

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPLICATION NO.151 OF 2018
(ARISING FROM CRIMINAL APPEAL NO.94 OF 2018)

10 **FREDRICK RWABUHORO::APPLICANT**

VS

UGANDA::RESPONDENT

CORAM: HON. MR. JUSTICE BARISHAKI CHEBORION, JA

(SINGLE JUSTICE)

15 **RULING**

This is an application brought by way of Notice of Motion under section 132(2) & (4) 2 of the Trial On Indictments Act and Rules 2(2), 5, 43 & 44 of the Rules of this Court for orders that:-

- a. *The applicant be granted bail pending appeal*
- 20 b. *The execution of High Court orders vide HCT-00-AC-SC-0017 be stayed pending the appeal*
- c. *Any other necessary directions regarding the matter.*

5 The background to the application is that the applicant was indicted, tried and convicted of the offence of abuse of office contrary to section 11(1) of the Anti-Corruption Act, No.6 of 2009. He was sentenced to a 1 year imprisonment and also disqualified from holding any public office for a period of ten years from the date of conviction.

10 Being dissatisfied with the decision of the High Court, he lodged an appeal in this Court against both the conviction and sentence. He subsequently filed this application for bail pending appeal.

The grounds upon which the application is premised are contained in the Notice of Motion and are that;

- 15 1. *The applicant is constitutionally entitled to seek bail pending appeal.*
2. *The applicant has substantial sureties capable of ensuring his Court attendance and adherence to the bail terms.*
3. *The applicant will not abscond should he be released on bail pending appeal.*
- 20 4. *Prior to conviction, High Court had granted the applicant bail whose terms he dutifully complied with'*
5. *The applicant has a fixed place of abode at Makandwa Zone, Lumuli LC1, Kitende Parish, Kajjansi Town Council in Wakiso District.*
6. *The applicant is a person of good conduct and has never been convicted of*
- 25 *any offense involving any form of personal violence.*



- 5 7. *The applicant suffers from acute diabetes that cannot be managed by the prison medical facilities.*
8. *The applicant is of advanced age and bread winner of 6 children and an equal number of dependant relatives.*
9. *The applicant's appeal has high probability of success.*

10 The motion is supported by the affidavit of the applicant's wife, Hon. Flavia Kabahenda Rwabuhoro sworn on the 10th day of September, 2018, and another by the applicant, himself sworn on 25th September, 2018. He also swore a supplementary affidavit on the 16th day of January, 2019. The relevant paragraphs in the supplementary affidavit are briefly that;-

- 15 I. *the applicant is of an advanced age of 60 years old and was convicted by the High Court of Uganda Anti-Corruption Division and currently in Uganda Prison Murchison Bay.*
- 20 II. *the applicant's appeal is pending in this honorable Court and he cannot predict when it will be resolved yet he has already significantly served his sentence of one year.*
- III. *the applicant has a fixed place of abode at Makandwa Zone, Lumuli LC1, Kitende Parish, Kajjansi Town Council in Wakiso District.*
- IV. *the applicant is a person of good conduct and character and has never been convicted of any offense involving any form of personal violence.*
- 25 V. *the applicant suffers from acute diabetes that cannot be managed by prison medical facilities*



- 5 VI. *the applicant is of advanced age and a bread winner of 6 children and an equal number of other dependant relatives including his parents.*
- VII. *the applicant was granted bail in the trial Court and he dutifully complied with the terms of the bail.*
- VIII. *the applicant was granted bail by this Honorable Court vide Criminal Application No.109 of 2016 arising out of Criminal Appeal No. 389 of 2016 before Hon. Lady Justice Elizabeth Musoke.*
- 10 IX. *The applicant has sound and substantial sureties within the jurisdiction of this Court who are capable of ensuring his attendance in Court as and when required to do so.*
- 15 X. *the applicant's appeal has a high probability of success.*

The Respondent did not file any affidavit in reply to the Applicant's affidavit in Support of the Notice of Motion.

At the hearing of the application, Mr. Aaron Kizza appeared for the applicant while the respondent was represented by Mr. Wanamama Isaiah, Senior State Attorney.

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Counsel for the applicant submitted that the applicant is already on bail granted by this Court on other charges and has dutifully complied with the terms which Court set for him. He invited Court to look at the ruling by Lady Justice Elizabeth Musoke attached to the applicant's supplementary affidavit marked as

25 annexure "E".



5 Counsel further submitted that the applicant has a fixed place of abode situate at Busiro, Block 383, Plot 3934 land at Mengo; with a duplicate certificate of title attached to the affidavit of Hon. Flavia Kabahenda Rwabuhoro, the wife of the applicant.

Counsel submitted that the applicant has exceptional circumstances to warrant
10 the grant of bail including being of advanced age of 60 years and suffers from grave illnesses. He invited Court to look at annexure "D", the medical report attached to the supplementary affidavit of the applicant which indicates that the applicant suffers from Diabetes Mellitus, Hypertensive Heart Disease and Chronic Gastritis among others.

15 Counsel further submitted that the offence for which the applicant was convicted was not violent in nature because it involved causing financial loss.

Further that the appeal has a high likelihood of success in light of the grounds enumerated in the Memorandum of Appeal attached to the supportive affidavits.

Counsel presented 3 sureties namely;

- 20 1. Mr. Balinda Charles a resident of Nakuwadde, Lubanyi LC1, Wakiso District. He is a Special Presidential Assistant in the office of the President and a holder of National ID No.CM59084100P03E.
2. Mr. Edward Mukiibi a resident of Kisosonkole LC1, Kyambogo Upper Stage, Nakawa Division. He is a Senior Librarian at Kyambogo University
25 and a holder of National ID No.CM700521053ZWD.



5 3. Mr. James Kayiru a 71 year old brother to the applicant and a resident of
 Kitonzi Ward, Kamwenge Town Council in Kamwenge District. He is a
 farmer and a holder of National ID No.CM47084102G4ZE.

Counsel added that the applicant was sentenced to a one year sentence of which
he has served a term of 8 months and if this application is not granted, the
10 appeal shall be rendered nugatory.

Mr. Wanamama, opposed the application and submitted that this Court could
not assess the possibility of success of the applicant's appeal because no Record
of Proceedings from the lower Court had been filed. He prayed that the
application be dismissed.

15 I find it pertinent to begin with the issue of failure by the Respondent to file an
affidavit in reply to the affidavit in support of the Application. The general rule is
that failure to file an affidavit in reply amounts to admission of the averments
made in the filed affidavit. As such, the Applicants' application stands
unchallenged. This however, does not bar Court from considering the application
20 on its merits and determine whether or not the Applicant has fulfilled the
conditions for grant of bail pending his appeal.

The jurisdiction of this Court to determine applications of this type is derived
from section 132(4) of the Trial on Indictments Act and Section 40(2) of the
Criminal Procedure Code.

25 **Section 132 (4) of the Trial on Indictments Act** provides;



5 “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 her 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”.

Section 40(2) of the Criminal Procedure Code reads:

10 “The appellate court may, if it sees fit, admit an appellant to bail pending the determination of his or her appeal; but when a magistrate’s court refuses to release a person on bail, that person may apply for bail to the appellate Court.”

The Supreme Court in **Arvind Patel V Uganda SC Criminal Application No. 1**
15 **of 2003** laid down the following guidelines to be applied by Courts in exercise of their discretion while granting bail pending appeal;

- i. *the character of the applicant;*
- ii. *whether he/she is a first offender or not;*
- iii. *whether the offence of which the applicant was convicted involved personal*
20 *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.*



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

The learned Justice of the Supreme Court who decided **Arvind Patel (supra)**
went further to hold that it was not necessary that all these conditions should
be present in every case as two or more may be sufficient depending on the
10 peculiar circumstances of each case.

Court will also consider whether exceptional circumstances exist to justify
refusal to grant bail pending appeal and whether the applicant shall not abscond
when released on bail. See **Chimambhai V Republic (No.2) (1971) E.A 343.**

Counsel for the applicant submitted that the applicant is already on bail granted
15 by this Court on other charges and has dutifully complied with the terms Court
set. He invited Court to look at the ruling by Lady Justice Elizabeth Musoke
attached to the applicant's supplementary affidavit marked as annexure "E".
Since no contrary evidence was adduced to show that the applicant had not
complied with the bail terms in the previous grant of bail to him. I have no reason
20 to disagree with counsel's submissions on this point.

I have looked at the evidence presented by counsel for the applicant namely the
letter from the LC 1, Kasubi Kawuku, a duplicate certificate of title of land situate
at Busiro, Block 383, Plot 3934 land at Mengo in the names of Flavia Kabahenda
Rwabuhoro and Fredrick Kwihira Rwabuhro and a National ID in the names of
25 Rwabuhoro Kwihira Fredrick. I find the evidence satisfactory in proof that the



5 applicant has a fixed place of abode within the jurisdiction of this honorable Court.

I am satisfied from the Court record that the offence for which the applicant was convicted of i.e abuse of office contrary to section 11(1) of the Anti-Corruption Act, No.6 of 2009 does not involve personal violence.

10 As to whether the appeal has a high likelihood of success, Court can assess the possibility of success of the appeal by perusing the relevant record of proceedings, the judgment of the Court from which the appeal has emanated, and the memorandum of the appeal in question. I have had the opportunity to peruse the judgment of the lower Court and the Memorandum of Appeal and I
15 am of the considered view that the appeal is not frivolous and has a reasonable possibility of success.

In ***Igamu Joanita V Uganda, Criminal Appeal No. 107/2013***, Court observed that exceptional circumstances are not only a rule of practice in bail pending appeal but a requirement of the law as defined in section 15(3) of the Trial on
20 Indictments Act CAP 23. The section sets out the following as being exceptional circumstances.

- 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.
- 25 b) The certificate of no objection signed by the Director of Public Prosecutions.
- c) The infancy or advanced age of the accused.



5 In **Kaguma V Republic (2004) 1 E.A 68**, the Court of Appeal of Kenya held that whereas ill-health alone may not necessarily constitute exceptional circumstances, a combination of the applicant's age and ill-health amount to exceptional circumstance.

The applicant herein is aged 60 years. In **John Kashaka Muhanguzi V Uganda, Court of Appeal Criminal Reference No.797 of 2014**, it was held that a person
10 of or above 50 years was considered as one of advanced age.

Counsel for the applicant argued that the applicant suffers from multiple ill health conditions. Annexure "D", the medical report states that the applicant suffers from severe Diabetic peripheral neuropathy, acute on chronic Gastritis,
15 Hypertensive Heart Disease and old age. According to the report, Diabetes Mellitus is complicated and very difficult to manage in prison conditions.

The applicant is of 60 years old and therefore of advanced age. This was confirmed by the medical report which indicates that because of his old age, his illnesses are very difficult to manage in prison conditions.

20 Grave illness and advanced age are exceptional circumstances and the applicant has proved them to the satisfaction of Court.

I have further taken into consideration the sureties and their particulars as presented by counsel for the applicant and find them substantial and willing to ensure the presence of the applicant in Court when they are required to do so.



5 In the result, I grant this application and release the Applicant on bail on the following conditions.

- a) Payment of cash bail of shs 10,000,000 (Ten Million shillings only) by the Applicant.
- b) The Applicant should report to the Registrar of this Court every last Friday
10 of every month at 9.00 am, beginning on 29th March, 2019, for extension of his bail until his appeal is heard and disposed of or until further orders of this Court.
- c) Mr. Balinda Charles, Mr. Edward Mukiibi and Mr. James Kayiru should
15 be the applicant's sureties, to secure his attendance in Court whenever he is required to do so.
- d) The said sureties should each bind himself by signing a bond (not cash) of shs. 5,000,000/= (Five million shillings)
- e) A breach of any of the above conditions shall render the bail pending
20 appeal herein granted to the Applicants liable to an automatic cancellation.



5 The orders of the lower Court are hereby stayed until the applicant's appeal **vide Criminal Appeal No.94 of 2018** is finally disposed of.

I so order.

Dated this.....*9th*.....day of.....*April*.....2019

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HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

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