

5

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA (COA) AT KAMPALA

MISCELLANEOUS APPLICATION NUMBER 58 OF 2017

(Arising from Criminal Appeal No. 175 of 2017)

10 **SERWAMBA DAVID MUSOKE :::::::::::::::::::: APPLICANT**

VS

UGANDA :::::::::::::::::::: RESPONDENT

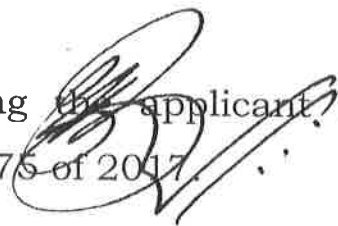
CORAM:

15 **HON. MR. JUSTICE S.B.K KAVUMA, DCJ**

RULING OF COURT

This Application is brought under, Section 40(2) of the Criminal Procedure Code Act, Cap 116 of the Laws of Uganda and Section 20 132(4) of the Trial on Indictment Act, Cap 23 of the Laws of Uganda, and Rules 6(2) of the Judicature (Court of Appeal Rules) Directions S1 13-10.

The Application seeks for an order granting the applicant bail pending the determination of his Appeal No. 175 of 2017.



25

5 **Background**

The background to the Application is that on 30th May 2017, the applicant was charged, convicted and sentenced to 10 years by the High Court Anti-Corruption Division for the offences of Embezzlement c/S 19(b) (i) of the Anti-Corruption Act 2009, Money
10 Laundering c/S 116 of the Anti-money Laundering Act and Conspiracy to Commit a Felony c/S 390 of the Penal Code Act. The applicant appealed against that sentence vide Criminal Appeal No. 175 of 2017 and also filed this Application.

Representation

15 At the hearing of the Application, Mr. Ocheing Evans (counsel for the applicant) appeared for the applicant while Mr. Peter Mugisha Bamwine (State Attorney) (counsel for the respondent) appeared for the respondent.

Grounds

20 The grounds upon which this Application is premised are stated briefly in the Notice of Motion and laid out in detail in the applicant's Affidavit in Support of his Application and are that;

1. The applicant was charged, convicted and sentenced by the High Court Anti-Corruption Division holden at Kisumu on
25 Charges of Embezzlement c/s 19(b) (i) of the Anti-Corruption Act 2009, Money Laundering c/s 116 of the Anti-money Laundering Act and Conspiracy to commit a

- 5 felony c/s 390 of the Penal Code Act on the 30th day of May,
2017 and accordingly sentenced to 10 years imprisonment.
2. That the Appellant has appealed against his conviction and sentence vide Criminal Appeal No. 175 of 2017.
 3. That the grounds exist to warrant the grant of bail pending
10 Appeal.
 4. That the Applicant's Appeal is not frivolous and has high chances of success.
 5. That the hearing of this Appeal is likely to delay due to the heavy busy schedule of this Honorable court.
 - 15 6. That the offences with which the Applicant was charged and convicted do not involve any personal violence.
 7. That this honorable court has powers and discretion to release the Applicant on bail pending the hearing and determination of his Appeal.
 - 20 8. That the Applicant has got a fixed place of abode and has sound and substantial sureties willing to undertake that he complies with all the bail conditions if released on bail pending the hearing and determination of his appeal.
 9. That the Applicant suffers from several ailments to wit
25 allergic bronchitis with Asthmatic components and Hypertensive Heart Disease.
 10. That the Applicant will suffer injustice and irreparable damages if this Application is not allowed as prayed.
 11. That it is the interest of justice that this Honourable Court
30 exercises its discretion in favour of the Applicant. (Sic)

5 **The case for the applicant**

Counsel for the applicant cited the authority of **Alvind Patel vs. Uganda Criminal Application No. 1 of 2003** and submitted that the case sets the conditions for grant of an Application for bail pending appeal to wit;

- 10 1. *That you have to consider the character of the applicant*
2. *Whether he or she is a first offender or not.*
3. *Whether the offense of which the applicant was convicted involved personal violence.*
4. *That the appeal is not frivolous and has reasonable probability*
15 *of success.*
5. *Possibility of substantial delay.*
6. *And whether the applicant has complied with bail conditions granted before.*

The Supreme Court also noted that these conditions need not all
20 present, two or more could suffice to warrant a grant of bail pending appeal.

Counsel submitted that the offences with which the applicant was charged did not involve personal violence. That the Appeal is not frivolous and has high chances of success. The applicant suffers
25 from chronic illnesses that are aggravated by the prison environment. He filed a medical report (annexure F) to this effect.

5 That the applicant has a fixed place of abode in Lukuli Konge Parish, Makindye Division and has a letter of the LC.1 Chairperson confirming that he stays in the said location.

The applicant is the holder of a Uganda passport Number B1246341 valid until 2025 and also possesses a national ID
10 Number CM820121028WFG.

The Applicant's passport and National ID can be availed to Court. The applicant further stated that he has substantial sureties that will ensure his attendance of court until his Appeal is heard and disposed of.

15 He presented four sureties namely;

1. Ms. Ruth Kijjambu 58 years of age. She is a resident of Kyeyagalire in Lubowa Estate Cell and the LC.1 Chairperson has introduced her as a permanent resident. She is the holder of a Uganda passport Number B0793210 valid until 2020.
20 This surety also availed court with a land certificate of title registered in her names. She is a lawyer and practices with the firm of Ntalo Kigozi & Co. Advocates at Parliamentary Avenue, Bahtia Chambers. She is a maternal aunt to the applicant.

2. Batendwa Betty Sejje, 54 years of age and a resident of Kosovo
25 LC 1 Zone, Salaama Parish Makindye Division. She has been introduced by the LC1 of the area. She possesses a National Identification Card Number CF630521000REE. She is one of the administrators of the estate of the deceased father of the applicant. She has availed a copy of a title deed that belongs to

5 the estate of the deceased and as the administrators, they
have made a decision to submit the land title to Court if it is
desired. It is for Mengo Block 269 Plot 331 currently registered
in the names of Bunjo Vincent Kizito. This property had been
purchased by their late father but at the time of his death he
10 had not transferred it but it belongs to the estate.

3. Ssendikaddiwa Williams, 59 years of age and a resident of
Kyengera Central LC 1. He has been introduced by the LC1
Chairperson. He is a business man located at Nkrumah Road,
JP plaza shop No. 3. He has a copy of his Uganda Passport
15 Number B1324620 and a National Identity Card No.
CM58099101ZFLLA. He is a paternal uncle to the applicant and
is also one of the administrators of the estate of the late father
of the applicant.

4. Sarah Sserwamba Nakibuuka, 43 years of age and a resident
20 of Kosovo LC1 Salaama Parish Makindye Division Kampala.
She is the holder of a Uganda National Identify Card No.
CF74099100457G. She is an elder sister to the applicant.

Counsel prayed that this Court be pleased to grant the applicant
bail pending the determination of his Appeal.

25 In reply, counsel for the respondent objected to the Application on
the grounds stated in the affidavit of Carol Tabaro, a State Attorney
attached to the Anti-corruption Division of the High Court. That
whereas the offenses which the applicant was convicted of did not
involve any personal violence, the same are serious in nature being

5 economic crimes. As regards the issue of the applicant having no criminal record, counsel submitted that there was no proof of this by any certificate of criminal record produced or attached to the proceedings before Court.

Further, in respect to the ground that the applicant suffers grave
10 illnesses, counsel submitted that the report presented to Court does not suggest that such diseases cannot be handled in the prison where he is incarcerated. With regard to the sureties, the respondent stated that he had no objection to any of them. On the land title deed presented to court for the land comprised in Block
15 269 Plot 331 at Kavumba, counsel observed that it was neither in the names of the applicant nor any of his sureties and that no sale agreement in respect of the said land has been attached to prove that indeed this land was purchased by the late father of the applicant.

20 In conclusion, counsel prayed that this Application be dismissed but in the event that Court desires to grant it, stringent terms and conditions should be imposed to compel the applicant to appear before Court at the time of the hearing of his Appeal.

25 **Consideration of the application**

I have carefully considered the submissions of both counsel, the evidence on record and the law applicable. The power of this court to grant bail pending appeal is discretionary but it must be



5 exercised judiciously (*See Walubiri Godfrey Vs Uganda Criminal Application No. 44 of 2012 Court of Appeal*)

The applicant's right to apply for bail is enshrined in **Article 23(6)** of the Constitution. It provides:

10 **"(6) Where a person is arrested in respect of a criminal offence—**

(a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable;"

15 The law relating to bail pending appeal is further found in *Section 132(4)* of the *Trial on Indictments Act Cap 23 of the Laws of Uganda* which provides:

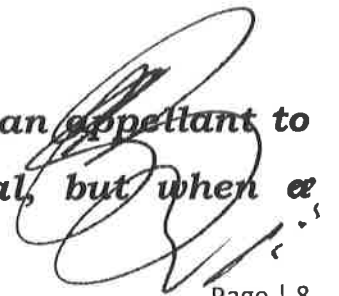
Section 132(4);

20 **"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 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."**

Similarly *Section 40(2)* of the *Criminal Procedure Code Act Cap 116* of the laws of Uganda provides:

25 *Section 40(2);*

"The appellate Court may, if it sees fit, admit an appellant to bail pending the determination of his appeal, but when a



5 ***magistrate's court refuses to release a person on bail, that person may apply for bail to the appellate court."***

The case of ***Arvind Patel Vs Uganda*** (*supra*) sets out some of the guidelines to be considered by court as special circumstances in granting or refusing to grant bail pending appeal to an applicant as
10 follows:

"(a) The character of the applicant.

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

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

15 ***(c) Whether the appeal is not frivolous and has a reasonable possibility of success.***

(d) The substantial delay in the determination of the appeal.

(e) Whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of appeal (if any)." (Sic)
20

His Lordship Justice Oder JSC (RIP) observed in ***Arvind Patel*** (*supra*):

"In my view, it is not necessary that all the conditions should be present in every case. A combination of two or more criteria may be sufficient. Each case must be considered on its own facts and circumstances".
25

5 See also *David Chandi Jamwa vs Uganda (supra)* and *Gregory Mugisha Vs. Uganda Criminal Reference No. 179 of 2001*.

In the instant Application, I have considered the fact that the applicant is sickly and suffers from Allergic Bronchitis with asthmatic components and is also hypertensive, a health condition the Medical Officer at Murchison Bay Hospital who prepared the same described thus: "***Asthma and Hypertension are chronic illnesses which can be fatal especially in prison conditions.***"

10 Related to this is the notoriously known extremely high level of prisoner concentration at Murchison Bay Prison, the facility where the applicant is incarcerated, a fact I do take judicial Notice of. In my view, these are factors that point to illness of the applicant grave enough to warrant courts' consideration as hazardous especially as the possibility of turning fatal cannot professionally be ruled out in that prison's environment as stated by the Medical Officer.

20 That, in itself, is notice from a professional medical practitioner that the applicant's right to life, constitutionally guaranteed under **Article 22** of the Constitution, is under serious threat.

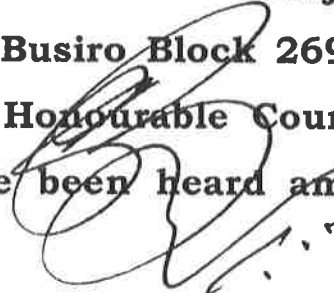
The applicant also has a fixed place of abode in Lukuli Konge Parish, Makindye Division Kampala Capital City Authority.

I further take judicial notice of the fact that due to various constraints faced by this Court, the applicant's Appeal may not be heard and conclusively disposed of any time soon. (See *Criminal*

5 ***Appeal No. 20 of 2011 David Chandi Jamwa Vs Uganda, and
Criminal Reference No. 179 of 2011 Mugisha Gregory Vs
Uganda)***

In the result, I am persuaded that the instant is an Application in
which court should exercise its discretion in favour of the applicant,
10 as It, indeed hereby does, and grant him bail pending appeal on the
following conditions.

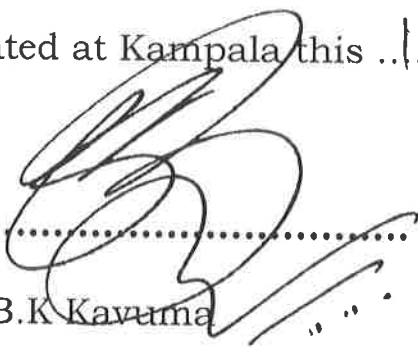
1. **The applicant shall deposit with this Court a cash bail of
shs 10,000,000(ten million) only.**
- 15 2. **The four persons presented to Court as possible sureties of
the applicant are approved as such and they will each
execute a bond of Shs. 100,000,000= (One hundred
million) not cash and deposit the same with this Court.**
- 20 3. **The applicant shall deposit with this Court his passport
which shall be retained by Court until the applicants'
Appeal shall have been disposed of or until such other or
further orders of this Court.**
- 25 4. **The Certificate of title in the names (Ms Ruth Nambogo.
Luwabya Kijjambu for the land comprised on in Mityana
Block 8 plot 50 together with that in the names of Bunjo
Vincent and Kizito John comprised in Busiro Block 269,
Plot 331 shall be deposited with this Honourable Court
until the applicant's Appeal shall have been heard and
disposed of.**



5 **5. The applicant shall report to the Registrar of this Court on every 21st day of the month starting from the 21st October 2017 for extension of his bail until his Appeal shall have been heard and disposed of or until such other or further orders of this court.**

10 **I so order.**

Dated at Kampala this ..13th... day of *October* 2017


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S.B.K Kayunga

15 **DEPUTY CHIEF JUSTICE**