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**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPLICATION NO. 165 OF 2019**

1. KATEBARIRWE ALFRED

10 **2. KOMUNDA EPHRAIM APPLICANT**

VERSUS

UGANDA.....RESPONDENT

**CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
(Single Justice)**

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RULING OF THE COURT

This is an application by way of Notice of Motion in which the applicants seeks the following orders;-

- 1. *That the applicants be released on bail pending appeal.*

20 The application was brought under *Section 40(2) of the Criminal Procedure Code Act and Rule 43 (1) of the Judicature Court of Appeal Rules Directions SI 13-10.*

Both applicants were charged and convicted of the offence of murder contrary to *Sections 188 and 189 of the Penal Code Act (Cap. 20)* on 9th May, 2016 by Hon. Justice Duncan Gaswaga, J in High Court Criminal Case No. 202 of 2011. They were each sentenced to 45 years imprisonment. Being dissatisfied with the conviction and sentence, the applicants filed a notice of appeal and memorandum of appeal on 5th July 2019 to this Court and also filed this application for bail pending appeal on the following grounds;

- 1. *The applicants have appealed against conviction and sentence and their appeal has chances of success.*
- 2. *The applicants are citizens of Uganda with permanent places of abode at Kyancere, Kongoro, Ndeija, Rwampara, Mbarara District.*

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- 5 3. *That the applicants have substantial sureties ready to guarantee their return for trial.*
- 10 4. *That the 1st applicant is of advanced age as he is now 63 years old and he is in poor health while the 2nd applicant is in poor health and medical facilities in prison are limited and it is reasonable that they be released on bail to enable them be alive to prosecute their appeal.*
- 15 5. *The applicants had earlier been released on bail and they never absconded.*
6. *That it is fair, reasonable and in the interest of justice that thus application be granted in so far as the applicants will never be compensated for the suffering they will have gone through in case they succeed on appeal and conviction is quashed.*

The application is supported by affidavits deponed to by the applicants repeating and expounding on the grounds reproduced above. I have found no reason to reproduce them.

20 The respondent filed an affidavit in reply deponed to by Nabisenke Vicky Assistant Director of Public Prosecutions opposing the grounds contained in the notice of motion seeking for bail pending appeal.

Representation

25 At the hearing of the application, the applicants were absent so was their Counsel Mr. Ngaruye Ruhindi. Ms. Fatina Nakafeero appeared for the respondent. However, following this Court's earlier instructions both parties had already filed written submissions. It is in the basis of the written submissions that this application has been determined.

Applicants' submissions

30 I was argued for the applicants that, they are seeking for bail pending appeal. It was contended that, the applicants filed an appeal which has a great likelihood of success

5 and is neither frivolous nor vexatious as evidenced in the grounds contained in the memorandum of appeal.

It was submitted that, the applicants have substantial sureties who will ensure that the applicants will return for the hearing of the appeal. It was also contended that, the applicants will not abscond, as they were granted bail at the lower court and
10 complied with the bail conditions. It was further submitted that, the applicants have fixed places of abode and as well as families to take care of.

It was contended that, the 1st applicant is of advanced age (63 years old) and he is in poor health while the 2nd applicant is in poor health and medical facilities in prison are limited. It was argued that, it is reasonable that, they be released on bail to
15 enable them be alive to prosecute their appeal. It was submitted that, it is fair, reasonable and in the interest of justices that the applicants be released on bail pending appeal.

They asked Court to allow the application.

Respondent's reply

20 The respondent opposed the application. It was submitted that, the grounds raised by the applicants in their notice of motion do not fall within the exceptional circumstances stipulated under *Section 15 (3) of the Trial on Indictments Act*. It was argued that, it is trite law that bail pending appeal ought to be granted only upon proof of exceptional circumstances.

25 On the issue of fulfilling the bail conditions in the High Court, counsel argued that this was only because the applicants had not been convicted and following their conviction in the High Court, they are likely to abscond from jurisdiction.

It was submitted that, the applicants' sureties are not substantial. They did not furnish proof of their employment and the nature of their residences and as such
30 they fall short of the required standards.

5 It was also argued that, the applicants did not provide any proof of illnesses as contended in ground 4. Counsel asked Court to dismiss the application for lack of merit.

Resolution

10 I have carefully perused the application, the accompanying affidavits and annextures. I have also read the submissions filed by the applicants and the respondent.

The grant of bail and particularly bail pending appeal is granted at the discretion of court. There is no automatic right to bail, the right cited under *Article 23(6)* of the Constitution is limited to the right to apply for bail. Court is seized with the
15 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.

In an application of this nature the applicants are required to prove to Court strong and exceptional circumstances that justify the grant of the application. An applicant for bail pending appeal bears the burden of proving that there are exceptional
20 reasons to warrant his or her release on bail. *See: Raghbir Lamba vs R [1958] 1 EA 337*. 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

In *Igamu Joanita vs Uganda, Court of Appeal Criminal Appeal No. 107/2013*, It was
25 observed and held as follows: - (at Page 15-18 of the Ruling).

*“The conditions set out in Arvind Patel case (supra) are not exhaustive, each case must be determined on its own merits. In addition to the conditions set out in Arvind Patel case for granting bail pending appeal, court ought to also take into account the provisions of Section 151, 152, 153 of the TIA, these are the
30 sections that deal with conditions for grant of bail at the High Court...*

5 *I am of the view that exceptional circumstances are not only a rule of practice in bail pending appeal. They are a requirement of the law. The law that defines exceptional circumstances in Section 15 sub (3) of the Trial on Indictments Act (CAP 23).*

In this section, exceptional circumstances mean any of the following:-

- 10 1. *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*
2. *The certificate of no objection from the DPP*
3. *Infancy or advanced age of the accused.”*

15 I still hold the same view, that in an application of this nature the applicants are required to satisfy the Court that exceptional circumstances exist for the grant of bail pending appeal. I also observed that exceptional circumstances are not limited to those set in the Trial on Indictments Act but rather Court has discretion to determine what constitutes exceptional circumstances in addition to those set out in

20 *Igamu Joanita (Supra). See;- Foundation for Human Rights Initiative vs The Attorney General, Constitutional Petition No. 20 of 2009 (unreported) and Kairu Arajab and Kange Patrick vs Uganda, Court of Appeal Miscellaneous Application No. 34 of 2014*

In this application, the applicants argued, that they have substantial sureties, they will not abscond, they have fixed places of abode and have families to take care of.

25 This Court held that sympathy and discomfort of family in itself does not constitute exceptional ground for the purposes of bail pending appeal. See: *Sande Pande Ndimwibo vs Uganda, Court of Appeal Criminal Application No. 241 of 2014*. These grounds in my considered view are the general grounds which apply to applications for bail pending trial. None of them constitutes an exceptional circumstance for the

30 applicants to be granted bail pending appeal.

5 It was also argued that the 1st applicant is of advanced age (63 years old)and he is in
poor health while the 2nd applicant is in poor health and medical facilities in prison
are limited and it is reasonable that they be released on bail to enable them be alive
to prosecute their appeal. The applicants did not attach any medical forms to
support this assertion. They also did not produce any evidence from the Uganda
10 Prisons Authorities to the effect that they cannot receive the necessary medical
treatment for such illnesses while they continue to serve their sentence of
imprisonment. Grave illness constitutes an exceptional circumstance. However in
this case the applicants have not proved to the satisfaction of the Court that they are
suffering from grave illnesses.

15 As to the fact that, the applicants observed and complied with the bail conditions at
the trial Court, this reason on its own is not an exceptional circumstance to warrant
the applicants to be released on bail pending appeal.

The applicants submitted that, their appeal to this Court has a great likelihood of
success, however the grounds of appeal contained in the memorandum of appeal do
20 not substantiate the likelihood of success of their appeal.

I am therefore not satisfied that the applicants have proved that exceptional
circumstances exist for grant of bail pending appeal, especially in view of the very
serious offences in respect of which they were convicted, murder and kidnap with
intent to murder. These offences involve extreme violence and loss of life.

25 As convicted offenders, they have lost their presumption of innocence. In *Basiku
Thomas vs Uganda, Supreme Court Criminal Appeal No. 33 of 2011*, it was held that;-

*“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
30 point onward, the interests of justice demand that the Courts should not only*

5 *take into account the rights of the convicted person, but also the interests of the victim and the society as a whole”*

See also: Chimambhai vs Republic (No. 2) [1971] 1 EA.

The applicants are convicted criminals who cannot be let loose upon the public lightly, simply by citing *Arvind Patel vs Uganda*, which I have on a number of occasions stated that, it was so decided *per incuriam* and therefore is not good law. The Supreme Court has distanced itself from that decision in its recent decisions. See: *Basiku Thomas (Supra)*, *Busulwa Bulasio vs Uganda*, *Supreme Court Criminal Reference No. 1 of 2016* and *David Chandi Jamwa vs Uganda*, *Supreme Court Miscellaneous Application No. 9 of 2018*.

15 This application also appears to be wanting in form. An application for bail ought not to have been joined. Each of the appellants ought to have filed a separate bail application stating reasons that are peculiar to him. This omnibus application has no basis at law. I would still have struck it out on that account alone.

Be that as it may, I find no merit what so ever in this application which is hereby dismissed.

It is so ordered.

Dated at Kampala this 24th day of Aug 2020.



Kenneth Kakuru
JUSTICE OF APPEAL

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