

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Miscellaneous Criminal Application No. 87 of 2019.

(Arising from Court of Appeal Criminal Appeal No. 131 of 2008)

NIWAMANYA JAMES:.....: APPLICANT

VERSUS

UGANDA:.....: RESPONDENT

**[CORAM: HON. MR. JUSTICE REMMY KASULE, Ag. JA] Sitting
as a Single Justice.**

RULING OF THE COURT

This application by notice of motion is seeking release of the Applicant on bail pending the hearing and final disposal of his **Criminal Appeal No. 131 of 2008** now in this Court.

The application was filed under **Articles 23(6) (a) of the Constitution, Section 40(2) of the Criminal Procedure Code Act, Cap 116, Rules 2(2), 6(2) and 43 (1) and (2), 44 and 53 (1) of the Judicature (Court of Appeal Rules) (Directions) S.1; 13-10) .**

The application is based on six (6) grounds which are set out, as follows:-

- “i) The Applicant was convicted of Aggravated Robbery contrary to sections 285 and 286 (2) of the Penal Code Act and was sentenced to life imprisonment.***
- ii) The Applicant appealed to the Court of Appeal, appeal number 131 of 2008.***

- iii) The Applicant's appeal is not frivolous and has reasonable chance of succeeding.**
- iv) There is likelihood of substantial delay before the Applicant's appeal can be heard by this Honourable Court.**
- v) The Applicant has substantial sureties who are willing and ready to stand for him.**
- vi) The Applicant will not abscond and will abide by the conditions set by this Honourable Court and will continue to lawfully pursue his appeal".**

Annexed to and filed together with the application is an affidavit in support of Niwamanya James, the applicant, sworn at Kampala on 11.06.2019 stating as follows:-

- "1. That I am of the above given particulars and the applicant here in, familiar with the facts in the present application and thereby swear this affidavit in that capacity.**
- 2. That I am a male adult Ugandan and before my incarceration, I was working as a soldier in the Uganda People's Defence Forces.**
- 3. That I am a biological father of (2) two children who are aged 22 and 17.**
- 4. That on the 4th day of August 2005, I was charged at Kasese Magistrates' Court and charged of Robbery C/s 285 and 286 of the Penal Code Act which I denied upon plea taking and I was remanded in Mubuku Prison.**
- 5. That I was subsequently convicted and sentenced to life imprisonment.**
- 6. That being dissatisfied and aggrieved with the decision of the Learned Trial Judge Honourable Justice Dan Kiiza Akiiki, I filed a notice of appeal and memorandum of appeal, case No. 68 of 2006."**

- 7. That I am informed by the Registrar that my case file cannot be found and attached are correspondences with the Registrar Court of Appeal.**
- 8. That I was additionally informed that there is likely to be a substantial delay before my case can be heard by this Honourable Court due to an inability to trace my file.**
- 9. That I have substantial sureties namely my biological sisters, Niwetwesiga Robbina and Kesande Milka all residents of Kanyantorogo Sub County Kanungu district, who are all ready to stand for me surety if my application is granted and are willing to further ensure that I will always be available until my appeal is heard and finally determined by this Honourable Court.**
- 10. That I undertake to abide by all the conditions which this Honourable Court shall set upon granting me bail pending appeal.**
- 11. That I swear this affidavit in support of my application for release on bail pending the hearing and determination of my appeal by this Honourable Court.**
- 12. That what is stated herein above is true and correct to the best of my knowledge and belief.”**

On 04.02.2020, Learned Counsel Nabisenke Vicky, an assistant Director of Public Prosecutions, swore an affidavit in reply which was filed in the Court on the same day stating:-

- 1. “That I am a female adult Ugandan of sound mind and an Assistant Director of Public Prosecutions with the Office of the Director of Public Prosecutions.**
- 2. I have had occasion to peruse the notice of motion filed by the applicant and the accompanying affidavit and object as hereunder;**
- 3. That all the contents of the notice of motion and the accompanying affidavit are hereby denied unless expressly admitted and the applicant shall be put to strict proof thereof.**

- 4. That the details of the pending appeal were not provided and thus we cannot allude to the possibility of its success let alone its existence.**
- 5. That the appeal has no likelihood of substantial delay given the vigorous and regular sessions organized by this Court.**
- 6. The particulars of the intended sureties are not known.**
- 7. I swear all the above knowing it to be true and in objection to the applicant being admitted to bail”.**

At the hearing of the application, the applicant self –represented himself; while the respondent was represented by the learned Senior State Attorney, Nakafeero Fatina from the office of Director of Public Prosecutions (DPP).

Applicant’s Case:

Before Court, the applicant prayed to be released on bail pending the disposal of his appeal on the grounds that; his appeal is not frivolous as the same has reasonable chances of succeeding. Unfortunately however, there is a likelihood of substantial delay before the same is heard by this Court due to the backlog of cases in this Court. He was also of advanced age being 51 years old.

The Applicant further submitted that he is HIV Positive and is thus weak and needed to have medical treatment outside of prison. He further contended that he had two children, who were missing his parental care while he remained in prison confinement.

He prayed for the application to be allowed.

Respondent’s Case:

Counsel for the respondent relying on the affidavit in reply, opposed the bail application. She contended that the applicant at the age of 51 years, was not of advanced age. Counsel referred to **Court of Appeal Criminal Application No. 9 of 2019; Wasswa Peter Weraga Vs Uganda** where Hon. Mr Justice Muhanguzi, JA held that being 51years old was below the advanced age.

Counsel further referred Court to the decision in **Court of Appeal Miscellaneous Application No. 241 of 2014; Sande Pande Ndimwibo Vs Uganda** where this Court held that sympathy and discomfort to family members was no ground for granting bail pending appeal.

Counsel for the respondent also submitted that the sureties presented by the applicant were not substantial given the very grave nature of the offence of robbery with which the applicant had been convicted of. Counsel prayed for the application to be dismissed.

Court's Consideration of the Application:

This Court has carefully considered the Notice of Motion, the affidavits both in support and in opposition to the application as well as the submissions of both the applicant and Counsel for the respondent

As a matter of Law, bail pending appeal ought to be granted only upon proof by the applicant of exceptional circumstances as a legal requirement. "Exceptional Circumstance" is defined in **section 15 (3)** of the **Trial on Indictments Act, Cap 23** as being one of these:-

1. Grave illness certified by a Medical Officer of the prison or other institutions or places 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.

This Court will now proceed to consider whether the applicant has established any exceptional circumstances to justify his being released on bail pending appeal. Regarding grave illness certified

by a Medical Officer that the applicant cannot get treatment for the same while he/~~she~~ is in prison, there is no evidence of such produced by the applicant to this Court.

The assertion by the applicant that he is sick and weak as he has been HIV positive since 2003, and therefore needs medical treatment, which treatment he cannot get while he remains in prison, is a mere allegation without any supporting evidence by way of medical report or otherwise.

As to age, the applicant asserts that he was 36 years on arrest and is now 51 years old by the time of hearing this application. This Court holds that being 51 years old is not an advanced age in terms of **section 15 (3) of the Trial on indictments Act. In fact the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** provide for 75 years as being the advanced age for purposes of sentencing. On the facts before this Court, the applicant has therefore not proved that he is of advanced age. See also: **Court of Appeal Criminal Miscellaneous Application No. 82 of 2017: Mubbale Peter Vs Uganda and also: Court of Appeal Criminal Application No.9 of 2019: Wasswa Peter Weraga Vs Uganda.**

Discomfort to children and family caused by the absence of the applicant while he serves his sentence for the offence he was convicted of as well as well as the applicant having substantial sureties are not exceptional and / or unusual reasons for granting bail pending appeal to the applicant.

As to the delay in fixing the appeal, this Court is to take steps to fix the same for disposal in accordance with the set time table of the Court.

Having failed to prove any exceptional circumstances and or unusual reasons, this Court finds no merit in this application and accordingly the same is hereby dismissed.

It is so ordered.

Dated at Kampala this *3rd* **day of** *March* **2020.**



HON. MR. JUSTICE REMMY KASULE

Ag, JUSTICE OF THE COURT OF APPEAL