IN THE HIGH COURT ZANZIBAR
HOLDEN AT CHAKE CHAKE PEMBA
CRIMINAL APPL. NO. 03/2014

SOSPETER OBUYE OKEY - ACCUSED

V/S

D.P.P. - PROSECUTOR

RULING

Hon. Mwampashi (J)

This is an application for bail pending appeal filed under S.366 (2) of the Criminal Procedure Act, 2004 (Act No.7/2004). The applicant is Mr. Sospeter Obuye Okeyo while the respondent is the Director of Public Prosecution – Zanzibar (DPP) . The applicant was on 25/05/2014 convicted by the District Court at Wete of causing grievous harm to another c/s 225 of the Penal Act, 2004 (Act No.6/2004) on his own plea of guilty and was ordered to serve an imprisonment period of three (3) years and pay Tshs 500,000/= as compensation to the complainant . Being aggrieved by both the conviction and sentence the applicant

filed a Criminal Appeal No. 2/2014 in the Regional Court at Wete , the appeal which is still pending for hearing. Along side the pending appeal in the Regional Court the applicant did also file this application for bail pending appeal .

This application is supported by an affidavit of one of the applicant's counsel Mr. Ali Hamad Mbarouk while on the other side the respondent DPP has filed a counter affidavit affirmed by Mr. Seif Mohammed Khamis learned state attorney .

At the hearing of this appeal the applicant was represented by two counsel namely Mr. Zahran Mohammed and Mr. Ali Hamad Mbarouk . The respondent DPP was represented by Mr. Seif Mohammed Khamis learned state attorney.

During the hearing of the application Mr. seif M. Khamis learned state attorney did raise his concern on the propriety of this application before this court. His objection was grounded on two points of law the first one being that the application is not properly before the court because the application brought under a wrong enabling provision of

law. It was argued that the provisions cited to move this court do not confer jurisdiction over this court to entertain an application for bail pending appeal. It was Mr. Khamis's further arguments that under S. 366 (2) of the Criminal Procedure Act,2004 the applicant ought to have firstly filed his application to the subordinate Court that convicted him and not directly rush to this court. He insisted that under s.366(2) read to gather with sub-section (3) of the same section, it is only when an application for bail pending appeal is refused by the trial court that an applicant can be allowed to again file his application to the High court. He therefore insisted that since the applicant's application had not firstly been filed and refused by the trial court then his application before this court is incompetent and should therefore be struck out.

The second point of objection raised by Mr. Khamis was that the application is incompetent for being supported by a defective affidavit. He pointed out that the supporting affidavit has no jurat, the defect which is incurable and which renders the application incompetent. To cement his argument that an application supported by a defective affidavit is incompetent Mr. Khamis cited trhe case of ***Mohammed A. abdulhussein V/S Pita Kempap Ltd*** [2005]

TLR 383 where it was held among other things that an application which is supported by a defective affidavit lacks the necessary support and is incompetent.

Responding on the first point as raised for the DPP, Mr Zahran Mohammed the learned council for the applicant simply argued that S. 366 (2) of the Criminal Procedure Act,2004 gives power to this court to entertain the application at hand. He therefore submitted that the first point is baseless and should therefore he overruled.

As for the second point in regard to the defective supporting affidavit, Mr. Mohammed readily accepted the fact that the copy of the supporting affidavit served to the respondent has no jurat. He so conceded after being shown by Mr. Khamis the said copy of the supporting affidavit that was served to the respondents. He thereafter explained that the supporting affidavit in the court records has six paragraphs and has the jurat but the one wrongly served by the court to the respondents has only five paragraphs with no jurat. He so conceded after being shown by Mr. Khamis the said copy of the supporting affidavit that was served to the respondents. He thereafter explained that the supporting affidavit in the court records has six paragraphs and has the

jurat but the one wrongly saved by the court to the respondents has only five paragraphs with no jurat Mr. Mohammed further explained that during when they were filing the application the problem was noticed and rectified but it appears that the court clerk who served the respondents did by mistake serve them with the defective affidavit instead of serving them with the correct rectified affidavit .

I would start with the argument that the application is brought under a wrong provisions of law and therefore that this court has not been properly moved. For easy reference I would reproduce in extenso what is provided under S. 366 (2) and (3) of the Criminal Procedure Act, 2004.

S.366 (2) The High Court or the subordinate court which convicted on appellant may, if it deems fit, admit on appellant to bail pending the determination of his appeal .

(3) When a subordinate court refuses to release such a person on bail, such person may apply for bail to the High Court'.

To my understanding the provisions of sub-section (2) of S. 366 of the Criminal Procedure Act, 2004 confers concurrent jurisdiction to determine applications for bail pending appeals to two different courts. These two courts are the High Court and a subordinate court or a trial court which convicted an appellant. An appellant who wishes to apply for bail pending the determination of his/her appeal has two options. He/she can either file his/her application to the High Court or to the trial Court which convicted him/her if he opts to file it in the trial court and application to the High court and at the end his/her application is refused such an appellant has another opportunity to file the same application to the High Court. This is where sub Section (3) of S.366 comes into play. If such an appellant opts to directly file his/her application to the High Court and at the end of the day the application is refused by the High Court, he/she cannot go back and file the same application to the trial court which convicted him/her.

So under S.366 of the Criminal Procedure Act, 2004, an appellant who desires to be released on bail pending the determination of his/her appeal is at liberty to either start by filling his/her application in the trial court which convicted

him/her or he/she can directly file the same to the High Court. The only disadvantage of an appellant who opts to directly file his/her application for bail pending appeal to the High Court and not firstly to the trail court is that such an appellant loses a chance for a second bite. S.366(2) of the Criminal Procedure Act, 2004 does not in any way require or force an appellant to firstly file his/her application to the trial court before doing so to the High Court. An application for bail under S. 366 (2) of the Criminal Procedure Act, 2004 which is directly filed to the High Court is therefore not incompetent for the only reason that it was not firstly filed to the trial court. The first point of the objection raised by Mr. Khamis for the respondent therefore fails. The High Court has jurisdiction to entertain an application for bail pending appeal filed under S. 366 (2) even where there had been no such an application firstly filed and refused by the trial court.

As to the second point in regard to the directive supporting affidavit it is a considered view of this court that although as also correctly argued by Mr. Khamis the law is very settled that an application which is supported by a defective affidavit is incompetent, the explanations given by the applicant's counsel as to what did happen and cause the

respondent to be served with the incorrect copy of the affidavit and also because the supporting affidavit in the court record is correct makes this court find it prudent to disregard the said point of objection. This court does not see any good reason for the course of administering substantial justice to be hampered by legal technicalities. It should also be pointed out here that if this court is to be that much strict on the application of legal technicalities, even the respondent's counter affidavit on which the objection is pegged, would not survive. The counter affidavit has an incurable defective jurat because the date the counter affidavit was made is not stated therein. Failure to state in the jurat the date an oath or affirmation is taken or made contravenes the mandatory provisions of S.7 of the Notaries Public Decree. Cap 29 of the Laws of Zanzibar under which it is provided as follows:-

> ***'Every notary before whom any oath or affidavit is taken or made under this Decree shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made' .***

The concept that in the administration of justice courts should not be much restrained with legal technicalities is also

enshrined in our Union Constitution of 1977. Article 107A (2) of the Constitution of the United Republic of Tanzania of 1977 provide in Swahili as follows:-

'Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, Mahakama zitafuata kanuni zifuatazo:-

(a).....

(b).....

(c).....

(d).....

(e) kutenda haki bila kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka'.

In his submission in support of the application it was Mr. Zahran Mohamed's arguments that as stated in the supporting affidavit the applicant who is a Kenyan citizen is currently living and working here at Pemba with a road construction company . He further argued grounds in supports of the application are that the applicant is a diabetic and he also suffers from Hypertension Mr.Mohammed did also submit that the prison environments are not Conducive as it is not easy for the sick applicant to get the required diet and medications as advised by his doctor. He referred the court to

the applicant's medical record annexed to the supporting affidavit as annexure SOS1. This court was also referred to the case of ***Amin Mohammed vs Republic***, Crim. Appeal No.170/2004 (Unreported) where the High Court of Tanzania allowed a similar application on grounds of the applicant's illness.

The other ground as argued by Mr. Mohammed was that the pending appeal in the Regional Court has overwhelming chances of success due to the manner the trial court conducted the trail and convicted the applicant.

Mr. Mohammed did further argue that although the applicant is a Kenyan citizen he is still employed here in Pemba and has reliable sureties who are Tanzanians and who are resident of Pemba. He criticized the intimation in the counter affidavit which is to the effect that since the applicant is a Kenyan Citizen then he should not be trusted. He referred the court to Article 12 of the Constitution of Zanzibar of 1984 under which equality before the Law is guaranteed regardless of citizenship.

Mr. Seif M. Khamis's for the respondent did strongly oppose the application arguing that the application

is supported by no good grounds. He argued that the applicant's medical record attached to the supporting affidavit do not show that further submit that the argument that the condition at jail is not conducive, that our jails are so crowded is supported by no evidence. He also argued that being in jail does not necessarily mean that the applicant is not accessible to medications. Here the court was referred to the case of ***Hassanali Walji vs R*** (1968) HCD.174, where it was held among other things that an application for bail pending appeal should be dismissed if the illness of the applicant is treatable in custody.

Mr.Khamis did also argue that the allegations that the applicant is a reliable person is irrelevant because in bail pending appeal it is not a question of individuals' right but it is a question of the discretion of the court. He referred the court to the case of ***Raghbir Singh Lamba vs R*** (1958) E.A.337 where it was held among other things that the complexity of the case or good character or hardship to his dependants cannot justify the grant of bail pending appeal.

It was lastly argued by Mr. Khamis that the allegations that the applicant's pending appeal has great

chances of success should be disregarded as it is baseless bearing in mind that the applicant was convicted on his own plea of guilty. He reffered the court to the case of ***Mr Makokoi N. Chandema vs Hassan Mtetete and the Republic,*** Crim. Application No.1/1999, CAT at Dar es salaam (Unreported) where the Court of Appeal of Tanzania held among other things that the task of deciding whether a prisoner is to be bailed involves balancing the consideration of the liberty of the individual and proper administration of justice. He therefore prayed for the application to be refused.

It is settled that in applications for bail pending appeal, the court will grant bail only in exceptional circumstances. It is also an acceptable principle that where it can manifestly be seen that the pending appeal has an overwhelming probability of succeeding an application for bail pending appeal can be granted. The case of ***Makokoi N. Chandema*** (supra) and that of ***Raghbir Singh Lamba*** *(supra)* are relevant on this principle. The only issue taxing my mind is whether this application at hand has met the required conditions and therefore that it deserves to be granted on the discretion of the court.

From the arguments for and against the application and also from the supporting affidavit and the counter affidavit I am of a considered view that apart from other usual factors that need to be taken into account when deciding whether or not to grant an application for bail, under the circumstances of this application at hand, there are two main grounds that have to be carefully considered in guiding this Court on whether it should exercise its judicial discretion and grant the application or not. There two grounds are the ground of the applicant's health condition and the ground in regard to the chances of success of the pending appeal.

On the ground that the applicant is a diabetic and suffers from hypertension this court agrees with Mr. Khamis that there is no good evidence to substantiate the allegations that the applicant is that much sick and therefore that his life would be at a great risk if the application is not granted and he continues to be detained in jail pending the final determination of his appeal.

Likewise the arguments that the conditions in jail are dangerous to his life or that he cannot get the advised diet or medications from jail are unfounded and not supported by good evidence. I am not convinced that our jail

authorities are in such disparate conditions that sick inmates who are diabetic for instance, cannot get a controlled diet or the required medications. I believe the applicant's health problems can easily be handled by the relevant authorities even if the applicant was to be denied bail.

Generally the ground that a pending appeal has overwhelming chances of success is a ground that should always be approached with great caution. As it was observed in ***Amin Mohamed's case*** (supra) the ground has a disadvantage of attracting pre-mature comments and pre-judging he merits of the pending appeal. This is much worse when the pending appeal in issue is not in the court determining the application for bail but it is pending in a subordinate court. All in all it is a considered view of this court that each case has to be determined on its own merits otherwise it will be an abdication of its duty and a failure of justice if courts will avoid to considerably weigh the chances of a pending appeal just because doing so may pre-empty the merit of the pending appeal. In some of the cases in order to be properly guided as to whether an application for bail pending appeal is to be granted or not the court, cannot avoid the need to determine the question as to whether the pending appeal stands any chances of being allowed.

A gentle glance by this court at the trial court's record particularly the manner the case was conducted on the dated an own plea of guilty was entered against the applicant, leaves a lot to be desired, it is only an eye of a layman or of a person mind or of a person not knowledgeable to the law relating to unequivocal plea of guilty, that cannot agree with this court that the pending appeal has more than overwhelming chances of succeeding . In avoidance of dangers associated with this kind of the ground as observed above, this is all it can be said by this court. I should not go any further.

For the only reason that I am more than convinced that the pending appeal has an overwhelming possibility of being a success, I hereby grant the application. The applicant Sospeter Obuye Okeyo be released on bail pending the final determination of his appeal by the Regional Court on the following conditions:-

1. The applicant to sign a bond of Tshs.500,000/=
2. Two reliable and well identified sureties to sign a bond of Tshs 300,000/= each.
3. The applicant to surrender to the Court all his travel documents.

4. The applicant is prohibited to leave the island of Pemba without a prio-leave of the Region Court at Wete.

SGD: ABRAHAM MWAMPASHI (J)
27/08/2014

Delivered in Court this 27th day of August, 2014 in the presence of the applicant with his counsel Mr. Zahran Mohamed and in the presence of Mr. Seif Mohammed Khamis (SA).

CERTIFIED COPY OF THE ORIGINAL

.....

HON. HAJI O. HAJI (D/R)
HIGH COURT
CHAKE - CHAKE
PEMBA.