

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPLICATION NO. 212 OF 2019

(Arising from Criminal Appeal No. 746 OF 2014)

AREET SAM.....:APPLICANT

10

VERSUS

UGANDA.....:RESPONDENT

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

(SINGLE JUSTICE)

RULING

15 This is an application brought by way of Notice of Motion under Article 23(6)
(a) of the Constitution, Section 132(4) and Section 40(2) of the Trial on
Indictments Act and Rules 6(2) (a) of the Judicature (Court of Appeal Rules)
for an order that the applicant be granted bail pending appeal.

The background to the application is that the applicant was indicted, tried
20 and convicted of murder contrary to sections 188 and 189 of the penal Code
Act before the High Court of Uganda at Soroti and was sentenced to suffer
death. He appealed to this Court and later to the Supreme Court which
ordered a retrial to wit; he was sentenced to death. However, as a beneficiary
of the Suzan Kigula Case in 2014, he appeared for resentencing and
25 mitigation whereupon the sentence of death was substituted with a jail term
of 39 years.

5 Being dissatisfied, he appealed to this Court against the sentence vide Criminal Appeal No.746 of 2014 which appeal is still pending hearing and determination. The appeal was fixed for hearing on 10th April, 2019 in Jinja but the record of appeal was incomplete so it could not be heard. He subsequently filed this application for bail pending appeal.

10 The grounds in support of the application as set out in the Notice of Motion are that;

1. *The applicant has filed a Notice of Appeal and Memorandum of Appeal with plausible grounds and the Appeal is not frivolous but has a high chance of success.*

15 2. *Judging from the busy schedule and backlog of cases in this Honourable Court which is also a Constitutional Court handling diverse matters including civil, criminal appeals and constitutional matters based on sessions, all types of Miscellaneous applications, and the practice of handling appeals on first come first serve basis, it's unlikely that this appeal will be heard and concluded before the*
20 *Applicant has served a substantial part of the sentence of 39 years.*

3. *The Applicant has been on remand since 1992 and the sentence of 39 years is exclusive of 6 years spent on pre-conviction remand.*

4. *The applicant has substantial sureties who shall abide by any of the*
25 *terms that shall be set by court.*

5. *This Honourable court has wide discretionary powers to grant the Applicant bail pending appeal against sentence only given that this*

5 Honourable Court has in the past set aside sentences in cases of this nature as the Applicant`s and substituted them with lessor sentences.

6. *There is no danger of the Applicant interfering with witnesses as the trial in the lower court was concluded.*

7. *The Applicant is of good repute, conduct, character and standing and is not a danger to society.*

8. *The Applicant has a fixed place of aboard in Agurut Village, Ngero Sub County within the jurisdiction of this Honourable Court.*

9. *It is only fair, just, constitutional and in the best interest of justice that the Applicant is granted bail pending the disposal of his Appeal.*

15 The Motion is supported by the affidavit of the applicant, Areet Sam sworn on the 6th day of December, 2019 expounding on the grounds of application reproduced above and as such, I will not belabour to reproduce them.

The respondent opposed the application and filed an affidavit in reply sworn by Baine Stanley, Senior State Attorney working with the office of the Director of Public Prosecutions dated 17th December, 2019, stating that;

4. *The said offence is rampant and involved personal violence.*

5. *The appeal has no chance of succeeding and the applicant will be tasked to prove the same.*

6. *There will not be a likelihood of delay since this court is fully constituted and can hear the appeal any time as it has made record time to hear the application expeditiously.*

5 7. *The applicant has no substantial sureties and will be tasked to prove the same.*

8. *There is no proof of fixed place of abode attached and the applicant will be put to strict proof thereof.*

9. *It is in the interest of justice that this matter be fixed for hearing immediately since this court is in the process of scheduling cases for hearing and is fully constituted.*

10. *There are exceptional circumstances that necessitate grant of bail to the applicant.*

11. *I verily believe to the best of my Knowledge and belief that the applicant`s application has no merit.*

At the hearing of the application, Mr. Ben Ikilai appeared for the applicant while the respondent was represented by Ms. Joanita Tumwikirize, State Attorney in the office of the Director of Public Prosecution.

Counsel submitted that the applicant was sentenced to serve a period of 39 years in prison which period was exclusive of the 6 years pre-conviction remand between 1992 and 1998.

Counsel submitted that the application exhibits exceptional circumstances to wit; the applicant is of advanced age of 61 years as per paragraph 1 of his Affidavit in support of the application, a fact which is not in contention as he was arrested in 1992 when he was 34 years.

Counsel for the applicant submitted that the applicant was a first offender with good conduct and character, the appeal is not frivolous and it has a

5 reasonable possibility of success and there was a possibility of substantial
delay in the determination of appeal. He relied on the Supreme Court decision
of ***Arvind Patel Versus Uganda Supreme Court Criminal Application***
No.1 of 2003 and ***Fredrick Rwabuhoro V Uganda CACA. NO. 151 of 2018.***

He contended that the record of proceedings of the 1998 file could not be
10 found and it's not known when his appeal will be heard and concluded. That
he has already served a long period on remand and since the appeal is against
sentence only, it would be in the interest of justice that the applicant is
granted bail.

Counsel submitted that the applicant has a fixed place of abode within the
15 jurisdiction of this Honorable Court to wit; Agurut Village, Nyero Sub County
in Kumi District as stipulated under paragraph 21 of his Affidavit in support.
He submitted that the applicant has three sureties before this court with the
following particulars;

1. Akol Stephen, a 42 year old nephew to the applicant and a resident of
20 Olilim Village, Agurut Parish, Nyero Sub County in Kumi District. He is
a holder of National ID No. CM77021100GD8G. He is a Carpenter and
has a carpentry workshop along Edawo road, Kumi municipal Council,
Kumi District.
2. Omede Ben, a 36 year old son to the applicant. He is a resident of Olilim
25 Village, Agurut Parish, Nyero Sub County in Kumi District and holder
of National ID No. CM830211007FEG. He is a farmer
3. Otojim Moses, a 29 year old son to the applicant and a resident of Olilim
Village, Agurut Parish, Nyero Sub County in Kumi District. He is a

5 holder of National ID No.CM90021103W72L and a medical worker operating a drug shop (Mukura Drug Shop) within Mukura trading Centre.

Counsel further submitted that the applicant had substantial sureties. He relied on the introduction letters signed by the LC1 Chairman Mr. Achakun
10 John of Tel; 0785996375 Olilim Village, Agurut Parish, Nyero Sub County in Kumi District confirming that the sureties were residents of that area. He contended that he had explained to them their duties and they seem to have understood them and they were willing to stand and ensure the attendance of the applicant before court as and when required. He prayed that Court
15 finds them substantial and grants the applicant bail pending the determination of his appeal.

In reply, Ms. Tuwikirize objected to the bail application and submitted that the applicant was convicted of a serious offence which involved personal violence since he shot his deceased cousin in the stomach and thus has a
20 burden to satisfy court that he should be granted bail pending the determination of his appeal.

Regarding the likelihood of delay in hearing the appellant's appeal, counsel submitted that the Appeal was partly heard in August this year and that this court is fully constituted. That it has been hearing appeal matters and thus
25 there is no likelihood of delay in hearing the said appeal.

Regarding sureties she contended that the letters of introduction relied on by the applicant did not satisfy the purpose and intention of this court to ensure that the applicant reports to Court should he be granted bail because the LCs

5 did not know the relationship between the applicant and the said sureties.
She added that the letters only state where the sureties reside and not the
intention of the said letters. Further that the two sureties are his sons and
young to wit; they may not be able to preside over the applicant to return to
court and that the third surety did not bring forth a licence to prove operation
10 of a medical facility.

Counsel further submitted that likelihood of success could not be determined
in the absence of a record of proceedings and further still, the sentencing
order is on file and thus the appeal will be heard since court is cause listing
matters for appeal. She added that the period between August and now is
15 short and there won't be any substantial delay.

Counsel submitted that there was no proof regarding the applicant's medical
condition or the fact that the prisons had failed to handle his medical
condition.

She further submitted that the applicant was a resident of Kumi District 27
20 years ago and that there was no letter of introduction showing that the LC1
still remembered him and further that the applicant did not depone that he
was going to stay in Kumi District once granted bail. She prayed that the
application be dismissed.

In rejoinder, counsel for the applicant submitted that there was no averment
25 in the affidavit in respect of health condition of the applicant and that the
sureties' letters of introduction are supposed to introduce the person in their
possession not what they were intending to do.

5 He contended that the third surety operates a drug shop himself in Mukura and that it's in his names, which makes it easy to trace him. He reiterated his earlier prayers.

I have perused the Notice of Motion and the accompanying affidavit. I have also studied the annextures thereto and listened to the submissions of both
10 counsel.

This Court has jurisdiction to grant bail pending appeal under **Rule 6(2) (a)** of the Rules of this Court which provides that:

*(2) Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may—
15 (a) in any criminal proceedings, where notice of appeal has been given in accordance with rules 59 and 60 of these Rules, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.*

The power to grant bail pending appeal is discretionary which discretion must
20 be exercised judiciously. **See Walubiri Godfrey Vs Uganda Court of Appeal Criminal Application No. 44 of 2012** and the main purpose for bail pending appeal is that the court must be satisfied that the applicant will comply with bail conditions and be available to attend trial or the appeal. See Supreme Court decision in **David Jamwa vs. Uganda, SCMA No.9 of 2018**.

25 The Supreme Court in **Arvind Patel V Uganda, Supreme Court Criminal Application No.1 of 2003** set out guidelines to be applied while considering applications of such nature to include the following:

- 5 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 violence;*
- iv. *the appeal is not frivolous and has a reasonable possibility of success;*
- 10 v. *the possibility of substantial delay in the determination of the appeal.*
- vi. *whether the applicant has complied with bail conditions granted after
 the applicant's conviction and during the pendency of the appeal (if
 any).*

Order, JSC further noted that it was not necessary to prove all the above
15 conditions as a combination of two or more criteria may be sufficient and each
case must be considered on its own facts and circumstances.

It's not disputed that the offence for which the applicant was convicted of
involved personal violence however, it's also not in dispute that the applicant
is a first offender as there is no evidence to prove he has any criminal record
20 of a previous conviction. I have perused the Judgment of the lower Court in
the High Court at Kampala and the mitigating Judge confirmed this position.

As to whether the applicant's appeal is not frivolous and has reasonable
probability of success, Court can assess the possibility of success of the
appeal by perusing the relevant record of proceedings, Judgment of the Court
25 from which the appeal has emanated, and the memorandum of the appeal in
question. See **Arvind Patel v Uganda** (supra).

5 The applicant availed Court with the Memorandum of Appeal, the proceedings
in Criminal Session Case No.1 of 1994, the mitigation and resentencing
proceedings in Criminal Mitigation Case No.0160 of 2014 and the sentencing
order in the absence of the Record of proceedings of the 1998 file which is
missing. In addition the appeal has already been partly heard by this court in
10 April 2019 as per Annexure "B". I, therefore find that the appeal is not
frivolous and has a reasonable possibility of success.

Counsel for the applicant contended that the applicant complied with the
mandatory bail conditions in the lower Court and was willing to do the same
in the event that this Court granted him bail pending appeal as averred in
15 paragraphs 22 and 23 of his affidavit in support of the application. Counsel
for the respondent did not dispute that the applicant complied with bail
conditions in the lower Court. This leaves the applicant's evidence in that
regard unchallenged and I have no reason to doubt the same.

Regarding the possibility of substantial delay in the determination of the
20 appeal, the applicant averred in paragraph 18 of his affidavit in support of the
application that his appeal was cause listed for hearing during the last
criminal session in April but the same could not be concluded since the record
of proceedings of the 1998 file could not be found., the record of proceedings
of the file of 1998 cannot be and has not been found. I have looked at the
25 record of proceedings of the partly heard appeal dated 10th April, 2019 also
marked as annexure "B" and the said proceedings indicate that the Appeal
was partly heard on 10th April 2019 and was adjourned sine die to enable
Court trace the record of proceedings before Justice Arach Amoko in 1998.

5 I note that to date the same has not been found and I cannot confidently say when the proceedings will be found to enable the applicant's appeal be heard because without the record of proceedings of that file, the record of appeal is considered incomplete under Rule 64 of the rules of this Court. I am of the considered view that a complete record of proceedings is crucial to the
10 applicant's appeal. In the circumstance, I am satisfied that there is a high possibility of substantial delay in the determination of the applicant's appeal.

Regarding the applicant's place of abode, the applicant averred in paragraph 21 of his affidavit in support of the application that he had a fixed place of abode in Agurut Village, Ngero Sub County in Kumi District within the
15 jurisdiction of this Honorable Court. The Indictment on record proves the same.

The applicant presented 3 sureties whose particulars I have taken into consideration and find them to be substantial. They all have fixed places of abode evidenced by their introductory letters from the different LC1s and
20 copies of their National IDs. They appeared to have understood their duty. I am satisfied that they will ensure the applicant's presence in Court as and when required to do so.

An applicant for bail pending appeal bears the burden of proving that there are exceptional reasons to warrant his release on bail. See ***Singh Lamba V R***
25 ***(1958) E.A 337.***

Section 15(3) of the TIA defines exceptional circumstances to include the following:

- 5 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.*
- b) *The certificate of no objection signed by the Director of Public Prosecutions.*
- 10 c) *The infancy or advanced age of the accused.*

Counsel for the applicant submitted that by the time the applicant was arrested in 1992 he was 34 years and that he is now 61 years. The applicant also averred in paragraph 1 of his affidavit in support that he is 61 years old. This fact was not rebutted by the respondent. In ***John Kashaka Muhanguzi***
15 ***V Uganda, Court of Appeal Criminal Reference No.797 of 2014***, it was held that a person of or above 50 years was considered as one of advanced age. In this regard the applicant has proved an exceptional circumstance of advanced age and thus this factor weighs in his favor.

For the above reasons, after a full consideration of all the circumstances of
20 the application especially in regard to the applicant being a first offender, being of advanced age, his appeal is not frivolous and has a reasonable possibility of success, the likelihood of substantial delay in hearing and disposing of his appeal and having found the sureties substantial these factors strongly weigh in the applicant`s favor.

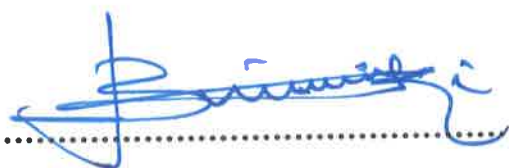
25 I am inclined to allow the application and grant the applicant bail pending the determination of his appeal vide ***Criminal Appeal No.746 of 2014*** on the following conditions:

- 5 a) The applicant shall deposit with the Registrar of this Court a cash bail of UGX 1,000,000 (Uganda Shillings One Million only)
- b) The Applicant should report to the Registrar of this Court every month at 9.00 am, beginning on 22nd January, 2020, for extension of his bail until his appeal is heard and disposed of or until further orders of this
10 Court.
- c) Each surety shall bind themselves by signing a bond (not cash) of UGX 5,000,000/= (Uganda Shillings Five million only).
- d) 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 follow up on the missing proceedings of the lower Court and ensure that the applicant's appeal is fixed for hearing at the next convenient Criminal Session.

I so order.

20 Dated this.....22nd.....day of.....Jan.....2020


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HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL