

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGHANDA AT KAMPALA**  
**MISC. CRIMINAL APPLICATION NO. 06 OF 2020**  
**ARISING FROM CRIMINAL APPEAL NO.31 OF 2016**

**BETWEEN**

**NOEL WANG NAN.....APPLICANT**

**AND**

**UGANDA.....RESPONDENT**

**Before Hon. Lady Justice Faith Mwendha, JSC (Single Justice)**

**RULING OF COURT**

This Application was brought by way of Notice of Motion under S.40 (2) of the Criminal Procedure Act, Cap 116 Laws of Uganda and Rule 42(1) of this Court's Rules. It was seeking for orders that:-

- (a) the applicant be granted bail pending determination of the appeal in this Court among others

The Application was supported by an affidavit deponed by the Applicant Noel Wang Nan containing the grounds. Briefly, the grounds were as follows:-

1. That there is a pending appeal the applicant lodged in this Court No. 31 of 2016.
2. That the applicant has a constitutional right to apply for bail pending hearing and determination of his appeal and this court has discretion to grant the same
3. That the applicant was convicted in 2004 and has served a substantial part of the 35 years term imprisonment
4. That the applicant is a first offender
5. That he is likely to suffer a miscarriage of justice occasioned by substantial delay of determination of his appeal as a result of untraceable record of the Court of Appeal proceedings including judgment from the Court of Appeal.
6. That the applicant has chronic health conditions which require specialised treatment and care which is not available in prison where he is currently detained.
7. That he has a fixed place of abode and substantial sureties all residents within the jurisdiction of this Court

8. That he will not abscond from the jurisdiction of this Court if released on bail.

The above grounds were supported by his affidavit inter alia as follows:-

1. That he was arrested on 8<sup>th</sup> October 2004 and charged with murder
2. That he was tried and convicted on 3<sup>rd</sup> October 2005 and was sentenced to suffer death, the mandatory sentence at the time.
3. That he was dissatisfied with the sentence and he appealed to the Court of Appeal against conviction and sentence but the appeal was dismissed.
4. He appealed to the Supreme Court against the conviction and sentence vide Criminal Appeal No.11 of 2008
5. That following the judgment of Attorney General Vs Suzan Kigula & 416 others Constitutional Petition No. 3 of 2006, he was one of the beneficiaries, his case was referred back to the High Court for mitigation of sentence
6. The High Court re-sentenced him on the 28<sup>th</sup> November 2013 to a term of imprisonment of 37 years starting from the date of conviction.
7. He appealed to the Court of Appeal against the High Court decision and the sentence was substituted with 35 years imprisonment of which he had served 11 years.
8. That he lodged an appeal which is pending determination in this Court
9. That he has been informed by his lawyers that he is likely to suffer a miscarriage of Justice occasioned by substantial delay of determination of his appeal as a result of untraceable record of proceedings and judgment from the registry of the Court of Appeal (He attached copies of correspondences from Court of Appeal) to that effect.
10. That he is known to have chronic health conditions which require specialised treatment and the treatment is not available in prison.

The respondent filed an affidavit opposing the Application deponed by one Vicky Nabisenke from the office of the Director of Public Prosecutions. She stated as follows among others:

1. That the applicant was charged with the offence of murder and convicted by the High Court and the conviction was upheld by the Court of Appeal.
2. That the offence of murder is grave and involved personal violence
3. That the Supreme Court is fully constituted so there is no likelihood of delay.
4. That the medical report will be challenged.



5. That there is no sufficient proof of fixed place of abode and has no substantial sureties.
6. That there are no exceptional circumstances which necessitate granting bail pending determination of the appeal.

### **REPRESENTATION**

At the hearing, the Applicant was represented by Mr. Kirubo Isaac, Elizabeth Nyamusingwa Ronald Rukakungwa and Kitimbo Simon of Kadiri and Company Advocates. Joanita Tumwikirize, State Attorney represented the state/respondent.

### **SUBMISSIONS**

Counsel for the Applicant made submissions and reaffirmed among others that the applicant will suffer miscarriage of justice because of the substantial delay caused by untraceable record of proceedings and judgment. He referred to the correspondence between the applicant's lawyers which were filed in Court to the effect that the record of the Court had not been traced. That there was no record to date. She submitted that the appeal has high chances of succeeding.

She also submitted that the untraceable record of the court records amounted to violation of the applicant's rights under Article 28(1) of the Constitution which provides for a fair and speedy trial. That this Court has a duty to uphold the rights of the applicant as the delay has been caused by the Court of Appeal. She relied on the case of **Alenyo Mark Vs Uganda Supreme Court Criminal Application No.5 of 2015**. Three sureties were produced whose particulars were taken and are on court record.

Counsel submitted that the sureties were substantial and prayed that the applicant may be released on bail pending determination of the appeal.

---

The respondent's counsel opposing the grant of bail pending appeal stated that the record of Appeal was in Court. (The record was produced in Court and Court saw it). That the submission therefore of delay cannot stand as the Court can fix it for hearing and it can be expedited.

She submitted that the Memorandum of Appeal was frivolous and vexatious since there had been no record of appeal no proper Memorandum of Appeal could be drawn. Counsel argued that since the applicant has served 2/3 of his sentence, it is very easy for him to abscond.

That as far as producing sureties, they are not substantial since they had not been known or stayed with the applicant for long for them to know him well. That it therefore follows that the undertaking they had undertaken is



superficial. For example, the 3<sup>rd</sup> surety knew the applicant after he had been convicted. The certificate of title which he had undertaken to deposit, the ownership had to be verified and in any case, it was not produced in Court.

The fixed place of abode was a rented house in the area. The LC chairman did not seem to know who was living there currently. She submitted that the offence the applicant committed involved personal violence when he caused the death of a relative in a family scuffle. She prayed that bail be denied.

### **CONSIDERATION OF THE APPLICATION**

S. 40(2) of the Criminal Procedure Act, clothes this court with powers to grant or not to grant bail pending determination of appeal. The authority of **Arvind Patel Vs Uganda Supreme Court Criminal Appeal No. 1 of 2003** considered some of the requirements that can be taken into account while handling applications such as this one. I must state that they are not exhaustive and not all of them have to be taken into account as each case is considered on its own facts and circumstances.

These are as follows among others:-

- (a) The appellant/applicant being a first offender
- (b) The appeal had been admitted to be heard
- (c) A delay is expected
- (d) The appeal is not frivolous or vexatious and has a reasonable chance of success among others.

Upon careful perusal of the pleadings and carefully listening to both counsel on the matter, I find that the sureties produced in court and undertook to ensure the applicant does not abscond to be able to face his appeal left alot to be desired. I accept counsel for the respondent's submission that they were very superficial and their demeanour showed that they did not know the applicant. 38

---

Counsel for the Applicant relied on among other authorities the Alenyo case (supra) arguing that the Court granted bail pending determination of the appeal but I hasten to add that the facts and circumstances surrounding the Alenyo case were very different much as he had been convicted of murder.

The applicant in this Application was living in a rented house and currently the surety who was chairman LC1 did not know who was living in the rented premises at the time of the hearing of the Application. This cast doubt on whether he has a fixed place of abode and showed that the surety could not meet the test of being substantial.

Also, it came out clearly at the hearing of the Application that the offence involved personal violence during a family scuffle and resulted into a member being murdered. It was true that the record of the Court of Appeal had been untraceable for some time, but by the time the application was heard, the record had been traced and was in the registry of Supreme Court

In the premises, the appeal can be fixed for hearing therefore and the hearing can be expedited.

Taking the above in account, I have no alternative but to deny the applicant bail pending determination of the appeal.

The Registrar is directed to ensure that the appeal is fixed in the next convenient session since the Record of Appeal is available. She should also avail the applicant with the Record when he or his lawyer asks for it in writing.

The Applicant should continue serving the sentence pending hearing the appeal or until further orders of this Court.

Dated at Kampala this 26<sup>th</sup> day of November 2020.

  
**MWONDHA**

**JUSTICE OF THE SUPREME COURT**