THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[CORAM: HON. JUSTICE M.S.ARACH AMOKO, JA]

CRIMINAL APPLICATION NO.13 OF 2013

[Arising from criminal appeal no. 62 of 2011]

[Arising from Bushenyi criminal session case no. 164 of 2010]

BETWEEN

TINDIFA SERAPIO .....APPLICANT

AND

UGANDA.....RESPONDENT

RULING

This is an application for orders that:

a) ***The applicant who is currently being held at Luzira upper Prison be granted bail pending the hearing and determination of his Criminal Appeal No. 62 of 2011; and***

b) ***Consequential directions be issued to regulate bail.***

The application is brought under **section 132(4) of the Trial on Indictments Act, Cap 23; Section 40 of the Criminal Procedure Code Act, Cap 116,** and **Rule 43(1) of the**

Judicature (Court of Appeal Rules) Directions, SI 13-10. It is supported by the affidavit of the applicant dated 31st January 2013, and is based on the following grounds:-

1. **That the applicant is dissatisfied with the conviction and sentence of the High Court and that the appeal has chances of success;**

2. **That the applicant is a law abiding citizen and was previously granted mandatory bail and complied with all the terms;**

3. **That the applicant will not abscond, that he has substantial sound sureties, and will abide by all the conditions set by the honourable court;**

4. **That the applicant is of advanced age and that his medical condition has continued to deteriorate;**

5. **That owing to the busy schedule of the Court of Appeal, the appeal may not be heard without substantial delay;**

6. **That if granted bail pending appeal, the applicant will abide by all the conditions this honourable court would set for his release but not limited to return to Court to prosecute his appeal whenever called;**

7. **That if the applicant is granted bail it will not in any way occasion miscarriage to anyone not; even the state.**

The background to this application is that, the applicant was tried by the High Court sitting in Bushenyi and he was convicted for the offence of manslaughter and consequently sentenced to 15(fifteen) years imprisonment on 13th August 2010.

Since his conviction, the applicant has lodged a Notice of Appeal dated 23rd August 2010 intending to appeal to this Court against the conviction and sentence vide **Criminal Appeal No. 62 of 2011.** The applicant has brought this application to be released on bail pending the hearing and determination of his appeal.

The applicant was represented by Mr. Ondimu Duncan. State Attorney Barbra Masinde appeared for the Respondent. No affidavit was filed on behalf of the Respondent. Court declined her application for adjournment to file the same due to the fact that the respondent had ample time to do so.

Submissions of Counsel:

Mr. Ondimu availed court the Notice of Appeal and proceeded to argue the grounds.

On ground 1, he submitted that the appeal has high chances of success, and based this argument on paragraph 2 and 3 of the applicant's affidavit in support. He stated that the applicant was dissatisfied with the conviction and sentence, and that his rights were not considered during plea taking and preparation for the trial as per paragraph 5 of the affidavit in support. He submitted that according to the celebrated authority of ***Adan v. Republic [1973] EA 445***, the question of the legality of plea taking goes to the root of any trial and has the effect of nullifying the entire

proceedings. In the instant case, the applicant is questioning the manner in which the plea was recorded. His contention is that it did not meet the constitutional threshold. Secondly, the applicant also questions the advocate who represented him. These are the key issues which the court hearing the appeal will have to determine. Therefore, the appeal has high chances of success.

Mr. Ondimu submitted on ground 2, that the applicant had previously been released on mandatory bail and complied with all the conditions until committal, even though he did not apply again, subsequent to his committal. He submitted that that served to show that the applicant was a law abiding citizen.

On ground 4, Mr. Ondimu submitted that the applicant is 79 years old, he is thus of an advanced age that court should consider and grant him bail.

Mr. Ondimu submitted on ground 5 that it is within the knowledge of the court as well as in the public domain that the Court of Appeal also doubles as the Constitutional Court, compounded by the well known fact of understaffing at the Court of Appeal; it would take quite some time before the appeal is cause listed for hearing.

On ground 3, Mr. Ondimu argued that the applicant had substantial sureties that have undertaken to ensure that the appellant will turn up to prosecute the appeal when called upon. That he had also explained to them that the grant of this application does not mean an acquittal. He introduced the following sureties:

They were:

i. Natukwata Nelson, 36 years, teacher in Mubende Local Government, son to the applicant.
ii. Mwine Clement, 46 years, businessman, Luwum Street, City Centre Complex, resident of Mukono, neighbour to the applicant, where the applicant resides.
iii. Siima Julius, 33 years, businessman, Mubende, family friend of the applicant.

In addition, on this point, Mr. Ondimu emphasized that the law did not require any specific number of sureties; however, the practice is to have at least two.

Ms. Masinde opposed the application.

On ground 1, she submitted that the court had not been availed with the Memorandum of Appeal which is the only means for Court to assess the possibility of success of the appeal. Therefore, court does not have the information that Mr. Ondimu was relying upon to say that the procedure for taking plea was irregular. Court should not to rely on mere speculation to grant bail.

On ground 2, Ms Masinde submitted that by then, the applicant was not a convict and so was benefitting from the presumption of innocence. But now that he is a convict, the chances of absconding have become higher.

Regarding ground 4, Ms. Masinde conceded that the appellant was of advanced age but contended that the advanced age alone is not enough for the court to flout the law.

On ground 5, she submitted that the delay has actually been occasioned by the laxity of the applicant because from 25th August 2010 when the Notice of Appeal was filed, to date, they have not filed a Memorandum of Appeal.

Further, the court has on the other hand shown its swiftness by fixing the application for hearing on 10th April 2013 even though it had only been filed on 1st February 2013. The delay was therefore of the appellant and not of the court. The delay cannot be blamed on the court but rather the on the laxity of the appellant's counsel especially since the matter did not involve the calling of witnesses since the applicant pleaded guilty. The delay is therefore, merely speculative.

On ground 3, Ms. Masinde submitted that she had only been given the details of the sureties in court and could not verify the correctness of the details. She however submitted that the driving license provided by surety 2 had long expired in 2012, and that he had knowingly presented it to court to hoodwink the court; that such a surety could not be relied on to secure the attendance of the applicant.

On surety 3, she submitted that the fact that the original of his driving license was confiscated by Police for a traffic offence that attracted an express penalty, that he has never paid, served to show that he was not a law abiding citizen, and thus should be disregarded as a surety.

In addition to the above, Ms. Masinde submitted that the Supreme Court in the authority of ***Arvind Patel vs Uganda, SCCA No.1/03,*** laid down considerations for the grant of bail

pending appeal to include among others, "whether the offence the applicant was convicted of, involved personal violence." She submitted that the applicant was convicted of the offence of manslaughter, where he broke into a room where his wife had locked herself during a fight, and caused her a head injury from which she bled to death. Considering the nature of the offence for which he was convicted therefore, the appellant should not benefit from bail.

In a brief rejoinder, Mr. Ondimu submitted that he had inferred the likelihood of success from his instructions. He also submitted that the Record of Appeal even though not filed was now available in the court registry, and if given leave, he could file it, and also that counsel for the respondent must have had access to it, gauging from her submissions. He also submitted that the delay on the part of the Registrar of the High Court to avail the Record of Proceedings without which he could not prepare a Memorandum of Appeal, should not be visited on the applicant.

He reiterated his earlier submission and added that the respondent had not led evidence to show that the applicant will abscond.

On the ground of delay by the court, Mr. Ondimu submitted in rejoinder, that the application for bail pending the hearing of the appeal is heard by a single Justice while the appeal is heard by at least three Justices of the Court, which explains why it was easier to fix the application.

He submitted further that Counsel for the respondent had relied on only one consideration in ***Arvind Patel vs Uganda*** (supra) to oppose the application, yet that decision laid down several other considerations and maintains that not all must be met. To him, even one of those considerations would suffice.

He also prayed court to find the sureties substantial; that the expired driving permit was also supported with an LC Letter showing particulars of the surety, and for the third surety, it was within the discretion of court to order the applicant to produce additional sureties as no rule of law dictates the number of sureties.

Consideration of the grounds by Court:

Section 132(4) of the Trial on Indictments Act provides that:-

> ***"Except in a case where the appellant has been sentenced to death, a judge of the High Court or the Court of Appeal may, in his or her or its discretion, in any case in which an appeal to the Court of Appeal is lodged under this section, grant bail, pending the hearing and determination of the appeal."***

Section 40(2) of the Criminal Procedure Code reads:

> ***"The appellate court may, if it sees fit, admit an appellant to bail pending the determination of his or her appeal; but when a magistrate's court refuses to release a person on bail, that person may apply for bail to the appellate court."***

This law is therefore settled; this court has jurisdiction to grant bail to any convicted person, who has lodged a criminal appeal to court before the appeal is determined. This, however, is a discretionary jurisdiction, which should be exercised judiciously.

The guidelines for the grant of bail pending appeal were laid down by **Oder JSC (RIP)** in ***Arvind Patel vs Uganda, SCCA 1/03.*** In that case, considerations which should generally apply to an application for bail pending appeal were summarised as follows:

i. the character of the applicant;

ii. whether he or she is a first offender or not;

iii. whether the offence of which the applicant was convicted involved personal violence;

iv. the appeal is not frivolous and has a reasonable possibility of success;

v. the possibility of substantial delay in the determination of the appeal and;

vi. whether the applicant has complied with bail conditions granted before the applicant's conviction and during the pendency of the appeal.

The Supreme Court also stated that all those conditions stated in ***Arvind Patel case (supra)*** need not be present in every case. A combination of two or more may be sufficient for a grant of bail. It is to be noted, however, that each case must be considered on its own facts and circumstances.

I shall now proceed to apply the said guidelines to the instant application.

In ground 1 of the application, which is in my view the most important one, the applicant alleges that he was never properly informed of his rights during plea taking and the pre-trial stages and that the advocate that represented him failed to do so and he, the applicant does not possess legal knowledge. For this reason, the applicant has been advised that the appeal is not frivolous and has chances of success. However, no Memorandum of Appeal or Record of proceedings has been furnished to court by the applicant. For this reason, it is difficult if not impossible, for the Court to determine whether or not the appeal has a likelihood of success. For that reason I find that this ground fails since it was not supported by any evidence.

Ground 2 succeeds since the applicant's averment that he complied with previous bail conditions was not rebutted by the respondent. The same reasoning applies to ground 4.

Regarding the possibility of a substantial delay in hearing the appeal, it may well be that the Court is busy and understaffed, but this does not mean that all convicts should be released on bail pending appeal in the meantime. Otherwise it will defeat the very essence of our justice system and will definitely lead to mayhem. Further, now that the record of proceedings has been brought to the Court, I have no doubt in my mind that the appeal will soon be cause listed. I can only advise the applicant to exercise vigilance and ensure that his case is cause listed during the next convenient session, now that the Record or proceedings has reached this Court. Therefore this ground also fails.

Advanced age is not one of the criteria for consideration in the ***Arvind Patel*** case. Otherwise advanced age could be an excuse to perpetuate crime with impunity.

Regarding the sureties, I have had the opportunity to observe the demeanour of the three persons who were produced before me. The teacher is not attached to any school. He is described generally as a teacher from Mubende, Surety No. 2 has an expired driving permit. Surety 3 has no driving permit, it was purportedly confiscated by Traffic police for a traffic offence. All of them are not substantial.

On ground 2 that the appellant had been granted mandatory bail before committal to the High Court and he complied. It is to be noted that once the trial of an accused person is completed and he has been convicted, his situation with respect to his release, changes significantly.

The principles governing the release of a convict on bail pending the hearing and determination of appeal are different from those of an accused person who is still under trial because, the latter is presumed innocent until proved guilty. The presumption of innocence and the right to participate in the preparation of a defense to ensure a fair trial are not present where an accused person has already been tried and convicted; the applicant is now a convict sentenced to 15 years imprisonment. In the circumstances, the chances that he will abscond if released on bail are higher now that he is a convict.

As Ms. Masinde rightly pointed out, in her submissions, on of the criteria laid down in the ***Arvind Patel*** case is the nature of the offence. In the instant case, the applicant was convicted of the offence of manslaughter, which is no doubt an offence involving personal violence. The other factor is whether the applicant is a first offender or not. These go to the root of the applicant's character, yet, the applicant's affidavit is notably silent on these two factors.

For the reasons given above, I am of the view that the applicant has not made out a case for the exercise of the court's discretion. The application is accordingly disallowed.

I so order.

Dated at Kampala this 12th day of April 2013.

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M.S. Arach-Amoko

JUSTICE OF APPEAL

Counsel Oredmic for the applicant & Counsel Masinde for the State present.