

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MBARARA**  
**CRIMINAL APPLICATION NO. 97 OF 2019**  
**(ARISING FROM CRIMINAL CASE No. BUS: 00-CR-AA-0044/2019)**

**KEMIGISHA ADRINE=====APPLICANT**

**VERSUS**

**UGANDA=====RESPONDENT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

This application seeking bail pending hearing is brought by way of Notice of Motion as under **Article 23 (6) (a) and Article 28 (3) (a) of the Constitution. Rule 2 of the Judicature (Criminal Procedure) (Applications) Rules S.I 13-8).**

The Applicant was charged with the offence of aggravated defilement as against Turyasiima Asaph, an 11 year old male. She has not pleaded guilty and is on remand. The Applicant was represented at the hearing of this application by Counsel Paul Mukiibi whilst Izikuru Gloria Asst DPP represented the state.

The grounds of the application as presented under the Notice of Motion and supporting affidavits are as follows;

1. The Applicant was charged with the offence of aggravated defilement which is only triable and bailable by this Honourable Court.

2. The Applicant is currently remanded to Nyamushekyera Government prison.
3. The Applicant is an HIV positive patient, her condition has deteriorated and she needs specialised care, which can only be accessed put of prison.
4. The Applicant has been at all times a law abiding member of society and has never been charged with or convicted of any criminal offence.
5. The Applicant shall not abscond if released on bail and has substantial sureties to ensure that she shall attend Court at all material times as directed or required by Court.

At the hearing, counsel for the Applicant contended that the Applicant is HIV positive and requires special attention at 24 years of age, providing a medical report from Bushenyi Medical Center (Annexure B) to that effect. That she has substantial sureties in the persons of Kyogabirwe Fausta, the mother with whom she lives at Ruhandagazi Cell, Ward 2, Central Division, Bushenyi/Isaaka Municipality; Beinomugisha Richard, the biological father, and Kyomugisha Mary, the neighbour and family friend. Counsel further contended in reliance on the case of *FHRI v AG* that the Court is not mandated to adduce exceptional grounds but exercise its discretion in granting bail.

Learned Counsel for the state argued that there was no report from the prison that they cannot manage her HIV status and that the offence of aggravated defilement is so grave that bail should not be granted.

To which Counsel for the Applicant replied that the gravity of the offence has to be weighed against the Applicant's rights to personal liberty. And that whereas the report is not on record, state is aware that she needs special treatment.

I have carefully considered the arguments of both parties, evidence on file and the law applicable, and thereby come to the following conclusions;

The spirit of the grant of bail is embodied in Article 28 (3) (a) of the Constitution which provides that all person charged with a criminal offence shall be presumed innocent until proved guilty. This provision is intended to safeguard the right to personal liberty of every citizen which should not lightly or arbitrarily be deprived. In the case of **Col (Rtd) Dr. Kizza Besigye v Uganda Criminal Application No. 83 of 2016**, Hon. Justice Masalu Musene ruled that “...*court has to consider and balance the rights of the individual, particularly with regard personal liberty...*”

It is further supported by Article 23 (6) (a) which provides for the automatic right of an accused to apply for bail, albeit the grant of it being the discretion of Court.

This discretionary power of the Court to grant bail is enunciated under Section 14 (1) of the Trial on Indictments Act which provides that High Court may at any stage in the proceedings release the accused on bail, upon satisfaction of a recognizance.

The circumstances under which Court can grant bail are spelt out in Section 15 of the above-mentioned Act, including exceptional circumstances and the fact that the accused will not abscond. Exceptional circumstances include grave illness, presentation of a Certificate of no objection from the Director of Public Prosecutions, and infancy or advanced age. Whilst the satisfaction that the accused will not abscond is consistent of proof of the Applicant having a fixed place of abode, production of sound sureties, the consideration whether the accused failed to comply with bail conditions on previous occasions, and the presence of pending charges.

In the instant case, the Applicant pleads exceptional circumstances as they are severely HIV positive and require special attention, although there was no presented proof of a report from the prison that their conditions could not be handled.

In the case of **Abacha v Uganda (Miscellaneous Criminal Application No. 0004 of 2016)**, Hon Justice Stephen Mubiru ruled that;

*“In bail applications, courts should lean in favour of and not against the liberty of the accused as long as the interests of Justice will not be prejudiced. It is for that reason that this court is empowered to exercise its discretion to grant bail even when none of the exceptional circumstances have been proved. Proof of exceptional circumstances is not mandatory.”*

In light of the above authority on exceptional circumstances and with the understanding that an accused person should not be kept on remand unnecessarily before trial. In well deserving cases the accused person should indeed be granted bail if they fulfill the conditions of their release.

An applicant should not be incarcerated if they have a fixed place of abode and has sound sureties capable of guaranteeing that the accused will comply with conditions of his or her bail.

I therefore find that in the view of personal liberty, the severity of the Applicant’s HIV status and the proof of a fixed place of abode and substantial sureties as the applicant has adduced, the Applicant’s matter is one to rightly grant bail.

The application is hereby allowed and bail granted, on the conditions that:

1. The Applicant shall deposit a sum of 1,000,000 cash.
2. Each of the three sureties is also bound in the sums of UGX 5,000,000/- not cash
3. The Applicant report to the deputy registrar of the criminal division once every three weeks.

**SSEKAANA MUSA**

**JUDGE**

**24<sup>th</sup> January 2020**