

UGANDA / JUDGMENT

Assingwire v Uganda (Criminal Miscellaneous Application 55 of 2023)

[2023] UGHCCRD 39 (31 July 2023)

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COURT

HC: Criminal Division (Uganda)

BEFORE

Nakachwa, J

CASE / FILE NUMBER

Criminal Miscellaneous Application 55 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO CRIMINAL MISCELLANEOUS APPLICATION NO. 055 OF 2023 (ARISING FROM MUKONO CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. AA. 60 OF 2021 & HCT-14-CR-SC-0157-2021)

ASSINGWIRE DANSON

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VERSUS**RESPONDENT UGANDA :::::::::::****BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA****RULING**

- 1. This was an application for bail pending trial brought by Notice of Motion under the provisions of Article 23 \$(6)\$ (a) and Article 28 \$(3)\$ (a) of the Constitution of the Republic of Uganda, 1995, sections 14 (1) and 15 of the Trial on Indictments Act, Cap. 23, Rule 2 of the Judicature (Criminal Procedure) (Applications) Rules.
- 2. The grounds of the application are briefly contained in the Notice of Motion and amplified by the Applicant's supporting affidavit deponed on 29th June, 2023. The grounds are as follows that:

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- (a) the Applicant was arrested on the 17th July, 2021 by security operatives and tortured as a result of which he is unable to sit or walk:
- (b) on 12th July, 2022, Justice Batema N. D. A while presiding over this case ordered the prisons to take the Applicant to Mulago Referral Hospital to determine whether he was tortured hence the annexed report;
- (c) according to the Medical Report requested by this court, the Medical Superintendent of Prison concluded that he suffers from peripheral neuropathy;
- (d) the Applicant was indicted as charged and committed to this court for trial on zoom, during the Covid-19 pandemic but has never been called for hearing up-to-date and he does not know when hearing of his case will start;
- (e) the continued suffering without trial for such a long time would better be cured by this court's discretion to grant the Applicant bail and he goes for further treatment, pending the final resolution of this case;
- (f) the Applicant's continued incarceration has deprived him of his constitutional right to a fair and speedy trial due to the period he has spent on remand without trial;
- (g) the Applicant has a right to apply for bail pending trial under the Constitution and other laws of Uganda;
- (h) the Applicant has spent one year and six months in detention at Luzira Murchison Bay Prison under such pain

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and suffering without trial and no reason has been advanced for such a delay hence this application; and

- (i) in view of the Applicant's current medical state, it is fair and just that he is released on bail pending trial because it is unjust to keep him in continued detention under such pain and suffering with inadequate medical support.
- 3. The Applicant stated that he has a fixed place of abode at Burindi L. C.1 Rukararwe, Katenga-Ruhinda Parish in Mitooma District, and that he shall at all times after his release on bail pending his trial reside at the said address and in the event of any change of address, he undertakes to immediately inform the court or the Respondent of the same. That the Applicant has substantial sureties who undertake to report to court when required to do so. That the Applicant undertakes to abide by all such terms and conditions of bail as shall be set by this honourable court. That the Applicant further undertakes not to interfere with any prosecution evidence and witnesses regarding the pending charges preferred against him.

- 4. The application was never opposed by the Respondent who was physically represented by Counsel Nanyonga Josephine during the hearing of the application. The Applicant was represented by counsel Mbatabye Asia from Justice Defenders who filed written submissions considered herein below.
- 5. The Applicant's counsel submitted that the Applicant has been in prison for a constant period of 2 years without trial and has no clear anticipation of any nearer disposal of the case. Counsel referred to the case of Tumwikurikize Grace v. Uganda, HCMA No. 228 of 2005. Counsel claimed that the Applicant has severe illness which is continuously worsened by prison conditions. That he suffers from peripheral neuropathy and cannot even walk and that his condition has not changed despite the treatment/physiotherapy being given at Murchison Bay hospital. That this fact is supported by a medical report by the Medical Superintendent, Dr. Kakoraki Alex.
- 6. Counsel prayed that this be treated as an exceptional circumstance and that this honourable court should take judicial notice of the Applicant's health. The Applicant's counsel emphasized that the Applicant's health condition has not improved, he cannot walk but only crawls with a lot of pain and difficulty for the last 2 years. That this is a deserving case for grant of bail on medical grounds of exceptional circumstances
- 7. Learned counsel further contended that the Constitution provides for an absolute right to a fair and speedy hearing. That it is incumbent upon this right that any suspected criminal is treated with such a presumption that he is innocent until the same is proved wrong. That the Applicant will suffer irreparable injustice should he be acquitted by this honourable court.

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- 8. Counsel further submitted that the Applicant has a high prospect of success due to the inconsistencies in the indictment. That the interests of justice are more inclined to the Applicant's grant of bail than it is to reject the application. Also that the Constitution is clear on wrongful prosecutions of the people and bail may be a remedy for it. That the Applicant will comply with the requirements of the bail bond as set out by this honourable court.
- 9. The Applicant's counsel alleged that the Applicant has never been involved in any crime before and that he has never jumped bail before. That the Respondent will suffer no prejudice whatsoever when the Applicant is granted bail. In addition, counsel averred that the Applicant has substantial sureties well aware of their responsibilities who will compel the Applicant to comply. And that the sureties are the Applicant's biological sister and Local Council Chairperson with full control on him.
- \$10.\$ However, during the hearing of the application, the Applicant's counsel presented to this court 2 sureties to stand for the Applicant who are his biological mother and brother, namely:

- (a) Mrs. Katushabe Beatrice, 45 years old, the Applicant's biological mother, a business woman, resident of Burindi Village, Rukararwe Parish, Katenga Sub-County, Ruhinda County, Mitooma District, with mobile telephone No. 0760 640520;
- (b) Mr. Kamusiime Mark, 31 years old, the Applicant's biological brother, a business man, resident of Burindi Village, Rukararwe Parish, Katenga Sub-County, Ruhinda County, Mitooma District, with mobile telephone No. 0704 000102/0753 489753;
- The Applicant's counsel prayed that this court be pleased to \$11.\$ exercise its discretion and allow the orders sought and grants bail on non-stringent terms and conditions as it deems fit.
- The Respondent's counsel conceded to the application but \$12\$ prayed for stringent conditions to both the Applicant and the sureties to compel the Applicant to appear before court to stand his trial. She further prayed that this court explains the role of the sureties to the sureties since they come from Mitooma District. The Respondent's counsel added that the rights of the victims should as well be taken into consideration.

Issue

Whether the Applicant is entitled to be granted bail.

\$13\$ Article 23 (6) (a) of the Constitution of the Republic of Uganda, 1995, provides for the right of an accused person to apply for bail, it stipulates that:

> "Where a person is arrested in respect of a criminal offence; a) That person is entitled to apply to court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable."

\$14.\$ The court's discretionary powers to grant bail are enshrined under section 14 (1) of the Trial on Indictments Act, Cap. 23, which provides as follows:

> "The High Court may at any stage in the proceedings release the accused person on bail, that is to say, on taking from him or her a recognizance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date and at such a time as is named in the bond."

15 While considering a bail application, the court is guided by the important principle of criminal law of presumption of innocence of an accused person until proved guilty by a competent court or until such accused pleads guilty to the charge voluntarily. This presumption is enshrined in Article 28 (3) (a) of the Constitution of the Republic of Uganda, 1995, which provides thus:

"Every person who is charged with a criminal offence shall— (a) be presumed to be innocent until proved guilty or until that person has pleaded guilty."

16. While applying the above fundamental principle of criminal jurisprudence, the court should endeavor to maintain fair balance between the societal interest vis-a-vis personal liberty. Both the right to liberty of an individual and the society's interest in maintenance of peace, law and order are equally important. This is because the

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society has a vital interest in grant or refusal to grant bail because every criminal offence is an offence against the state.

Section 15 (1) and (2) of the Trial on Indictment Act, provides for 17 circumstances under which bail may or may not be granted. It provides as follows:

"Section 15

- (1) Notwithstanding section 14, the court may refuse to grant bail to a person accused of an offence specified in subsection (2) if he or she does not prove to the satisfaction of court-
 - a) That exceptional circumstances exist justifying his or her release on bail and
 - b) That he or she will not abscond when released on bail."
- Under section 15 (3) of the Trial on Indictment Act, Cap 23 18. exceptional circumstances include: a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody; b) the certificate of no objection signed by the Director of Public Prosecutions; and c) the infancy or advanced age of the accused.
- 19. In determining whether the accused will abscond if granted bail, reference must be made to section 15 (4) of the Trial on Indictment Act, where court must establish:
 - a) Whether the accused has a fixed place of abode within the jurisdiction of the court or is ordinarily resident outside Uganda;
 - b) Whether the accused has sound sureties within the jurisdiction to undertake that the accused shall comply with the conditions of bail: c) Whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and d) Whether there are other charges pending against the accused.
- \$20.\$ On the consideration of the Applicant having a fixed place of abode at Burindi Village, Rukararwe Parish, Katenga Sub-County, Ruhinda County, Mitooma District, there was no objection from the Respondent. Hence, this court is satisfied that the Applicant has discharged the requirement of proving that he resides within the jurisdiction of Uganda. However, this consideration is not by itself sufficient ground for grant of bail. It has to be considered alongside the other grounds provided for in section 15 (4) of the Trial on Indictment Act cited above.

- In the case of *Livingstone Mukasa & Others v. Uganda* [1976] \$21.\$ HCB 117, Saied CJ (as he then was) held that:

"The fact that accused persons may be married or have permanent abodes within the jurisdiction of Uganda courts are not by themselves sufficient enough for granting bail. I take the view that where the considerations concerning the liberty of a person are involved, courts must equally bear in mind the interests of justice and neither ought to be sacrificed at the expense of the other."

22. Paragraph 12 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice No. 8 of 2022, provides thus:

> "An application for bail shall contain the particulars of the applicant, accompanied by –

- (a) a copy of the applicant's national identity card, or passport or aliens identification card or employment card or student identity card;
- (b) an introduction letter from the Local Council 1 chairperson of the area where the applicant resides;
- (c) where applicable, asylum seeker or refugee registration document issued by the Office of the Prime Minister; and
- (d) expounded grounds for the application."
- The word "shall" makes it a mandatory requirement for one of \$23\$ those documents to accompany the Applicant's application for bail together with other documents like introduction letter from the Local Council 1 Chairperson prior to the Applicant's release on bail. Such identification documents assist court in determining whether to grant or deny bail.
- In the instant case the Applicant has not complied with the above \$24\$ requirements. Similarly in *Uwacu Busheshi Jeanne Francoise De Chantal and Another v. Uganda Criminal Misc. Application No. 71 of 2022* this court held on 3rd March, 2023 that in the absence of the passports of the applicants, the court was not certain about the

nationality of the Applicants since there was no proof on court's record that they were Rwandese nationals as alleged. This court dismissed the bail application in *Uwacu's* case.

- Furthermore, the medical report relied on by the Applicant does 25. not state that the medical condition cannot be managed in the prison facility where he is detained. This is a pre-requisite under paragraph 14 (2) of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice No. 8 of 2022. Paragraph 14 (2) states that the exceptional circumstances referred to in subparagraph \$(1)\$ include -

- (a) grave illness certified by a medical officer of the prison or other institution or place where the applicant is detained as being incapable of adequate medical treatment while the applicant is in custody;
- (b) a certificate of no objection signed by the Director of Public Prosecutions; and
- (c) the infancy or advanced age of the applicant.
- In the instant application, the above requirements are lacking. 26. Therefore this application cannot be granted. However, I order that the Applicant be taken to Mulago Hospital for treatment of his condition. I further direct the Director of Public Prosecutions to ensure that the accused is tried in the next criminal session. Each party shall bear their own costs of this application.

I so rule and order accordingly. This ruling is delivered this 31. day of July 2023 by

In the presence of:

- (1) Counsel Josephine Nanyonga for the Respondent;
- (2) Ms. Pauline Nakavuma, the Court Clerk.

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Prepared on 13 October 2026 · Esheria