

TANZANIA / JUDGMENT

WILFRED WERANDUM MASSAWE 2 RULING

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IN THE HIGH COURT OF TANZANIA DODOMA SUB REGISTRY AT DODOMA MISC CRIMINAL
APPLICATION NO 1912 OF 2025 (Arising from Dodoma Resident Magistrate Court in Criminal
Case No. 30923 of 2024) BETWEEN WILFRED WERANDUMI MASSAWE
APPLICANT VERSUS THE REPUBLICRESPONDENT

RULING

Date of last order: 12/02/2025 Date of the Ruling: 19/02/2025 LONGOPA, J.: This is an application for this court to vary the bail conditions granted to the applicant by the Dodoma Resident Magistrate Court. The applicant and one Abdulahimu Jail Mwakibinga stood charged with twelve counts, namely offences of Personation contrary to Section 15 of the Cyber Crimes Acts (No. 14 of 2015), Obtaining Money by False Pretence contrary to Section 302 of the Penal Code [Cap 16 R.E 2022], use of sim card registered in another person name contrary to section 4

(1) (c) and (4), 31 (1), (2) and (3), 40 (1) of the Electronic and Postal Communications (Sim Card Registration) Regulation 2023 GN 60 read together with Section 152 (2) of the Electronic and Postal 1|Page Communications Act 2022, and unlawful use of customer information contrary to Regulation 39 of the Electronic and Postal Communications (Sim Card Registration) Regulation 2023 GN 60 of 2023. The trial Dodoma Resident Magistrate Court on October 2024 informed the accused persons on the admissibility to bail as all the offences areailable and set conditions for bail. It was upon failure of the applicant who is the first accused person to meet the bail conditions set out when he took up arms to challenge the bail conditions. The applicant filed an application under Section 149 of Criminal Procedure Act, Cap 20 R.E 2022 for the following orders, namely:

1. That, the court be pleased to vary terms of bail by lower court to the applicant and any other conditions it may deem fit to grant pending trial in Criminal Case No. 30923/2024.
2. That, any other orders /relief the court deems fit to grant. The application is supported by affidavit of the applicant. The respondent did not file a counter affidavit. On 12th February 2025, the parties appeared before me for hearing whereby Mr. Daniel Lyatuu, 2|Page learned State Attorney represent the respondent and applicant appeared in person prosecuting the application for oneself. The applicant stated that he requests this Court to vary terms of the

bail as he is facing offences of personation and false pretence before the Dodoma Resident Magistrate Court. The terms of the bail set by the trial Court were that he should have two sureties one of them being an employee of the Government who will sign a bond of TZS 5,000,000/= each. According to the applicant, these terms are so stringent for him to fulfill them as they are so strict. It should be recalled that the case he is facing resurfaced twice before the Dodoma Resident Magistrate Court. At the beginning, the terms of the bail were no stringent thus he managed to obtain bail and attended the court regularly for period of nine months. However, the prosecution late on changed the case by entertaining nolle prosequi/ there was change of trial magistrate and there was amendment of the charge which complicated the issue on terms of the bail. The applicant argued that the offences he is facing are bailable, and yet to be convicted as according to the law he still innocent. It is his 3|Page submission that he has the right to enjoy the freedom of movement as a father of family in which he is needed. He prayed that terms of the bail that are lenient should be put in place including having two sureties who are reliable that will ensure that he attend the Court session. It was further submitted that the applicant has no doubt that the requirement of cash bond of TZS 5,000,000/= will be met and made available to court and if he will fail to appear before the court such bond would save the purpose. In case the bail terms are varied to remove the requirement of the public employee to be one of the sureties that will amount to fair bail conditions for him to get bail. Mr. Daniel Lyatuu, learned State Attorney objected the prayer for varying terms of the bail by changing them. The reason was that the nature of the offence that the applicant is facing, the nature of the victims involved and other facts that were considered by the trial court made the terms of the bail to be set. The accused person was not denied bail but only required to have two sureties where one of them should be a public servant. 4|Page The offences relate to the lack of trust thus there is a need for the public servant to be one of the sureties. This will ensure that the applicant attends the court as required. It was his prayers that the terms of the bail are lenient already. There is no need to change the same at this juncture. In rejoinder, the applicant reiterated his submission in chief as valid as he had been attending the court throughout before the offence/ charge was amended. He is trustworthy person and he is quite sure that he will ably attend the court on days fixed for hearing or otherwise without fail. Having heard the parties to the rival submissions, it is pertinent duty of this court to determine validity of the application or otherwise. This court is guided by the available evidence in the affidavit in support of the application, record on the charge and proceedings of the trial court as well as legal principles on the varying bail conditions. In order to underscore the matter, it is important to reiterate the contents of affidavit in place. For easy reference the contents of affidavit in support of the application reveal that: 5|Page

1. That, I am the applicant in this matter herein referred as 1st Accused person in Criminal Case No. 30923/2024 pending at Dodoma District Court at Dodoma before Hon. D.J. MPELEMBWA-PRM, thus conversant with the facts I am going to depose hereunder.

2. That, the applicant herein stands charged jointly and together with another accused who is on bail in the same criminal case.
3. That, the charge sheet laid against both accused persons contained 13 counts whereby the 1st accused person was charged with 9th counts. The copy of the said charge sheet is appended as Annexure S1 to form part of this affidavit.
4. That, the applicant herein stands charged in 1st count personation c/s 15 of the Cyber Crime Act, 2nd count personation c/s 15 of the Cyber Crimes Act, 3rd count obtaining money by false pretence c/s 302 of the 6|Page Penal Code (Cap 16 R.E 2022), 4th count obtaining money by false pretence c/s 302 of the Penal Code, 5th count use of sim card registered in another person name c/s 4 (1) (c) and (4), 31(1), (2) and (3), 40 (1) of the Electronic and Postal Communications (Sim Card Registration) Regulation 2023 GN 60 read together with Section 152 (2) of Electronic and Postal Communications Act 2022, 6th count use of sim card registered in another person name c/s 4 (1) (c) and (4), 31(1), (2) and (3), 40 (1) of the Electronic and Postal Communications (Sim Card Registration) Regulation 2023 GN 60 read together with Section 152 (2) of Electronic and Postal Communications Act 2022, 7th count use of sim card registered in another person name c/s 4 (1) (c) and (4), 31(1), (2) and (3), 40 (1) of the Electronic and Postal Communications (Sim Card Registration) Regulation 2023 GN 60 read together with Section 152 (2) of Electronic and Postal Communications Act 2022, 8th count use of sim card registered in another person name c/s 4 (1) (c) and (4), 31(1), (2) and (3), 40 (1) of 7|Page the Electronic and Postal Communications (Sim Card Registration) Regulation 2023 GN 60 read together with Section 152 (2) of Electronic and Postal Communications Act 2022, 9th count use of sim card registered in another person name c/s 4 (1) (c) and (4), 31(1), (2) and (3), 40 (1) of the Electronic and Postal Communications (Sim Card Registration) Regulation 2023 GN 60 read together with Section 152 (2) of Electronic and Postal Communications Act 2022.
5. That, the total counts in which the Applicant faced are criminal offences which all of them are bailable offences and the said bail has never been withheld so far.
6. That, the Dodoma District Court imposed strict bail conditions to the extent that the Applicant failed to comply thereto hence this application.
7. That, the Applicant is a responsible citizen of this country, Tanzania, so he will comply with the terms and 8|Page conditions of bail if it will be granted to him so as to exercise his Constitutional rights such as Freedom of Movement, and Presumption of innocence.
8. That, he has permanent residence within the United Republic of Tanzania with reliable sureties who can be able to execute bond to secure and ensure appearance of the applicant before the Court of law.
9. That, it will be the interest of justice if the prayers in the chamber summons will be granted since the applicant is presumed to be innocent until proved guilty. It is not a dispute that the offences applicant is facing are bailable, the bail which was granted to the applicant by the

Dodoma Resident Magistrate Court. The purpose of granting bail to the accused is to let him free for a while pending trial because of the presumption of innocence principle. Even though its subject to limitations and judicial considerations before the court grants such bail i.e. to consider if such bail will not be detrimental to the interest of justice. 9|Page Bail is an important aspect of criminal trial that accords an accused person temporary release from police custody or remand prison pending trial or determination of his appeal. It is governed by the provisions of Section 148 of the Criminal Procedure Act, Cap 20 R.E. 2022. The Act provides that: 148.-(1) Where any person is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail the officer or the court, as the case may be, may, subject to the following provisions of this section, admit that person to bail; save that the officer or the court may, instead of taking bail from that person, release him on his executing a bond with or without sureties for his appearance as provided in this section.

- (2) The amount of a bail shall be fixed with due regard to the gravity and other circumstances of the case, but shall not be excessive. 10 | P a g e
 - (3) The High Court may, subject to subsections
 - (4) and (5) of this section, in any case direct that any person be admitted to bail or that the bail required by a subordinate court or a police officer be reduced (Emphasis added). The law allows generally a person to be admitted on bail when such person is under custody of the police or other means of detention. The Police officer or the Court is enjoined to satisfy that a person is eligible to bail in the sense that such person should be charged or facing allegations in a bailable offence. The bail restrictions are set out in Section 148(5) of the Criminal Procedure Act, Cap 20 R.E. 2022. The offences for which the applicant faces are not among those offences whose bail is restricted. They are bailable offence under the laws of Tanzania. The instant application on bail is a step towards applicant enjoying his freedom of movement that is temporarily curtailed by his failure to meet the bail conditions. The application for bail is a realization of the provisions of Article 13(6) (b) of the Constitution of United Republic of 11 | P a g e Tanzania on presumption of innocence which forms crucial element of principle of equality before the law. However, it should not be over-emphasized that restriction of individual's freedom through detention either at a police station or remand prison pending hearing or appeal serves a critical aspect of criminal justice too. The importance/objective of temporarily curtailing freedom of movement in criminal justice has been stated in clear terms in the case of Attorney General vs Dickson Paulo Sanga (Civil Appeal 175 of 2020) [2020] TZCA 371 (5 August 2020), at page 36;
- [2020] 1 T.L.R 61 [CA], at pages 99-100, where the full bench of Court of Appeal stated as follows: Thus, the detention pending trial is undoubtedly the necessary restriction for attainment of the desired objective which include among others, the interests of public safety and public order, defence and protection of those involved in judicial proceedings such as witnesses. 12 | P a g e Having in mind of the objectives of remanding an accused person in

custody pending trial, a Court exercising powers to grant bail or otherwise must be fully versed with jurisdiction before it embarks on determination of an application for bail. In the case of *Director of Public Prosecutions vs Farid Hadi Ahmed & Others* (Criminal Appeal 96 of 2013) [2013] TZCA 260 (20 November 2013), at pp.18-19, the Court of Appeal distinctively stated that: In disposing of this crucial ground of appeal, we have found it instructive to begin by stating categorically that it is now trite law that the issue of jurisdiction for any court is basic. As this Court succinctly stated in *Fanuel Mantiri Ng'unda v. Herman M. Ng'unda and Others*, Civil Appeal No. 8 of 1995 (unreported), "it goes to the very root of the authority of the court to adjudicate upon cases of different nature" The Court went on to hold that "the question of jurisdiction is so fundamental" such that "it is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case". We are 13 | Page accordingly of the settled view that jurisdiction to adjudicate must not be presumed or taken for granted. It must be traced to unequivocal statutory provisions and in some rare cases from the Constitution. This court has explicit jurisdiction to entertain the variation of bail terms as per section 149 of the Criminal Procedure Act. This provision provides that:

149. Where in connection with any criminal proceedings a subordinate court has power to admit any person to bail but either refuses to do so or does so or offers to do so on terms unacceptable to him, the High Court may admit him or direct his admission to bail or, where he has been admitted to bail, may vary any conditions on which he was so admitted or reduce the amount in which he or any surety is bound to discharge any of the sureties. Generally speaking, the Criminal Procedure Act, Cap 20 R.E. 2022 has provided amply in its sections 148 and 149 that High Court may vary 14 | Page the terms/ conditions of bail in appropriate circumstances. In my view exercise of such powers of court should not be done without justifications as such there must be solid grounds to do so. In *Ikindila Wigae vs Republic* (Criminal Appeal 60 of 2000)

[2005] TZCA 102 (10 March 2005) (TANZLII), at pages 4-5, the Court of Appeal noted that: It leaps to the eye that the power to cancel bail or vary the conditions thereof has to be exercised in accordance with this section. One of the principles underlying this statutory provision is that no one should be condemned without being afforded an opportunity to be heard in his defence. Section 150 of the Act, in so far as the question of cancellation of bail or variation of the terms thereof is concerned, makes recognition of the right to reasons. It is a general principle of law of this country that, where the determination of the rights or obligations of a person is involved, a decision maker must give reasons for his decision: see *Tanzania Air Services Limited v 15 | Page Minister for Labour, Attorney General and the Commissioner for Labour* [1996] T.L.R. 217. Upon careful consideration on the matter, this court is duty bound to determine whether the conditions set by the trial Dodoma Resident Magistrate Court are stringent terms to deserve exercise of discretionary powers of this court to vary them to favourably meet the interests of the applicant. The conditions which were set by the Dodoma Resident Magistrate Court were set to both accused person in the Criminal Case No.30923/2024 in which the second accused met those conditions and

he is free pending trial. These conditions were that: First, the accused persons are eligible to bail. Second, there should be two sureties, one of whom should be a public servant with introduction from his employer and another one with introduction from lawful authority. Third, each of the sureties shall sign a bond of TZS 5,000, 000/= (five million only). This was made through an order dated 31st October 2024. In the assessment of this Court these bail conditions are simple, straightforward, manageable and fair. The conditions are such that two 16 | P a g e sureties are not necessarily to originate from the public sector and there is nothing to deposit to court in terms of certificate of titles or other documentations of ownership nature except signing a bond/ taking cognizance to the tune of TZS 5,000,000/= only. It is on record that a charge that was instituted in court had a total of 12 counts. The applicant is facing a total of 9 counts out of 12 counts and the offence he is facing especially personation and false pretence are serious offences punishable by imprisonment for seven years. Further, the applicant was charged jointly with one Abdulahim Jail Mwakibinga who is facing counts of unlawful use of customer's information. The punishment for the counts this accused is facing is fine of shillings five million or imprisonment for term not exceeding twelve months or both. In terms of seriousness of the offences, the applicant is facing much more serious offences/ counts than the co-accused. Both accused persons were subjected to the same bail conditions. It is also lucid that the 2nd accused met the bail conditions thus was released on bail based on the same bail conditions that the applicant is challenging before this Court. 17 | P a g e According to the applicant, he invites this Court to vary the terms of bail on his side to be lesser than those applicable to the co-accused who was subjected to the bail conditions which the applicant challenges. Seriousness of the offences are what guarantee the conditions set at the trial court. The conditions of bail were set to ensure that accused will appear to take his trial and not seek to evade justice by leaving the jurisdiction of the court as it was stated in the case of Jaffer v R (1972) H.C.D 92. According the principle in this case, the bail conditions should consider the following factors namely the nature of and serious of offence, severity of punishment and whether the investigation will be interfered to mention but a few. Bail conditions granted to the accused must be fair and manageable, so as to adhere to the meaning of bail and its purpose as provided in the case of Ally Amon Eliyakunda vs Republic (Misc. Criminal Application 34 of 2022) [2022] TZHC 11793 (28 June 2022). Having gone through the application at hand, I am satisfied that the bail conditions set by Dodoma Resident Magistrate Court are fair and manageable so that the court to have an assurance of the accused attendance during the hearing of the case. It is on this account 18 | P a g e that the second accused who was facing lesser serious offences managed to meet the bail conditions. It is without flicker of doubts that varying the bail conditions in favour of the applicant will have two main legal implications. First, it will violate the principle of equality before the law by promoting the discrimination among the co-accused persons. The person facing less serious offence being subjected to stiffer bail conditions than those accorded to the person facing many counts of serious nature compared to the former. Such discriminatory endeavour should not be done by the court of law that is a temple of justice. As the accused persons are charged jointly, it is settled

view of this court that they must be subjected to the same bail conditions. By maintaining the bail conditions set out by the trial court, this Court will be promoting equality before the law as envisioned in Article 13(1) of the Constitution of the United Republic of Tanzania, Cap 2 R.E. 2002 which calls for promotion of equality before the law. It will avoid conspicuous discrimination of the co-accused with regards to bail. This was reiterated in *Freeman Aikael Mbowe vs The Director of Public Prosecution & Others* (Civil Appeal No. 382 of 2021) [2024] TZCA 836 19 | Page (30 August 2024) (TANZLII), at page 1, where the Court of Appeal stated that: Article 13 (1) of the Constitution of the United Republic of Tanzania, 1977 ("the Constitution"), provides for equality before the law and prohibits any form of discrimination. In order to promote constitutional provisions on equality and prohibition of discrimination, it is pertinent for this Court to uphold the bail condition set forth by the trial court. It will be doing injustice for this court to set bail conditions to the applicant by varying/ reducing them in favour of the applicant while discriminating the other accused person who was released on the same terms/conditions which the applicant is making efforts to be varied. The second implication of varying the bail conditions in the circumstances of this application relates abuse of the discretionary powers of the court. I have perused thoroughly the affidavit in support of the application and oral submission of the applicant to find any iota of solid grounds to warrant invoking the discretion of the court. It is lucid 20 | Page that there is nothing on record. It is will be abscondment of duty to administer justice entrusted in the courts of law to grant an application that is neither supported by any cogent reasons nor have iota of merits. The nature of the offences that applicant is facing relates to lack of trustworthiness as they involve personation and obtaining good by false pretence. In the circumstances of the case it is pertinent to have a reliable surety who can certainly guarantee availability of the accused person/applicant to face criminal justice. Having a surety who is public servant of any category is appropriate to ensure that there is a trustworthy person guaranteeing the trial court that applicant shall make himself available. At this juncture therefore, I am of the settled mind that the circumstances of the case do not warrant this court to alter/ vary bail conditions to the applicant. I shall proceed to dismiss this application for being unmeritorious. Bail conditions granted to the applicant by Dodoma Resident Magistrate Court are to be adhered to and they are accordingly sustained. 21 | Page The application for varying the bail conditions in favour of the applicant is delinquent of the merits to warrant invoking discretionary powers of this Court to vary the manageable and fair bail conditions set forth by the trial Court. Such attempts are intended to put this court in ridicule as there is nothing on record to support the application that terms/ bail conditions are stringent against the applicant. The application therefore stands dismissed in its entirety. It is so ordered. DATED at DODOMA this 19th day of February 2025. E.E. LONGOPA JUDGE 19/02/2025. 22 | Page

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