

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPLICATION NO. 44 OF 2012.

WALUBI GODFREY ===== APPLICANT

5

VERSUS

UGANDA ===== RESPONDENT

CORAM: HON MR. JUSTICE KENNETH KAKURU, JA.

RULING

This is an application for grant of bail pending appeal. It is brought by
10 way of Notice of Motion under Article 23(6) (a) of the Constitution,
Section 40 of the Criminal Procedure Code Act, Section 132 (4) of the
Trial on Indictments Act and Rule 6, 43 & 44 of the rules of this Court.

At the hearing of this application the applicant was represented by Mr.
15 Asuman Nyonyintono and Mr. Fred Kakooza Principal State Attorney
first appeared for the respondent. However Mr. Kakooza was not ready
to proceed. He had no case file and applied for adjournment on that
account. I declined to grant the adjournment. Because this application

had been before this Court previously on 10th January, 2013 and at that time Mr. Byansi who appeared for the respondent failed to proceed on account that the DPP had been served late. The matter was stood over by the presiding judge to allow him peruse the file; again he was unable to proceed, in the afternoon. In the result the application was adjourned **sine die**. That was more eight months back. There is a possibility that the applicant could have been released on bail in January 2013. Eight months later he is still in jail on account of inefficiency and neglect of the DPP's office. Even if bail had been denied the applicant would have been saved the trouble and the legal expenses and courts time would have been saved. The DPP has never bothered to file an affidavit in reply in this case which was filed in November 2012.

This kind of attitude by the DPP's office and specifically by individual State Attorneys is completely unacceptable at this Court. The conduct of both Mr. Byansi and more especially Mr. Kakooza is unprofessional and unacceptable. It verges on neglect of duty and abuse of office. Am directing that a copy of this ruling be served on the person of the DPP Hon. Mike Chibita.

On 21st day of August 2013, I heard and disposed of six applications for bail pending appeal and none of them had an affidavit in reply filed by the DPP yet four of them were so incompetent that the Advocates simply withdrew them.

5 Be that as it may, Mr. Nyonyintono learned counsel for the applicant submitted that the applicant had sufficient grounds upon which court ought to release him on bail pending appeal. He submitted that exceptional circumstances exist upon which the applicant ought to be granted bail.

10 I have listened to the arguments of learned counsel for the applicant and the response by learned counsel for the respondent. I have studied the Notice of Motion and the accompanying affidavit. I also studied carefully the annexures to the affidavit. Neither counsel filed a list of authorities.

However Mr. Nyonyintono referred me to the case of **Arvind Patel Vs**
15 **Uganda** from the bar.

The Notice of Motion sets out eight grounds, a close look at them reveals that only 4 are relevant that is paragraphs 3, 4, 5, and 6 which can be summarised as follows:-

1. That the applicant is sickly and has a history of asthma that is deteriorating.

2. That he has filed a Notice of Appeal in this Court.

3. That he is a first offender and the offence he was convicted of does not involve personal violence.

4. That he, when he was previously released on bail he complied with bail conditions.

The affidavit in support of the Notice of Motion expounds in the above grounds.

10 The applicant is now 54 years old, as he was born on 30th April 1959. His driving permit which was availed to court is proof. He was convicted by the High Court on 25th May 2012 for two counts of Causing Financial Loss C/S 20(1) of the Anti-Corruption Act and Conspiracy to defraud C/S 309 of the Penal Code Act.

15 He was sentenced to six years in jail for each of the two counts of causing Financial Loss and one year for Conspiracy to Defraud the

sentences are running concurrently and I was availed a copy of the Judgement.

On 6th June 2012 the applicant lodged at this Court a Notice of Appeal; against both sentence and conviction and filed a memorandum of appeal
5 on 19th June 2012 copies of both documents were also availed to me.

The jurisdiction of this court to grant bail pending appeal is not in dispute. It is derived from section 132(4) of the Trial on Indictments Act and Section 40 of the Criminal Procedure Code Act.

Since jurisdiction is not in issue I find no reason to reproduce the above
10 law here. Suffice it to say that power to grant bail is discretionary. It is up to this court to grant or not to grant bail. But discretion cannot be granted in a vacuum, neither can it be exercised arbitrary or subjectively. The discretionary power of court must be exercised sparingly, objectively and most importantly judiciously.

15 The law relating to bail pending appeal is provided for under Section 132 (4) of the Trial of Indictments Act, so this section grants jurisdiction to this court to grant bail. Similarly Section 40(2) of the Criminal Procedure Code Act does the same.

However both of these above Sections must be read together with Section 14 and 15 of the Trial of Indictments Act which relate to conditions for grant of bail. Although Section 15 of the Trial of Indictments Act relates to release of bail at the High Court, it is my view
5 that it sets the bench mark. It sets out the minimum conditions required for release of accused on bail pending or during trial. At this stage the accused is shielded by the constitutional right of the presumption of innocence. He is not yet a convict. It follows therefore that upon conviction the applicant has to satisfy the conditions set out under
10 section 15 as the bear minimum.

However due to the absence or suspension of the presumption of innocence, the applicant has a much greater burden of proof at this stage.

Accordingly this court must apply the requirements of Section 15 of the
15 Trial of Indictments Act and in addition and NOT in alternative also follow the guidelines set out in case law.

In this regard the Supreme Court has set guidelines to be read and applied together with Section 15 of the Trial of Indictments Act.

Section 15 of the Trial of Indictments Act is to the effect that application for bail at the High Court must prove to the satisfaction of Court that exceptional circumstances exist justifying his or her release on bail.

It defines exceptional circumstances to mean any of the following: _

- 5 1. Grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody.
- (b) A certificate of no objection signed by the DPP or
- 10 (c) The infancy or advanced age of the accused.

In addition to the above court must also consider whether or not the accused is likely to abscond and in doing so High Court is required to take into account the following factors under Section 15 (4) of the Trial of Indictments Act.

- 15 a) Whether the accused has a fixed place of abode within the jurisdiction of court or is ordinarily resident outside Uganda.

b) Whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;

5 c) Whether the accused has on previous occasion when released on bail failed to comply with the conditions of his or her bail; and

d) Whether there are other charges pending against the accused.

In addition to the above court is required to take into account the guidelines set out in (*Supreme Court Criminal Application No. 1 of 2003*)

Arvind Patel Vs Uganda. These are:-

10 a) The character of the applicant.

b) Whether he or she is a first offender or not

c) Whether the crime of which the applicant was convicted involved personal violence.

15 d) Whether the applicant has complied with bail conditions granted after the applicants conviction and during the pendency of the appeal.

As stated in the **Arvind Patel** case (supra) all these conditions need not be present in every case. A combination of two or more criteria may be sufficient provided in my view exceptional circumstances have been proved to exist.

5 In this case the applicant has proved that he is 54 years old. In Uganda a person of 50 years and above is by law considered to be of advance age. See **Andrew Adimola Vs Uganda** (*Criminal Miscellaneous Application No. 9 of 1992*), **Francis Ogwang Vs Uganda**, (*Criminal Application No. 25 of 2003*) and **Vicent Nyanzi vs Uganda** (*Criminal*
10 *Application No. 7 of 2001*), are High Court decisions which have been cited with approval in this court in (*Constitutional Application No. 25 of 2012*) **Lt. Colonel John Kaye Vs Attorney General**. I have no reason to differ.

In this regard therefore the applicant has proved exceptional
15 circumstances. However, since this is bail pending appeal, he has also to satisfy court that he will not abscond when granted bail. He has satisfied court that he is a married man with a wife and six children. That

he has a fixed place of abode, at Budumbuli West, Bugembe Town Council, Jinja District.

Although no specific proof has been provided to confirm he is of good character, no evidence has been brought to the contrary either. Am
5 inclined to give him the benefit of doubt.

From the judgment of the High Court, I have ascertained that the applicant is a first offender with no previous criminal record.

The offence he was convicted of did not involve personal violence. I have noted that the memorandum of appeal was filed promptly after the
10 judgment on 19th June 2012 and I have not found it frivolous and being a first appeal it has some chance of success. Am unable to determine anything more than that in this regard.

The applicant complied with bail terms when he was first released on bail. This evidence is on record.

15 The applicant was sentenced to six years imprisonment; on 29th May 2012, he has already served more than one year of that sentence. It has taken more than one year from the date of filing the Notice of Appeal in this Court to the hearing of this application. It is not far fetched to

suggest that it may take another 12 months or more before the appeal is heard and determined. Even though new Justices of Appeal have appointed, there are many pending appeals and applications before this court, as a result the applicant may have served a substantial part of his
5 sentence before the appeal is determined. In the event that his appeal is successful, he would have suffered irreparable loss and injustice. If on the other hand he is unsuccessful he will be required to go back to jail and complete his sentence.

The most important thing therefore is to ensure that he does not
10 abscond and he turns up for his appeal. He has presented a number of sureties to ensure this. I have found them substantial. The respondent has had time to vet them, and has no objection.

I accordingly allow this application. The applicant is hereby admitted to
15 bail pending appeal on the following terms:-

- 1. He shall deposit Shs. 10.000.000/= as cash bail in this Court before release.**

2. Each of his sureties shall execute a bond of 20.000.000 NOT cash.
3. He shall report to this Court every 1st Monday of each month beginning 2nd September, 2013.
- 5 4. The conditions shall not be varied by the Registrar.

Before I take leave of this matter I would like to observe as follows:-

That the High Court of Uganda has resident judges spread all over the country. In addition there are regular High Court circuits held all over the country on a regular basis. On the other hand except on very few occasions this court sits almost exclusively at Kampala.

Almost all appeals from the High Court have to be filed at the Registry of this Court. Almost all applications for bail pending appeal are filed, heard and determined by the Court of Appeal at Kampala.

Successful applicants are also more often than not required to renew their bail at Kampala. Although this is expensive and inconvenient. It is none the less desirable.

5 It seems in my view that the High Court has powers to grant bail pending appeal to the Court of Appeal. For reasons I have not ascertained these applications have only been filed at this court.

Section 132 (4) of the Trial of Indictments Act provides as follows:-

10 *“Except in 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 own 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”*

Am therefore of the considered view that a High court judge has jurisdiction to hear and determine applications such as this one under
15 the above law and they should freely do so.

Dated this26..... day ofAugust..... 2013 at Kampala.


KENNETH KAKURU
JUSTICE OF APPEAL

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