

TANZANIA / JUDGMENT

njungwa mshamu njungwa and 2 others vs republic 2022 tzhc 215 28 february 2022

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TZHCDECIDED
28 February 2022

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IN THE HIGH COURT OF TANZANIA (MTWARA DISTRICT REGISTRY) AT MTWARA MISC.
CRIMINAL APPLICATION NO. 41 OF 2021 (Originating from Economic Case No. 9 of 2021 in the
District Court of Liwale at Liwale) NJUNGWA MSHAMU NJUNGWA AND 2
OTHERS.....APPLICANT VERSUS THE REPUBLICRESPONDENT
Date of Hearing: 21/02/2022 Date of Ruling: 28/02/2022

RULING

Muruke, J. The three applicants have filed present application for grant of bail pending trial in Economic Case No. 09/2021 at the District Court of Liwale at Liwale. The applicants being arrested on diverse dates in June 2021, they were arranged in Court on 30th June 2021. They were charged for an offence of being found with unlawfull possession of Government trophy valued at Nine million, three hundred nine thousands 69,309,000/=. Application is supported by joint affidavit affirmed by themselves in which at paragraph 6 and 7 insist on their to redness to comply with bail conditions, having fix place at abode and reliable sureties, once bail is granted. Respondent did not file counter affidavit, and on the date not file counter affidavit, and on the date set for hearing, Ajuaye Bilishanga, principal State Attorney did not object granting of bail, she only insisted, on the law to be followed specially section 36 at the 1 Economic and organized Crime Contral Act, as amended by written Law Misc. Amendment Act No. 3 of 2016, as this is an economic offence. In Tanzania Legal System, bail of an accused person is his/her constitutional rights. Articles 13(6) of the Constitutional provides that no person charged with a criminal offence shall be treated as guilty of the offence until proven otherwise by a count of competent jurisdiction. In determining bail, count shall observe the provisions of Section 148(5) (a) to (e) of the Criminal Procedure Act (CPA), Section 36 (4) of the Economic and Organized Crimes Control Act, or Section 16 of the Primary Court Criminal Procedure Code, as the case may be. In addition to the conditions prescribed under the provisions above, the count shall take into account the following factors:-

- a) Gravity of the offence and severity of the sentence
- b) Security of the accused person.

- c) Protection of the victim.
- d) Possibility that accused might abscond,
- e) Prevention of furtherance of crime
- f) Preservation of public order
- g) Nationality of accused
- h) The nature of the accused person in terms of his social standing, ties with the community etc.
- i) Special circumstances of the accused eg. Illness vulnerability
- j) Period during which the accused may be in remand.
- k) Possibility of the accused interfering with the investigation process.
- l) Age of accused (minor or old age) It is not disputed that, the amount in the charge sheet is above ten (10) millions, thus this court has Jurisdiction to determine the application. 2 Equally so, the offence applicants facing at trial court is bailable offence. Legally, bail is a right not a privilege to an accused person as correctly held by Mwesiumo, J. in the case of Tito Douglas Lyimo v. Republic

[1978] LRT No.55, when he insisted that;

- (i) Bail is a right and not a privilege to an accused person. (ii) The court may refuse bail on evidence that granting of bail would result in failure of justice or in abuse of the process of the court. (iii) The court should not refuse bail to an accused person as form of punishment; to do so would be to punish the accused before pronouncement of his verdict. (iv) The court should be impartial irrespective of whether the accused person is in remand custody or out on bail.
- (v) In refusing to grant bail the trial Magistrate took extraneous factors which portray gross injustice and an abuse of the process of the law. It is also recognized principal of law that, a person charged with criminal case is innocent until proved guilty, thus, bail is his constitutional rights. Same was held by fully bench of the High Court in the case of Geoffrey Eliawony & 3 others Vs. R [1998] T.L.R 190 that:-
- (1) A person charge with a criminal offence must be presumed innocent until his guilt is proved. Just like the right to fair hearing, this is a fundamental and established common law rule which has been accorded a constitutional footing.
- (2) Denying bail to an accused person does not necessarily amount to treating such person like a convicted person.

- (3) S.35 (3) (g) of the Economic and Organised Crime Control Act, 1984, is not arbitrary; it would be a clear contradiction and an extreme absurdity for a statute to forbid the grant of 3 bail and then make provision for challenging the withholding of the same.
- (4) It cannot be said that Section. 35 (3) (g) of the Economic and Organised Crime Control Act, does not meet the principle of proportionality. It is true that, bail is a right of an accused unless taken away or restricted by the law. Denial of bail must be accompanied with reasons justified to safeguard public interest. Bail should not be withheld maliciously or as punishment to an accused prior to determination of his accusations, this was the holding of this court Muruke J in the case of *Nguyen Van Chat v. Republic*, 206 T.L.S – LR.8; that:-
- (1) Under our law, an accused person is presumed to be innocent until his guilt has been proved beyond reasonable doubt. Bail is a right, unless the right is taken away or restricted by the law, i.e., s.148 (4) and (5) of the CPA. The grant of bail should only be denied/refused in exceptional circumstances, and provisions governing bailable and non- bailable offences manifest constitutional balance between freedom of the individual in the context of the society he belongs.
- (2) It is not disputed that the offence with which the applicant is charged is bailable. However, whether or not bail should be granted depends on the circumstances of each case. 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.
- (3) It is true that one of the factors to be taken into consideration when deciding whether or not to admit a person to bail is the availability of independent and reliable sureties. However, the availability of sureties is not the only factor when considering the grant of bail and the risk that the accused will fail to appear at the trial.
- (4) In the instant matter, it is very clear that the applicant is readily offering independent and reliable sureties. Yet, it is not disputed that the applicant is a foreigner with no fixed abode or residence permit allowing him to stay in Tanzania. The fact that he has no fixed abode raises the question as to where he will reside if he is granted bail. While I agree that foreigners should not be treated differently in our jurisdiction, I am of the strong opinion that the applicant being a foreigner, if released on bail, will very likely abscond and fail to attend trial. The above notwithstanding, it all depends, with the nature of the offence, applicants charged with. In this application, applicants are charged with economic offence. Although it is bailable offence, bail is restrictive, in terms of conditions set forth in Section 36 (5) of the Economic and Organized Crime Control Act, as amended by the Written Laws Misc. Amendment act No.3 of 2016. For clarity same is hereby reproduced. Section 36 (5) “Where the court decides to admit an accused person to bail, it shall impose the following conditions on the bail, namely;

- (a) Where the offence with which the person is charged involves actual money or property whose value exceeds ten million shillings unless that person deposits cash or other property equivalent to half the amount or value of actual money or property involved and the rest is secured by execution of a bond; provided that where the property to be deposited is immovable, it shall be sufficient to deposit the title deed, or if the title deed is not available such other evidence is satisfactory to the court in proof of existence of the property; save that this provisions shall not apply in case of police bail;
- (b) Appearance by accused before the court on a specified date at a specified time and place;
- (c) Surrender by the accused to the police of his passport or any other travelling documents; and 5
- (d) Restriction of the movement of the accused to the area of the time, village or other area of his residence. The above requirements are mandatory, need to be complied once set by the court, it is not an option. Honourable Ngwembe, J. while granting bail in Misc. Application number 07 of 2020, in the case of Abadi Seif Said and 7 others Vs. Republic, Mtwara high court registry at page 7(unreported) of the ruling he said; The court has no discretion to depart from those statutory conditions for bail, but to comply with, that being the law, then the applicants in this application for bail are subjected to comply with, prior to being released on bail. According to paragraph 7 of affidavit in support the application, Applicants avered as follows: - “We have a fixed place of abode and reliable sureties who can execute bond to secure and ensure our appearance in court whenever our case is called and the said sureties are persons of good standing in society having fixed assets who are ready and willing to be sureties”. The above words being sworn evidence by the applicants, and same not contracted by respondents no doubts that, same will be adhered to. According to the charge sheet attached and marked PH-1 referred at paragraph 3 of the same affidavit, the amount mentioned vale at government tropline is 69,309,000. In terms of Section 36(5) (a) of the Economic and Organized Crime Control Act, as amended by the Written Laws Misc. Amendment act No. 3 of 2016, half of the amount need to be deposited cash to the court or property valued at the amount as security, by three applicants together. However, the case involves three accused persons (applicants). Applying the principle of sharing which was 6 underscored by the Court of Appeal in the case of Silvester Hillu Dawi & Stephen Leons Mwambene v. The Director of Public Prosecutions, Criminal Appeal No.250 of 2006 (unreported), Dar es Salaam Registry), each applicant is entitled to deposit Tsh. 12,000,000/= . Having satisfied that, offence isailable and this court has jurisdiction to grant bail, same is granted to the three applicants upon fulfillment of the following conditions:
 - 1. Each applicant shall deposit 12,000,000/= cash, or tittle of property worth the amount or more.
 - 2. Each applicant to provide two reliable sureties; each surety shall execute a bond valued Tzs seven million (TShs.7,000,000/=) each, provided that, one surety to be Government employee.

3. The applicants to surrender their passports and any other travelling documents if any, to the District Court Magistrate of Liwale.
 4. The applicants should not leave jurisdiction of Lindi Region without written permission from the Liwale District Court Magistrate.
 5. Applicants are mandatorily required to appear in court at any time when they are required for hearing, until final determination of the criminal case facing them.
 6. Verification of sureties and bond documents, shall be executed by the District Court Magistrate of Liwale. 7
 7. District Registrar to ensure compliance. Z.G. Muruke Judge 28/02/2022 Ruling delivered in the presence of Ajuaye Bilishanga State Attorney for the Respondent and Aclara Abdallah Blangeti Advocate. Z.G. Muruke Judge 28/02/2022 8
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