

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

MISCELLANEOUS APPLICATION NO. 241 OF 2014

[Arising from Criminal Appeal No. 799 of 2014) which itself arises from High Court at Kampala Criminal Session Case No. 0032 of 2014]

Sande Pande Ndimwibo:..... Applicant

VERSUS

Uganda:..... Respondent

Coram: Hon. Mr. Justice Remmy Kasule, Justice of Appeal, sitting as a single Justice

RULING

The applicant aged 43 years, a convicted prisoner, at Luzira Murchison Bay Prison, applies to be released on bail pending determination of his appeal to this Court, Criminal Appeal No. 799 of 2014.

The application is made pursuant to Article 23 of the Constitution, **Section 132 (4)** of the Trial on indictments Act, Cap. 23 and **Section 40(2)** of the Criminal Procedure Code Act, Cap. 116, and under Rules 6 (2) (a) and 43 (1) of the Rules of this Court.

On 3rd September, 2014, the applicant was convicted by the High Court, Kampala, (Alividza, J.) in **Criminal Session Case No.**

0032 of 2014 of obtaining money by false pretence, procuring another to do an act which would constitute an offence, and being a director of a corporation, was privy to the act of falsification of company documents. The offences were respectively contrary to sections **305, 19(2) and 323 (6) (i)** of the Penal Code Act.

He was sentenced to two and half years on all accounts to be served concurrently and was ordered to refund shs. 970,624,348= to Uganda Revenue Authority (URA).

The conviction and sentence arose out of a scheme, that the trial Court found to be fraudulent, whereby the applicant with another person successfully claimed a refund of a non-existent VAT refund of shs. 970,624,348= from URA.

Learned Counsel Isaac Musumba, Sylvester Wambuga and Mugogo Edward appeared for the applicant, while Peter Muliisa and Lydia Katama both Public Prosecutors from URA appeared for the respondent.

The applicant deponed to an affidavit in support of his application. He produced Ms. Namunhana Annette, Assistant Manager, Human Resource, Ministry of Agriculture, sister-in-law to the applicant, Mr. Muiso Fred, Managing Director, Jutrade General Agencies Ltd and Mr. James Kisaale Kalyebi, Manager Finance Administration of Messrs Jabez International Clean Energy Technologies Ltd, as sureties. Each one would ensure that if released on bail, the applicant would attend Court every time he would be required to do so.

The applicant put forward a number of grounds for being released on bail pending appeal. He had lodged in this Court a Notice of Appeal registered as **Criminal Appeal No. 779 of 2014** challenging his conviction and sentence and his intended appeal had high chances of success. Due to the busy schedule of this

Court and yet the sentence he had been subjected to being short, the appeal process was likely to take long with a likelihood of rendering the appeal nugatory. He had all along complied with the bail conditions during his trial by the High Court. He would not abscond from attending Court whenever ordered or called upon and he had produced sound and substantial sureties to ensure his return to Court as Court would direct once released on bail. He is the sole breadwinner of his family with eight school going children now stranded at home. His wife suffers from hypertension and he is the caregiver to her. It is just, fair and equitable that he be released on bail. The applicant also surrendered to Court his Passport and a Certificate of Title of land registered in his names as further securities to Court.

The respondent opposed the application for bail on the main ground that the applicant had not established any exceptional circumstances; and yet he was applying for bail pending appeal.

Bail is the adjudication process by Courts of law in criminal trials where an accused is released from the custody of officers of the law and is entrusted to the custody of the sureties of that accused, who are bound to produce the said accused to answer, at specified time and place the charge(s) against the said accused; and in default of so doing, the sureties are liable to forfeit such sums of money as are specified by Court when bail is being granted.

A bail application may be considered by Court at the trial stage before the applicant has been tried of the offence of which he/she is charged. A bail application may also be entertained after the applicant has been tried, convicted of the offence charged and sentenced by the trial Court to serve a punishment. In such a case the application for bail is made to the appellate Court to which the applicant has appealed. The application is said to be an application for bail pending an appeal.

It follows therefore that an applicant in an application for bail pending an appeal no longer enjoys the presumption of innocence guaranteed to every accused under **Article 28(3)(a)** of the Constitution, as such applicant is now a Criminal Convict serving sentence. He/she is such a one whom the Criminal Justice System, after the due process of law, has identified as being one who has wronged against society and his/her life needs to be subjected to restriction, as the law prescribes, so that such a one as a convict does not do further damage to society.

By reason of the above, the conditions that Court considers whether or not to release an applicant on bail at the pretrial stage are different from those that the Court considers in respect of bail pending an appeal after the applicant has been convicted and sentenced.

At the pre-trial stage Court considers such matters as the applicant's character, the criminal record, whether the offence charged involves personal violence, the presence of substantial sureties, the place of abode and family obligations, as well as others.

However in case of an application for bail pending appeal, for the reasons already given, the Court requires that in addition to fulfilling the general conditions required for an application for bail at the pre-trial stage, the applicant must also establish exceptional circumstances otherwise the bail application pending appeal cannot succeed: See: **MUGISHA GREGORY VS UGANDA: CRIMINAL REFERENCE NO. 179 OF 2011 AND ALSO IGAMU JOANITA V UGANDA: CRIMINAL APPLICATION NO. 154 OF 2013 (COA).**

Hence for an applicant for bail pending appeal to succeed the applicant must prove to the satisfaction of the Court that he/she has very unusual and outstanding conditions and for facts of a situation that entitles him/her to be released on bail.

The applicant in this application for bail pending appeal relies on the ground that he has lodged a Notice of Appeal vide **Appeal No. 799 of 2014** to challenge the decision of the High Court whereby he was convicted and sentenced and that there is likelihood that the appeal will succeed.

My appreciation of the law on this point is that mere lodgement of an appeal against conviction and sentence is not an exceptional circumstance per se for one to be released on bail pending Appeal. I have also perused the Judgement of the High Court in **Criminal Session Case No. 0032 of 2014** whereby the applicant was convicted and sentenced. I am unable to conclude that the intended appeal is such that, on the face of it, the applicant will have an overwhelming chance of success.

The applicant also avers that due to the busy nature of this Court and given the short sentence of $2\frac{1}{2}$ years imprisonment that he has to serve, the appeal process is likely to take long and there is likelihood of rendering the appeal nugatory.

In my considered view, the above ground amounts to speculation. The applicant has not, in any way indicated, what steps he has taken to expeditiously prosecute the appeal and that he has failed to do so by reason of the slow operations of this Court. This ground therefore cannot be an exceptional circumstance warranting granting bail to the applicant: See: High Court at Mbale: **CR-CM-0071, 0072,0073/2013 NAMUREMWE PATRICK, CHEBET ALFRED and YORAMU KASUMU vs UGANDA**, unreported.

As to the good character and absence of a bad criminal record upon the applicant up to the time of his conviction, and the fact that he is a first offender, while relevant matters for a bail application do not constitute exceptional circumstances, given the facts of this application: See: **SINGH LAMBA VS R [1985]**

EA 337 and Court of Appeal Miscellaneous Application No. 76 of 2014: Angol Michael vs Uganda, unreported.

The alleged hardship to the applicant's family members is not an exceptional circumstance: See: **Mugisha Gregory vs Ugands** (Supra).

This Court appreciates that the applicant's wife suffers from hypertension. There is however no evidence availed to Court that the wife cannot handle her condition in the absence of the applicant. Sympathy and discomfort to family members cannot constitute exceptional grounds for purposes of a bail application pending appeal.

The applicant was convicted and sentenced only as recent as 08.09.2014. There is therefore no justification at all for his contention that since he was only sentenced to $2\frac{1}{2}$ years imprisonment, he is likely to serve his sentence or a substantial part of it before his appeal is disposed of and therefore he should be released on bail pending disposal of the appeal. For this ground to have some validity the applicant should do all that is required of him to prosecute his appeal expeditiously, which so far he has not yet done, as he has not even filed a memorandum, let alone a record of appeal. It is only after he has done his part and Court has failed to fix the appeal for hearing that the applicant should advance this ground. As of now, the applicant is not justified to do so.

Having considered the grounds upon which this application is grounded, I have come to the conclusion that the application is without merit. The same therefore stands dismissed.

Dated at Kampala this **29th** day of **October**, 2014.



Hon. Remmy Kasule
JUSTICE OF APPEAL