

Byamukama and others still at large to commit the felony of attempted murder.

The applicant was convicted on the 3rd day of August, 2015 and was subsequently sentenced to 8 years' imprisonment on count one and a term of 3 years imprisonment on count 2. The sentences were to run concurrently.

10 The applicant appealed to the High Court of Uganda at Kampala against both conviction and sentence vide Criminal Appeal No. 86 of 2015 on four grounds namely:-

- i. That the learned Chief Magistrate erred in law and fact when she found that the appellant had been properly identified.*
- ii. That the learned Chief Magistrate erred in law and fact in finding that the appellant had participated in the commission of the alleged crime.*
- iii. That the learned Chief Magistrate erred in law and fact when she disregarded the appellant's defence of alibi.*
- iv. That the sentences meted out against the appellant were manifestly*
20 *harsh and excessive given the obtaining circumstances.*

Having heard the appeal, Murangira Joseph, J upheld the judgment and findings of the trial Chief Magistrate. He also upheld the sentences passed. While dismissing the appeal, he set aside the order that the sentences passed by the learned Chief Magistrate should run concurrently and substituted it with an order that the said sentences should run consecutively. The learned appellate Judge then considered both the aggravating and mitigating factors and granted an order for compensation to the complainant

of Uganda Shillings Thirty Million (30,000,000/=) to be recovered by way of execution as a civil debt.

Being dissatisfied with the above decision, the applicant filed Criminal Appeal No. 322 of 2015 in this Court and filed this application for grant of bail pending appeal against the judgment and orders of the High Court.

10 The grounds for the application are contained in the Notice of Motion and the applicant's affidavit dated 5th July, 2017. Briefly they are that:

- a) The applicant's appeal is not frivolous and has great chances of succeeding.
- b) Throughout the trial in the Chief Magistrate's Court of Buganda Road, the applicant remained on bail until the 3rd day of August, 2015 when she was convicted.
- c) The applicant will not abscond when released on bail pending appeal and will abide by the conditions set by this Honourable Court and turn up to pursue her appeal.
- 20 d) There is a likelihood of substantial delay before the appeal can be heard and determined due to the busy schedule of work in this court.
- e) The applicant has substantial sureties willing to stand for her and ensure his attendance during the hearing of his appeal.
- f) The applicant has a fixed place of abode at Sempa Zone, Luwafu Parish, Makindye Division in Kampala District where she stays with her biological brother, Nsimire Gipson.
- g) The applicant's appeal has high chances and probability of success.

h) It is in the interest of justice that the orders sought herein be granted by this Honourable Court.

The applicant further filed a supplementary affidavit in support deposed by Nsimire Gipson and dated 4th July, 2017 wherein he swore that he was a resident at Sempa Zone, Luwafu Parish, Makindye Division in Kampala District and undertook to stay with the applicant when released on bail pending appeal.

The respondent opposed the application through an affidavit in reply sworn by Lilian Nandawula, a State Attorney with the Office of the Director of Public Prosecutions dated 13th September, 2017, stating that:-

- a) The applicant failed to prove her fixed place of abode as attachment of the LC1 letter was insufficient pointing to the likelihood to jump bail.
- b) The applicant failed to prove that she was the biological mother of three children and did not attach any evidence in support thereof.
- c) Since the applicant had filed a Notice of Appeal and Memorandum of Appeal, the appeal and this application be heard at the same time.
- d) The appeal filed by the applicant was frivolous and had no chances of success.
- e) The sureties presented by the applicant are not substantial.
- f) The applicant does not merit release on bail pending appeal.
- g) The application for bail pending appeal be denied and Criminal Appeal No. 86 of 2015 be fixed for hearing.
- h) It is in the interest of justice that this application and appeal be denied.

At the hearing of this application, the applicant was represented by Counsel Henry Kunya, while Senior State Attorney, Isaiah Mics Wanamama appeared for the respondent.

10 Counsel for the applicant made reference to the grounds stated in the Notice of Motion and the affidavit in support of the application and submitted that at trial the applicant had been released on bail on the 15th day of November 2010 and she religiously answered to the bail terms while making appearances as and when required up to the 30th day of July 2015 for a period of four years. He referred court to the bail form attached to the pleadings and marked as "Annexure C".

20 He further submitted that following the decision of the lower court, the applicant appealed to the High Court as the first appellate court and the said court dismissed her appeal. It confirmed the conviction and altered the sentence to run consecutively whereas there had been no cross-appeal by the state. Further, the learned appellate Judge additionally made a compensation order for 30,000,000/=.

Counsel for the appellant contended that it was upon this that the applicant filed a Notice and Memorandum of Appeal in this court raising substantive questions of law with regard to the sentence and the compensation order. He further contended that it was apparent from the face of the record that this appeal had merit and a great chance of success on account of these glaring errors of law.

It was submitted for the applicant that given the nature of this court's work, there was a very strong likelihood of delay in the hearing and determination

of the substantive appeal on account of the on-going election petitions, constitutional matters and other routine matters which were filed long before the substantive appeal.

Counsel for the applicant further submitted that the applicant had sound sureties who were ready and willing to stand for her. The sureties were
10 introduced as follows:-

- I. Nsimire Gipson, introduced to Court by the LC1 Chairperson of his area of residence, resident of Sempa zone, Bukeje village, Luwafu Parish, Makindye Urban Council in Kampala District, a Business Development Manager at Inter-Global Logistics Ltd and a brother to the applicant.
- II. Nitwesiga Gerald, introduced to court by the Chairperson of his area of residence, resident of Nsasa village, Kira Town Council in Wakiso District, a Supervisor for DTD in Uganda Revenue Authority and a brother to the applicant.
- 20 III. Tumwesigye Happy, introduced to court by the Chairperson of his area of residence, resident of Kabaga-Kayanga village, Kiteezi Parish, Nangabo sub-county, Kyadondo county in Wakiso District, an Officer at Uganda Revenue Authority and a brother to the applicant.

Counsel further submitted that the applicant would not abscond. She would abide by the conditions given by court and turn up to prosecute her appeal. He stated that the applicant had a permanent place of abode within the jurisdiction of this court at her brother's home (Nsimire Gipson) where she had been living before conviction. Further, that the brother, Nsimire Gipson also swore a supplementary affidavit in support stating that he would stay

with the applicant if and when released on bail, as he had done before her conviction.

10 It was further submitted that the applicant was ready and willing to abide by all conditions as shall be set up by this court and that she would surrender her Passport No. BO63845 as a further undertaking of her appearing in court as and when called upon. Further that Mr. Nsimire Gipson, the first surety and Nitwesiga Gerald, the second surety had national identification cards and land titles in their names confirming their permanent residences at those particular places which are within the jurisdiction of this court.

Counsel referred court to **Sserunkuma Edrisa Versus Uganda, Criminal Miscellaneous Application No. 152 of 2015**, where, while citing **Arvind Patel versus Uganda Supreme Court Criminal Appeal No. 036 of 2002**, court set out conditions to be considered as special circumstances in granting or refusing to grant bail pending appeal such as the substantial delay in the determination of the appeal. Counsel further stated that in 20 Arvind Patel (supra), it was found that not all the guidelines needed to be in place, but any one of them would be sufficient and could be considered favourably by the court.

He also relied on the authority of **John Kashaka Muhanguzi versus Uganda, Criminal Reference No. 797 of 2014**, to state that the degree of success of an appeal could be computed from questions of law being raised in the substantive appeal, and until the Supreme Court of the land found otherwise, presumption of innocence was still available to the appellant.

He prayed that this court be pleased to grant the applicant bail pending the hearing and determination of the substantive appeal before this court.

The respondent deposed an affidavit in reply objecting to the appeal. When the matter came up for hearing however, Counsel for the respondent conceded to the application. He submitted that having reviewed the original documents before this court and compared them with the copies which were served on the respondent, he had no objection to this application.

He further submitted that according to the bail form which was adduced as evidence, the applicant reported to the trial court for a period of 4 years without any warrant of arrest being issued or jumping bail on record. Further that the sureties presented had national identification cards, introduction letters from the respective local councils, and other documents which showed that they had fixed places of abode. He also conceded that the Memorandum of Appeal filed in court raised questions of law.

I have considered the pleadings and submissions of Counsel on either side as well as the evidence and the law relied upon by both parties.

The jurisdiction of this Court to grant bail pending appeal, is derived from **Rule 6 (2) of the Judicature (Court of Appeal Rules) Directions S.I 13-10**, which provides as follows:-

"6. Suspension of sentence and stay of execution.

(2) Subject to subrule (1) of this rule, the institution of an appeal, shall not operate to suspend any sentence or to stay execution, but the Court may_

(a) in any criminal proceedings, where the Notice of Appeal has been given in accordance with rule 59 or 60 of the Rules, order that that appellant be release on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal..."

10 Reference should also be made to **section 40 of the Criminal Procedure Code Act** which provides:-

"...the appellate court may, if it sees fit, admit an appellant to bail pending the determination of his /her appeal..."

Further **section 132 (4)** of the **Trial on Indictment Act**, provides:-

"...Except in areas where the appellant has been sentenced to death, a judge of the High Court or Court of Appeal may in his or her 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..."

20 I agree with the decision of Kakuru, JA in **Igamu Joanita Criminal Application No. 107 of 2013**, that in order for an applicant to be admitted to bail, he/she must prove and show exceptional circumstances as part of the conditions set out in the Arvind Patel case. In that case, it was held that:-

"... the burden is upon the applicant to convince court of any special circumstances warranting that he be released on bail pending appeal..."

It is clear that, the burden of proving any exceptional circumstance lies with the applicant.

Section 15 (3) of the Trial Indictments Act gives some guidance on what "exceptional circumstances" mean when it provides:-

" 3) Exceptional circumstances mean the following:

- 10 ***a) 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 Director of Public Prosecution or***
- c) the infancy or advanced age of the accused."***

Although this section applies to the lower courts, it is instructive in the exercise of judicial discretion even at this court when it comes to exceptional circumstances of bail pending appeal.

- 20 Exceptional circumstances are to be read together with the guidelines in the Arvind Patel case, where Oder, JSC while applying **Rule 5 (2) (a)** of the Supreme Court Rules which are in pari materia with **Rule 6 (2)** of this Court's Rules laid down the criteria for the grant of bail pending appeal. He held that the Court had jurisdiction to grant bail to any convicted person, who had lodged a criminal appeal to the court before which the appeal is to be determined. The learned Justice, however, went on to hold that:-

"... this is a discretionary jurisdiction which should be exercised judiciously..."

The learned Justice further held that:-

"Different principles must apply after conviction. The accused person has become a convicted person and the sentence starts to run from the date of his conviction..."

... in my view, considerations which should generally apply to an application for bail pending appeal as indicated in the cases above referred to may be summarized as follows:

a) The character of the applicant.

b) Whether he or she is a first time offender.

c) Whether the offence for which the applicant was convicted involved personal violence.

d) The appeal is not frivolous and has a reasonable possibility of success.

e) The possibility of substantial delay in the determination of the appeal.

f) Whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any).

It is not necessary that all the conditions set out should be present in each case. A combination of two or more criteria may be

sufficient and each case must be determined on its own facts and circumstances...”

It should however be noted that the guidelines in Arvind Patel are just indicative and each application for bail must be considered on its own merit.

10 In all bail applications, the main consideration should be assurance that the applicant will not abscond or commit further offences if granted bail. **See Chimambahai versus Republic (1971) E.A 343.** The court must be assured that the applicant will abide by the bail conditions. In this regard **Section 15 (4) of the TIA** provides factors to take into account. These are:

1. Whether the accused has a fixed place of abode within the jurisdiction of the court or is ordinarily resident outside Uganda;

20 *2. Whether the accused has sound sureties within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;*

3. Whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail;

4. Whether there are other charges pending against the accused.

I should point out at this point that the applicant no longer enjoys the presumption of innocence guaranteed to every accused under **Article 28(3) (a) of the 1995 Constitution**, as she would in an application for bail

pending her trial. The applicant is now a convict serving sentence. Further, the offence for which she was convicted involved personal violence.

10 I will now look at the grounds presented for this application that is to say, character before and after the commission of the offence, the likelihood and reasonable possibility of success for appeal, anticipated delay, non-abscondment when released on bail, and substantial sureties.

As one of the grounds in support of the application herein, it was stated that the applicant's appeal has high chances of success. I find that when considering whether or not the appeal has a likelihood of success, regard should be made to the memorandum of appeal and the record of appeal. It is however, important to bear in mind that this court is not required to delve into the merits of the appeal at this stage. A memorandum of appeal was filed on 7th March, 2017 and attached to this application. I have also perused the judgment of Joseph Murangira, J in Criminal Appeal No. 086 of 2015 and the Memorandum of Appeal. I find that that the intended appeal raises some
20 issues that merit consideration by this Court.

The applicant averred in her affidavit in support that due to the nature of this Court while handling Election Petitions, Constitutional Petitions and other matters the appeal process was likely to take long. In **Akbarali Juma Kanji (1942) 22 (I) K.R. 17** cited with approval in **Chimambhai versus Republic (No. 2) (1971) E.A 343**, It was stated that:-

"...anticipated delay in hearing of the appeal together with other factors could constitute good grounds for granting bail pending appeal..."

The case of an appellant under sentence of imprisonment seeking bail lacks one of the greatest elements normally available to an accused person seeking bail before trial, namely the presumption of innocence, but nevertheless, the law to an extent, frankly recognizes the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.

I stated earlier that under **Section 15 of the Trial on Indictment Act**, Court may refuse to grant bail to a person accused of an offence specified under sub section 2 of that section, if the applicant does not prove to the satisfaction of court that:-

a) exceptional circumstances exist justifying his or her release on bail; and

b) he or she will not abscond when released on bail.

In this case the applicant did not plead or argue any exceptional circumstances. However, I am aware that proof of exceptional circumstances is not mandatory. **See Foundation for Human Rights Initiative versus Attorney General Constitutional Petition No. 020 of 2006.**

As for the evidence to the satisfaction of Court that the applicant will not abscond when released on bail, I find that the applicant has a fixed place of abode within the jurisdiction of this court at Sempa Zone, Luwafu Parish, Makindye Urban Council in Kampala District (See Paragraph 2 of the affidavit in support of the Motion), the applicant also presented a letter of introduction from the LC1 Chairperson of Sempa Zone confirming her residence in that

area with her brother, Nsimire Gipson (first surety) and she can be accessed thereat. Further, I note that the applicant never attempted to escape for the 4 years she had been on bail during trial.

10 I also find that the applicant presented substantial sureties with sufficient documents that is to say, national identification cards, letters of introduction from the LC1 Chairperson of their respective areas of residence and work identification documents. I note that the first surety stood surety for the applicant at the lower court and I am persuaded that these three persons can stand surety for the applicant and ensure her presence as and when required.

I am also of the strong view that at the age of 44 years old (she was 37 in October 2010 as per the charge sheet) and having spent a substantial part of her term in jail, the applicant is not likely to jeopardize her chances of obtaining total freedom by absconding from justice, and living a life of a fugitive from justice.

20 The applicant's application for bail is therefore hereby granted on the following conditions:-

1. The applicant shall deposit a sum of Uganda Shillings Five Million (5,000,000=) cash with this court.
2. The applicant shall not leave the jurisdiction of this court without leave of court.
3. The applicant shall deposit her passport No. BO63845 with the Registrar of this Court.

4. The three sureties by the names of: 1 – Nsimire Gipson; 2- Nitwesiga Gerald and 3- Tumwesigye Happy shall each execute a bond of Ug. Shs. 10,000,000= each, (not cash) and deposit the title deeds of their residences with court.
5. The applicant shall report to the Registrar of Court of Appeal on every last working day of the month starting from the 31st day of October, 2017 for further management of her bail until her appeal is heard and disposed of, or until such other further orders of the court.
6. The Registrar (COA) is hereby directed to fix the appeal for hearing at the earliest convenient date.

It is so ordered.

Dated at Kampala this^u17^u..... day of^uOctober^u..... 2017.

Elizabeth Musoke

JUSTICE OF APPEAL