

UGANDA / JUDGMENT

Aryampa v Uganda (Criminal Application 4 of 2024) [2024] UGSC 33 (31 July 2024)

[2024] UGSC 33

COURT

Supreme Court of Uganda

BEFORE

Mike Chibita, JSC

CASE / FILE NUMBER

Criminal Application 4 of 2024

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THE REPUBLIC OF UGANDA**IN THE SUPREME COURT OF UGANDA****AT KAMPALA****(CORAM: CHIBITA, JSC;)****CRIMINAL APPLICATION NO. 04 OF 2024**

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 $\overline{\$5}$ **ARYAMPA JACKSON:.....APPLICANT****VERSUS****UGANDA:..... 15**

(An application for bail pending appeal arising from, criminal appeal No. 142 of 2023)

RULING

This applicant filed this application by Notice of Motion under the provisions of Rules 6(2)(a), 42 and 43 of the Rules of this Court, Section 40(2) of the Criminal Procedure Code Act Cap. 116 and Article 126(2)(e) of the Constitution of the Republic of Uganda. The application, seeks for bail pending determination of the applicant's appeal No. 142 of 2023 by this Court.

The grounds in support of the application are that;

1. The applicant's appeal is not frivolous and has reasonable possibility of success.
2. The offence for which the applicant is convicted of is bailable by this Honourable Court.
- 3. The applicant is a first time offender and has no previous criminal record or any other pending criminal charges against him.
- 4. The applicant has sound and substantial sureties who are willing to stand for him before this Honourable Court.
- 5. The applicant shall not interfere in any way with this Honourable Court's process in hearing and determination of his appeal and will not abscond if granted bail.
- 6. The applicant was granted bail by the High Court and never flouted the bail terms and conditions which had been set against him.
- 7. The applicant has a permanent place of abode within the jurisdiction of this Honourable Court.
- 8. The applicant is of advanced age which renders him unfit to withstand the conditions of jail.
- 9. The applicant is grappling with chronic allergic bronchitis with asthmatic components, cervical/lumbar spondylitis and cervical spasm which are fatal most especially while the appellant is in prison.
- 10. The applicant undertakes to abide by all conditions as shall be set by this Honourable Court.
- ¹1. It is fair and just to release the applicant on bail pending hearing and determination of his appeal.

The application is supported by the affidavit in support and the affidavit in reply of the applicant sworn on 27th May, 2024 and 27th 30 June, 2024 respectively, which substantially expound the grounds.

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The respondent opposed the application in an affidavit in reply sworn on 20th June, 2024 by Nabaasa Carolyn Hope, Office of the DPP. She averred, inter alia, that the grounds presented by the applicant were not sufficient and material to grant bail. That there was nothing exceptional to warrant the grant of the application and that the applicant's appeal had no possibility of success.

Background;

20 25 The applicant together with others were indicted under the Penal Code Act on six counts namely; aggravated robbery c/s 285 and 286(1) and (2), attempted murder c/s 204, indecent assault c/s 128, arson c/s 327 (a), malicious damage to property c/s 335(1) and criminal trespass c/s 302. He was convicted for aggravated robbery, arson, malicious damage to property and criminal trespass. He was sentenced to 16 years for aggravated robbery and arson but was cautioned for malicious damage to property and criminal trespass. He was also ordered to compensate the complainant a sum of 7 7,1 12,7 00 / =. His appeal against conviction and sentence was unsuccessful at the Court of Appeal. He has now appealed to this Court Vide Criminal Appeal No.142 of 2023 hence this application pending determination of his appeal.

Representation;

At the hearing the applicant was represented by Counsel Kumbuga Richard while Mr. Oola Samuel, Senior Assistant DPP, appeared for the respondent. Both parties filed written submissions.

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⁵ Submissions;

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Applicant's submissions;

Counsel for the applicant stated the law on bail and followed the criteria set out in Anrind Patel v Uganda No.1 of 2003 (SC) to make his submissions. He submitted that the applicant had a good character with a good reputation in the community, a family man and he was a first time offender. He further submitted that the applicant had a fixed place of abode at Kasiita town in Kakumiro District, he had complied with the conditions of bail throughout the High Court trial, and that the applicant currently has a pending appeal before this Court that has merit and a strong chance of success.

In addition, Counsel submitted that there's a possibility of substantial delay in the determination of the appeal. Counsel further stated that the applicant consents to abide by any rules that this Honourable Court may establish. Counsel also submitted that there was no evidence indicating that the applicant was involved in any personal violence.

In addition, counsel contended that the applicant had substantial sureties some of whom stood surety at the trial court. He argued that his sureties were alive to their duty and were prepared to follow all rules this court had established in order to grant bail. The applicant listed his significant sureties as:

- a) Mr. Moses TWimukye a family friend, businessman and chairman LCIII of Kasiita Sub-County
- ⁵ b) Mr. Magezi Rauben Patrick a family friend, businessman, and resident of Kasiita town council,
- c) Mr. Rwatoro Lazarus a brother, businessman and resident of Kasiita East Village,
- d) Mr. Nshekalimwe Benon a brother, businessman and a resident of Wakiso District, and 10
- e) Ms. Birungi Agnes a sister-in-law, a civil servant at Ministry of foreign Affairs and a resident of Wakiso District.

On the basis of exceptional circumstances, Counsel submitted that the applicant was of advanced age and very sick that his health conditions were deteriorating while incarcerated. Counsel relied on the medical report and submitted that the applicant suffered from Chronic Allergic Bronchitis with asthmatic components, cervical/lumbar spondylitis, cervical spasm and old age. He adds that these health conditions are so sensitive especially bronchial asthma and can be fatal while he is in prison. Counsel therefore argued that temporarily releasing him from prison would help to access better treatment to secure the applicant's life. Counsel relied on the case of *Rajiv Kumar Sabharral v Uganda* No. 2 of 2023(SC) to support this submission. 15 20

²⁵ Counsel therefore invited this Court to grant this application.

Respondent's submissions;

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Counsel for the respondent vehemently opposed the application. he submitted that the applicant's submission regards being a first time offender, personal responsibility and grant of pre-trial bail,

are immaterial and insufficient for grant of bail pending appeal. In addition, Counsel submitted that the applicant's good character alone was not sufficient reason for grant of bail, as the conviction against him obviously dented his character. Counsel also argued that the offence for which the applicant was convicted involved personal violence. He submitted that the applicant was convicted of the offence of aggravated robbery, to which the record shows that one of the fingers of PW2 was cut off with a panga during the omission of the offence. He relied on *Kitaka Robert Nsubuga v Uganda* No.8 of 2019 (SC) to support his submissions. '10

Counsel also argued that the applicant had no proof of a fixed place of abode as purported in the LC letter, photos purportedly of his residence, copy of land site plan and copy of national ID. She submitted that all these did not confirm residency of the applicant as they were in the names of Aryampa Jackson, a different person and not the applicant, Aryampa Jackson. Nevertheless, a fixed place of abode was not a consideration to grant bail pending appeal. 15 20

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Regarding the sureties, counsel argued that the sureties had no real significance and it was not a material issue. Counsel additionally contended that none of the proposed sureties had demonstrated the ability to influence or control the applicant to ensure court appearance, given that the applicant is a convicted criminal.

Regarding the likelihood of success, Counsel submitted that the appeal was pointless and unlikely to succeed. Counsel argued that the trial and Court of Appeal upheld the applicant's conviction 30

⁵ therefore nothing would suggest that the appeal had a realistic chance of success, even though this Court would consider the evidence as it is.

In reply to the ground of substantial delay in determination of the appeal, Counsel submitted that the argument was speculative and there was no communication of document from the head of this Court or a competent authority to substantiate the applicant's claims. Counsel relied on the case of Kitaka Robert Nsubuga (supra). In addition, Counsel stated that the applicant had not moved the court to fix the appeal for hearing, in view of the fact that he filed a Memorandum of Appeal and the record is available. 10

Regarding the applicant's health, counsel stated that it can be treated in detention because the prison's medical officer has not certified his grave illness and inability to be treated while in 20 custody. Furthermore, it has not been demonstrated that the prison administration lacks a mechanism to guarantee that the applicant, if needed, has access to specialized medical care outside of the prison. Therefore, the applicant has not demonstrated any extraordinary circumstances that would justify the grant of bail. 25 To bolster his arguments, counsel cited Kitaka Robert Nsubuga v. Uganda, (Supra).

Counsel therefore invited Court to reject the application.

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⁵ Applicant's submissions in rejoinder;

Counsel reiterated his earlier submissions and argued that the applicant's grounds were all requirements for the grant of bail pending appeal and they were not immaterial.

In addition, relating to substantial delay, Counsel submitted that the appeal is already lodged in this Court and it is at Court's discretion to fix the same for hearing and determination. 10

Regarding the discrepancies in the applicant's name, counsel submitted that this was an oversight and a technical mistake done by the investigators which persisted during trial. This should therefore not be visited on the applicant's substantive rights. Counsel further submitted that this was also an issue of different dialects and pronunciations of some words which differ from one tribe to another hence the possibility of a typing error. Counsel relied on Article L26 (21)(e) and invited Court to administer substantive justice without undue regard to technicalities. 15 20

CONSIDERATION OF THE APPLICATION BY COURT

I have perused the affidavits and considered the submissions together with the authorities. 25

The mandate of this Court in such applications is settled. Rules 6(2)(a) of the Rules of this Court empowers this Court to grant bail pending appeal. Needless to say bail pending appeal is discretionary with each case determined on its own merit.

³⁰ Rule 6(2)(a) provides that:

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s KSubJectto subttle (1) of thts ntle, the Instlttrtlon of an appeal shall not operate to suspend any sentence...., but the court mdg ln any crlmlnal proceed,lngs, where notlce of appeal has been glven ln accordance wth niles 56 and 57 of these Rzles, order thqt the appellatnt be released on ball pendng the 10 detennlnatlon of the appeal."

It is trite as outlined in *Anrind Patel v. Uganda* (Supra) that some of the considerations to be taken into account in such applications include:

"7. The character of the applicant

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Is 2. Whether the applicant is or not a first offender;

3. Whether the offence of which the applicant is convicted involved personal violence;

4. The appeal must not be frivolous and has reasonable chance of success;

20 5. The possibility of substantial delay in the determination of appeal and;

6. Whether the applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal. Nevertheless, the above guidelines are not exhaustive and it is not necessary for all these conditions to be present in every case. A combination of two or more of the guidelines is sufficient."

In elucidating the above criteria, this Court has settled that bail pending appeal mainly hinges on whether there are exceptional and unusual circumstances to warrant release which the applicant must prove given that the conditions at this stage are slightly higher and are applied strictly. See; *Magombe Joshua v Uganda* No. 13 of 2020 (SC), *Rajiv Kumar Sabharwal v Uganda* (Supra)

⁵ The issue for determination therefore is whether the applicant has satisfied court to warrant the grant of bail pending determination of his appeal.

Regarding the name variations, a minor error should not unnecessarily compromise the admissibility of evidence if the evidence proves that it is one and the same person like in the instant case.

I find that the applicant is a first time offender, a family man with a good reputation in the community having held a position of leadership as Chairperson LCIII of Kisiita Sub-County. He also has a fixed place of abode at Kisiita Town Council, Bugangaizi East County, Kisiita East L. C.I, Kakumiro District with substantial sureties some of whom stood surety at trial. All these factors favor the applicant.

However, as earlier stated, the release on bail pending appeal mainly hinges on whether there are exceptional or unusual circumstances. It is trite that such factors go to the applicant's credit and recede to the background because there is nothing exceptional or unusual about them especially when weighed with the seriousness of the offence and the likelihood of success of the appeal. This Court held in *John Muhanguzi Kashaka v Uganda* No. 19 of 2019 and *Magombe Joshua v Uganda* (Supra) that,

"Factors which go to the applicant's credit, like being a first offender, of good character, breadwinner of his family and although he may have offered sureties of sound character, all such considerations would recede

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⁵ to the background when weighed with the seriousness of the offence and whether or not there is a likelihood that the appeal would succeed."

Therefore, while these factors are considered when assessing such applications, these factors alone are not compelling enough to justify release on bail pending appeal.

In reference to the likelihood of success, counsel for the applicant submitted that the appeal was not frivolous and had a high chance of success. As this Court has noted, the only way to ascertain the possibility of success is by reviewing the complete record of appeal. In the cases of *Anrind Patel v. Uganda* (supra), *Magombe Joseph v. Uganda* (supra), and *Imere Deo v. Uganda* No. 2 of 2015, this

Court held that:

in considering an application for bail pending appeal the only means by which the Court can assess the possibility of success of the appeal is by perusing the relevant record of proceedings, the Judgment of the Court from which the appeal has emanated, and the memorandum of the appeal in question. D

The applicant attached the notice of appeal, memorandum of Appeal and the lower court judgment. No record of proceedings was attached. In the circumstances it is not possible to determine the success of the prospected appeal. Nevertheless, a perusal of the applicant's memorandum of appeal shows that the applicant's appeal raises arguable grounds. In my view therefore, the appeal is not frivolous. 25 30

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⁵ In regard to substantial delay, I note that the Court is fully constituted and constantly operating. In my view therefore, substantial delay is speculative and no evidence has been adduced. Furthermore, in *Henry Bamutura v Uganda* No. 19 of 2019 (SC) it was held that delay in disposing of the appeal should be assessed in light of whether there is a real risk that the sentence or a considerable portion of it will have been served before the appeal is heard. 10

In the instant case, I note that the applicant was sentenced to ¹⁶ years' imprisonment in September, 2021. These years will not have expired by the time the appeal is heard. I also note that the instant application which was filed on 30th May, 2024 did not take long to be heard and determined. Substantial delay is therefore not an issue.

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20 In regard to the applicant's health status, this Court has considered grave illness as an exceptional circumstance which must be proved as being incapable of adequate medical treatment while in custody. See: *Magombe Joseph V Uganda* (Supra) and *Ojok John Bosco Olapakino v Uganda* No. 5 of 2023 (SC).

The applicant asserts that he is elderly and suffers from Chronic Allergic Bronchitis with asthmatic components, cervical/lumbar spondylitis and cervical spasm. He adds that these health conditions are so sensitive especially bronchial asthma and can be fatal while he is in prison. The applicant attached the Prison's medical report (Annexure AJ7) as evidence.

⁵ I have perused the medical report by the Prison's Medical Superintendent attesting to the said illness. There is no evidence in the medical report that proves the applicant's illness as being incapable of adequate medical treatment while in custody. There is no evidence to show that he has not responded to the available medical treatment. I am therefore of the firm view that the applicant's health can be managed by the Prison's Authority in the absence of any evidence to the contrary. 10

I therefore find that the applicant has not proved any exceptional circumstances to warrant my discretion. As a result, I decline to grant this application and it is accordingly dismissed.

Counsel is advised to get in touch with the Registrar of the Court to ensure that the appeal is fixed for hearing at the earliest opportunity.

3 \=* Dated at Kampala this day of \-)\- 2024.

MIKE J. CHIBITA JUSTICE OF THE SUPREME COURT

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