

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: A.S.NSHIMYE JSC.)

CRIMINAL APPLICATION NO.04 OF 2016

BETWEEN

BIREETE SARAH.....APPLICANT

VERSUS

UGANDARESPONDENT

RULING OF JUSTICE NSHIMYE.JSC:

This is an application by way of Notice of Motion brought under article 23 (b) (a) of the Constitution, and rules 42 and 43 of the Judicature (Supreme Court) Rules Directions for the release of the applicant on bail pending the disposal of her appeal. The application is supported by both the original affidavit and a subsequent one in rejoinder.

In brief she deponed that she is an appellant in this Court since 21st April 2016. She was first convicted by the Anti-



5 Corruption Court and was sentenced to 10 years imprisonment on each of the two counts of Abuse of office C/S (1) and embezzlement C/S 14 (a) (iii) of the Anti Corruption Act 2009. She was also ordered to refund the embezzled USD 70,000.

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She appealed to the Court of Appeal which allowed her appeal against conviction and sentence on the offence of Abuse of office.

15 Her conviction and sentence on the second count of embezzlement was upheld, hence her appeal and this application to this court. She deponed further that she applied to be supplied with a copy of proceedings which has not been availed by the Court of Appeal.

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She is a single mother of two infant sons and guardian of an orphaned child. The infant children are 8-10 years while the dependent girl child is 4 years.

25 ***Submission by Counsel for the applicant:***

Her learned Counsel Mr. Kanduhoo read and highlighted paragraphs 2,3,4,6 and 7 of the applicant's affidavit in support relating to the character of the applicant.



5 That during the trial at the High Court and on appeal to the Court of Appeal, she was released on bail and she abided by all the bail terms which were set by the said two Courts.

10 Counsel submitted that, in the courts below, she deposited a certificate of title on which her residential house is situated and that if the court was inclined to ask for another title, her cousin sister who is an Ag. Assistant DPP and Potential Surety was ready to give her Powers of
15 Attorney to deposit her title.

Learned counsel Kanduhlo further submitted that the appeal was not frivolous and had a reasonable chance of success. However, Counsel expressed fear that there was
20 a high possibility of delay in hearing the appeal because since the applicant applied for proceedings they have not been availed by the Court of Appeal.

He contended that in the likely event of the appeal being
25 allowed after delay, the applicant would have to her detriment served a substantial part of her sentence.

Lastly Counsel pointed out that the offence for which the applicant was convicted did not involve personal violence.

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He presented 4 sureties namely:

1 Major Okwiri Lwabwoni 48 years former MP in the 6th
Parliament. Retired army officer resident of Muyenga B
division. His particulars are on the file. He is a colleague of
10 the applicant at work "**Center for Constitutional
Governance**".

2 Mr. Beyanga Joseph resident of Nsansa LC1 Kira
Municipality Wakiso. He works with Monitor publications,
15 he is a brother to the applicant and his particulars are on
the court file.

3 Nduhukire Naume a resident of Katooke BV, she is the
employee of Reserve Protection Services Ltd. She is
20 childhood friend of the applicant.

4 Caroline Nabasa Ag. Assistant DPP, resident of Kiira
Division, Kiira town council Division, cousin sister of the
applicant. She executed powers of attorney authorizing the
25 applicant to deposit her land title comprised in Mengo,
Kyadondo, Block 210 plot 1920 if Court so ordered.



5 ***Submission in reply by counsel for the respondent:***

Marion Achio SSA Counsel for the respondent opposed the application and relied on the affidavit of Bisamunyu David a Senior State Attorney in the Directorate of Public Prosecutions.

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She submitted that the application had been bought under a wrong law, namely article 23 (b) (a). This article does not provide for bail pending appeal.

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She submitted further that the applicant's appeal being a second and final appeal, section 2 of Judicature Act provides that the appeal can only be based on a point of law.

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The Learned Senior State Attorney wondered why no proposed memorandum of appeal was attached to guide Court on what ground the appeal is based.

In her view therefore, the appeal has no chance of success.

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She argued that contents of paragraph 4 of the affidavit rejoinder G-d are not matter of law. They are issues of evaluation of evidence. According to her, improper evaluation of evidence is not a point of law.



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With regard to delay, she submitted that, there was no evidence of likely delay because the court was well staffed with Justices.

10 While relying on the authority of **Arvind Patel Vs Uganda Misc Application No. 2003** filed by counsel for the applicant, she distinguished it from the one before this court on the ground that there was substantive delay in Arvind Patel which is not the case in the applicant case.

15 The learned Attorney asked the court to ignore the submission of counsel for the applicant that she abided by the bail conditions set by the lower courts as a ground that the applicant should be trusted against the
20 absconding.

That circumstances have changed, she was then during at the trial innocent, but now she is a convict and her conviction on the charge of embezzlement was upheld by
25 the Court of Appeal.

Counsel Achio referred to the respondent's affidavit paragraph 11 and contended that even if embezzlement is



5 not of violent in nature, financial crimes are peculiar with far reaching implication.

She prayed to court to dismiss the application. But in the event that court is inclined to grant the application, 10 stringent terms should be imposed like depositing a land title in the applicant's names with express authority to dispose of the property in the event of jumping bail and in addition deposit cash of 70,000 USD.

15 ***Submission in rejoinder by Counsel for the applicant:***

In rejoinder counsel for the applicant conceded that article 23 (b) (a) of the Constitution was quoted in Motion in error but the court is called to exercise substantial justice. Whether the proposed appeal discloses a point of law, 20 counsel contended that the question as to what the applicant did amounts to embezzlement is a point of law to be decided by this court.

Counsel referred court to paragraph 4 (b) affidavits of the 25 applicant in rejoinder that the money in question was used by the Permanent Secretary and not the applicant which is a question of law as to whether that was embezzlement.



5 Counsel cited the case of ***Alenyo Marks Vs Uganda Misc Application No. 05 of 2015*** in which my sister Faith Mwendha JSC cited with approval the case of Arvind Patel (*Supra*). He prayed that the court do consider the application with compassion. On how soon the appeal can
10 be heard, Counsel contended that will depend on how soon the Court of Appeal can be ready to make the proceedings available to the applicant.

15 With regard to the proposal by counsel for the respondent that in the event the applicant is granted bail, she should deposit cash of USD 70,000, Counsel submitted that the purposed of bail would be defeated. He reiterated his early prayer that the applicant be granted bail.

20 ***DECISION:***

Upon reading the affidavits in support of the application and that of the respondent together with supporting documentary evidence and authorities attached thereto and upon hearing and considering submissions of both
25 Counsel, the following are my findings and decision.

I uphold the submission of counsel for the respondent that article 23 (b) (a) under which the application was brought is inapplicable to this bail application and is



5 irrelevant. Un seriousness and profession negligence of this nature especially when it is portrayed by senior counsel in the Highest Court of the land is unacceptable and should not be repeated.

10 The correct law that should have been quoted is section 40 (2) of the Criminal Procedure Code.

15 However, professional error of Counsel should not be visited on the applicant who is yearning for substantive justice. Her application is clear that she wants to be released on bail pending her appeal on grounds she has deponed to and the court is alive of the correct provision of the law under which her application should have been brought.

20 Errors of counsel notwithstanding, I will invoke the provision of article 126 of the Constitution which provides:

“That substantive justice shall be administered without undue regard to technicalities”

25 The principles which guide court in applications of this nature, were stated in the case Arvind Patel (Supra) which were considered and reproduced in the 2nd applicant's authority of ***Alenyo Marks Vs Uganda*** (Supra) decided by



5 my learned sister Faith Mwendha JSC on the 17th
February 2016.

I find, having considered the objection of Counsel for the
respondent that the applicant proved that:

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1. It is not clear when her appeal is likely to be heard,
2. Having succeeded by 50% in her appeal in Court of
Appeal, there was no compelling evidence to tilt her
15 belief that even the remaining leg of her appeal would
succeed in this court.
3. Judging from the way she conducted herself when
she was released on bail in the High Court and in the
20 Court of Appeal I have no reason to believe that she
could flee.
4. Her sureties are substantial and are approved and
relied upon for her return to court until her appeal is
heard and disposed of.

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Her application therefore succeeds

- (a) *She will be released on bail, if she executes a bail
bond of Shs. 700 million (not cash).*
- (b) *Deposit the original land title in the names of her
30 cousin sister the 4th surety who agreed to give her*

5 Powers of Attorney to do so (Mengo Kyandondo Block 210 Plot 1920).

(c) Each of 4 sureties will execute bonds of Shs 250million (not cash).

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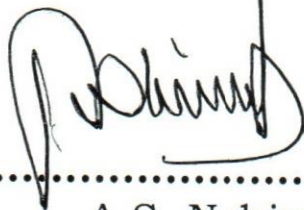
(d) The securities the applicant deposited in the trial and or the Court of Appeal should not be released until the applicant's appeal is disposed of i.e. her pass post and land title on which her residence is situated.

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The applicant is directed to report to the Registrar of this Court on every 15th working day of the month starting to 15th July 2016 to have her bail extended until her appeal is heard and disposed of.

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Dated at Kampala this.....^{15th}.....day of June 2016



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A.S. Nshimye

JUSTICE OF THE SUPREME COURT

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