

CRITICAL ANALYSIS OF ‘BAIL’ IN TANZANIA

“A matter of right or privilege”

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1.1: INTRODUCTION

Bail is a security required by the court or police for the release of an Accused person or a prisoner who must appear in Court or police station in a future time¹. The security given can be in form of cash, bond, or word from a reputable surety. In Tanzania bail can be sought and be granted by only two institutions².

i. *By Police*

The Criminal Procedure Act gives power of granting bail to police. However, police bail can only be obtain when the matter yet to be instituted before the Court of law.

ii. *By the Court*

When the case is instituted before the court of law, police power to grant bail is curtailed. Under this situation bail can only be sought in court.

In that sense it is very clear under the Tanzania legal position, that there areailable offences and non-ailable offences. And bail can only be granted onailable offences. Forailable offences bail is a right though it is not an absolute right because it depends on court discretion and fulfillment of bail conditions.

The decision on whether to grant or not to grant bail rests on the court. Right to bail draws its genesis from the principle of presumption of innocence which is enshrined under Art 13 (6) of the Constitution of the United Republic Tanzania. **Mwisumo, J** stated “*Bail is a right and not a privilege to an Accused person.*”³ Therefore, under our law accused person is entitled with right to bail. From that premise it is therefore argued that denial of bail to an accused person without legal justification amount to infringement of constitutional right.

¹ Blacks’ Law Dictionary 9th ED

² Criminal Procedure Act Cap 20 R.E 2002 section 148(1)

³ Tito Douglas Lyimo vs. R [1978] TLR

Biron, J held “*a man whilst awaiting trial is as of right entitled to bail, as there is a presumption of innocence until the contrary is proved...*”⁴ section 148(3) of *Criminal Procedure Act*, gives discretionary power to the Court on whether to grant bail to an Accused Person or not. But the power is subject to section (148)4 and 5 *Criminal Procedure Act*.

In Tanzania bail can be sought during trial and after trial when a person has been convicted and intends to Appeal. Bail during trial is commonly known as bail pending trial. And bail after conviction and after appealing is called bail pending Appeal.

1.2: Bail Pending Trial

This is kind of a bail which is sought in court proceeding when the trial is yet to be determined or when judgment is not yet to be given. For a person to be granted this bail, the offence itself has to be a bailable offence not mentioned in section 148(5) (a) of *Criminal Procedure Act*. Not only that, there are other conditions which focus on the Accused and his general previous conducts. The following are other condition to be put into considerations;

- i. *Having reliable sureties*
- ii. *Readiness to comply with bail conditions*
- iii. *Having no record of previous imprisonment for a period exceeding three years*
- iv. *Suffering from diseases such as diabetes and high blood pressure*
- v. *Accused’s own safety or protection*

This bail is provided under section 148(1) *Criminal Procedure Act*. The court has power to grant bail however, in-case the DPP certify in writing that granting Bail to the Accused is likely to prejudice safety or interest of the Republic, which will be a sufficient ground for the court to deny bail to the Accused.

When a person wants to apply for a bail in Tanzania, he/she must consider nature of the offence as to whether it is bailable or non-bailable offence. Non-bailable offences have been provided by

⁴Patel vs. R [1971] HCD

s.148 (5) (a) *Criminal Procedure Act*. From that premise a person would only be granted Bail if the offence is a bailable offence

1.2.1: Critical analysis of section 148(4) and section 148(8) of Criminal Procedure Act

The provision of 148(4) provision gives enormous power to the DPP which can be abused. It doesn't say what are meant by public interest or public safety. Whatever, the DPP thinks at his power that the Accused may jeopardize public safety or interest, then the DPP stand at a position of certifying the same without giving in-depth reason. This is absolute unnecessary is violation of the natural law on the right to be heard, right to be given reason for the decision and law against bias.

Section 148(5) of *Criminal Procedure Act* provides offences which are not bailable and circumstances to which bail may not be granted. This section defeats the whole purpose for which bail is based upon. Because being a suspect doesn't by any chance means you are guilty. Denying bail to an Accused person is to punish before he is found guilty by the Court.

1.3: Bail Pending Appeal

Bail pending appeal is encompassed by the provision of section 368(1) of *Criminal Procedure Act*. Upon recording in writing a reasonable cause, the court may grant bail to a person who has been sentenced to a term in prison pending hearing his /her appeal.

This section does not specify which reasons are '*reasonable causes to suffice the grant of bail*'. But the court throughout practices, it has set some pre-condition tests by which an applicant must suffice for successful grant of bail pending appeal.

It was held by **Bahati, J** held that "*for bail pending Appeal to succeed there has to be an overwhelming chances of success of the appeal filed and not chances of success.*"⁵ This is the classical and old test in court practice by which some judges avoid applying it as it attract premature discussion on merit of the appeal. Where **Shangwa, J.** found that:-

⁵ R vs. Nicholas Alfred Kiyabo [1987] TLR 39

“Illness such as *hypertension, diabetes, and high blood pressure which does not suit poor prison condition is a good ground for bail pending appeal*”⁶.

His lordship in this case avoided to discuss the test of “*overwhelming chances of success of the filed appeal*” on the reason that “*the test has pre-mature comments by the court on merit of the appeal and it calls for pre-judgment of the appeal.*” His lordship did not apply this test.

However, Courts have formed two tests for granting bail pending appeal. According to the Judge, Bail pending appeal is only granted on *exceptional circumstances* and where the applicant has shown that the appeal have *overwhelming chances of success*⁷.

Therefore, It can be stated that as far as Bail pending appeal is concern, there are two test to be carried out for the court to determine whether to grant or not, namely:-

- *Overwhelming chances of success of the appeal filed and*
- *Exceptional circumstances which includes illness which does not suit poor prison conditions*

1.4: Application for bail

Application for bail in Tanzania can be made by two ways; by oral application or by a written application.

Oral application is usually made by the Accused or his/her Advocate in the course of court proceeding. In determining this application the court shall hear both side, prosecution and the applicant and make a ruling whether to grant or not.

Written application is another way of applying for bail. Section 390 of *Criminal Procedure Act* as amended by Written laws Miscellaneous Act No. 3 of 2011, requires all applications under

⁶ Amiri Mohamed vs. R Crim. Ap. No. 170 of 2004 HC of Tanzania at Dar es Salaam (unreported)

⁷ Hassanali Ali vs. R [1968] HCD 174

Criminal Procedure Act to be by chamber summons supported by affidavit. In that remark written application must be by chamber summons supported by affidavit.

1.5: Conclusion

It has been a debate in Tanzania on whether Bail is a matter of right or privilege. Different legal scholars have argued either way. It is not directly provided as “*right to bail*” but article 13(6) of the Constitution of United Republic of Tanzania embraces the right to bail. This article provides for presumption of innocence, that a person is innocent until proven otherwise by the Court. And the essence of detaining a person is to secure and assure his presence when needed in court or by police. Since the constitution presumes innocence of every accused person, then became a matter of right as long as the sureties guarantee to procure the Accused whenever needed.

This has not been the case in practice, as some provision of the *Criminal Procedure Act* seems to go against provisions of the constitution. Section 148(5) (a) of *Criminal Procedure Act* contravenes the constitution by denying bail to some offences. This is to judge the accused’s innocence before the court finds him/her guilty of the offence. On the strength of the Constitution and above referred cases it is clear bail is a right, though it is not an absolute right depending on the nature of the offence.

REFERENCE

Blacks' Law Dictionary 9th ED

Criminal Procedure Act Cap 20 R.E 2002 section