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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPLICATION NO. 141 OF 2018

(ARISING FROM CRIMINAL APPEAL NO. 91 OF 2018)

WILBERFORCE SENJAKO:.....APPLICANT

10

VS

UGANDA:.....RESPONDENT

CORAM: HON. MR. JUSTICE BARISHAKI CHEBORION, JA

(SINGLE JUSTICE)

RULING

15 This application was brought under the provisions of sections 14 and 15 of the Trial on Indictments Act, section 40 (2) of the Criminal Procedure Code Act and Rules 6(2) (a), 43 and 44 of the Rules of this Court. It is for orders that the applicant be granted bail pending the hearing and determination of Criminal Appeal No.91 of 2018.

20 The Background of this application is that the applicant was convicted of the offence of corruption (neglect of duty) contrary to section 2(i) of the Anti-Corruption Act No.6 of 2009 and sentenced to 5 years imprisonment. Being dissatisfied with the decision of Court, the applicant appealed to this Court vide



5 Criminal Appeal No.91 of 2018. He subsequently filed this application for bail pending appeal.

The grounds upon which the application is premised are contained in the Notice of Motion, the affidavit in support of the application of Monica Kisubi, the applicant's wife and the supplementary affidavit of the applicant, Wilberforce
10 Senjako. The supplementary affidavit of the applicant sets out the grounds more clearly and they are that;

- a. *On the 29th of August, 2018, the applicant was convicted on the count of corruption (neglect of duty) contrary to section 2(i) of the Anti-Corruption Act No.6 of 2009 and sentenced to 5 years imprisonment.*
- 15 b. *Being dissatisfied with the judgment, the applicant has appealed to this Court against both conviction and sentence which appeal is pending before this Honorable Court.*
- c. *The appeal is neither frivolous nor vexatious and has a high likelihood of success.*
- 20 d. *There is a possibility of substantial delay in prosecuting the appeal.*
- e. *The offence with which the applicant was convicted did not involve personal violence.*
- f. *The applicant has substantial sureties ready and willing to act as aforesaid.*
- g. *The applicant is a middle aged man of 43 years of age with a young family
25 of four children all of school going age for whom he is the sole bread winner.*
- h. *The applicant is diabetic and requires special medical care and diet.*



- 5 i. *The applicant is of good character and a first offender.*
- j. *During the trial of Criminal Case No.12 of 2015 in the Anti-Corruption Division of the High Court, the applicant honored the terms of his bail set for him by Court ~~which~~, included the deposit of his certificate of title to his home in Kasubi, Entebbe, the payment of cash bond in the sum of Ug shs. 10,000,000/= and the deposit of his passport into Court.*
- 10 k. *The applicant has a fixed place of abode in Kisubi, Entebbe within the jurisdiction of this Honorable Court.*

The respondent opposed the application and filed an affidavit in reply sworn by Sarah Birungi, the Director Legal Affairs from the Inspectorate of Government, 15 stating that;

- 1) *The applicant does not disclose or prove any exceptional circumstances as envisaged by the law to warrant this honorable Court to exercise its discretion to grant the applicant bail pending disposal of his appeal.*
- 2) *The applicant is a convict, no longer covered by the presumption of innocence so there is a high probability that he will jump bail.*
- 20 3) *The applicant's assertion that there is a possibility of substantial delay is speculative.*
- 4) *The applicant has not provided evidence that his ailment of diabetes cannot be treated while in prison.*
- 25 5) *The state has cross appealed in the matter and cross appeal has a high likelihood of success.*



5 The applicant filed an affidavit in rejoinder sworn by Monica Kisubi, the applicant's wife briefly stating that;

i. *It is not true that the instant application does not disclose exceptional circumstances to warrant the grant of bail by this Court and that the applicant has not provided evidence that his ailment of diabetes cannot be*
10 *treated in prison.*

ii. *The applicant applied for a medical report from the Commissioner General's Office demonstrating his medical condition of diabetes.*

iii. *The medical report prepared by the Ag. Medical Superintendent of Murchison Bay Hospital was availed to the applicant's lawyers.*

15 iv. *The medical report indicates that the applicant's blood sugar had risen to 12.6 mmol/L in October, 23.8mmol/L in early November and to 17.2mmol/L in late November*

v. *The normal blood sugar levels for a diabetic patient should not exceed 9.9mmol/L and blood sugar levels as high as 23.8mmol/L is accordingly*
20 *alarming.*

vi. *The medical report specifically indicates that a diabetic patient with the applicant's condition requires specialized approach including a special diet which is not readily available in prison.*

vii. *Illness especially that which cannot be managed in Prison is one of the*
25 *exceptional circumstances that warrant the grant of this application.*

viii. *It is not true that the applicant will jump bail because he is already a convict.*



5 ix. *The applicant faithfully honored the terms of his bail as set out by the lower Court.*

At the hearing of the application, the applicant was represented by Mr. Jimmy Muyanja and Mr. Andrew Bwengye while Mr. Derrick Munobe from the Inspectorate of Government represented the respondent.

10 In his submissions, learned counsel Muyanja, for the applicant referred to the affidavit sworn by the applicant in support of the application and submitted that the applicant was of good character and a first offender.

Counsel further submitted that the applicant suffers from diabetes which requires special medical care and diet. He invited Court to look at the medical
15 report marked as annexure "A".

Counsel contended that the applicant was granted bail in the lower Court and honored the bail terms set by that Court. He invited this Court to look at the bail bond marked as annexure "B"

He then presented the following sureties whom he said would ensure that the
20 applicant abides with the terms if the applicant was granted bail;

1. *Ms. Joan Nakaliika, a practicing advocate and a resident of Seguku Cell 5 Local Council, Makindye-Ssabagabo Municipal Council in Wakiso District. She is a holder of National ID No.CF87030103JT8G.*

2. *Mr. Lukwago Lameck, a retired auditor and a resident of Seguku Cell 5 Local
25 Council, Makindye-Ssabagabo Municipal Council in Wakiso District. He is a*

5 holder of National ID No.CM45052107EDZA and was said to be a father to the applicant.

3. Mr. Robert Ssali, a resident of Kajjansi "C" Cell, Kitende Ward, Wakiso District. He is ~~a 45 year~~ old businessman in Bugolobi market and a holder of National ID No.CM73030105WF9E.

10 He submitted that the applicant had a fixed place of abode within the jurisdiction of this honorable Court, he was a kibanja holder in Kisubi Kawuku Local Council 1, Entebbe Sub-County in Wakiso District.

Counsel further submitted that the applicant was a middle aged man of 43 years with a young family of 4 children all of school going age for whom he is the sole
15 bread winner. He invited Court to look at the children's birth certificates marked as annexure "E1", "E2", "E3" and "E4".

Counsel argued that there was a likelihood of delay in disposing of the applicant's appeal because the appeal was filed on 31st August 2018 and to date the same had never been fixed.

20 He argued that although convicted the applicant was presumed to be innocent until this Honorable Court disposes of his appeal. He relied on the decision in ***Kyeyune Mitala Julius V Uganda, Miscellaneous Application No.4 of 2017*** for the proposition that the presumption of innocence continues as long as someone decides to exercise his or her right of appeal and prayed that this Court
25 grants the application.

5 In reply, counsel for the respondent opposed the application and submitted that the applicant had not availed Court with a certificate of criminal record granted by Police to prove that he was a first offender. He relied on ***Igamu Joanita V Uganda, Criminal Application No.0107 of 2013.***

Regarding the issue of the applicant being a sole bread winner with 4 children,
10 counsel submitted that sympathy and discomfort to family members cannot constitute exceptional grounds for bail pending appeal. He referred this Court to the decision of Kasule, JA in ***Sande Pande Ndimwibo V Uganda, Miscellaneous application No.241 of 2014.***

Counsel submitted that the applicant had not availed any evidence to prove that
15 he was of good character. He added that the applicant should at least have availed Court with a copy of a letter from his previous employer. He relied on ***Igamu Joanita (supra).***

Counsel further submitted that the applicant had not demonstrated that his appeal has a high likelihood of success.

20 Whether the applicant had a fixed place of abode, counsel submitted that the same had not been proved and therefore there were high chances of the applicant absconding. According to him, the applicant should have availed Court with a land title or a sale agreement as proof of residence.

Counsel submitted that under article 28(3) of the Constitution, a person is
25 presumed to be innocent until proved guilty by a competent Court and since the



5 High Court which convicted the applicant was competent, his presumption of innocence was suspended.

In rejoinder, it was submitted for the applicant that he had exercised his right of appeal and therefore his presumption of innocence had not ceased. Counsel for the applicant added that in an application for bail pending appeal, the burden is
10 on the respondent to adduce rebuttal evidence that the applicant may not discharge his onus.

I have considered the submissions of both counsel, the evidence on record and the law applicable. The power to grant bail pending appeal is discretionary which discretion must be exercised judiciously. ***See Walubiri Godfrey Vs Uganda***
15 ***Court of Appeal Criminal Application No. 44 of 2012.***

Article 23(6) of the Constitution which provides for the right to apply for bail states that where a person is arrested in respect of a criminal offence, he 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.

20 Section 132(4) of the Trial on Indictments Act Cap 23 and section 40 (2) of the Criminal Procedure Code Act grant this Court jurisdiction to hear applications for bail pending appeal. The said sections state thus:

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

25 *“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*



5 *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 Act Cap 116:

10 *“The appellate Court may, if it sees fit, admit an appellant to bail pending the determination of his 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 case of **Arvind Patel Vs Uganda Supreme Court Criminal Application No.1 of 2003** set out the following guidelines to be applied when considering an application for grant of bail pending appeal:

- 15 (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.
- (c) Whether the appeal is not frivolous and has a reasonable possibility of
- 20 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).



5 Justice Oder JSC clarified that it was not necessary to prove all the conditions in every case as a combination of two or more criteria may be sufficient and each case must be considered on its own facts and circumstances.

It was submitted that the applicant was a first offender with no known previous criminal record. I have perused the Judgment of the lower Court in the Anti-
10 Corruption Division of the High Court and the trial Judge confirmed this position.

As to whether the applicant is a person of good character, it was deposed in paragraph (i) of the affidavit in support of the application and the respondent did not challenge the assertion. I will therefore give him the benefit of doubt.

15 Counsel for the applicant contended that the applicant was granted bail in the lower Court and honored the bail terms as were set by the lower Court. This was deposed to in paragraph 12 of the supplementary affidavit. I have looked at the applicant's bail bond in the lower Court marked annexure "B" and find that the applicant diligently complied with the bail conditions set by Court.

20 It was not disputed that the applicant had a fixed place of abode within the jurisdiction of this honorable Court. He adduced an LC1 Letter indicating that he was a resident of Kisubi Kawuku Local Council 1, Entebbe Sub-District. He is a kibanja holder in Kisubi Kawuku Local Council 1 in the same Sub- District. I am therefore convinced that the applicant has a fixed place of abode within the
25 jurisdiction of this Court.



5 In search for sympathy, it was submitted that the applicant was a middle aged man of 43 years with a young family of 4 children all of school going age for whom he is the sole bread winner. I am persuaded by the decision of this Court in **Sande Pande Ndimwibo V Uganda, Court of Appeal Miscellaneous Application No.241 of 2014** when it held that sympathy and discomfort to
10 family members cannot constitute exceptional grounds for purposes of an application for bail pending appeal.

The applicant argued that there was a likelihood of delay in disposing of his appeal because the appeal was filed on 31st August 2018 and to date the same has never been fixed. I find this assertion speculative because the applicant's
15 appeal has taken only 6 months without being heard. In my view, this is a short time for the applicant to assume that there was a likelihood of delay in disposing of his appeal.

Counsel further argued that although the applicant was a convict, he was presumed innocent until this Court disposes of his appeal.

20 Kasule JA in **Sande Pande Ndimwibo V Uganda, Court of Appeal Miscellaneous Application No.241 of 2014**, held that an applicant in an application for bail pending appeal no longer enjoyed the presumption of innocence guaranteed to every accused under Article 28(3) (a) of the Constitution because he was now a criminal convict serving sentence. **See also Igamu**
25 **Joanita V Uganda, Court of Appeal Criminal Application No.0107 of 2013,**



5 **No. 7038 WDR Ekusia Joseph V Uganda, Court of Appeal Criminal Application No.69 of 2016** among others.

Article 28(3) of the Constitution provides that every person who is charged of a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.

10 Justice Eldad Mwangusya in **Kyeyune Mitala Julius V Uganda Supreme Court Criminal Application No.9 of 2016** held that;

15 *“The case of Arvid Patel V Uganda SCCA NO.1 of 2003 which is frequently cited for guidelines as to the considerations for grant of bail pending appeal sets down the followingthe above considerations were listed after the Court had observed that an appellant seeking bail pending appeal lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely the presumption of innocence.”*

Later in the same case of **Kyeyune Mitala Julius V Uganda Supreme Court Miscellaneous Application No.4 of 2017**, Opio-Aweri, JSC stated that;

20 *“It must also be noted that an applicant in an application for bail pending appeal enjoys the presumption of innocence as provided under Article 28(3) (a) of the Constitution.*

The presumption of innocence continues as long as someone decides to exercise his or her right of appeal. The presumption of innocence does not



5 *stop at the trial level. The presumption of innocence as enshrined in the Constitution is one of the rail guards to the protection of personal liberty and the right to a fair trial. The presumption of innocence is also predicated on the motion that Courts can make errors because they are manned by human beings.”*

10 In ***Busiku Thomas V Uganda, Criminal Appeal No. 33 of 2011***, the Justices of the Supreme Court discussed this same issue of presumption of innocence after conviction and concluded in the following words;

15 *“It should also be further noted that the presumption of innocence guaranteed to a person accused of a crime, ends when the accused person is found by an impartial Court guilty of the offence he or she was charged with. From this point onward, the interests of justice demand that the Courts should not only take into account the rights of the convicted person, but also the interests of the victim and the society as a whole. Upon conviction, the victim should take centre stage in guiding the Court to determine the most*
20 *appropriate sentence the convicted person deserves for the wrong he committed to the victim. In the appeal under consideration, the wrong committed was not only against the victim but also the people of Uganda, who constitute society.”*

25 In my view, the wording of **Article 28(3) (a)** of the Constitution is clear to the effect that the presumption of innocence of a person charged with a criminal offence ends when he is proved guilty or when that person pleads guilty. This

5 presumption is premised on the understanding that he would have had a fair trial before a competent and impartial Court.

I am however persuaded by the words of Harris J in **Chimambhai V Republic (No.2) (1971) 1 EA 343** when he says at page 344 that;

10 *“It is manifest that the case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, that of the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation*
15 *creating a right of appeal in criminal cases.”*

Section 15(1) of the Trial On Indictments Act states that the Court may refuse to grant bail to a person accused of an offence if he or she does not prove to the satisfaction of the Court that exceptional circumstances exist justifying his or her release on bail and that he or she will not abscond when released on bail.

20 S.15 (3) of the Trial of Indictment Act (TIA) further defines “*exceptional circumstances*” to mean any of the following—

(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) a certificate of no objection signed by the Director of Public Prosecutions; or (c) the infancy or advanced age of the accused.*

5 The requirement of proof of exceptional circumstances is however not mandatory. See ***Foundation for Human Rights Initiative V Attorney General, Constitutional Petition No.020 of 2006.***

It was argued for the applicant that he suffers from diabetes which requires special medical care and diet. Court was invited to look at the medical report
10 attached as annexure "A" from Murchison Bay Hospital which states that the applicant suffers from Diabetes Mellitus complicated with Diabetic Foot, Retinopathy and Peripheral Neuropathy. Further that with these complications the applicant required specialized treatment which was not readily available in prison.

15 I have taken into consideration the sureties presented for the applicant and there particulars and find that the said sureties are substantial and able to ensure that the applicant attends Court as and when required to do so.

For the reasons advanced above, I am convinced that the applicant's medical condition cannot be managed while he is in custody.

20 I am satisfied that the applicant meets the conditions for the grant of bail pending appeal and grant the same on the following terms and conditions;

- a) Payment of cash bail of UG shs 10,000,000/= by the Applicant into this Court.



- 5 b) The Applicant should report to the Registrar of this Court every month at
9.00 am, beginning on 22nd March 2019, for extension of his bail until his
appeal is heard and disposed of or until further orders of this Court.
- c) Ms. Joan Nakaliika, Mr. Lukwago Lameck and Mr. Robert Ssali should be
the applicant's sureties, to secure his attendance in Court whenever he is
10 required to do so.
- d) The said sureties should each bind themselves by signing a bond (not cash)
of shs. 20,000,000/= (Twenty million shillings only).
- e) The applicant should not travel outside the country without leave of Court.
- f) A breach of any of the above conditions shall render the bail pending
15 appeal herein granted to the Applicant liable to an automatic cancellation.

The Registrar of this Court is directed to fix the appeal for hearing at the next
convenient Criminal Session.

I so order.

Dated this 9th day of April 2019

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HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL