

UGANDA / JUDGMENT

Ayebazibwe v Uganda (HCT Misc App 8 of 2024) [2024] UGHC 976 (17 October 2024)

[2024] UGHC 976

COURT

High Court of Uganda

BEFORE

Allan Nshimye, J

CASE / FILE NUMBER

HCT Misc App 8 of 2024

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBARARA HCT MA 08 OF 2024 5 (ARISING FROM HCT CRIMINAL APPEAL 003 OF 2024) (ARISING FROM NTUNGAMO CRIMINAL CASE NO. NTU-00-CR-CO-560/2020)

AYEBAZIBWE JUSTINE ----- APPLICANT

VERSUS

UGANDA ----- RESPONDENT

15 BEFORE: Hon. Justice Nshimye Allan Paul M.

RULING ON AN APPLICATION FOR BAIL PENDING APPEAL

REPRESENTATION

20 The Applicant was represented by Adv. Bakwatanise Godfrey from M/s Ruyondo & Co Advocates, while the Respondent was represented by State Attorney Jacob Nahurira.

BACKGROUND

- 25 The Applicant was convicted by the Chief Magistrates Court of Ntungamo at Ntungamo on two counts of the offence of setting fire to growing crops C/S 329(a) and (c) of the Penal Code Act CAP 120. She was then sentenced on 24th January 2024 to 10 months on each count to run consecutively. The Applicant being dissatisfied with the conviction and sentence, appealed to the High Court
- 30 *vide* HCT Criminal Appeal No.003 of 2024.

APPLICATION

The Applicant then filed this application for bail pending appeal by way of a notice of motion basing on the law in Article 23(6)(a) of the Ugandan Constitution, section 132(4) TIA, Rule 19 of the Judicature (Criminal Procedure)

5 (Applications) Rules S. I 13-8, paragraph 14(1)(f) of the Constitution (Bail Guidelines for courts of Judicature) (Practice) directions 2022.

GROUNDINGS

The grounds of the application as presented in the Notice of Motion and 10 supporting affidavit by the Applicant are as follows;

- 1. That the Applicant having been convicted of the of the offence of setting fire to crops C/S 329(a) and (c) of the Penal Code Act CAP 120, the Applicant appealed to the High Court vide Criminal Appeal No.003 of 2024.
- 2. That the said appeal is not frivolous and has a reasonable possibility of
- 15 success.
- 3. That there is a possibility of substantial delay in determining the said appeal given the busy schedule of High Court.
- 4. That the Applicant has a fixed place of abode as she has been introduced by the area LC1 Chairperson.
- 20 5. That the Applicant has substantial sureties who are ready to guarantee her return for trial and the same have been introduced by their LC1 area Chairpersons.
- 6. That it is fair, reasonable and in the interest of justice that this application be granted in so far as in the event of an acquittal after the determination of
- 25 the appeal, the Applicant will never be compensated for the unbearable suffering will have gone through during detention.

SUBMISSIONS

The Applicant filed submissions on 8th October, 2024 wherein counsel argued 30 that conditions for grant of bail pending appeal were laid out in Arvind Patel Vs Uganda, Supreme Court Criminal Appeal No.001 Of 2003 and cited in Kabugo Stephen & Another Vs Uganda High Court Criminal Appeal No.69 Of 2013.

Counsel submitted that the applicant was preparing her field to sow millet, 35 when drought winds blew fire to an adjacent bush, it also burnt her family garden. That the applicant never intended to burn any one's garden. Counsel contended that the appeal has a reasonable possibility of success.

Counsel presented Mr. Tumwine Gordon the husband to the Applicant, and Mr. 5 Henry Sabiti, the LCII Chairperson of Nyongezi Parish as the sureties of the applicant and prayed that court find them substantial. He also prayed for the application to be allowed.

The Respondent did not file submissions in reply despite being ordered by 10 court to file the same by 10 October 2024.

DETERMINATION

It is trite that the High Court has discretion to entertain and determine an application for bail pending appeal as is stipulated in **SECTION 40 (2) OF THE 15 CRIMINAL PROCEDURE CODE ACT CAP 122**, which states that:

"The appellate court may, if it sees fit, admit an appellant to bail pending the determination of his or her appeal; but when a magistrate's court refuses to release a person on bail, that person
20 *may apply for bail to the appellate court."*

In **ARVIND PATEL VS UGANDA, SUPREME COURT CRIMINAL APPLICATION NO.**

1 OF 2003, Hon Justice Arthur Oder (JSC) laid down the conditions to be considered in an application for bail pending appeal as follows:

- 25 a) the character of the applicant;
- b) whether he/she is a first offender or not;
- c) whether the offence of which the applicant was convicted involved personal violence.
- d) the appeal is not frivolous and has a reasonable possibility of 30 success;
- e) the possibility of substantial delay in the determination of the appeal.
- f) whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the 35 appeal (if any).

The Learned Judge of the Supreme Court also opined that it is not necessary that all the conditions be present in every case, concluding that a combination of two or more in the criteria may be sufficient.

The conditions set out in the Arvind Patel case had been challenged by Hon. Lady Justice Dr. Esther Kisakye (JSC) In **MAGOMBE JOSEPH JOSHUA VS UGANDA, SUPREME COURT CRIMINAL APPLICATION 11 OF 2019**, when she held that there is no constitutional provision permitting the seeking and the 10 grant of bail to a person that has been convicted. She then concluded that the Arvind Patel case had been wrongly decided. This position of Her Lordship was addressed by a panel of three Justices of the Supreme Court handling a reference in the **MAGOMBE JOSEPH JOSHUA VS UGANDA, SUPREME COURT CRIMINAL REFERENCE 13 OF 2020** case where they agreed with the holding in 15 the **NAKIWUGE RACHEAL MULEKE VS. UGANDA, CRIMINAL REFERENCE NO. 12 OF 2020** case, where the Justices of the Supreme court also reacted to the holding of Hon Justice Dr. Esther Kisakye (JSC) In the **MAGOMBE JOSEPH JOSHUA VS UGANDA**,

SUPREME COURT CRIMINAL APPLICATION 11 OF 2019 holding that:

20 "We agree that the 1995 Constitution does not provide for the right to apply for bail pending appeal. It does not specifically rule it out either. We also agree that once an accused person is convicted, the presumption of innocence is extinguished. However, we respectfully disagree with the learned single* 25 *Justice's conclusion that the applicant has no right to apply for bail pending appeal".*

The panel of the Justices of the Supreme Court in deciding **NAKIWUGE RACHEAL MULEKE VS. UGANDA, CRIMINAL REFERENCE NO. 12 OF 2020** held 30 that the **ARVIND PATEL VS UGANDA** case was rightly decided, and they did uphold it as the proper position of the law on bail pending appeal.

I find that the Supreme Court case references¹ stated above, therefore confirmed that the conditions that an applicant is required to be prove in applications for bail pending appeal are those that were laid out in **ARVIND PATEL VS UGANDA, SUPREME COURT CRIMINAL APPLICATION NO. 1 OF 2003**.

GROUND 1,2,3,4 5 & 6

I will handle all the grounds raised in the application collectively.

In **KYEYUNE MITALA JULIUS VS UGANDA, SUPREME COURT CRIMINAL APPLICATION NO. 09 OF 2016**, it was held that it is impossible to gauge the 10 success of the appeal in the absence of the record proceedings. This means that the notice of appeal and memorandum of appeal, or even the judgement of the lower court ought to be made available to the appellant court handling the application for bail pending appeal.

15 I have perused the court record and I find that Her Worship Nassuna Sharon delivered her Judgment on 23rd January 2024 convicting the applicant of the offence of settling fire to growing crops contrary to Section 329 (C) Of The Penal Code Act Cap 120. The applicant filed a Notice of Appeal and Memorandum of Appeal in the High Court Registry on 31st January 2024 vide 20 Criminal Appeal 3 of 2024.

It is the applicant's averment in paragraph 4 and 7 of the affidavit in support that there is a possibility of substantial delay in determining the appeal in the High Court and if successful she will never be compensated for the unbearable 25 suffering of detention and serving the sentence.

I am of the opinion that convicts that have been sentenced to two years or less ought to be considered more favorably in applications for bail pending appeal, than those who have been sentenced to many years, this is because 30 those that are sentenced to two years or less stand a real risk of serving their sentence before their appeal is heard.

¹ Nakiwuge Racheal Muleke Vs. Uganda, Criminal Reference No. 12 of 2020 and Magombe Joseph Joshua Vs Uganda Supreme Court Criminal Reference 13 Of 2020.

Considering that the convict has a legal right of appeal and also considering that **she was sentenced on 24th January 2024 to serve 10 months on each count, with the sentence on each count to run consecutively. It means that the convict would essentially have to serve 20 months**, of which she has 5 already served close to 10 months. I find that it would be a great injustice if the applicant's appeal is successful, when she has already served the sentence.

In **MAGOMBE VS UGANDA SUPREME COURT CRIMINAL REFERENCE 13 OF 2020** The supreme court also held that:

"*The consideration for release of an Applicant on bail pending appeal hinges on whether there are exceptional and unusual circumstances warranting such release. This is because the Applicant is no longer wholly shielded by the presumption of innocence espoused in Article 28 (3) of the* 15 *Constitution of Uganda. The conditions for bail pending appeal are thus higher than those of bail pending trial."*

This court has to interrogate whether the applicant has any exceptional circumstances as a required condition for bail pending appeal as was stated in **20 MAGOMBE VS UGANDA, SUPREME COURT CRIMINAL REFERENCE 13 OF 2020**.

SECTION 16 (3) OF THE TRIAL ON INDICTMENTS ACT CAP 25 has guided on what amounts to exceptional circumstances in the following way.

"*In this section, "exceptional circumstances" means any of the* 25 *following—*

> *(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) a certificate of no objection signed by the Director of Public 30 *Prosecutions; or*

(c) the infancy or advanced age of the accused"

The provisions in Section 16 of The Trial On Indictments Act CAP 25 (formerly section 15 of the TIA) must be considered while bearing in mind the 35 interpretation of the Supreme Court in **FOUNDATION FOR HUMAN RIGHTS**

INITIATIVES VS ATTORNEY GENERAL, SUPREME COURT CONSTITUTIONAL APPEAL 3 OF 2009 where it stated that;

"*I also note that section 15 of the TIA (Currently section 16 TIA CAP 25)* 5 *also predates the 1995 Constitution. It is however saved as an existing law under Article 274 of the Constitution which enjoins Courts to construe existing laws, to bring it in conformity with the Constitution. Such construction requires that if Court finds it necessary to consider exceptional circumstances in the course of hearing a bail application* 10 *involving offences listed under section 15(2) of the TIA (Currently section 16 (2) TIA CAP 25), Court should not restrict itself to only considering the exceptional circumstances provided for under section 15 (3) of the TIA (Currently section 16 (3) TIA CAP 25). Other 'exceptional circumstances' might exist."* (emphasis mine)

The evidence in paragraph 5 of the affidavit in support is to the effect that that the applicant attached his national identity card as annexure C. The National Identity card shows that the convict was born on 03 May 1966, which makes her 58 years of age. She is short of the categorization in the law as a person of 20 advanced age but she is still an old lady.

I have also considered the evidence on record that the applicant is a wife, a family woman with children and has a fixed place of abode residing in Bukiro Cell, Nyongo Ward, Nyamukana Town Council in Ntungamo District as was 25 confirmed by the letter of Mr Edson Mwebaze the LC1 chairperson. (see annexure B to the affidavit in support of the application).

In light of the guidance in **ARVIND PATEL VS UGANDA SUPREME COURT CRIMINAL APPLICATION NO. 1 OF 2003**, that a combination of any two or 30 more conditions for bail pending appeal may be sufficient, I have in this application now before me considered the fact that:

- 1) The convict is 58 years of age.
- 2) The convict has a legal right to appeal against the conviction and sentence which she has exercised by filing High Court Criminal Appeal 35 No 003 Of 2024.
- 3) She was sentenced to serve 10 months on each count, with the sentence on each count to run consecutively. It means that the convict would essentially have to serve 20 months, of which she has already served close to 10 months, so there is thus a real risk of serving the sentence before her appeal is heard.
- 4) I also find the sureties presented substantial, these are Mr. Tumwine Gordon the husband to the Applicant, and Mr. Henry Sabiti, the LCII Chairperson of Nyongozi Parish.
- I find this a befitting case for court to exercise its discretion to grant bail 10 pending appeal. I take note that the state did not challenge the application. Generally, convicts granted bail pending appeal are given more stringent terms because a court of law has already found them guilty of an offence.
- I grant bail pending appeal on the following terms 15
- 1) The applicant will pay a cash bail of UGX 1,000,000/= (one Million Shillings).
- 2) The sureties are each bonded in the sum of Uganda shillings 10,000,000/= (Ten million shillings) Non cash.
- 3) This bail will immediately be canceled if the applicant is charged with any other offence.
- 4) The applicant will report to the Registrar High Court Mbarara on every first Monday of the month, starting with 4th November 2024 until advised otherwise.
- 5) The Registrar of the High Court Mbarara will put the applicant's appeal on the next session of handling appeals so that it is heard at the earliest opportunity.

wards

NSHIMYE ALLAN PAUL M. JUDGE 17.10.2024

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