Constitution does not take a leave of absence simply because the court is sitting with a bail application. That does not, however, detract from the fact that bail applications are determined in a particular legislative context which is constitutionally sanctioned. In Tanzania, the Constitution and section 148 of the CPA govern the applications like the instant one in: which the charged offence is bailable. 3 The applicant has in addition informed the court that she has reliable sureties who are ready and willing to fulfill bail conditions that will be imposed by the court. On the other side, the respondent Republic insisted the court to examine this application carefully on the suspicion that the applicant may jump bail. The State Attorney also suspects that the applicant if granted bail, will collude with the victim to escape justice. Without disrespect to the learned State Attorney, it is trite law that suspicion alone, however strong, cannot be the basis of the court's decision. There are numerous precedents to that effect. See for example, *Shabani Mpunzu v R*, Criminal Appeal No. 12 of 2002, *Benedict Ajetu v R.*, [1983] TLR 190 and *B. Mapunda v R.*, Criminal Appeal No. 2 of 1989. In *B. Mapunda v R.*, (supra) the Court of Appeal observed as follows: "Upon a careful perusal of the record, we think that the evidence as adduced was such as to cast strong suspicion against the appellant. However, it is trite law that suspicion alone, however strong, cannot be the basis of conviction." From the authorities cited above, I am of the firm view that mere suspicion, however, bona fide held, cannot be a ground for denying the applicant bail pending her trial. I hold that view considering that bail is a fundamental right of the accused person guaranteed under the Constitution of the United Republic of Tanzania under Article 13 (6) (b) which provides that: "To ensure equality before the law, the State Authority shall make procedures which are appropriate or which take into account the following principles namely, no person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence. Moreover, section 148 (5) (a) of the CPA lists the offences which are unbailable. Attempted murder is not one of such offences. The same provision lists some

restrictions to the police and the courts of law from granting bail to accused persons in certain: circumstances even if the offence is bailable. In the instant application, the respondent has not demonstrated any strong grounds to convince the court that the applicant does not deserve to be granted bail awaiting her trial. By necessary implication, the offence with which the applicant stands charged is bailable just like any other criminal offence unless the court is satisfied that the circumstances of the case do not support granting bail. Therefore, since the offence is bailable under the provisions of section 148 of the CPA, I am persuaded that the applicant has assigned sufficient reasons for her to be granted bail pending trial. Hence, based on the reasons stated, I grant her bail subject to the following conditions:

1. She shall be released on bail upon executing a bond in the tune of Tshs. 2,000,000/= with two reliable sureties each in the like sum.
2. Sureties to produce in this court introductory letters from their respective Village leaders affixed with sureties' current passport-size photos and photocopies of their National Identity cards.
3. The applicant shall be reporting to the OCD Kaliua Police Station once a week pending trial and determination of the case. 5
4. Sureties to be approved by the Deputy Registrar of the High Court of Tanzania at Tabora. Order accordingly. KADILU, MJ. JUDGE 04/12/2023 Ruling delivered in chamber on the 4th Day of December, 2023 in the presence of Ms. Stella Nyakyi and Mr. Salehe Makunga, Advocates for the applicant and Ms. Upendo Florian assisted by Ms. Aziza Mfinanga, State Attorneys for the Respondent. 6

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