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**THE REPUBLIC OF UGANDA,**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CRIMINAL APPLICATION NO 77 OF 2017**

**[ARISING FROM CRIMINAL APPEAL NO 321 OF 2017]**

**[ARISING FROM CRIMINAL SESSION CASE NO HCT – 00 – ICD – CR – SC – NO 004 OF 2015]**

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**SHEIKH MOHAMMED YUNUS KAMOGA}.....APPLICANT**

**VERSUS**

**UGANDA}..... RESPONDENT**

**BEFORE HON MR. JUSTICE CHRISTOPHER MADRAMA**

15

**RULING**

The Applicant filed this application by Notice of Motion under the provisions of section 132 (4) of the Trial on Indictment Act, section 40 (2) of the Criminal Procedure Code Act and rule 6 (2) of the Judicature (Court of Appeal) Rules for orders that the Applicant be released on bail pending his appeal before this honourable Court.

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The grounds of the application in the Notice of Motion are that:

1. The Applicant is of advanced age i.e. 60 years.
2. The Applicant has substantial and influential sureties who are ready to abide by the terms of the bail set by the Court.
3. The Applicant has filed a notice of appeal before this Court and the intended appeal has plausible grounds and has a high likelihood of success.
4. There is a possibility of substantial delay in determination of the appeal.
5. It is just and equitable that this application is granted.

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The application is supported by the affidavit of the Applicant Sheikh Mohammed Yunus Kamoga which gives the following facts:

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On 21<sup>st</sup> August 2017, the Applicant was acquitted of two counts of murder and convicted of terrorism and sentenced to life in prison. Since the delivery of judgment, he

5 has expressed his dissatisfaction with it and initiated an appeal to the Court of Appeal to have the conviction and sentence set aside. A copy of the Notice of Appeal is attached to the application. Since his conviction, he has written to the trial Court requesting for a typed and certified record of proceedings so as to facilitate his appeal process but it has not yet been availed. On the information of his lawyers Messieurs Muwema & company  
10 advocates which advise he believes to be true, he deposed that this honourable Court has plausible grounds with a high possibility of success since no murder or attempted murder was ever proved against him at the trial Court and yet the terrorism charge was centred on the murder counts.

15 He has substantial sureties before this Court who have influence over him and are aware of their responsibility to this Court as sureties. He is of advanced age because he is 60 years old. On the advice of his lawyers, he deposed that there is a possibility of substantial delay in determination of this appeal as there are a series of cases pending and those that are already fixed for the next criminal session. He is of good character, a religious leader/Muslim cleric with a huge following and a law abiding citizen. He does  
20 not intend to abscond from the jurisdiction of this honourable Court and he has a permanent and fixed place of abode at Tula Village LC1 Kawempe within the jurisdiction of this Court. He is ready to fulfil all the conditions set by this honourable Court on granting him bail pending the appeal. Furthermore, he deposed that it is in the interest of justice that bail is granted to him.

25 In a supplementary affidavit filed on Court record on the 20<sup>th</sup> of April 2018 he deposed that he suffers from a grave illness that cannot be sufficiently managed in prison. A medical examination was carried out by the Medical Superintendent and the report subsequently availed to the Court.

30 The Applicant further deposed that he is deemed innocent until he exhausts all his rights of appeal. He is of advanced age as indicated in his national ID which has his date of birth. His passport which has his date of birth was confiscated by the Police.

In reply Marion Ben Bella a State Attorney with the DPP deposed to an affidavit filed on Court record on 25<sup>th</sup> April, 2018 in which she deposed that the Respondent opposed the application. The deposition on a matter of fact confirms that the Applicant was  
35 convicted and sentenced by the High Court for the offence of Terrorism. The offence is a grave offence that involves threat of murder or attack on groups of persons, intimidating the public or a section of the public for religious, political, economic or

5 social aims which was committed indiscriminately and without regard to the safety of others or their property.

The contention that the appeal has a high likelihood of success is speculative because the Applicant has neither filed a memorandum of appeal nor perused the record of proceedings. The deposition about the likelihood of substantial delays in hearing the  
10 appeal is speculative. The Court of Appeal Bench is now fully constituted and it is in the interest of justice that the appeal is fixed for hearing.

The sentence of life imprisonment would tempt the Applicant to abscond. The Applicant is a religious cleric whose release would expose the public to danger, insecurity and is likely to cause a breach of the peace.

15 The Applicant was not released on bail pending his trial in the High Court.

The application was mentioned for hearing on 18<sup>th</sup> April, 2018 and adjourned by consent of Counsel of the parties to 2<sup>nd</sup> May 2018 when it was heard. Counsel Kagoro Friday Robert assisted by Counsel Mayanja Twa, Counsel Charles Nsubuga and Counsel Ramula Nalugya appeared for the Applicant. Counsel Lillian Omara Alum Senior State  
20 Attorney appeared for the Respondent and court recorded arguments in the presence of the Applicant. The pleadings were amended by consent of Counsel and with leave of Court to reflect in ground 1 of the Notice of Motion that the Applicant is of advanced age i.e. 66 years.

#### **The Applicant's Counsel submitted as follows:**

25 The application is brought under the laws cited in the Notice of Motion and the Applicant seeks to be released on bail pending his appeal. The application is supported by affidavit of Applicant in support of the motion, a supplementary affidavit of the Applicant dated 19<sup>th</sup> April 2018, and another affidavit in rejoinder of 26<sup>th</sup> April, 2018. The grounds of the application are that he is of advanced age namely 66 years old. Secondly,  
30 he has substantial and influential sureties who will abide by terms set by this Court. The Applicant filed a Notice of Appeal in this Court and his appeal has plausible grounds with a likelihood of success. There is a possibility of substantial delay of the intended appeal. It is just and equitable that the application is granted.

The Applicant's Counsel submitted that the Court in considering the application should  
35 be guided by the case of **Arvind Patel v Uganda Criminal Application No. 1 of 2003**

5 and particularly page 9 thereof where Oder JSC sets out the conditions the Applicant should fulfil before bail is granted. These include the good character of the Applicant; that he is a first offender; whether the offence involves personal violence; whether the appeal is not frivolous; the possibility of substantial delay in determination of appeal and whether the prisoner complied with bail conditions in a previous bail granted by the  
10 lower Court. He held that a combination of two or more of these grounds is sufficient for the grant of bail pending appeal. Counsel argued that the Respondent's Counsel conceded to the ground and evidence that the Applicant is of advanced age. Secondly he submitted that the Applicant is sick and the evidence thereof is in the supplementary affidavit of the Applicant. The evidence discloses that the Applicant is suffering from  
15 high blood pressure, severe heart disease and a fluctuating blood pressure. He has chronic gastritis, gross obesity and suffers a risk of cardiac complications.

Furthermore, the Applicant filed a Notice of Appeal. On the question of likelihood of success of the appeal, the Applicant's Counsel relied on the case of **Joanita Igamu v Uganda Criminal Application No. 0107 of 2013** where Hon. Mr. Justice Kenneth  
20 Kakuru JA, held that the Applicant can attach a judgment or draft memo of appeal to enable evaluation of the likelihood of success of the appeal. In that regard the Applicant's Counsel relied on paragraph 5 of the affidavit in support of the Applicant that:

25 "I am informed by my lawyers of M/S Muwema & Co. Advocates whose advice I verily believe to be true that my appeal before this Honourable Court has plausible grounds with a high possibility of success since no murder or attempted murder was ever proved against me at the trial Court and yet the terrorism charge was centred around the murder counts. **(A copy of the judgment and sentence is attached hereto and marked Annexure "C").**"

30 The Applicant's Counsel relied on Annexure C being the judgment of the lower Court the Applicant intends to appeal against. The Applicant was charged with the murder of Sheikh Mustafa Bahiga, Sheikh Hassan Ibrahim Kirya and attempted murder of Sheikh Haruna Jjemba among others. The offence of terrorism was in respect of actions against the two deceased persons and attempted murder of Sheikh Haruna Jjemba. The  
35 Applicant was acquitted of the murder of Sheikh Hassan Kirya and Sheikh Mustapha Kirya and the threatened murder of Sheikh Haruna Jjemba. None of the witnesses implicated the Applicant of murder or intended murder. The Applicant's Counsel argued

5 that the terrorism charges and conviction should have been in relation to the above  
offences of which the Applicant was acquitted. Further, the trial Court relied mostly on  
two witnesses namely Haruna Jjemba and Hajj Kakomo P22. Ssonko witness A PW2 8 is  
one of the complainants. At page 33 of judgment he says he never saw any of the  
accused at the scene apart from warnings. The Court relied on the threat to murder. In  
10 conclusion the Applicant's Counsel submitted that the complainants were Ssonko Najib,  
Mayiga Mustapha, Omar Sadiq, Ibrahim Hassan Kirya, Mahmud Kibate and Omulangira  
Kassim Nakibinge. Only two of them came to Court and the two who came to Court  
denied having ever been threatened by the Applicant.

The Applicant's Counsel submitted that the Court made errors and in the case of  
15 **Kyeyune Mitala Julius v Uganda Miscellaneous Application No. 4 of 2017 (Arising  
from Criminal Appeal No. 11 of 2017)**, the Court held that judges make errors.

The Applicant submitted that there was a likelihood and possibility of substantial delay  
in hearing of the appeal. On 23<sup>rd</sup> August, 2017 the Applicant wrote to the Registrar  
requesting for the record of proceedings but did not get the record. On 16<sup>th</sup> January,  
20 2018 the Applicant further requested for the record but it was not availed and it is  
coming to a full year from the time the Applicant applied for the record. The Applicant  
does not know when the appeal will ever be heard.

On a question put to Applicant's Counsel as to whether the offence the Applicant was  
convicted of involves personal violence, he submitted that the Applicant had been  
25 acquitted of murder and attempted murder which are violent crimes. In the judgment  
the Court said the Applicant threatened to murder and for that reason he committed an  
act of terrorism. He was acquitted of the murders and threats. The Applicant's Counsel  
submitted that the Applicant was convicted of an aspect of threatening violence which  
does not involve personal violence. In fact Ssonko one of the complainants and Jjemba  
30 testified that the Applicant never threatened them and the rest of the complainants  
never attended Court.

Lastly he presented 7 sureties and submitted that the Court should be pleased to find  
that the sureties are substantial sureties. To wind up the Applicant's Counsel prayed that  
the Court should find it just and equitable that the application be allowed and that a  
35 combination of two or more grounds should be sufficient.

5 In reply Lillian Alum Senior State Attorney opposed the application on the following grounds:

10 She agreed that the Applicant is 66 years old. Secondly, on the issue of his health status, the medical report on record does not indicate that the Applicant's condition cannot be managed in prison. There is no evidence that he is weak on account of age and cannot withstand prison conditions.

15 In relation to **Arvind Patel v Uganda** (supra) the Respondent's Counsel submitted that the same precedent holds that the ground whether the Applicant will not abscond while on bail should be proved to satisfaction of Court and this ground has not been proved. On the issue of good conduct of the Applicant and the presumption of innocence, the Respondent's Counsel submitted that the Applicant is a convict sentenced to life imprisonment. Therefore the presumption of innocence does not exist and the burden is higher on the Applicant to be released on appeal. In **Kyeyune v Uganda** (supra) it was held that the burden is on the Applicant to demonstrate that he should be released on bail pending appeal. The Applicant was charged with and convicted of a grave and serious offence of terrorism. The sentence thereof is imprisonment for life. Therefore there is a high likelihood for him to abscond given the nature of offence and the sentence. She relied on **Arvind Patel v Uganda** (supra) and page 8 thereof where it was noted that the longer the length of the term of imprisonment, the higher the likelihood to abscond.

25 On the ground of likelihood of success, the Respondent's Counsel submitted that the ground is speculative because there is no memorandum of appeal or a draft of the record to assess it. In further response to the submissions of the Applicant's Counsel, the Respondent's Counsel submitted that the Applicant was acquitted of Attempted Murder and Murder but he was convicted of the offence of Terrorism. Acts of terrorism involve threats to murder as one of the acts complained of. Threats to murder are different from attempted murder. The Court relied on evidence and witnesses who testified about the acts of threats to murder and they implicated the Applicant. It was therefore not true that the Court used the same witnesses whose evidence was disregarded on threats to murder. The only evidence disregarded was attempting to murder. In the premises the Respondent's Counsel submitted that the Applicant has advanced no grounds with a possibility of success.

5 Furthermore, the Respondent's Counsel submitted that the possibility of delay was speculative. In any case from the time the Applicant was convicted and sentenced to the time of his application for bail is a period of less than five months and to date it amounts to nine months. She contended that this was not a long period of time to warrant Court to find a possibility of delay in hearing and determining the appeal.

10 As to whether the offence for which the Applicant was convicted does not involve violence, the Respondent's Counsel submitted that the offence legally involves personal violence as provided under section 7 (1) of the Anti Terrorism Act. With regard to acts of terrorism in threats to murder, it involves personal violence. In **Arvind Patel v Uganda**  
15 (supra) the offence of inciting to murder was found to involve violence. She submitted that terrorism is an offence that involves personal violence. She further submitted that where the offence involved personal violence, the prisoner has a higher burden to satisfy Court to be released on bail pending appeal.

As far as the sureties are concerned, the submissions thereto will be considered at a later stage.

20 In rejoinder, Counsel Kagoro Friday Robert for the Applicant submitted that the Applicant had been confirmed to be 66 years. Secondly, regarding his medical status, a combination of old age and sickness is sufficient enough to grant the Applicant's bail application. Thirdly, the Applicant is presumed innocent until he exhausts his right of appeal according to **Kyeyune v Uganda** (supra) which decision holds that an Applicant  
25 who elects to appeal has a presumption in his or her favour that he may be found innocent and would have served part of the sentence. On the likelihood of success of the appeal, the reason the Applicant has a good appeal is that there was no violence in the act of terrorism for which the Applicant was convicted. At page 39 of the judgment, the Court said that the essential ingredients were four and all the four ingredients  
30 should be proved but at the end of the trial they only picked one ingredient and convicted. The Applicant's Counsel contends that the single act the Applicant was convicted of did not involve violence. The Applicant had spent 9 months in prison since his conviction but taking into account the period of remand, the Applicant has already served 5 years imprisonment. Furthermore, the Applicant's bail application was not  
35 heard in the lower Court.

5 Regarding the Memorandum of Appeal, the Applicant has been pushing hard to ensure that the appeal is heard. In **Arvind Patel v Uganda** (supra) the appeal had been fixed for hearing when the Applicant was released on bail pending appeal.

### Ruling

10 I have carefully considered the application and the grounds for bail pending appeal together with the evidence adduced for and against and the submissions of the Advocates. I have duly considered the law. One of the co prisoners convicted of the same offence with Applicant applied for bail pending appeal and the decision of this Court is in **Criminal Application No 86 of 2017 (Arising from Criminal Appeal No 3321 of 2017) (Arising From Criminal Session Case No – HCT – 00 – ICD – CR – SC-**  
15 **No 004 of 2015) Sheikh Siraje Kawooya v Uganda** and was delivered on 10<sup>th</sup> May 2018. The principles of law in that decision need not be reproduced in detail but the highlights of which are discussed on the footing that each case is decided on the basis of its own facts and circumstances though general principles may be considered. What are these principles?

### 20 **Bail Pending Appeal**

Francis J Ayume in **Criminal Procedure and Law in Uganda**, after review of several East African decisions, wrote that the principles and practice of Courts for grant of bail pending appeal are as follows. The courts have held that a convicted person who knows he has little chance of succeeding on appeal is unlikely to wait patiently to serve what  
25 might be a severe sentence of imprisonment and when released on bail pending the hearing and final determination of the appeal, very stringent conditions must be imposed. Secondly, bail may granted when there are exceptional and unusual circumstances which depend on the facts of each case. Thirdly, bail may be granted if there was an overwhelming probability of the appeal succeeding. Last but not least bail  
30 would be granted if it is unlikely that the appeal would be heard until the end or after the expiration of the sentence appealed against.

In this application, the leading authority the Court was addressed on is that of **Arvind Patel v Uganda Supreme Court Criminal Appeal No. 1 of 2003**. In that application to the Supreme Court, Oder JSC discussed earlier precedents of the High Court on  
35 principles applied in applications for bail pending appeal and listed general



5 considerations used to evaluate whether bail pending appeal should be granted. These include:

1. the character of the Applicant;
2. whether he/she is a first offender or not;
- 10 3. whether the offence of which the Applicant was convicted involved personal violence;
4. whether the appeal is not frivolous and has a reasonable possibility of success;
5. Whether there is possibility of substantial delay in the determination of the appeal.
- 15 6. Whether the Applicant has complied with bail conditions granted after the Applicant's conviction and during the pendency of the appeal (if any).

Oder JSC further held that it is not necessary that all these conditions should be present in every case. A combination of two or more criteria may be sufficient and each case  
20 must be considered on the basis of its own facts and circumstances.

In **Raghibir Singh Lamba v R [1958] 1 EA 337** (High Court of Tanganyika) Spry Ag J at page 338 of the law report referred to the fundamental principle of burden of proof in criminal matters which shifts to the accused where the accused is found guilty for him or her to justify his or her release on bail pending appeal. Spry Ag J held:

25 "Where a person is awaiting trial, the onus of proving his guilt is on the prosecution and consequently the onus is also on the prosecution of showing cause why bail should not be allowed. On the other hand, when a person has been convicted, the onus is on him to show cause why the conviction should be set aside and similarly the onus is on him to show cause why as a convicted  
30 person he should be released on bail. If that is so, it follows that the reasons must be exceptional. "

The burden is on the prisoner to show why he or she should be released on bail pending appeal because he has been convicted. As we shall note later unless there is an  
35 overwhelming ground showing that the trial Court's decision cannot stand, the presumption is that the conviction of the prisoner was proper hence the burden is on him to demonstrate why the conviction would be set aside on appeal. Secondly, the

- 5 release will be for exceptional reasons or unusual reasons proved to the satisfaction of Court. One major factor taken into account is that a convict is likely to abscond compared to an accused person awaiting trial who is presumed innocent until proven guilty. A person serving a long period of imprisonment is more likely to abscond than one serving a lighter sentence of imprisonment.
- 10 In **Girdhar Dhanji Masrani v R [1960] 1 EA 320** (judgment of the High Court of Uganda) Sheridan J held that different principles should apply to applications for bail pending appeal after conviction compared to applications for bail pending trial thereby confirming the shifting of the burden to the prisoner to prove the likelihood of their innocence pending appeal. Bail pending appeal would be granted in exceptional
- 15 circumstances because of the presumption of proper conviction by the trial court.

In **Chimambhai v Republic (No. 2) [1971] 1 EA 343 (High Court of Kenya at Mombasa)** Harris J held at 344 that:

20 "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 creating a right of appeal in criminal cases."

25 In **David Chandi Jamwa v Uganda Criminal Application No 20 of 2011 (Arising from Criminal Appeal No 77 of 2011)** Hon. Mr. Justice A. S Nshimye, JA listed several factors as found in the case of **Arvind Patel v Uganda** (supra) and included the ground that the sureties presented to Court appeared to be very substantial and reliable and the Applicant, if released would not be tempted to abscond.

30 In **Kagama v Republic [2004] 1 EA 68** the Applicant was convicted of bigamy and sentenced to three years' imprisonment. He appealed against both conviction and sentence. The Court of Appeal of Kenya at Nairobi quoted from an earlier decision not reported in East Africa Law reports that:

35 "In the case of **Karanja v Republic [1986] KLR 612** the Court of Appeal gave due consideration to the principles applicable to the grant or denial of bail pending appeal. ... the Court of Appeal set down the following principles, at 613:

5           “The most important issue here is if the appeal has such overwhelming  
chances of success that there is no justification for depriving the Applicant  
his liberty. The minor relevant considerations would be whether there are  
exceptional or unusual circumstances. The previous good character of the  
Applicant and the hardship, if any, facing the wife and children of the  
10           Applicant are not exceptional or unusual factors.”

This most important issue had previously been distilled from various precedents by a High Court judge in **Somo v Republic [1972] 1 EA 476** being a decision of the High Court of Kenya at Nairobi. The Applicant applied for bail pending appeal. After review of a host of precedents on the issue Trevelyan J held that:

15           “I shall be dealing with a few of them in a moment – ***the most important of them is that the appeal will succeed.*** There is little, if any, point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the Applicant will be granted his liberty by the appeal Court. I have used the word  
20           “overwhelming” deliberately and for what I believe to be good reason. ***It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the Applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case.*** That is why, when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed. That the appeal has not summarily been rejected, taken in isolation, is of no account in view of what I have said. In any event the  
25           power summarily to reject can only be exercised within very narrow limits. Nor is the fact that the appeal is not frivolous of any consequence on its own in support of the application. The fact that it is thought to be frivolous, on the other hand, is for consideration in favour of its rejection.” (Emphasis added)  
30

35           The above authorities give the fundamental principles for exercise of discretion of the Appeal Court whether to grant bail or not.

5 **Presumption of innocence:**

For the reason that the Applicant prays that the Court presumes him innocent, I have further discussed the concept of presumption of innocence below. In addition to the above authorities where the presumption exists side by side with the burden of proof, there is the further consideration that the burden shifts when a prima facie case is established against the accused as decided by the trial Court. That is when the presumption is in favour of the guilt of the accused unless he has a reasonable answer to the prima facie case. In other words a reasonable tribunal addressing its mind to the law and the evidence would convict if there is no reasonable explanation from the defence.

15 Under the Constitution, the presumption of innocence lasts until an accused person is convicted. I do not agree with the Applicant's Counsel that the presumption of innocence continues after conviction. I hold a contrary view and so do several other Justices of Appeal and Supreme Court. My views are partly reflected in my recent ruling in **Criminal Application No 86 of 2017 (Arising from Criminal Appeal No 3321 of 2017) (Arising From Criminal Session Case No – HCT – 00 – ICD – CR – SC- No 004 of 2015) Sheikh Siraje Kawooya v Uganda.**

In that holding under the clear wording of article 28 (3) (a) of the Constitution of the Republic of Uganda, the presumption of innocence lasts until there is a conviction of guilt or until the person has pleaded guilty. The words in the article are unambiguous and the meaning cannot be in doubt as to give rise to a need for determination of any question as to interpretation of article 28 (3) (a) of the Constitution. Article 28 (3) (a) of the Constitution of the Republic of Uganda provides that:

“(3) Every person who is charged with a criminal offence shall—

30 (a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;”

A person who has been proved guilty or has pleaded guilty suffers a contrary presumption that the finding of guilt and hence conviction of the offence charged is proper and the burden of proof shifts to the prisoner to satisfy Court why the finding of guilt and subsequent conviction therefore for the defined offence he or she was charged with should be set aside. The burden shifts to the appellant to prove his or her

5 innocence and that prisoner is logically presumed to have been properly found guilty and convicted by the lower Court.

Secondly the presumption of innocence prior to a finding of guilt supports the right to liberty enshrined under article 23 of the Constitution which permits liberty to be taken away when someone is serving a sentence of a Court of competent jurisdiction after a  
10 finding of guilt and conviction (See holding of Spry Ag J in **Ragbhir Singh Lamba v R 1(1958) 1 EA 337**). This is consistent with several other holdings of the Court of Appeal which I will refer to in due course.

Article 23 of the Constitution provides that:

"23. Protection of personal liberty.

15 (1) No person shall be deprived of personal liberty except in any of the following cases—

(a) in execution of the sentence or order of a Court, whether established for Uganda or another country or of an international Court or tribunal in respect of a criminal offence of which that person has been convicted, or of an order of a  
20 Court punishing the person for contempt of Court"

The bail envisaged under article 23 (6) of the Constitution is bail pending trial and before a finding of guilt and thereby conviction and sentence. Article 23 (6) provides as follows:

"(6) Where a person is arrested in respect of a criminal offence—

25 (a) the person 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;

The Constitutional provisions under article 23 and 28 apply to trial Courts and not to appeals after conviction and sentence. The application in the Court of Appeal for bail  
30 pending appeal is brought under other laws other than Article 23 (6) (a) of the Constitution which is applicable to bail before a finding of guilt and conviction in criminal proceedings. This is further confirmed by an additional wealth of Ugandan authorities. Hon. Mr. Justice Remmy Kasule JA in **Sande Pande Ndimwibo v Uganda Miscellaneous Application No. 241 of 2014** held at page 3 of his ruling that:

*Decision of Hon. Mr. Justice Christopher Madrasa Izama* *Temporarily maximum 735 securityx 2010 style COURT 07 APPEAL*

5 "an Applicant in an application for bail pending appeal no longer enjoys the presumption of innocence guaranteed to every accused person under article 28 (3) (a) of the Constitution, as such an Applicant is now a Criminal Convict serving sentence. ..."

In **Igamu Joanita v Uganda Court of Appeal Criminal Application No. 0107 of 2013**

10 Hon Mr. Justice Kenneth Kakuru, JA held that:

"Bail pending appeal is a different matter. By this time the Applicant is no longer wholly shielded by the presumption of innocence. The Applicant at this stage is only a convicted offender with a right of appeal. The presumption of innocence is suspended."

15 In **Court of Appeal Criminal Application No. 69 of 2016, No 7038 WDR Ekusia Joseph v Uganda** Hon Lady Justice S.B. Bossa, JA held:

20 "Moreover a convict should be treated differently from a person who has not been convicted. The reason is that the case of an Appellant under a sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused seeking bail before trial, namely the presumption of innocence."

The presumption of innocence endures if the Court finds that there is no case to answer, it shall acquit the accused without the need to put him or her to his or her defence. The converse is true that the accused may be asked to defend himself or herself if the court holds that a prima facie case has been established by the prosecution. **Osborn's Concise Law Dictionary Eleventh Edition Sweet and Maxwell** defines the word "presumption" as:

"A conclusion or inference as to the truth of some fact in question, drawn from other facts proved or admitted to be true.

30 (1) Irrebuttable or conclusive presumptions (*praesumptiones juris*) are absolute inferences established by law; evidence is not admissible to contradict them: they are rules of law...

(2) Rebuttable presumptions of law (*praesumptiones juristantum*) are inferences which the law requires to be drawn from given facts, and which are conclusive until disproved by evidence to the contrary, e.g. the presumption of the innocence of an accused person."

5 The presumption of innocence before trial and judgment is rebuttable and where the Court finds the person guilty the presumption is rebutted and the burden shifts to the prisoner to prove his or her innocence. If the convict does not appeal the conviction, the finding of guilt will stand. Even at the trial where there is a finding by the Court of a prima facie case, the Court will convict the accused if there is no evidence adduced by the accused or reasonable explanation as to absolve him or her by rebutting the prima facie case.

In **Ramanlal Trambaklal Bhatt v R [1957] 1 EA 332**, the Court of Appeal of East Africa sitting at Dar-Es-Salaam and Coram of Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA held that the onus is always on the prosecution to prove its case beyond reasonable doubt (so that a prima facie case is made out). They defined a prima facie case at page 335 in the following words:

20 *"It may not be easy to define what is meant by a "prima facie case," but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."*  
(Emphasis added)

Where there is a prima facie case, the presumption of innocence does not operate anymore because a reasonable tribunal would convict on the basis of such a prima facie case. Otherwise, the accused would not be put to his or her defence but would be acquitted on a submission of no case to answer. If the Court finds the accused guilty after the defence and imposes the prescribed penalty, for a person found guilty, the onus shifts to the accused who files an appeal against a finding of guilt to prove his or her innocence.

30 In the premises, the ruling of the Single Justice of the Supreme Court in **Kyeyune Mitala Julius v Uganda in Supreme Court Miscellaneous Application No 4 of 2017 (arising from Criminal Appeal No. 11 of 2017)** that the presumption of innocence continues after conviction goes against the weight of legal doctrine, the statute law and judicial precedents reviewed above. The passage relied on by the Applicant's Counsel in **Kyeyune v Uganda** is that:

35 *"The presumption of innocence continues as long as someone decides to exercise his or her right of appeal. The presumption does not stop at the trial level. The presumption of innocence as enshrined in the Constitution is one of*

5 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.”

This is wider than the decision of the Court of Appeal in **John Kashaka Muwanguzi v Uganda in Criminal Reference No. 797 of 2014 (arising from Criminal Application No. 187 of 2014) (arising from Criminal Appeal No 734 of 2014)** comprising of Justice S.B.K. Kavuma Ag. CJ, Hon. Mr. Justice A.S. Nshimye, JA and Hon. Justice Rubby Opio Aweri, JA who had held that:

10 “Until the Appellant’s conviction has been confirmed by the highest Court, his/her right of presumption of innocence is not completely extinguished. It keeps alive to a certain extent and we find so in the instant application.”

In conclusion and as held in **Sheikh Siraje Kawooya v Uganda** (supra), the above decisions were reached per incuriam and are not binding on the Court of Appeal for the reasons discussed in that ruling. This is because the two rulings reverse the criminal procedure on the burden of proof and are against the express wording of article 28 (3) (a) of the Constitution of the Republic of Uganda which provides that an accused shall be presumed innocent until proved guilty or until he or she pleads guilty. The decision is per incuriam and not binding since there is another judgment of the Supreme Court before a fully constituted Supreme Court of Uganda comprising of 5 judges in **Busiku Thomas v Uganda Criminal Appeal No. 33 of 2011** where Tumwesigye & Dr. Kisaakye JJSC ; Tsekooko, Okello and Kitumba Ag. JJSC held as follows at page 31 from line 23 of the judgment of Court and on the presumption of innocence after conviction:

20 “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 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. ”



5 In this application the prisoner/Applicant was proved guilty by a panel of three judges  
of the High Court and does not enjoy the presumption of innocence as held by the  
Supreme Court in the above decision. Finally the holding of the Supreme Court in  
**Busiku Thomas v Uganda** (supra) is binding on me and dispels any doubt about  
whether a convict upon conviction (but who has appealed against conviction) enjoys any  
10 presumption of innocence.

Bail pending appeal proceeds under Rule 6 (2) (a) **of the Judicature (Court of Appeal)  
Rules** provides that:

"6. Suspension of sentence and stay of execution

15 (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-

(a) in any criminal proceedings, where Notice of Appeal has been given in  
accordance with rule 59 or 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; and..."

20 The enabling law is the Criminal Procedure Code Act Cap, 116 which provides in section  
40 that

"40. Admission of appellant to bail and custody pending appeal.

25 (1) A convicted appellant who is not admitted to bail shall, pending the  
determination of his or her appeal, be treated as an appellant prisoner for the  
purposes of the Prisons Act.

(2) The appellate Court may, if it sees fit, admit an appellant to bail pending the  
determination of his or her appeal; but when a magistrate's Court refuses to  
release a person on bail, that person may apply for bail to the appellate Court.

...

30 (5) Notwithstanding subsection (1), a convicted appellant may, at the time of  
lodging notice of appeal, elect to be treated pending the determination of his or  
her appeal as a convicted criminal prisoner for the purposes of the Prisons Act.

..."

5 Applicant lodged a Notice of Appeal and applied for the record of proceedings in accordance with the rules of procedure. The Applicant has a right to apply for bail if he can satisfy the Court that there is a likelihood of success of the appeal and for other grounds mentioned in the authorities.

10 The right to appeal against a conviction or sentence which could be executed before the appeal can be heard is preserved by Rule 6 of the Judicature (Court of Appeal) Rules. They include the proposition that if bail is not granted the appeal will be rendered nugatory in that the Applicant would have served a substantial or full sentence before the appeal against conviction and sentence is heard.

15 The rules of this Court require that the grounds of the application are stated in the Notice of Motion. Rule 43 of the Judicature (Court of Appeal) Rules provides that all applications to the Court shall be by Notice of Motion which shall state the grounds of the application. The grounds of the application as contained in the Notice of Motion are as follows:

1. The Applicant is of advanced age i.e. 60 years.
- 20 2. The Applicant has substantial and influential sureties who are ready to abide by the terms of the bail set by the Court.
3. The Applicant has filed a notice of appeal before this Court and the intended appeal has plausible grounds and has a high likelihood of success.
4. There is the possibility of substantial delay in determination of the appeal.
- 25 5. It is just and equitable that this application is granted.

With regard to the ground that the Applicant is of advanced years, he is 66 years old and age per se is not a ground for release on bail. There is no averment that as a result of his age, he has become infirm or incapable of living under the conditions in prison. Secondly in ground 2 it is averred that the Applicant has substantial sureties. The issue  
30 of substantial sureties should abide the question as to whether the application should be granted and should not be the main basis for granting bail pending appeal.

With regard to the 3<sup>rd</sup> ground the Applicant filed a notice of appeal and the intended appeal has plausible grounds with a high likelihood of success, I have duly considered ground three.

### 35 **Likelihood of success of the intended appeal:**

5 I have considered the submissions that the evidence which was used to convict the  
Applicant of the offence of terrorism was not sufficient to have the Applicant convicted  
of the offence of murder and attempted murder which ought to be the central  
ingredients of the offence of terrorism. The Respondent's Counsel inter alia submitted  
that the offence has other ingredients which had been proved to the satisfaction of  
10 Court.

The Applicant has been convicted after a hearing by the High Court but there is no  
memorandum of appeal or record of proceedings to consider whether the conclusion of  
the Court is supported by evidence. It has consistently been held that the prospects of  
the success of the appeal cannot be determined without a memorandum and record of  
15 appeal. I will however address the submission of the Applicant's Counsel that the  
offence for which the prisoner was acquitted of murder and attempted murder was the  
centre ingredient of the offence of terrorism he was charged with. From those premises,  
counsel concluded that it followed that the Applicant could not properly be convicted of  
the offence of terrorism.

20 In an application for bail pending appeal, the Applicant should demonstrate that the  
appeal has a high likelihood of success since there is a presumption in favour of the  
correctness of the conviction.

The Applicant's Counsel relied on paragraph 5 of the affidavit in support of the  
Applicant that:

25 "I am informed by my lawyers of M/S Muwema & Co. Advocates whose advice I  
verily believe to be true that my appeal before this Honourable Court has plausible  
grounds with a high possibility of success since no murder or attempted murder was  
ever proved against me at the trial Court and yet the terrorism charge was centred  
around the murder counts. **(A copy of the judgment and sentence is attached**  
30 **hereto and marked Annexure "C")."**

The Applicant's Counsel supported paragraph 5 with his analysis of the judgment of the  
trial Court as contained in his submissions referred to at the beginning of this ruling.

What are the ingredients of the offence of terrorism?

The offence of terrorism is defined under sections 2 and 7 of the Anti – Terrorism Act,  
35 2002. Section 2 which is the interpretation section of the Act provides that: "terrorism"

5 has the meaning assigned to it in section 7. Section 7 (2) of the Anti Terrorism Act 2012 defines the offence of terrorism as:

"7. The offence of terrorism

(1) Subject to this Act, any person who engages in or carries out any act of terrorism commits an offence and shall, on conviction—

10 ...

(2) A person commits an act of terrorism who, for purposes of influencing the Government or intimidating the public or a section of the public and for a political, religious, social or economic aim, indiscriminately without due regard to the safety of others or property, carries out all or any of the following acts—

15 (a) intentional and unlawful manufacture, delivery, placement, discharge or detonation of an explosive or other lethal device, whether attempted or actual, in, into or against a place of public use, a State or Government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury, or extensive destruction likely to or actually resulting in  
20 major economic loss;

(b) direct involvement or complicity in the murder, kidnapping, maiming or attack, whether actual, attempted or threatened, on a person or groups of persons, in public or private institutions;

25 (c) direct involvement or complicity in the murder, kidnapping, abducting, maiming or attack, whether actual, attempted or threatened on the person, official premises, private accommodation, or means of transport or diplomatic agents or other internationally protected persons;

30 (d) intentional and unlawful provision or collection of funds, whether attempted or actual, with the intention or knowledge that any part of the funds may be used to carry out any of the terrorist activities under this Act;

(e) direct involvement or complicity in the seizure or detention of, and threat to kill, injure or continue to detain a hostage, whether actual or attempted in order to compel a State, an international inter-governmental organisation, a person or

- 5 group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage;
- (f) unlawful seizure of an aircraft or public transport or the hijacking of passengers or group of persons for ransom;
- (g) serious interference with or disruption of an electronic system;
- 10 (h) unlawful importation, sale, making, manufacture or distribution of any firearms, explosive, ammunition or bomb;
- (i) intentional development or production or use of, or complicity in the development or production or use of a biological weapon;
- (j) unlawful possession of explosives, ammunition, bomb or any materials for  
15 making of any of the foregoing."

A person commits an act of terrorism if the person commits the prohibited acts "for purposes of influencing the Government or intimidating the public or a section of the public and for a political, religious, social or economic aim, indiscriminately without due regard to the safety of others or property", listed under section 7 (2) (a) – (j). The offence  
20 is fully committed if any of the acts are committed, subject to the proof of the purpose of the act as defined above. The acts prohibited include those defined in section 7 (2) (b) and (c) particularly; "(b) direct involvement or complicity in the murder, kidnapping, maiming or attack, whether actual, attempted or threatened, on a person or groups of persons, in public or private institutions; (c) direct involvement or complicity in the  
25 murder, kidnapping, abducting, maiming or attack, whether actual, attempted or threatened on the person, official premises, private accommodation, or means of transport or diplomatic agents or other internationally protected persons;" The above definition is very wide and close to the definition of terrorism by **Osborn's Concise Law Dictionary 11<sup>th</sup> Edition** as:

30 "The use or threat of action designed to influence the government or an international governmental organisation or intimidate the public or a section of the public in order to advance a political, religious or ideological cause."

The High Court relied on the definition under section 7 of the Anti Terrorism Act that the Applicant and others were involved in acts of terrorism "*for purposes of influencing  
35 the Government or intimidating the public or a section of the public and for a political,*

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5 *religious, social or economic aim, indiscriminately without due regard to the safety of*  
*others or property..”* This is apparent from the judgment and I have accordingly read  
through the judgment. The submission of the Applicant’s Counsel that the court held  
that all 4 ingredients they listed at page 39 of the judgment should all be present but  
they only relied on one ingredient is not tenable on the basis of the statutory definition  
10 of the offence and the judgment referring to the ingredients of the offence of terrorism  
and it is unlikely to succeed on appeal.

Secondly, the offence of terrorism has different ingredients to that of murder or  
attempted murder and the conclusion that because the charge was centred on murder  
or attempted murder of which the Applicant had been acquitted by the same Court  
15 does not give rise to an overwhelming likelihood of success of the appeal.

For instance the Court considered whether there was actual, attempted or threatened  
murder, maiming or attack on a person or a group of persons in a public or private  
institution. At page 43 of the judgment they held that “*on threatened murder there is*  
*other evidence that the threats of death were directly communicated to some witnesses*  
20 *by Sheikh Yunus Kamoga (A2).*” The High Court went ahead to review the evidence. The  
conclusion of the Court is at page 45 and 46 where they found that the element of  
threatened murder through meetings of the Applicant and others was proved beyond  
reasonable doubt by the prosecution.

On threats of maiming the Court found that it has been proved beyond reasonable  
25 doubt against the Applicant and others at page 48.

On actual attacks, the Court concluded at page 49 that the Applicant and others  
mentioned therein were involved.

The Court found that the Applicants targeted a section of the Muslim Community in the  
said attacks namely the *Jamiya Dawa Al Salafiya* and there were threats and actual  
30 threats directed at actual persons in an organisation (See pages 49 – 50).

The Court found that there was intimidation of a section of the public that is a group of  
targeted Muslims within their organisation at page 51. Their analysis of the evidence can  
be found between pages 51 – 54. They conclude at page 54 that there was intimidation  
for religious purposes.

5 On intimation for political purposes, the evidence is at pages 54 – 55 and the Court concluded that A1, A4 and A8 were guilty though the Applicant is not included in that category.

At pages 62 – 63 of the judgment, the learned trial Court judges concluded that threats were delivered by words of mouth and other means mentioned therein including by the Applicant. The conclusion of the Court at the last paragraph summarises the offence against the Applicant.

It follows that the Applicants ground for the intended appeal in paragraph 5 of the affidavit in support and on the basis of the judgment but in the absence of the record can be concluded to be bound to suffer strong counter arguments and does not have an overwhelming chance of success.

The primary basis for the exercise of the discretionary power of the court is to ensure that if the Applicant is granted bail, he or she does not abscond. Secondly, that he or she is a deserving person for the bail pending appeal inter alia because the appeal has a high likelihood of success. An Applicant for bail pending appeal has a higher burden to satisfy Court to grant bail than an Applicant for bail pending trial because the accused does not enjoy the presumption of innocence.

The judicial precedents relied on by the Applicant's Counsel relate to non capital offences with less severe sentences than those meted out in capital offences where the convict is liable to suffer death. In **Arvind Patel v Uganda** (authority Number 1 on the Applicants list of authorities) (supra) the accused had been charged with the offence of conspiracy to murder and was tried by a Magistrates Court and sentenced to 5 years imprisonment. In **Kyeyune v Uganda** (Authority No 2) (supra) the offence the accused was charged with and convicted of is theft and conspiracy to defraud and he was sentenced to 7 years imprisonment and a compensation award of Uganda shillings 300,000,000/= . It was not capital offence. In **Teddy Sseezi Cheeye v Uganda Miscellaneous Criminal Appeal No. 37 of 2009 arising from Court of Appeal Criminal Appeal No. 105 of 2009**, (Authority Number 3) the prisoner had been charged and convicted of embezzlement and sentenced to 10 years imprisonment. In **David Chandi Jamwa v Uganda Criminal Application No. 20 of 2011 arising from Court of Appeal Criminal Appeal No 77 of 2011** (Authority number 4) the accused had been charged with and convicted of causing financial loss and sentenced to 12 years imprisonment. Finally in **Igamu Joanita v Uganda** (Authority Number 5) (supra)

5 the prisoner had been convicted of the offence of causing financial loss and sentenced to 30 months imprisonment.

I have considered other authorities where applications for bail pending appeal were considered where the prisoner had been convicted of a capital offence. In **Court of Appeal Criminal Application No. 69 of 2016, No 7038 WDR Ekusia Joseph v Uganda** had been convicted of murder of his wife and was sentenced to 23 years imprisonment. Hon Lady Justice S.B. Bossa, JA held that the general principle is that bail pending appeal is granted in exceptional circumstances. The learned judge also held that:

15 "The length of sentence is a material consideration. If a term of imprisonment is long, it makes it more likely that the Applicant may abscond, if released on bail. Moreover a convict should be treated differently from a person who has not been convicted. The reason is that the case of an Appellant under a sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused seeking bail before trial, namely the presumption of innocence."

20 The learned Justice of Appeal held that the Applicant was sentenced to 23 years imprisonment which was a long term imprisonment that makes it more likely that the Applicant would abscond if released on bail. She directed the Registrar to follow up the record of proceedings of the lower Court so that the Applicant pursues his appeal.

In **Kabaza Jackson v Uganda Court of Appeal Criminal Application No. 097 of 2016 (arising out of Criminal Appeal No. 009 of 2013)**, the Applicant had been indicted for the offence of aggravated robbery contrary to sections 285 and 286 of the Penal Code Act Cap 120 and sentenced to the mandatory death penalty which was nullified by the decision in **Susan Kigula and Others v Uganda Constitutional Appeal No 3 of 2006**. His file was sent back for re-sentencing whereupon he was sentenced to 30 years imprisonment. He appealed against sentence and applied for bail pending appeal. There was no record of appeal and the file of resentencing was missing since 2011. The Applicant has been indicted in 1998. By the time his bail application was determined in March 2017 he has been in prison confinement for over 19 years. Hon. Lady Justice Elizabeth Musoke JA held that the Applicant had been sentenced to 30 years imprisonment which he was about to complete taking into account remission. She further considered the issue of delays and missing file and concluded that the Court has to guard against the Applicant completing a bigger part of his sentence before the



5 appeal is heard. She held that the Applicant in the circumstances was unlikely to jeopardise his freedom by absconding from justice.

The offence of terrorism is a capital offence in Uganda and the Applicant was sentenced to jail for the remainder of his life. The meaning of life imprisonment is found in the decision of the Court of Criminal Appeal of England in **R v Foy [1962] 2 All ER 245** that  
10 "Life imprisonment means imprisonment for life. ... the sentence of life imprisonment remains on them until they die." This meaning was confirmed by the Supreme Court in **Criminal Appeal No 08 of 2009 Tigo Stephen v Uganda** and reaffirmed in **Ssekawoya Blasio v Uganda Supreme Court Criminal Appeal No 24 of 2014**. The Supreme Court held that "life imprisonment" meant imprisonment for the remainder of the prisoner's  
15 life subject to the right of remission.

Life imprisonment is the severest penalty after the death penalty. The Applicant in an application for bail pending appeal ought to demonstrate an overwhelming chance of success of the intended appeal. Though that ground cannot be conclusively determined in the absence of the record of appeal, the grounds based on the judgment do not  
20 demonstrate even a fair chance of success for which reason bail pending appeal is not available.

Last but not least I have considered the age of the Applicant together with the medical record. The medical report dated 13<sup>th</sup> March 2018 indicates that the Applicant suffers from severe hypertensive heart disease with fluctuating blood pressure, Chronic Gastritis  
25 with a high suspicion of peptic ulcer disease, gross obesity, and old age. The report notes that old age and obesity and High Blood Pressure may pose a risk of cardiac complications.

The medical condition is definitely serious and grave but the doctor who wrote the report stopped short of indicating whether the condition of the Applicant can be  
30 managed in prison. The **Prisons Act 2006** allows prisons authorities to make a report that a prisoner is in need of outside medical treatment inclusive of being admitted in hospital outside the prisons walls. Section 75 of the Prisons Act 2006 provides as follows:

"75. Removal of sick prisoners to hospital

35 (1) In the case of illness of a prisoner confined in a prison where there is no suitable accommodation for that prisoner, the officer in charge on the advice of

5 the medical officer, may make an order for his or her removal to a hospital and in cases of emergency, the removal may be ordered by the officer in charge without the advice of the medical officer.

10 (2) A prisoner who has been removed to a hospital under this section shall be deemed to be under detention in the prison from which he or she was so removed.

15 (3) Where the medical officer in charge of a hospital considers that the health of a prisoner removed to hospital under this section no longer requires his or her detention there, he or she shall notify the officer in charge who shall cause the prisoner to be brought to the prison if he or she is still liable to be confined in the prison.

(4) Every reasonable precaution shall be taken by the medical officer in charge of a hospital and the other officers and employees of the hospital to prevent the escape of a prisoner who may at any time be under treatment in the hospital.

20 (5) The officers and employees of the hospital shall take such measures to prevent the escape of the prisoner as shall be necessary but nothing shall be done under the authority of this section which in the opinion of the medical officer in charge of the hospital is likely to be prejudicial to the health of the prisoner."

25 The proper treatment and good accommodation is within the powers of the prison authorities. In **Kaguma v Republic [2004] 1 EA 68**, the Court of Appeal of Kenya at Nairobi held per Ochieng Ag J:

"whereas ill-health alone may not necessarily constitute exceptional circumstances, I deem the combination of the Applicant's age and ill-health to be exceptional."

30 The Applicant was said to be 75 years old and it was argued that due to his age, his continued stay in prison would expose his life to real danger. He could no longer recognise anybody. In this case there is no evidence supporting the Applicant that his state of health cannot be managed in prison however desirable the outside facilities may be. In fact the medical report shows that he has had a history of hypertensive heart  
35 disease and peptic ulcer disease for years 20 years. It is the duty of the Prisons

5 Professional service to evacuate him to a medical facility if that is necessary to manage his health.

I have finally considered the sureties presented to Court. The first surety is Hon Hussein Kyanjo former Member of Parliament of Makindye West and stated to be a law abiding citizen of reputable character and 58 years of age. A resident of Buziga Parish Makindye  
10 Division. He has a letter of introduction from LC Mawanga LC1. His national ID confirms that he is a resident of Mwanga village Buziga Parish, Makindye division. He is stated to be a friend of the Applicant and can be considered a substantial surety.

The second surety is Imam Kasozi, a lecturer at Islamic University Kampala Campus. He is stated to be a law abiding leader and resident of Mwanga Local Council and Buziga  
15 Parish Makindye. Founder Member of Uganda Muslim Youth Assembly. He has a letter of introduction from the Deputy Director of the Islamic University of Uganda Dr. Kasule Twaha Ahmed dated 2<sup>nd</sup> May 2018.

The third surety is Amir Daud Sheikh Suleiman Kakeeto who is stated to be a Muslim Scholar and a friend of the Applicant. 54 years of age and a religious leader and a  
20 resident of Katenda Zone LC1 Katwe II Parish Makindye Division. His National ID states that he is a resident of Bukasa village, Bukasa Parish Makindye Division. No explanation has been offered for the disparity in his residence in the above two documents. He further wrote a letter introducing himself as a member of Uganda Muslim Tabliq Community. I would not regard him as a substantial surety.

25 The fourth surety is Nyende Ayoub a resident of Rubaga Lugala Rubaga Division. He is a director of Dar Al Talim Al Islam 44 years old and Secretary General of the Tabliq Community and friend of the Applicant. His documents are in order.

The fifth surety is Nanfumba Musa a brother of the Applicant. He is a resident of While Nile Zone LC1 village confirmed by his National ID and can be considered a substantial  
30 surety.

The 6<sup>th</sup> Surety is Kalyango Siraj a friend of the Applicant and a resident of Namugoona Kasubi LC1 village Rubaga Division. He is 46 years old and a businessman. He has produced his introductory letter of LC and national ID. He also has employment card and can be considered a substantial surety.

- 5 The seventh surety is Butanaziba Yunus. He is a resident of Kiyindi Local Council 1 zone Bwaise Kawempe Division and 70 years old and also an older brother of Applicant. He passes for purposes of being a surety.

The sureties can be put to task to fulfil terms of Court but in light of the finding that the chances of success of the intended appeal are not certain, I decline to consider them.

- 10 In light of my decision in **Sheikh Siraje Kawooya v Uganda** (supra) who is a co prisoner charged and convicted of the same offence with the Applicant, the Applicant's appeal should be speeded up rather than have him released on bail pending his intended appeal.

- 15 In light of the severity of sentence which is for the remainder of the Applicant's lifetime, and the nature of the offence, the Applicant has not met the primary principle of proving the likelihood of success of his appeal on the basis of the judgment attached to his application and on that basis the application lacks merit. Instead the registrar of the International Crimes Division is directed to produce the record of proceedings within 40 days from today together with that concerning Sheikh Siraje Kawooya and should try to  
20 comply with rule 64 (7) of the Judicature (Court of Appeal) Rules which provides that the record shall be prepared within 6 weeks.

- This order shall likewise be served on the Hon. the Chief Justice of Uganda to play his role if need be in accordance with Rule 64 (7) for any directions as to the preparation of the record for purposes of expediting the Applicant's appeal. The appeal shall be fixed  
25 for hearing expeditiously to avoid any injustice to the Applicant if his appeal succeeds. The record shall be availed to Applicant so that he lodges his intended memorandum of appeal.

Just like my decision in **Sheikh Siraje Kawooya v Uganda** (supra) the Applicant's application stands dismissed.

- 30 Dated at Kampala on 18<sup>th</sup> May, 2018



**Christopher Madrama Izama**

**Justice of Appeal**

5 Ruling delivered in the presence of:

Counsel Ramula Nalugya for the Applicant

Counsel Masinde Barbara Senior State Attorney for the Respondent

Applicant is in Court



10 **Christopher Madrama Izama**

**Justice of Appeal**

**18<sup>th</sup> May, 2018**