

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA**

MISC. CRIMINAL APPLICATION NO. 13 OF 2022

(Arising from Criminal Case No. 173 of 2021 pending in the District Court of
Momba District, at Chapwa)

HUSSEIN OMARY MANYAMA.....1ST APPLICANT

SALEHE ALLY MWANYIKA2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Date of last Order: 18.05.2022

Date of Ruling: 20.05.2022

Ebrahim, J.

The applicants above filed the instant application seeking for the order of this Court to vary a bail condition of having immovable property of a value not less than 78,000,000 imposed by the District Court of Momba District. The application was made under **section 149 and 391 of the Criminal Procedure Act, Cap. 20 R.E. 2019**. It was accompanied by a joint affidavit of the applicants.

The applicants, together and jointly stand charged with the offence of theft contrary to **sections 265 and 269 of the Penal Code, Cap. 16 R.E. 2019**. The charge is however, a holding charge. It is called the holding charge on the account that the accused are being held pending to be transferred to Zambia where the offence is alleged to have been committed.

Pending the transfer, the applicants applied for bail. The District Court found that the offence which the applicants are facing is bailable. It thus, set conditions for bail. One of the conditions is a bond of Tshs. 78,000,000/= for each, the same to be proved with an immovable property of not less than a like sum. Found themselves that they are unable to fulfil the same condition, the applicants are before this court praying that the said condition be varied and the same be reduced to Tshs. 46,000,000/=.

In the first instance, when the application was called on for hearing, on 9th May 2022, the applicants appeared in person without legal representation. Mr. Davis Msanga, learned State Attorney appeared for the respondent/Republic.

When parties argued for and against the application, they left it to the Court to determine the merits of the application. The Court doubted if the ongoing proceedings before the District Court are viable. The doubt was based on the fact that the so-called holding charge pending to be transferred to the neighbour country i.e Zambia under which the applicants are charged is not provided in our laws. It thus doubted on the jurisdiction of the District Court on the procedure regarding the transfer of the accused persons from one country to another.

To clear the court's doubt, parties were invited i.e on 13th May, 2022 to address the court on the issue of whether or not the District Court has jurisdiction to entertain the application under the so-called holding charge pending to be transferred to Zambia where the incident is alleged to have occurred. As it was before, the applicants appeared unrepresented, whereas Ms. Hanna-Rose Kasambala, learned State Attorney appeared for the respondent/Republic.

Ms. Kasambala took the floor to address the court. In essence, she conceded with the court's view that there no law in our land called 'holding charge'. However, she argued that

section 132 and 135 of the Criminal Procedure Act, Cap 20 RE 2019

talk about it.

As regard to the jurisdiction of the District Court in so far as the accused are held pending transfer to another country, Ms. Kasambala argued that the court has jurisdiction to entertain the matter. She relied to the provision of **section 6(1)(b) of the Penal Code Cap 16 RE 2019** which gives jurisdiction to the courts in the land to entertain a case of a national who commits an offence outside the boundary. She thus, concluded that the District Court of Momba in the present matter had jurisdiction to grant bail.

The applicants had nothing to argue due to the fact that the concern was purely a matter of law.

On my part, I concur with Ms. Kasambala that there is no law which provides for the holding charge pending the transfer of the accused to another country as well as the application of the provision of **section 6(1)(b)**. The case of **Elidadi Emanuel vs Republic, Criminal Appeal No. 244 of 2007**, CAT at Arusha [2010] TZCA 85 (tanzlii) supports such stance. However, I am of the view that the said provision is not applicable in the instant case. This is due to the fact that the applicants herein are not yet charged

basing on the provision of **section 6(1)(b) of Cap 16**. The proceedings on the record speaks for themselves that the applicants are charged for being held to be transferred.

Nevertheless, there is no specific provision of the law on which court could entertain the procedures regarding the transfer of the accused person to another country to face the charge committed outside the country. It is commonly known that the law applicable is the **Extradition Act, Cap. 368 R.E 2019**. However, it does not provide for how extradition is to be done. Thus, it is the common practice that the accused is held in the prison pending the transfer. In order for the accused be held in custody, it is when the charge akin to the offence alleged to be committed is drafted and the accused taken to the court. It is therefore the court with jurisdiction over the drafted charge the accused is taken. Under that practice, I agree with Ms. Kasambala that the District Court of Momba has jurisdiction in the instant matter.

Now, reverting to the merits of the application, the applicants insisted on their prayers made in the chamber summons and the reasons advanced in their supporting affidavit.

They further told this court that they are living at Arusha and Moshi respectively.

Having considered their reasons for the application, considering also the circumstances prevailing in this matter, that the offence was committed outside the boundaries, it means there is application of international law. Following also the fact that the applicants themselves told this court that they are living outside the jurisdiction of the District Court of Momba (at Arusha and Moshi), I am of the concerted view that bail condition set by the District Court intended to secure the attendance of the applicants till when either their transfer procedures are complete or be charged accordingly.

It is therefore, my observation that the bail condition intended to be varied be left the way it is. In the circumstance I dismiss the application.

Accordingly ordered.



Mbeya

20.05.2022

R.A. Ebrahim

JUDGE

Date: 20.05.2022.

Coram: Hon. P.A. Scout, Ag -DR.

1st Applicant: } Present.
2nd Applicant: }

For the Republic: Ms. Hanarose – State Attorney.

B/C: Gaudensia.

Ms. Hanarose – State Attorney:

Your honour, the case is coming on for judgment. We are ready to proceed.

1st Applicant: I am ready too.

2nd Applicant: I am ready too.

Court: This Ruling is delivered in the presence of Ms. Hanarose State Attorney, 1st Applicant and 2nd Applicant and C/C in Chamber Court on 20/05/2022.



A.P. Scout

Ag-Deputy Registrar

20/05/2022

DEPUTY REGISTRAR
HIGH COURT OF
MADAGASCAR