

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPLICATION NO. 89 OF 2017
(Arising from Criminal Appeal No. 520 of 2017)

KWAGALA GONZA ::: APPELLANT

VERSUS

UGANDA ::: RESPONDENT

CORAM: HON. MR. JUSTICE STEPHEN MUSOTA, JA
(Single Judge)

RULING

This application seeks for orders that the applicant, Kwagala Gonza, be granted bail pending the hearing and determination of Criminal Appeal No. 520 of 2017 pending before this court.

The background of this application is that the applicant was charged and convicted of reckless driving C/S 110(1)(a), (c) and 46(a); Causing death through reckless driving C/S 108(i) (a) of the Traffic and Road Safety Act and was sentenced to 2 years and 6 months imprisonment.

The application was brought under Article 28(3) (a) and 44(c) of the Constitution, Section 132(4) of the Trial on Indictment Act Cap 23, Section 40(2) of the Criminal Procedure Code Act Cap 116 and Rule 6(2) of the Judicature Court of Appeal Rules Directions SI 13-10.

The application is premised on the following grounds;

1. The applicant was charged and convicted of reckless driving and causing death through reckless driving by the Makindye Chief Magistrates Court and sentenced to two years and six months imprisonment.

2. The applicant filed an appeal in the High Court Criminal Division which confirmed and upheld the conviction and sentence of the trial court.
3. The applicant has filed a second appeal before the Court of Appeal against the conviction and sentence of the High Court, which appeal is pending a hearing.
4. This Honourable court is possessed with authority and/or discretion to order the release of the applicant on bail pending appeal.
5. The applicant has substantial sureties within the jurisdiction of this Honourable court who shall ensure that he appears as and when required by the Court.
6. The accused shall abide by such conditions set by this Honourable Court if granted bail pending appeal.

At the hearing of this application, Mr. Basalirwa Asuman represented the applicant while Ms. Tumwikirize Joanita represented the respondent.

In his submissions, counsel for the applicant made reference to the affidavit of the applicant in which he deponed that the appeal is likely to delay and yet the applicant was sentenced to two and half years imprisonment. Further, that the appeal has a likelihood of success considering the fact that the sentencing guidelines seem not to have been followed while confirming both the conviction and sentence by the learned trial Judge. Counsel argued that the applicant is a sole bread winner of his family and he suffers from chronic osteomyelitis which requires constant medical review which may not be received adequately while in prison.

Counsel further relied on the guidelines in **Arvind Patel Vs Uganda Supreme Court Criminal Application No. 1 of 2003** and **Atayi Hellen Doreen Vs Uganda Criminal Misc. Application No. 180 of 2016** and submitted that the applicant is a first time offender who has complied with bail conditions before while in the High Court.

The applicant presented three sureties namely; Ms. Nabutono Aisha, a resident of Namataba LC1. She has a letter of introduction

from the chairperson LC1 and a National Identity Card. The 2nd surety is Mr. Mugerwa George Wilson, a member of the tax appeals tribunal and there is a letter to that effect introducing him. The 3rd surety is Mr. Balengera Dan, a resident of Mbuya 1 Parish in Nakawa Division. He has a letter of introduction from the LC1 and a National ID.

Ms. Tumwikirize opposed the bail application and submitted that there is no likelihood of delay in hearing the appeal since this court is now fully constituted. Also, that there is no possibility of success since there is no record of proceedings on the file and therefore this court cannot decipher as whether the appeal will actually be successful. Further, that there are no exceptional circumstances proved in this case and the 2nd and 3rd surety should be rejected for reasons that they are much younger than the applicant and may not be able to compel him to appear in court.

Before I deal with the merits of this application, I must emphasize that bail and particularly bail pending appeal is granted at the discretion of court. There is no automatic right to bail and the right cited under Article 23(6) of the constitution is limited to the right to apply for bail. Court is seized with the discretion to grant or not to grant bail. I must note that this discretion must be exercised judiciously and each case must be determined on its own merits.**(see Walubiri Godfrey vs Uganda Criminal application no. 44 of 2012 CA)**

The circumstances of bail pending appeal present a peculiar scenario since the applicant is no longer wholly shielded by the presumption of innocence under Article 28 of the constitution. I will be guided by the principles in **Arvind Patel Vs Uganda Supreme Court Criminal Application No. 1 of 2003** to determine whether the applicant fulfilled most of them and they are;

- (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.

It has been observed while making a distinction between an application for bail pending trial and an application for bail post-conviction that an applicant for bail pending appeal bears the burden of proving that there are exceptional reasons to warrant his or her release on bail. While factors like character of the applicant and whether he or she is a first offender or not maybe taken into account, they cannot be said to be exceptional reasons for release of a convict/appellant on bail pending appeal. Without the record of proceedings of the lower court, this court would not be able to tell as to whether or not the appeal has chances of success. The only factor that favors the grant of bail pending appeal in this case is that, the applicant may serve a substantial part of his sentence before the hearing of his appeal because as of now, the record of proceedings has not been forwarded to this court yet.

In the circumstances, I am persuaded that this Court should grant the applicant bail pending the disposal of his Appeal, as indeed I hereby do, on the following terms:

1. He will execute a bail bond of shs. 2,000,000/=
2. The three sureties whom I do approve as presented will each execute a bond of 1,000,000/= (Not cash)
3. The applicant shall report to the Registrar of this Court every last working day of the month starting 31/05/2018 for extension of his bail until his appeal is heard and disposed of or until further orders of this court are made.

I so order

Dated at Kampala this *16th* day of *May* 2018

A handwritten signature in blue ink, appearing to read "Stephen Musota", written in a cursive style.

HON. JUSTICE STEPHEN MUSOTA, JA