

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

MISC. CRIMINAL APPLICATION NO. 1 OF 2007

(Originating from District Court Babati No. 315/2005)

NICOLAUS BILOS APPLICANT

Versus

THE REPUBLIC RESPONDENT

R U L I N G

CHOCHA, J.

Nicholaus s/o Bilosi and another stand jointly charged with disobedience of lawful order c/s 124 of the Penal Code. The case is before Hon. Magesa (RM) at Babati; Manyara.

Briefly the facts of the case spell that the accused persons did unlawfully disobey the order for temporary injunction granted by Babati Primary Court vide C.C.3129/2003. The two are now arraigned vide Cr. C. 315/2005, whose trial is still on progress.

This court was moved to review the order in Babati Cr. Case 315/2005 by the accused. He believed he had his liberty unlawfully curtailed following refusal of bail in the offence which is basically bailable. His complaint was submitted by way of an affidavit supported with a chamber summons.

I had the occasion to go thru the proceedings of the trial court. I realised that in fact on the 25th November 05, the accused person had been admitted to bail. But on the 13th January, 2006, the court, on the prosecution's application, cancelled the accused persons' bail. The prosecution had the following submission:-

"We pray for cancellation of accused persons bail as they have continued to threat (sic) the accused life. At the same time they have been growing and cultivating on the farm while there is a court order to stop (.....) cultivating on the victim farm."

This quotation is extracted from the hand written manuscript. I must confess that I had some difficulties to read all the spellings with precision. No doubt I may have missed some, but I do believe the intended substance is unaffected.

Moved by the application by the prosecution, the trial magistrate disbelieved the accused persons' defence. He cancelled their bail, and committed them to remand until the final disposition of the trial. The accused persons felt aggrieved. They applied to this court to have their bail restored, because the offence is bailable. As noted earlier, the motion was by way of an affidavit supported with chamber summons.

The application was quickly fixed for hearing so that the trial of the main case shall equally come to an end as soon as practicable.

During the hearing of an application, the respondent was represented by MS. Banzi – State Attorney. The applicant did not appear.

I decided to proceed determining the application, the applicant's absence notwithstanding. The applicant is incarcerated at Babati remand prison, more than 170 kms from here. It is a very expensive exercise to cause his appearance here. The affidavit / application quite plainly disclose the accused's requirements, that he desires restoration of bail. There is no need of interpretation by mischief to capture what the accused is looking for. Neither the

learned State Attorney nor myself required clarification on what is contained in the application. We, unanimously agreed to dispense with the applicant's presence, and proceeded to dispose the application.

The learned State Attorney Ms. Banzi in her submission called upon this court to strike out the application because it had improperly been lodged. She stated that S.161 of the Criminal Procedure Act requires that orders made U/S 148 – 160 of the same law shall be appealable. According to her therefore, if the accused persons are aggrieved with the orders of the trial court, such grievances ought to be forwarded to this court by way of an appeal and not application as is the case now.

She otherwise was of the view that bail is the accused's right.

The learned State Attorney is quite right. Despite this statutory position, this court faced similar situation in the case of JUMA JOSEPH SILIMU, DANIEL JOSEPH SILIMU and ONSESMO JOSEPH SILIMU V. REPUBLIC (1987) TLR 114 wherein Mroso J., (as he when was) held:-

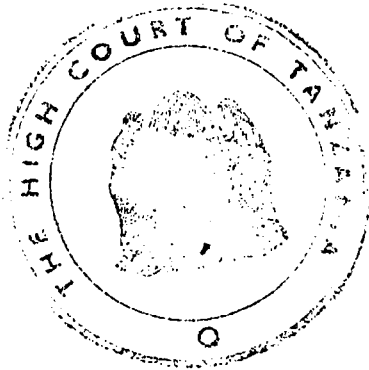
“where an application for bail s refused by a subordinate court, the applicant may appeal against

***the refusal order to the High Court, and it is
improper for the applicant to move the High Court
by way of a fresh application."***

(emphasis added is mine)

In view of this legal position, this application is dismissed. The applicant may appeal to this court against the lower court's order if he so wishes. However, he may re-apply for re-admission to bail in the same subordinate court. The trial court may entertain the application upon being satisfied that there are change of circumstances as enumerated u/s 150 of the CPA.

Application dismissed.




N. P. Z. CHOCHA

JUDGE

12/02/2004

/ljk.