

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)**

AT MTWARA

MISC. CRIMINAL APPLICATION NO.37 OF 2022

*(Originating from the District Court of Tandahimba in Criminal Case
No.20 of 2020)*

YUVES MALIMA NYAKINA.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

10/10/2022 & 24/10/2022

LALTAIKA, J.:

This ruling is on the issue raised *suo motu* by this court on whether Presidential Clemency (commonly referred to as Presidential Pardon) is subject to appeal. This court raised that issue on 21/9/2022. On that day the applicant herein **YUVES MALIMA NYAKINA** through his counsel Advocate Acrala Blanket knocked the doors of this court carrying a somewhat unusual application as will be apparent shortly. The respondent Republic, on the other hand, was represented by Mr. Enosh Gabriel Kigoryo, State Attorney.

It was Ms. Blanket's submission that the applicant was charged with Criminal Case No.20 of 2020 at the District Court of Tandahimba on three counts: 1. Breaking into a Building contrary to section 296(a) of the Penal Code Cap 16 R.E. 2019 (the Penal Code) 2. Stealing contrary to sections



258 and 265 of the Penal Code 3. Breaking out of a building contrary to section 296(b) of the Penal Code.

When the charge was read over to the accused, Ms. Blanket narrated, he pleaded guilty hence he was sentenced to pay a fine of TZS. 1,000,000/= (One Million Tanzanian Shillings) and in default to serve twelve (12) months imprisonment term. The learned counsel stated further that the applicant was unable to pay the fine hence, on 13/5/2020 he was committed to prison.

The lucky star hovered over the then prisoner. On the 10th day of December 2020, Ms. Blanket explained, the applicant received a Presidential Pardon and was released from jail forthwith. Nevertheless, the learned counsel averred, when the applicant was in prison, he indicated his willingness to appeal, and he filed a Notice of Intention to Appeal with the prison officer in charge of court issues. It was not immediately clear to this court what the rationale of the exercise then was, as the applicant was no longer in prison.

After a few exchanges with the learned counsels and the applicant, I tasked the parties to address me on aptness of the application in the wider context of adjudicative role of this court. As a result of this order, the matter would later involve two more Advocates (Mr. Alex Msalenge and Rainery Songea) and a Senior State Attorney (Mr. Wilbroad Ndunguru) as expounded on in the next paragraphs.

On 03/10/2022 the respondent Republic was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney while the applicant was represented by Mr. Alex Msalenge, learned counsel. Mr. Ndunguru stated that this court had ordered counsels for both sides to acquaint themselves



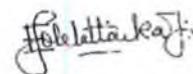
with the concept of Presidential Clemency and address the court on the same.

To that end, Mr. Ndunguru stated, he had found out that as asserted by counsel for the applicant, **Article 45(3) of the Constitution of the United Republic of Tanzania of 1977** provides for presidential pardon, but such a pardon is confined to the sentence only and not conviction. The learned Senior State Attorney submitted that he conducted online research and found that the Constitution of India particularly Article 72, unlike our own, provides for categories of Presidential pardons and may include pardon on conviction or guiltiness of the accused.

The learned senior State Attorney contended that in Tanzania, since the pardon does not remove the guiltiness of the recipient, he remains at liberty to appeal to the court of higher rank against that conviction. Therefore, Mr. Ndunguru reasoned, the applicant is justified to approach the High Court in its appellate jurisdiction to appeal against conviction.

In response, Mr. Msalenge conceded with what Mr. Ndunguru had submitted. He indicated that he too conducted research and found an article based on a comparative study on presidential pardon in the constitutions of Tanzania, England, USA, and India.

Mr. Msalenge contended that in our country, as the learned Senior State Attorney had alluded to, Presidential Pardon is only on sentence, not conviction. The learned counsel insisted that article 45(3) of the Constitution is clear that no one can get Presidential Pardon before conviction. The learned counsel referred this court to the case of a famous Musician Nguza Vicking and his sons who got Presidential Pardon in 2015. He went on to provide that by the time Nguza and his sons received the Presidential Pardon they had already filed an Application No.006/2015



(2018) before the African Court on Human and Peoples Rights and the parties were **Nguza vs United Republic of Tanzania**. It is unfortunate that the learned counsel did not provide full citations of the case during his oral submission. Nevertheless, the famous musician's case was part of the local news and blogosphere in Tanzania for many years.

It is Mr. Msalenge's submission that after the pardon the case before the ACHPR continued and in its decision the Court muted on the issue of sentence because it had already been addressed by the Presidential Pardon. The learned counsel insisted that the rest of the issues were decided by the court.

In the instant matter too, Mr. Msalenge reasoned, the sentence cannot be appealed against because Presidential Pardon is unappealable. Nevertheless, Mr. Msalenge stressed, since the same does not touch upon conviction, the application in this court is well placed and prayed this court to allow the same to proceed to the next stage namely hearing on merit.

Before concluding his presentation, Mr. Msalenge averred that the subject matter of the application was not new in this court and that in his twelve years of practice as an Advocate of the High Court of Tanzania, he had handled several applications emanating from presidential pardon. It was unfortunate once again, however, that the self-proclaimed seasoned counsel could not cite any case although he could mention the name of the Judge who, allegedly, granted the application in this registry.

Based on the above conspicuous inadequacy, this court tasked Mr. Msalenge to conduct further research and back up his arguments with case law authorities. This court, moreover, challenged the learned counsel not to go for "low hanging fruits" but provide this court with the requisite information through which our jurisprudence could be shaped. I insisted



that the desired outcome (of enlarging our jurisprudence) could only happen if counsels rolled up their sleeves and conduct sound research on the matter.

On 10th day of October 2022, the matter came for, yet another hearing and representation had changed. The respondent enjoyed the services of Mr. Ndunguru, learned Senior State Attorney while Mr. Rainery Songea, learned advocate appeared for the applicant.

The learned Senior State Attorney admitted that case law on the subject were almost non-existent. However, Mr. Ndunguru averred, he had come across one case he thought, though not directly on the subject, could shade some light. The learned Senior State Attorney referred this court to the case of **Ausi Chapachapa @Ibrahim and 2 Others vs Republic**, Criminal Appeal 103 of 2019. Mr. Ndunguru argued that the case involved a person who received presidential pardon and the presiding Judge acknowledged the same at page 2. The learned Senior State Attorney went further and submitted that although in the cited case the Hon. Judge did not discuss whether a recipient of presidential pardon can appeal or not, that is the farthest he could go insisting that he could not get any Court of Appeal case on the subject. He prayed that the application be allowed to proceed on merit.

In reply, Mr. Songea, learned advocate, conceded with what Mr. Ndunguru had submitted. He further contended that his main argument is that presidential pardon deals with sentence not conviction. The learned counsel went on and argued that the many decisions of the court he had come across with were to the effect that a recipient [of presidential pardon] could still appeal against conviction. To this end, Mr. Songea



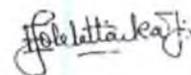
referred this court to the case of **Ismail Aden Rage vs Republic**, Criminal Appeal No.286 of 2005 CAT, Dar.

Mr. Songea submitted that in the cited case the appellant was accused of obtaining money by false pretence and was convicted by Resident Magistrate's Court of Dar es Salaam at Kisutu and appealed to this court before Mihayo J (as he then was) and his appeal was dismissed. The learned counsel argued further that while serving his jail term, the appellant obtained Presidential Pardon. Going into the details, the learned counsel stressed that Mr. Rage was among the 3788 recipients of the presidential pardon that year after serving about ten months of his jail term.

Despite the presidential pardon, the learned advocate reasoned, Mr. Rage proceeded with his appeal which was finalized on 27/3/2008 by the Court of Appeal of Tanzania. It is the learned counsel's submission that the aim of appeal was to remove criminal record as the appellant could later run for the position of Member of Parliament which would have been barred by existence of the record on conviction.

The learned advocate concluded his submission by reiterating that presidential pardon deals with sentence only and not conviction. Since courts usually set aside both sentence and conviction, Mr. Songea argued, he hoped that this court would consider the application on merit.

Having dispassionately considered submissions by both parties, I must admit that I remain with even more questions than answers. My doubts on the aptness of the application have augmented. The learned counsels have not been able to convince me otherwise through authoritative case law or even credible academic literature such as peer reviewed law journals. For reasons that will become apparent towards the



court should roll up their sleeves and properly move the court, by way of a petition under the **Basic Rights and Duties Enforcement Act (BRADEA) Cap 3 R.E. 2002** and the **Basic Rights and Duties Enforcement (Practice and Procedure) Rules 2014** to hold the bull by the horns.

In the upshot, this application is hereby dismissed.

It so ordered.



Court:

E. I. LALTAIKA

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**JUDGE
24.10.2022**

This ruling is delivered under my hand and the seal of this Court on this 24th day of October, 2022 in the presence of Mr. Enosh Kigoryo, learned Senior State Attorney and Mr. Rainery Songea, learned Counsel for the applicant.



Court

E. I. LALTAIKA

Handwritten signature of E. I. Laltaika in blue ink.

**JUDGE
24.10.2022**

The right to appeal to the Court of Appeal of Tanzania is fully explained.



E. I. LALTAIKA

Handwritten signature of E. I. Laltaika in blue ink.

**JUDGE
24.10.2022**

Handwritten signature of E. I. Laltaika in blue ink.