

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

MISC APPLICATION NO.05 OF 2019.

[ARISING FROM CRIMINAL APPEAL NO.36 OF 2019]

[ALSO ARISING CRIMINAL APPEAL NO.0147 OF 2015]

10 [ALL ARISING OUT OF CRIMINAL CASE NO. 123 OF 2013 OF HIGH COURT AT ANTI-CORRUPTION DIVISION]

[CORAM: A.S NSHIMYE, Ag.JSC]

BETWEEN

15 1. SEGUJJA DANNY
2.MATOVU EDGAR } APPLICANTS

AND

UGANDANARESPONDENT

20 *[Appeal from a conviction and sentence of the Court of Appeal at Kampala before Honourable Justices, Elizabeth Musoke JA, Stephen Mosoto JA and Percy Tuhaise, JA given at Court of Appeal in Kampala on 29th day of August 2019 in Criminal Appeal No.0147 of 2015*

RULING OF A.S. NSHIMYE AG.JSC

25 The two applicants are appellants in this court under criminal No 36 of 2019. Their appeal was lodged on 29.8.2019 and the present application arises there from. They together with other persons who were acquitted by the trial court, charged with 6 counts namely:

- 1. *Embezzlement C/S 19(b) (1) of the Anti corruption Act 2009*
- 30 2. *Theft, contrary to section 254(1) and 261 of the Penal Code Act.*

- 5 3. *Conspiracy to commit a felony by section 390 of the Penal Code Act Cap 120.*
4. *Unauthorized access to section 12(1) and 20 (1) of the Computer Misuse Act 2011.*
5. *Unauthorized access contrary to section 12(3) and 20 (1) of*
10 *Computer Misuse Act.*
6. *Electronic fraud C/S 19 of Computer Misuse Act, 2011.*

The 1st applicant was convicted on 3 counts of theft C/S 254 and 261 of the Penal Code, electronic fraud C/s 19 of the Computer Misuse Act 2011 and conspiracy to commit a felony C/S 390 of the
15 Penal Code Act and sentenced to 5-9 years imprisonment to run concurrently.

The second applicant was convicted of similar offences as the 1st applicant save, that in addition, he was convicted of unauthorized
20 Access C/S 123 and 20 (1) of the Computer Misuse Act of 2011 and similarly sentenced to 5-9 years imprisonment to run concurrently. On appeal to the Court of Appeal their convictions on the charge of conspiracy to commit a felony were quashed. The conviction of the second applicant on unauthorized access
25 was similarly squashed.

However, the Court of Appeal upheld convictions on the charges of theft and Electronic fraud and imposed sentences of 5-7 years imprisonment respectively to run concurrently. It is against both

5 conviction and legality of sentences that they have appealed to
this court.

While they were awaiting hearing of their appeal in the Court of
Appeal, they applied and were granted bail pending appeal on
10 which they remained for almost 4 years until they partially lost
their appeal, and their bail lapsed hence their re-committal to
prison.

*In their joint motion brought under Article 2,126 (2)(e) of
the Constitution of the Republic of Uganda 1995 and 2006
15 as amended; Sec 132 (4) of the Trial on Indictment Act ,
Cap 23; Sec 40 (2) of the Criminal Procedure Code Act; Rule
41 (1) & (2) of the (Supreme Court Rules) Directions 1996,*

they are seeking to be released on bail pending appeal on grounds
that:

- 20 (a) *They will serve an illegal sentence,*
(b) *They will effectively and sufficiently be able to facilitate
their Appeal pending the hearing and determination of
their Criminal Appeal No. 36 2019*

It is supported by their separate affidavits, and several annexures
25 their too.

Briefly and in summary the main grounds of the application are
that:

- 5
1. *That their appeal is not frivolous and is purely based on points of law as enumerated in the attached memorandum of appeal*
 2. *That they have fixed places of abode and that they are of good character.*
 - 10 3. *That they are 1st offenders*
 4. *And when they were released on bail they complied with the terms to the end.*

15 During the hearing both applicants were represented by Counsel Bakole Simon while Khauka James, state attorney represented the respondent.

20 In prosecution of the application counsel Bakole submitted that the offences for which the applicants were convicted are bailable and that although the presumption of innocence is much higher before conviction, an appellant still hopes to be found innocent by an appellate court. He gave an example of his clients success in the Court of Appeal at a percentage he put at 80%

25 He pointed out that the principles that guide an appellate court in an application of this nature are set out in this court's decision of *Arvind Patel vs Uganda Miscellaneous Criminal Application No.0 1 of 2003* which has been followed in numerous decisions

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5 He numerated the principles as follows:

1. *That the appeal is not frivolous and reasonable chance of success.*
2. *The appellant is the 1st offender*
3. *That there is likely to be delay before the appeal is heard*
- 10 4. *That the offence for which the appellant was convicted was not one involving personal violence.*
5. *That the applicants have complied with bail conditions before.*

Referring to the affidavit evidence adduced by the his clients, he
15 submitted that the applicants had proved that the offences they were convicted of did not:

- a. *Involve violence*
- b. *That their appeal was not frivolous and that it had reasonable chances of success.*
- 20 c. *That they complied with bail conditions of the Court of Appeal until their bail lapsed and were recommitted*
- d. *That they are first offenders.*
- e. *That there was likely to be delay before the appeal is heard.*

25 Counsel informed court that, the applicants have fixed places of abode. Applicant No1 adduced an agreement upon which he bought a plot on Kabaka's land in 2003 where he constructed his residential house where he lives He had supporting letters from Lubowa Estate Cell Lc, Sseguku ward, Wakiso District where he

5 resides and a good character recommendation from his Church Priest.

In addition he introduced 4 potential sureties being the wife and 3 brothers whose particulars are on court record. For applicant
10 No.2, counsel also introduced sureties being brothers and sister respectively. Their particulars are on the file. He in addition produced introduction and support letters from Kiruddu - Buziga LC where he resides. Applicant no 2 resides within his father's homestead.

15 Counsel informed court that he had explained the duties of sureties and in particular that they had to undertake and ensure that the applicants would comply with bail terms. He added that in any case they were the same sureties when the applicant's were granted bail by the Court of Appeal.

20 Finally, counsel prayed that, the applicants application be granted by court on terms court will deem fit.

M/S Khauka James for the respondent opposed the application. He stated that the appeal is frivolous and relied on the affidavit reply
25 deponed to by Caroline Marion Acio date 23/10/2019. That appeal is likely to be disposed of during hearing on a preliminary point of law.

5 He submitted that when one peruses the grounds in the memorandum of appeal which was annexed by the applicants, one finds that the grounds are based on facts or mixed facts and law. According to him this being the final court the appeal would lie only on points of law.

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Secondly, on sentence, in accordance with the Judicature Act, an appeal does not lie on severity sentence but on a point of law like illegality.

15 Counsel argued further that although the Court of Appeal released them on bail and they abided by its terms, the stake now is higher. They have been convicted by two courts. According to counsel, the temptation of fleeing is now much higher.

20 On sureties he submitted that to applicant number one's sureties were not substantial.

He illustrated that 1st surety is said to be the wife of the Applicant, the names on the annexed marriage certificate differ from the names stated in applicant's affidavit.

25 Another surety No 4 of the applicant who is a brother is a driver who moves from place to place as part of his job.

Another ground of objection was that the property presented to court, in case court required the applicant to deposit valuable

5 property is based on an agreement and drawings which are not
certified and are suspicious. Accordingly the collateral for the
case of this nature should match in gravity of the case.

10 With regard to the 2nd applicant counsel challenged the certificate
of the title of the 2nd applicant's wife which had been deposited in
court under powers of attorney.

15 Counsel submitted that the powers could not be relied on because
they were not registered. Therefore according to him they had no
legal effect.

Counsel contended that both applicants had failed to deposit
anything of value. It would be risky to have them released on
bail.

20 He submitted that Electronic fraud pose a very serious problem to
the financial services sector of the economy of the country. He
suggested that since the court was fully constituted, they should
continue serving their sentences and have the appeal heard
expeditiously.

25 In rejoinder counsel of the applicants explained that the
residential plans for the 1st applicant were drawn this month
because he did not have any at the time the house was built in
2003.

5 Counsel submitted that appeal on sentence was valid because the court considered remand period only on the theft charge and did not do so in respect of the remaining counts which rendered the sentences illegal.

10 Secondly, according to counsel, the Court of Appeal did not ascertain how much money was lost and how much was recovered, yet the charge sheet was drawn indicating the whole amount as if nothing was recovered.

15 The above notwithstanding it was counsel's submission that the applicant had satisfied the conditions to be released on bail as stated in *Arvind Patel (Supra)* and that all conditions stated therein need not be present.

20 He asked court not to disqualify the wife of applicant No 1 only because her names on the marriage certificate slightly differed from her other maiden names. And for the brother of applicant No 1 who is a driver, being a driver is a job like others. The same person stood for applicant No.1 until the bail lapsed with no default.

He prayed that court do grant his clients bail as prayed.

Decision:

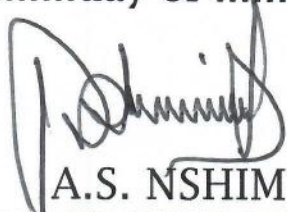
25 I have considered the evidence adduced in the application and the submissions for and against by both counsel. The applicants have established that they have an arguable case to present to Supreme Court especially on the propriety of sentence.

1. Their appeal is therefore not frivolous

- 5 2. They have known places of abode and they have produced persons by way of sureties who are ready to be answerable for the applicant's return to court until their appeal is disposed of.
- 10 3. They have proved that they were once trusted when they remained on bail for 4 years in the Court of Appeal and did not jump bail.
- 15 4. However, going by the authority to *Arvind Patel vs Uganda (Supra)* referred me by counsel for the applicants, even if the offences they committed did not involve personal violence, their venture had more serious economic consequences compared personal violence. The Electronic sophistication that was involved and is still within the knowledge and capability of the applicants, is a threat to economy and to the wellbeing of millions of Ugandans if they do not repent. I am
- 20 saying all this because two courts below found them guilty, notwithstanding that the final court of the land may exonerate them.
- 25 5. I reluctantly grant bail on the following terms,
a. Each of the applicants shall deposit cash bail of shs 5,000,000/= (five million)

- 5 *b. Each applicant will have 4 sureties as presented to court and each surety shall bind himself or herself in the sum of shs 50,000,000/= (fifty million) not cash.*
- c. Each applicant is to deposit his passport with the Registrar until their appeal is heard and disposed of.*
- 10 *d. In the event the passports are held by any of the courts below, the Registrar shall make arrangements to have them transferred to his custody.*
- e. The purchase agreements of the 1st applicant's residence land are to be deposited in court.*
- 15 *f. The title deed of the wife of applicant No.2 upon which the applicant obtained powers of attorney also be deposited in court until the appeal is heard and disposed of.*
- g. The applicants are ordered to report to the Registrar at the end of each month starting with 29/11/2019 until the*
- 20 *appeal is heard and disposed of.*

Dated at Kampala this 31st day of October 2019



A.S. NSHIMYE
AG. JUSTICE OF THE SUPREME COURT

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