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- "i) The applicant has filed an appeal against both conviction and sentence, which appeal is pending before this honourable Court.*
 - ii) The appeal is nether frivolous nor vexatious and has a high likelihood of success yet there is a possibility of substantial delay in prosecuting it.*
 - iii) The offences of forgery of judicial documents and uttering a false document with which the appellant is convicted areailable by this Honourable Court*
 - iv) The applicant herein was on bail in both the lower courts and did not abscond or jump bail.*
 - v) The appellant has substantial sureties who are ready and willing to act as aforesaid.*
 - vi) The Appellant is of advanced age of 51 years, way past the life expectancy of an average Ugandan male.*
 - vii) That the appellant has fixed places of abode in Wankulukuku, Rubaga Division.*

Annexed to and filed together with the application is the twenty (20) paragraphs affidavit of Waswa Peter Weraga, the applicant, sworn at
45 Kampala on 15/01/2019 stating as follows:-

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- "1. That I am a male Ugandan of sound mind and the applicant herein and I make this oath in that capacity.*
 - 2. That I was convicted by the Chief Magistrates Court at Buganda Road on two counts of forgery of judicial documents and uttering a false document and sentenced to 2 years imprisonment on each count and ordered that the two counts (sic) run consecutively.*
 - 3. That the judgment and sentence of the lower Court was confirmed by the High Court on appeal by Honourable Lady Justice Jane Frances Abodo, in her judgment delivered on the 29th day of*

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November, 2018, vide Criminal appeal No. 52 of 2015. (A copy of the judgment is attached as "CJ").

4. *That I was immediately arrested upon delivery of the said judgment and committed to Luzira Prison to serve the aforesaid sentence.*

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5. *That being dissatisfied with the said judgment and sentence, I henceforth preferred an appeal in this honorable court, which is pending hearing and determination. (A copy of the Notice of Appeal and memorandum of appeal is attached as "NA" and "MA").*

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6. *That I have been informed by my above mentioned attorneys that my appeal is not frivolous or vexatious, that it has a very high probability of success and raises the following issues;*

a) *Whether learned trial judge as the first appellate court erred in law when she totally failed in her duty to evaluate the evidence on Court record and come up with her own decision.*

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b) *Whether the learned trial judge erred in law when she disregarded the additional evidence adduced by the Appellant, thereby coming to a wrong decision.*

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c) *Whether the learned trial judge erred in law when she upheld the decision of the trial court in absence of proof of all ingredients of the two counts by the prosecution beyond reasonable doubt.*

d) *Whether the learned trial judge erred in law when she based on the evidence adduced by the appellant to find that the prosecution had proved the case against him beyond reasonable doubt, albeit wrongly.*

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7. *That I also honestly believe without a doubt that my appeal has high chances of success because I know in my heart that I am innocent of the crimes over which I was sentenced.*

8. *That when I was granted bail in both the lower courts I fulfilled all the conditions that were set and I did not abscond or jump bail.*

- 85 9. ***That the offences above mentioned, with which I was charged, convicted and sentenced are bailable by this honorable court.***
10. ***That I have fixed place of abode at Wankulukuku, Rubaga Division, where I stay with my family and parents. (See the letter from the Local Authorities of my area attached as "LT").***
- 90 11. ***The offence of forgery of judicial documents and uttering a false document did not involve violence or endangerment of society.***
12. ***That I am a good family man, a first offender at that and do not have any previous criminal record at all.***
13. ***That I am a married man with a family of 4 minor children all of whom are dependent on me as the only daily bread winner. (See baptism certificates hereto attached as "BC").***
- 95 14. ***That I suffer serious ailments that render my continued incarceration in prison unsuitable.***
15. ***That also my terminally ill parents are entirely dependent of me as their own source of livelihood (see annexure "A").***
- 100 15. ***That I wish to continue fending for family while reporting to court at all dates appointed by it because they are lost and helpless without me.***
16. ***That when I was earlier granted bail pending the hearing of my first appeal No. 52/2015, I complied with all conditions set out by the previous court without fail, and shall do the same for any conditions set forth by this honourable court***
- 105 17. ***That I have been advised by my attorneys that there is a high possibility of substantial delay in the hearing and determination of my appeal because of the backlog that has clogged this court system.***
- 110 18. ***That I humbly pray to this honourable court to exercise its discretion to grant me bail on the grounds stated in my application and this affidavit.***

- 115 **19. That it is in the interest of justice to allow this application.**
- 20. That all that is stated herein is true to the best of my knowledge, save for those paragraphs whose source is therein disclosed”.**

120 Further to the above affidavit, the applicant, on 18/4/2019, deponent to a four (4) paragraphs supplementary affidavit at Luzira, which was filed on record, stating as follows:-

- 125 **“1. That I earlier deponed an affidavit in support of this matter and therefore wish to supplement on the same given some new information that was not referred to at the time of my first affidavit.**
- 2. That I have since obtained a health status report from Murchison Bay Hospital of the Uganda Prisons Service confirming the state my health conditions as life threatening and therefore cannot stand the prison conditions. (A copy of the health status report is hereto attached and marked as “A”).**
- 130 **3. That I depone this supplementary affidavit in further support of my application for bail pending appeal.**
- 4. That all that I have stated is true and correct to the best of my knowledge and belief”.**

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On 23/04/2019, Joanita Tumwikirize, a State Attorney in the Office of the Director of Public Prosecutions, swore a ten (10) paragraphs affidavit in reply which was filed on record on the same day stating as follows:-

- 140 **“1. THAT I am a female adult of sound mind and competent to swear this affidavit.**

2. *THAT I am a State Attorney based at the Appeals and Miscellaneous Applications Department of the Director of Public Prosecutions and I swear this affidavit in that capacity.*

145 3. *THAT I have read and understood the Notice of Motion and the grounds stated in the affidavit in support of the motion, and I swear this affidavit in opposition to the application for grant of bail pending of the applicant determination of his Appeal (sic).*

150 4. *THAT save for paragraphs 1, 2, 3, 4, 5 and 9 of the affidavit in support whose contents are not denied, the Respondent denies the contents of the rest of the paragraphs and shall put the Applicant to strict proof thereof.*

155 5. *In response to paragraph 6 and 7, it is not true that the applicant's appeal has high chances of success, the applicant was charged with 1 count of forgery of judicial documents and 2 counts of uttering a false document before the Chief Magistrate at Bugunda Road where he was convicted and his conviction and sentence was confirmed on appeal by the High Court.*

160 6. *THAT in response to paragraph 8 of the affidavit in support of the application, it is not true that the applicant will not abscond once granted bail. There are high chances of him absconding knowing that his conviction and sentence were confirmed by the 1st appellant Court, a position he was not in at the time he was released on bail in the lower courts.*

165 7. *THAT in response to paragraph 10 of the affidavit in support of the application, it is not true that the applicant has a fixed place of abode, no utility bills have been attached to show that that is where he resides, Letter introducing him attached and marked LT does not refer to him as a resident to that zone nor tenancy agreement or land title in his names to show that he has a fixed place of abode.*

170 8. *In response to paragraph 14, it not true that the applicant is suffering from any life threatening ailment and that it cannot be managed in the prison as there is no proof attached on the application to the effect.*

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9. THAT in response to paragraph 17, it is not true that his appeal will substantially delay because of backlog in the court system, as this court has a good record of disposing of cases.

10. That whatever is stated herein is true and correct to the best of my knowledge and belief”.

180 When the application came up for hearing on 23/04/2019, Mr. Muhammed Matovu and Mr. Mutyaba Bernard, learned counsel appeared for the applicant while Mr. Peter Mugisha appeared for the respondent.

185 It appeared quite clearly that counsel for applicant was not fully prepared to proceed, so he requested for an adjournment to produce relevant documents which counsel for the respondent did not oppose.

190 In the circumstances I granted the request and counsel introduced two sureties after which I gave both parties a schedule to file and serve on each other written submission in the matter. Ruling was reserved on notice.

Applicant’s Submissions

195 In his written submissions filed on 30/04/2019, counsel for the applicant cited and relied on the cases of **Arvind Patel V. Uganda, SCCA No. 1/2005** and **Igamu Joanita V. Uganda, CACA No. 17/2013** as well as Section 15 (3) (c) and (4) (a) and (b) of the Trial on Indictments Act, Cap. 23 in support of the preposition that an applicant may be released on bail pending appeal upon proof of exceptional circumstances.

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Respondent's submissions

In reply, Mr. Peter Mugisha, learned counsel for the respondent, filed written submissions on 17/05/2019 opposing the application. He cited and relied upon the cases of **Kyeyune Mitala Julius V. Uganda, Supreme Court Criminal Application No. 9/2016** and **Mubbale Peter V. Uganda, CACA No.290/2017** in support of the submissions that the guidelines in the **Arvind Patel V. Uganda** (supra) case are mere guidelines, not exhaustive, not mandatory and not relevant in some situations and that an applicant pending appeal no longer enjoys the presumption of innocence in the same way as an applicant pending trial. Also it was submitted for the respondent that the age of 50 years is not advanced age.

Consideration by Court

I have carefully perused the Notice of Motion, the affidavits both in support and in opposition of the application. I have also carefully considered the submissions of counsel for both parties and the authorities cited and relied upon by both parties.

It is now trite that bail pending appeal ought to be granted only upon proof of exceptional circumstance as a legal requirement. "Exceptional circumstance" are defined in Section 15 (3) of the Trial on Indictments Act, Cap 23 as:-

1. Grave illness certified by a Medial 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.
2. Certificate of no objection from the D.P.P.

3. Infancy or advanced age of the accused.

230 The over riding consideration for grant of bail whether pending trial or pending appeal is to, as much as possible, ensure that the applicant is not likely to abscond bail but will attend court whenever required to do so.

235 I will consider this application in the context of each of the exceptional circumstances set out above. Regarding grave illness certified by a Medical Officer in No. 1 above of exceptional circumstances, it does not feature in any of the seven (7) grounds set out in the notice of motion as grounds on which the application is based.

240 Nevertheless, there is a veiled attempt in paragraph No. 14 of the applicant's affidavit sworn on 15/01/2019 in support of the application stating:-

"14. That I suffer from serious ailments that render my continued incarceration in prison unsuitable."

Further, in paragraph No. 2 of his supplementary affidavit sworn on 18/04/2019, the applicant stated:

245 *"2. That I have since obtained a health status report from Murchison Bay Hospital of the Uganda Prisons Service **confirming the state my health conditions as life threatening and therefore cannot stand the prison conditions.** (A copy of the health status report is hereto attached and marked as "A"). (Emphasis mine)*

250 I have carefully perused the report mentioned above, compared it with the provisions of section 15 (3) of the Trial on Indictments Act defining exceptional circumstance No. 1 set out above and I find and hold that the applicant has failed to show that the health status report proved that the Hospital is incapable of providing adequate medical treatment
255 to him while he is in custody.

Regarding the second exceptional circumstance, namely:- Certificate of no objection from the D.P.P, no ground in the notice of motion and no averment in the supporting affidavits or any submissions for the applicant attempts to raise such circumstance in support of this application.

On the third exceptional circumstance, namely: Infancy or advance age of the applicant, ground No. vi) of the grounds of the application states:-

“vi) The applicant is of advanced age of 51 years, was past the life expectancy of an average Uganda male.”

Upon carefully perusing the affidavits in support of the application as well as the applicant’s submissions, I was unable to find any evidence to substantiate that ground of the application. That ground therefore was not proved at all. It remained a mere allegation without supporting proof.

The relevant exceptional circumstance was, in my view, not proved. Before taking leave of this ground of the application I wish to associate myself with the view expressed by my brother Stephen Musota. JA in **Court of Appeal Criminal Miscellaneous Application No. 82/2017 Mubbale Peter V. Uganda** where he stated:-

*“Whereas the case of **John Kaye V. Attorney General, Constitutional Petition No. 52 of 2012**, having cited **Francis Ogwang V. Uganda, Criminal Misc. Application No. 25 of 2003** considered the average age of 50 as advanced age was good law, it is my considered view that the life expectancy today in Uganda has increased and 50 years would no longer, in my view, be advanced age. According to the latest World Health Organization data published in 2015, life expectancy in Uganda is 60.3 male,*

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64.3 Female and total life expectancy 62.3. In this case, the applicant being 55 years of age would not qualify him to be of advanced age. It is my considered view therefore that an applicant should be regarded to be of advanced age at 60 years."

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The applicant in the application before me being 51 years old, in my view, is therefore below the advanced age. As such he has not satisfied the third and last exceptional circumstance.

Having failed to prove any of the three exceptional circumstances specified in Section 15 (3) of the Trial on Indictments Act, this application, in my view, has no merit and accordingly is hereby dismissed.

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Dated at Kampala this.....18th.....day ofNov.....2019.



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EZEKIEL MUHANGUZI
JUSTICE OF APPEAL/CONSTITUTIONAL COURT