

UGANDA / JUDGMENT

Bogere and Another v Uganda (Criminal Miscellaneous Application 53 of 2022) [2023] UGHCCRD 119 (4 August 2023)

[2023] UGHCCRD 119

COURT

HC: Criminal Division (Uganda)

BEFORE

Bukirwa, J

CASE / FILE NUMBER

Criminal Miscellaneous Application 53 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT JINJA CRIMINAL MISC. APPLICATION NO. 053 OF 2022 (ARISING FROM CRIMINAL CASE NO. AA-45 OF 2019)

1. BOGERE JOSEPH $\$ \backslash \mathrm{mathsf{S}} \$$ 2. ODONGO BRIAN ::::::::::::::::::::::::::::::::::

VERSUS

UGANDA :::::::::::::::::::::::::::::::::: BEFORE: HON. LADY JUSTICE FARIDAH
SHAMILAH BUKIRWA NTAMBI

RULING

The applicants presented this application for their release on bail pending appeal under Section 40(2) of the Criminal Procedure Code Act Cap 116 and Section 205 of the Magistrate Courts Act Cap 16. The application which is supported by the applicants' affidavits raised grounds which can be summarized as follows: -

- 1) The applicants were charged with two counts; malicious damage to property and arson for which they were convicted and sentenced to imprisonment for four \$(4)\$ years.
- 2) The applicants appealed against the decision of Court and their appeal has not
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- been fixed for hearing. 3) The applicants have been in prison for seven months and the hearing of the appeal may take a long time.
- 4) The appeal has merit and is likely to succeed.

- 5) The applicants were granted bail during trial and complied with the bail terms,
- and undertake to comply with bail terms in this Court.

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- 6) The applicants are sole bread winners and have young families whose life has been negatively affected by their imprisonment.
- 7) The applicants have fixed places of abode at Namayingo District within the jurisdiction of this Court.
- 8) The applicants have substantial sureties ready to be presented before Court for examination and approval.
- 9) It is in the interest of justice that this application is granted.

In his affidavit in support of the application, Bogere Joseph added that he had never been convicted of any offence except in this matter and that he was found guilty simply because he was selling petrol which had been taken by the mob without his permission. Both applicants added that they were ready and willing to abide by all the terms and conditions set by this Honorable Court for the grant of bail.

Applicants' Submissions

Counsel John Bwire represented the applicants at the hearing. He abandoned the bail application in respect of the 2nd applicant on grounds that he failed to avail sureties who will guarantee his appearance in Court. (Court confirmed from Odongo Brian that he has no sureties). Thereafter, Counsel presented two sureties for the 1st applicant as follows: -

- 1) EMERIA PETER, aged 37, a brother-in-law and village-mate of the 1st applicant, a farmer and a resident of Mutumba 'B' Cell, Mutumba North Ward, Mutumba Town Council in Namayingo District.
- 2) BUYINZA KALOLI, aged 35, an elder and biological brother to the applicant, a boda boda rider at Mutumba Central and a resident of Natololo Cell, Mutumba North Ward, Mutumba Town Council in Namayingo District.

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Counsel stated that he had explained the responsibilities and obligations to the sureties and they had understood and accepted to undertake the same. Copies of the national identity cards of both sureties as well as introduction letters from their area Local Council I Chairpersons were attached to their affidavits in rejoinder dated 22nd January 2023. While reiterating the contents of the application and Bogere's affidavit in support and in rejoinder, Counsel argued that the applicant had presented a letter from the LC I Chairperson of the applicant's place of residence confirming that the applicant is a resident at Mutumba B Cell, Mutumba North Ward,

Mutumba Town Council in Namayingo District. He further cited Article 28(3) of the Constitution which provides that accused persons are presumed innocent until proved guilty. He contended that the presumption of innocence extends to convicts who apply for bail pending appeal as confirmed in the case of *Mitala Julius vs Uganda* Criminal Application No. 11 of 2017. He argued that before an application of this nature is granted, the applicant must demonstrate that he is of good character, his appeal has merit and there's a likelihood of delay in hearing the appeal. That 15 these principles were confirmed in the case of *Lugomba Robert vs Uganda* Criminal Application No. 25 of 2018. He concluded that in the absence of evidence from the State to the contrary, the applicant has no other criminal record save for the one appealed against.

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In relation to previous conduct, Counsel argued that it is on record that the applicant 20 complied with the bail conditions in the Chief Magistrates Court at Iganga

and undertakes to do the same in this Court. Regarding the delay in hearing the appeal, he noted that the applicant was convicted and sentenced to 4 years in prison on 14th December 2021. He filed a notice and memorandum of appeal on 27th December 2021. To date the appeal has not been fixed for hearing and as such on 9th August 2022, the applicant filed this bail application. Counsel added that there is a danger that the applicant may serve full sentence before his appeal is heard and

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determined, notwithstanding the fact that the appeal is likely to succeed on the three grounds.

In conclusion, Counsel invited Court to refer to the case of *Kyeyune Julius vs Uganda* Supreme Court Miscellaneous Application No. 4 of 2017 where Court held that the criteria for granting bail pending appeal is that one is presumed innocent even for a person who has been convicted pending appeal. Therefore, he prayed that the two sureties presented by the applicant be found substantial and the applicant be released on bail on reasonable terms.

Respondent's Submissions

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The State represented by Ms. Loy Karungi argued that Article 23(6)(a) of the 10 Constitution on the presumption of innocence is not applicable to the instant application because in this case the applicant is not innocent. He was convicted by a Court of competent jurisdiction which according to her, means that he is not an innocent party. That a mere lodging of an appeal does not render a convict innocent until the appellate Court determines the appeal and overturns the conviction. 15

On the delay in hearing the appeal, Ms. Karungi referred to the record and stated that the application for bail had been earlier set for hearing on 8th February 2023 but the same could not be heard since the applicants could not be traced at the time. That this delay was occasioned by circumstances beyond the control of Court. She argued that just like this application was fixed despite the delay, even the appeal can be fixed and heard accordingly since the Court has two judges who hear criminal and other cases on a daily basis.

Counsel for the Respondent further argued that this case is unique since the applicant has served a bigger part of his sentence of 1 year 5 months and he is remaining with 1 year and 3 months. Therefore, she prayed that the matter be handled with utmost

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urgency and the appeal be determined once and for all for justice to be achieved for all parties. On the likelihood of success of the appeal, she contended that this is speculative unless the grounds are heard and responded to. In conclusion, she submitted that the applicant be denied bail and the application be fixed for hearing.

1st Applicant's Submissions in Rejoinder S

Counsel for the applicant contended that the State had conceded that delay has already been occasioned regarding the fixing of the appeal and that the prayer by the state to fix the appeal does not cure the anomaly. That fixing of the appeal does not do away with the discretion of Court to grant bail. He further argued that the delay on 8th February 2023 does not impact on the delay of the appeal as the circumstances were different.

Decision of Court

Bail pending appeal is based on the presumption of innocence as enshrined in Article 28(3)(a) of the Constitution of the Republic of Uganda, 1995 as amended. As rightly argued by Counsel for the 1st applicant, in Kyeyune Mitala Julius vs Uganda 15 Supreme Court Miscellaneous Application No. 4 of 2017, Justice Opio Aweri held that the presumption of innocence does not stop at the trial level but continues as long as someone decides to exercise his or her right of appeal and that the presumption of innocence as enshrined in the Constitution is one of the rail guards to the protection of personal liberty and the right to a fair trial. Thus a convict would not lose that right until his or her conviction is upheld by the highest Court possible to hear their appeal. See, Lwamafa Jimmy & Others Vs. Uganda Court of Appeal Miscellaneous Application No. 011/2017.

According to the Supreme Court in Arvind Patel Vs Uganda Criminal Application. No. 1/2003, the powers of Court when granting this category of bail 25

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are discretionary and should be exercised judiciously. That said and in agreement with Counsel for the state, I am persuaded by the ruling of Justice Eva K. Luswata in *Lugomba Robert & Others vs Uganda Criminal Misc. Application No. 025 of 2018* that in light of a standing conviction, a convict who has filed an appeal does not lie exactly in the same stead as an accused person who is on remand pending the determination of his trial. I will take all those factors into consideration as I exercise my discretion.

The Supreme Court in *Arvind Patel (supra)* set forth conditions that a Court may consider to grant bail pending appeal as follows: -

- a) The character of the applicant. 10
- b) Whether or not they are a first offender.
- c) Whether the offence for which they were convicted involved personal violence.
- d) Whether the appeal is not frivolous and has a reasonable possibility of success.
- e) The possibility of substantial delay in the determination of the appeal.
- f) Whether the applicant has complied with bail conditions granted before the applicant's conviction and during the pendency of the appeal if any.

I must emphasize that these factors are neither exhaustive nor mandatory but rather merely guidelines of which a combination of two or more is sufficient. See *Igamu*

Joanita v Uganda, Criminal Appeal No. 107/2013. It was further held in the said 20 case that the main purpose of granting bail especially bail pending appeal is that while the applicant is set free pending trial or appeal, court must be satisfied that the applicant shall in compliance with the bail conditions be available to attend trial or appeal. Court must therefore be satisfied that the applicant will not abscond.

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First, I will consider the suitability of the two sureties presented before this Honorable Court namely Mr. Emeria Peter, a brother-in-law and Mr. Buyinza Kaloli a biological brother to the applicant, both of whom reside in the same Ward as him. Copies of their National IDs and original introduction letters from the Chairperson LC I were presented and neither the documents nor the sureties were contested by the Respondent. This means that their identities and residential addresses are not in contention. They are closely related to the 1st applicant and have reasonable influence on him by virtue of that relationship. I therefore, find them suitable and substantial enough to compel the applicant to adhere to his bail conditions.

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In regard to the character and antecedents of the 1st applicant, it was not contested 10 that he is a first offender and serving a light sentence. Regarding a substantial delay in the determination of the appeal, it is not contested that the 1st applicant has served more than a half of his sentence while his appeal has been pending fixing and hearing. On whether the 1st applicant complied with bail conditions in the lower Court, under paragraph 2 of his affidavit in support of the application, the 1st applicant states that he was granted bail in the Chief Magistrates Court of Iganga and never absconded. No evidence was adduced to the contrary. In respect of the argument that the appeal is not frivolous, I am unable at this point in the proceedings to gauge the success of the appeal as that would entail descending into its merits which, for purposes of this application, is undesirable. However, a quick perusal of 20 the memorandum of appeal indicates that it raises five grounds on matters of fact (strength of the prosecution evidence) and law including the procedure. This Court is at this point enjoined to give that pleading due regard. Equally important is the argument by the 1st applicant's Counsel that there is a danger that the 1st applicant may serve his sentence before the appeal is heard and disposed of. That argument is 25 not foolhardy because the judgment of the Learned Chief Magistrate was delivered on 14th December 2021 yet there is no evidence that the appeal has a hearing date,

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and this cannot be blamed entirely on the 1st applicant or his advocate. That notwithstanding, it is of great importance that the Court is satisfied that the applicant who is already a convict, will not take the chance to abscond.

Having carefully considered all factors in this application, I am persuaded that it is more likely than not, that the applicant will adhere to the bail terms on the appeal as he did before the trial court. I therefore allow the application and grant the applicant bail pending appeal on the following conditions: -

- a) Cash bail of Uganda Shillings 500,000 only.
- b) Non cash bail against each one of his sureties to the tune of Uganda Shillings \$2,000,000\$ only.

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- c) The applicants shall report to the Registrar of the Court to answer the bail terms, on every first Monday of each month starting on 4th September 2023.

Any contravention of the above terms will result into automatic cancellation of the bail granted.

I so order. 15

FARIDAH SHAMILAH BUKIRWA NTAMBI

JUDGE

04/08/2023 20

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