

UGANDA / JUDGMENT

Ddegeya v Uganda (Miscellaneous Application 16 of 2021) [2022]

UGSC 10 (8 February 2022)

[2022] UGSC 10

COURT

Supreme Court of Uganda

BEFORE

Tibatemwa-Ekirikubinza, JSC

CASE / FILE NUMBER

Miscellaneous Application 16 of 2021

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IN THE REPUBLIC OF UGANDA AT THE SUPREME COURT OF UGANDA AT KAMPALA
MISC. APPLICATION NO. 16 OF 2021

BETWEEN

\$\mathsf{S}\$

DDEGEYA HASSAN ::::::::::::::::::::

AND

UGANDA:::::::::::::::::: 15

[An application for bail pending appeal arising from Criminal Appeal No.36 of 2021, which arose from Criminal Appeal No.0011 of 2015 of the decision of the *Court of Appeal at Kampala (before Egonda-Ntende, Musota and Kasule, JJA)* dated 1st June, 2021 which in turn arose from Criminal case No.13 of 2014 of the *High Court at the Anti-Corruption Division.*]

BEFORE: HON. JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA, JSC.

Summary: Bail pending appeal- The conditions to be satisfied in an application for grant of bail pending appeal are different from those required for bail pending trial.

> **Bail pending appeal-** The threshold for grant of bail pending appeal is proof of exceptional and unusual circumstances.

Representation: The applicant was represented by Mr. Ocheng Evans and Mr. Lubaale Jimmy of M/S Luhom & Co. Advocates.

> The respondent was represented by Ms. Inzikuru Gloria- Chief State Attorney in the Office of the Directorate of Public Prosecutions (ODPP).

The applicant attended court via video-link from Murchison Bay Prison.

RULING OF COURT

This application was brought by a Notice of Motion under Article 126 (2) (e) of the Constitution, Section 40 (2) of the Criminal Procedure Code Act and Rule 41 (1) and (2) of the Supreme Court Rules wherein counsel prayed for orders that:

1. The applicant be granted bail pending the hearing and determination of his appeal vide Criminal Appeal No.36 of 2021.

The grounds upon which the motion is premised are that:

- 1. The applicant's appeal is highly meritorious with a high 15 likelihood of success.
- 2. The applicant has a fixed place of abode at Nateete Church Zone, Rubaga Division in Kampala district.
- 3. The applicant has substantial sureties who know their duties and are the same individuals who stood as sureties in the lower courts.
- 4. Apart from the offences he is currently convicted of, the applicant has no other criminal record.
- 5. It is the applicant's constitutional right to apply for bail pending the hearing and determination of his appeal.
- 6. It is just and equitable that this application be granted.
- 7. That this honourable Court has the discretion to grant the said application.

The respondent filed an affidavit in objection to the grant of bail sought by applicant which was sworn by Harriet Angom- a Chief 30 State Attorney in the Office of the Director of Public Prosecutions. She deponed as follows:

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- ⁵ 1. That the applicant applied for bail pending the determination of his appeal before this honourable Court but his application was denied.
- 2. That the circumstances under which the Applicant complied with the bail terms in the High Court and Court of Appeal have since changed following his conviction by the two Courts which also upheld his sentence of 8 years, as well as the Compensation Order in the sum of UGX 102,146,453.

- 3. That the applicant's averment to the effect that his appeal has a high likelihood of succeeding is speculative since no evidence has been adduced to prove the said averment. Furthermore, that a study of the Judgment of the Court of Appeal as well as the applicant's record of appeal reveals that the intended appeal has no merit.
- 4. That the averment of having children and a wife who are solely dependent on the Applicant is not gr sufficient ground for grant of bail pending appeal.
- 5. That the offences the Applicant was convicted of are serious financial crimes committed and resulted into financial loss of UGX. 102,146,453 to Safe Way Pkrarmacy (2003) Ltd.
- 6. That it is in the interest of justice the Applicant's application be denied and instead, the Appeai be expeditiously heard, determined and disposed of on its merits.

Background:

The applicant was employed as a Manager by Safeway Pharmacy (2003) Ltd at one of its branches.

In March 2013, the Company management instructed the applicant to carry out stock taking of the company. The applicant did so and 40

⁵ verbally reported that the stock rvas Ugx 70 million. He undertook to produce a written stock report later but did not do so.

On 30th May, 2013, a fresh stock taking was carried out under the supervision of Pw3-the Company managing Director. PW3 found that most of the boxes on display in the pharmacy were empty and some drugs were not for the Company. He also discovered that the Company's stock was of Ugx. 4 million only and not 70 million as previously reported by the applicant.

Further still, it was discovered that Astra Pharmacy, another pharmacy demanded payment of Ugx. 69 million from Safe Way Pharmacy for pharmaceutical products supplied on credit. The applicant denied this claim and undertook to go with the management to Astra pharmacy on 13th July 2013 to disprove the claim. However, on the said date, the applicant disappeared with the

keys to the pharmacy where he worked. He did not communicate to anyone until 4:30pm when he sent a text message to PW3 claiming that he had left Uganda for Kuwait. He also denied having used some of the money claimed by Astra Pharmacy for personal purposes. 20

The company management then resorted to breaking the padlocks to the pharmacy and found that the Company's vital business records

had been taken by the applicant to frustrate the investigations. The matter was reported to police.

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Thereafter, an audit of the Company business was carried out which revealed that UGX. 69,996,453/= 'nad been embezzled by tLre applicant. It was also discovered that the applicant had opened up a personal account with Imperial Bank, Kampala, on which he banked some of the company's money.

On 11th March 2014, tlrc applicant was arrested and charged with 2 Counts of embezzlement, 3 Counts ol forgery and 3 Counts of uttering false documents. He was found guilty and sentenced to 8

years' imprisonment on Counts !- & 2 and to 2 years' imprisonment on each of the 3 Counts . The sentences were to run concurrently. 35

\$\cdot\$ 5 The applicant was also ordered to refund 102, \$146,453/\$ = to Safeway Pharmacy (2003) Ltd.

Dissatisfied with the conviction and sentences, the applicant lodged an appeal in the Court of Appeal. The Court of Appeal upheld both the convictions and sentences.

The applicant was still dissatisfied with the decision. He appealed to 10 this Court vide Criminal Appeal No.36 of 2021 from which the application for the grant of bail pending appeal arises.

Applicants' submissions

Counsel submitted that the principles of bail pending appeal are those laid out in the case of **Arvind Patel vs. Uganda**¹ which are: 15

- \$(i)\$ Character of the applicant.
- \$(ii)\$ Whether or not the applicant is a first offender.
- Whether the offence which the applicant was convicted of (iii) involved personal violence;
- The intended appeal is not frivolous and has reasonable \$(iv)\$ 20 possibility of success.
- The possibility of substantial delay in the determination of \$(v)\$ the appeal.
- Whether the applicant has complied with bail conditions \$(vi)\$ granted after the conviction and during the pendency of the appeal (if any)

Regarding the character of the applicant, counsel submitted that he was a first time offender and has no other criminal record. Furthermore, that the applicant is a family man, married to Shamilah Nabaale and have three children whose livelihood is solely dependent

30 on the applicant since his spouse is a house wife without gainful employment.

¹ SCCA No.1 of 2003.

- ⁵ Counsel further submitted that the applicant qualifies to be granted bail because he complied with the previous bail conditions set in the High Court and the Court of Appeal. That this goes to show that the applicant will attend court whenever he is required to do so if he is granted bail.
 - As to whether the offence the applicant was convicted of involved personal violence, counsel submitted that it did not and he will therefore not be a threat to the society when released.
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In regard to possibility of substantial delay in determination of the pending appeal, counsel argued that since the practice of this Court

is to handle cases on a first in-first out basis, and given the busy schedule of the Court, there is likelihood of delay in handling the applicant's appeal. That in the event the appeal is successful, the applicant if not granted bail will suffer a miscarriage of justice. 15

Counsel also argued that the applicant filed a Memorandum of Appeal annexed and marked "G" as well as the record of proceedings. That the grounds indicated in the Memorandum of Appeal point to possibility of success of the appeal in the following ways: 20

Ground 1 of the Memorandum of Appeal states that:

- The learned Justices of Appeal erred in law when they sustained a conviction against the appellant of the offences of embezzlement C/S 19 (b) of the Anti-Corruption Act 2009, 3 counts of the offence of forgery CIS 342 and 347 of the Penal Code Act and 3 counts of uttering false documents C/S 351 of the Penal Code Act without proof of the ingredients of the offences beyond reasonable doubt. 25
- That on Counts, 1 and 2 the offence of embezzlement, the ingredient of theft of the company's books of accounts was not proved beyond reasonable doubt. Counsel argued that the trial judge relied on the evidence of PW3, PW6 and PW7 to conclude that the applicant is the one who stole the books simply because he did not show up on the 30
- day investigations were carried out. 35
- ¶ 5 Counsel further argued that if the trial Judge disbelieved the evidence of PW2 who stated that the company had no salary books, she should not have believed her evidence to the effect that she deposited money on the applicant's account.
- Furthermore, that the document-PE11 which was adduced by the Prosecution as proof of deposit of the company's money on the 10 applicant's account only indicated the depositor's name as Asha or Aisha. It neither indicated the depositor's name as that of PW2 nor the deposit of the alleged amount of Ugx. \$18,000,000/\$ =. Counsel thus argued that there is doubt as to whether the said money was ever deposited on the applicant's account. 15

- Counsel also argued that it was incumbent on the management after breaking the padlocks to place on record the items which were found in the pharmacy rather than merely alleging that some vital items were not found in the pharmacy.
- Counsel further submitted that PW6's evidence was to the effect that, 20 on the last day the applicant appeared at the pharmacy, he left the pharmacy with him and the applicant did not take any books of accounts because they could not fit in his pocket.
- Similarly, on the Counts of forgery, counsel maintained his argument that the prosecution failed to prove the said counts beyond 25 reasonable doubt. He premised his argument on the fact that the specimen signature of PW 16- the Cashier of Astra Pharmacy was obtained and sent for verification to a handwriting expert but not that of the applicant. That the failure to obtain the applicant's signature strengthened PW4's testimony who stated during cross examination, 30 that the alleged forged documents did not bear the applicant's signatures. Counsel therefore argued that it was erroneous for the trial judge and the learned Justices of Appeal to come to the conclusion that the applicant forged documents.

⁵ On the premise of the above pieces of evidence, counsel invited this Court to find that the applicant's appeal is arguable and hence has a high likelihood of success.

In support of the foregoing arguments, counsel relied on the case of Henry Bamutura vs. Uganda², wherein Court held that: "the likelihood of success of an appeal is perhaps the only ground which even then put forward singly can present as an exceptional circumstance." ¹⁰

Counsel also relied on the case of Arvind Partel (supra) wherein it was held that, the only means by which court can assess the possibility of success of the appeal is by perusing the relevant record of proceedings of the court from which the appeal emanated and the Memorandum of Appeal in question. ¹⁵

Counsel submitted that the applicant has sureties who know their duties and will ensure that the applicant maintains his previous record of answering bail conditions set by Court. Counsel introduced to the court persons who offered to stand as sureties to the applicant as follows: Nabaale Shamila, wife of the applicant, Kabaalu Katibu, the biological father of the applicant, Mrs. Mayiga Lukia Namboze, mother in-law of the applicant, Mr. Lukalamuko Badru, a biological brother of the applicant. Each of the potential sureties produced identification documents. ^{20 25}

Counsel prayed that the individuals presented be considered substantial sureties since they are aware of their duties and are close relatives of the applicants who will secure his attendance in Court

whenever required to do so. Counsel also emphasized that the said sureties were the same persons who stood surety for the applicant in both the High Court and the Court of Appeal. ³⁰

² Supreme Court Misc. Application No. 19 of 2019

5 Respondent's reply

The respondent's counsel opposed the application and submitted that the applicant has not adduced enough evidence to prove the circumstances that were articulated for consideration of bail pending appeal.

- 10 Counsel submitted that since the applicant's conviction was confirmed by the Court of Appeal, he cannot be said to be a person of good character. Furthermore, that having a family which is solely dependent on him is not a sufficient ground to secure bail pending appeal. Counsel relied on the case of John Muhanguzi Kashaka vs
- 15 20 Uganda³, where Court held that the good character alone can never be enough because there is nothing exceptional or unusual in having a good character. Counsel also relied on the case of Bamutura Henry vs Uganda (supra), where Court held that when hearing an application for bail pending appeal, the presumption of innocence will have already been rebutted by the fact that the two lower courts convicted the applicant and as such, to grant bail to such an applicant /convict, there must exist some unusual and exceptional circumstances.

⁵ Furthermore, that in the case of Raghbir Singh Lamba vs. R4, the East African Court of Appeal held that: neither the complexity nor the good character of the applicant, nor the alleged hardship to his dependants justifies the grant of bail.

Counsel further submitted that whether or not the applicant has complied with previous bail conditions does warrant his release since at this stage two courts have confirmed the conviction. That this being a final appeal, the risk and temptation by the applicant to abscond is higher than it was in the lower courts.

As to whether the offence the applicant was convicted of involved personal violence or not, counsel argued that this Court has on

³⁵ Supreme Court Misc. Application No 18 of ²⁰¹⁹

⁴[1958] EA 337.

⁵ several occasions held that the requirement of personal violence does not apply to financial crimes. The cases relied on by counsel to support the foregoing proposition were:

John Muhanguzi Kashaka vs Uganda (supra) where this Court held that "the requirement for personal violence in granting bail pending appeal should not be applied to corruption and corruption related cases. "

Segufia Danny & Anor vs Ugandas where this Court held that:

"... even if the offences committed did not involve personal violence, their sentence had more serious economic consequences compared to personal violence."

Counsel invited this Court to be persuaded by the above decisions and make a finding that the requirement of personal violence no longer applies to corruption and corruption related offences.

Regarding the applicant's averment that there is possibility of substantial delay in the determination of his appeal, counsel argued that there was no evidence adduced by the applicant to support the averment. That on the contrary, the Court is fully constituted and has always expeditiously handled matters before them. By way of example, counsel submitted on 13th September 2027, the applicant filed a similar application in this Court and the Ruling was delivered on 5th November 2021. Counsel further submitted that the intended appeal from which the present application emanates has already been fixed for hearing on 27th January 2022 for hearing. That therefore the applicant's submission and averment on substantial delay of his intended appeal is speculative. 20

In respect of the possibility of success of the applicant's intended appeal, the respondent counsel argued that a juxtaposition of the grounds contained in the Memorandum of Appeal attached to the present application and those contained in the earlier application

^sSupreme Court Misc. App No. 5 of 2019

⁵ vide Ddegeya Hassan vs. Uganda SC Misc. Application No. 9 of 202 ¹ before Hon. Justice Muhanguzi, JSC shows that the applicant is on a fishing expedition as he is uncertain of the grounds on which his appeal is premised. That a perusal of the Record of Appeal attached, shows that the Court of Appeal properly re-evaluated the evidence before upholding the conviction and sentence. Therefore, the applicant's argument cannot stand. 10

In conclusion, counsel prayed that this Court dismisses the application since the factors favouring the grant of bail pending appeal have not been proved by the applicant.

- Without prejudice to the foregoing submissions, counsel submitted that if this Court grants the applicant bail pending the determination of his appeal, stringent terms should be imposed. Counsel proposed that the applicant be ordered to deposit a Certificate of Title, a hefty monetary deposit equivalent to the amount on the charge sheet be 15
- deposited in this Court. The applicant should also be ordered to deposit his passport with Court and to report to the Registrar of this Court every after 2 weeks until the determination of his appeal. 20

Rejoinder

- In rejoinder, counsel for the applicant reiterated his earlier submissions. He however argued that the differing grounds in the Memorandum of appeal as argued by the respondent counsel does not show that the applicant is on a fishing expedition. He explained that the application for bail pending appeal before Justice 25

- Muhanguzi was handled by a different Law Firm to wit M/S Mayanja, Nakibuule & Co. Advocates. That following receipt of instructions to take over the matter, a new Memorandum of Appeal was drafted and liled in this Court. 30

Consideration of the application 5

I have considered the pleadings and submissions by both counsel together with the relevant laws.

Rule 6(2) (a) of the Rules of this Court provides for the grant of bail pending appeal to an applicant as follows:

“(2) ... the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-

(a) in any criminal proceedings where a notice of appeal has been given in accordance with rules 56 and 57 of these rules. order that the appellant be released on bail.....pending the determination of the appeal."

I note that the applicants have complied with the above rule and filed a Memorandum of Appeal in this Court as seen from annexure "G" of the application.

I must however from the onset emphasize that bail whether pending trial or pending appeal is granted at the discretion of court which discretion must be exercised judiciously with each case being determined on its own merit.

I have previously held in **John Muhanguzi Kashaka vs. Uganda** (Supra) and in **Henry Bamutura vs. Uganda** (Supra) that:

After conviction, the legal status of an offender changes and the consideration for release hinges on whether there are exceptional and unusual circumstances warranting release pending appeal. This is because the applicant is no longer wholly shielded by the presumption of innocence espoused in Article 28 (3) of the Constitution.

⁵ The Henry Bamutura decision was cited with approval by this Court in **Nakiwuge Racheal Muleke vs. Uganda**⁶ - a reference before a bench of three Justices.

Similarly, in **Chimambhai vs. R** (No.2)⁷, Harris J held that:

it is manifest that the case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial - namely that of presumption of innocence.

As I held in the **John Muhangazi Kashaka** decision, a presumption is rebutted by factual evidence. In the instant case, the presumption of innocence has already been rebutted by the fact that the two lower courts have convicted the appellant. 15

It was argued for the applicant that it is constitutional right to apply for bail pending the hearing and determination of his appeal. But

whereas Article 132 (21) of the Constitution provides for a right of appeal to the Supreme Court and whereas our judicial system accepts that an already convicted person has as a right to apply for bail pending the hearing of his appeal, the said rights cannot be said to re-clothe an already convicted person with the presumption of 20

innocence. It follows that the principles which apply to applications for bail pending appeal are different and certainly more stringent than those applicable to applications for bail pending trial.s If it is expected that the threshold for 'exceptional and unusual circumstances' is high in regard to an application for bail pending appeal in a first appellate court, it must be that much higher on a second appeal. Release on bail pending a second appeal should be 30

the exception rather than the norm.

From the foregoing discussion, it is clear in my mind that the general principles for grant of bail laid out in *Arvind Patel vs.*

7[1971] 1 E. A 343.

⁶Supreme Court Criminal Reference No.12 of 2020.

³Per Sheid4-l in *Girdhar Dhanji Masrani vs. R* [1960] 1 E. A ³²⁰

Uganda (supra) and relied upon by the applicant's counsel are not $\mathcal{S}$ applicable at this stage. The applicant in the instant case must therefore prove exceptional and unusual circumstances to warrant his release.

It is my view that the fact that the applicant has a fixed place of abode is not an exceptional and/or an unusual circumstance and neither 10 is the fact that he has children and a wife who are solely dependent on him. The fact that the applicant has no criminal record prior to what he was convicted of in the matter before us is also not an unusual or exceptional record.

- As I held in the **Bamutura case (supra)**, in applications regarding 15 bail pending appeal, the court must - above everything else - be guided by two important factors:
- the gravity of the offence; and $\mathcal{S}(i)\mathcal{S}$
- the likelihood of success of the appeal. $\mathcal{S}(ii)\mathcal{S}$
- Counsel for the applicant submitted that the fact that the offence did 20 not involve personal violence should be considered as a factor favourable for their release.

It is my considered view that the gravity of the offence must not and cannot be exclusively defined in terms of whether it involved violence or not. By its very nature, the offences of embezzlement, forgery and 25 uttering of false documents cannot by the stretch of any one's mind involve violence. The distinction sought to be drawn between violent and non-violent crimes is over emphasized. I reiterate Trevelyan J's words in **Somo v Republic**⁹ that:

A man who has been convicted of committing a serious 30 financial crime is [not] deserving of more favoured treatment than an ordinarily inoffensive man, who has

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[1972] E. A. 476 – 481.

been convicted because, having had a mite too much drink, he knocked someone's tooth out.

The applicant was charged with embezzlement, forgery and uttering false documents in relation to property which was entrusted to him to manage on behalf of others. The conduct in issue constitutes breaches of trust. Such conduct cannot be considered an offence which is not grave. The seriousness of the offences are also clear from the sentences given to the applicant.

In considering the possibility of success of the intended appeal, this Court is not clothed with the power to delve deeply into the merits of

the appeal. At this particular point, it is sufficient for the Court to 15 ask itself whether the appeal is **prima facie** arguable. As I opined in the **Bamutura case**, in assessing whether the intended appeal is arguable, Court is guided by the question: having read the Memorandum of Appeal, the judgment of the Court of Appeal and the relevant court record, does Court hold the impression that the 20 **applicant's appeal has a fair chance of being successful?**

The applicant in the present matter attached to his application both the Memorandum of Appeal and the Record of Proceedings in the lower court.

- I have taken a cursory look at the judgment of the Court of Appeal \$25\$ and studied the Record of Proceedings. The essence of the grounds of appeal relates to matters of re-evaluation of evidence leading to erroneous conclusions that the offences with which the applicant was convicted of were proved by the prosecution to the requisite standard.
- I note that before proceeding with determination of the matter, the 30 Court of Appeal stated its duty as a first appellate court as follows:

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This Court ... has the dutg to re-appraise the evidence adduced at trial and draut its own inferences of cat. This Court on re-appraising the evidence and after considering and ueighing the judgment being appealed then resolves as ,o uhether or not the trial Court came to the right conclusions; and if not, then this Court mag substitute its oun conclusions.

From the above excerpt, it is clear that the court was mindful of its duty as a first appellate court to rehear the matter and come up with its own conclusions. I cannot therefore come to the finding that on the face of the record, the appeal has a high likelihood of

1s success. A finding that the appeal is arguable means that on the face of it, the applicant has a case. I have not found it so.

In stating the above, I do not hold that the appeal will certainly not be successful. To say so would amount to rendering the appeal nugatory. Nevertheless it is not my duty at this stage to delve deeply

into the merits of the appeal and make findings as to whether the findings of the first appellate court were supported by the evidence. To do so would be tantamount to hearing the appeal. 20

Counsel for the applicant also argued that there is a possibility of substantial delay in disposing of the appeal since the Court handles matters on a first-in first out basis. The respondent's counsel on the other hand stated that the applicant's submission was speculative and that there was no cogent evidence adduced to support the assertion. 25

I note that delay in the determination of an intended appeal should be assessed in light of whether there was a risk that the sentences or 30

⁵ a great portion of them would be served by the applicant before the appeal is heard.

I note that the applicant was sentenced to 8 years imprisonment on the counts of embezzlement and 2 years imprisonment on the counts of forgery and uttering false documents. There is no strong basis to support the averment that the sentences will have expired by the time the appeal is heard.

In regard to the sureties, I have perused the particulars of the said individuals and I find each of these persons a substantial surety. They were all present in Court during the hearing of the application and each one of them orally committed before Court to take on the responsibilities of a sureties. They are same persons who stood surety for the applicants in both the High Court and the Court of Appeal. I take it that the individuals appreciate their legal duties as

sureties in an application for bail. The relationship which they have

with the applicant respectively also indicates that they have influence over him and are capable of ensuring that he abides with the bail conditions. 20

It is also on record that the applicants duly complied with the terms of bail set by the High Court pending trial and by the Court of

Appeal pending the appeal. This negates the respondent's submission that the applicants are a flight risk and may abscond from the Courts jurisdiction if granted bail. 25

Be that as it may, in consideration of all the circumstances of this case, I find that the applicant has not proved existence of unusual and exceptional circumstances to warrant his release pending a second appeal.

¶ 5 The applicant's prayer for grant of bail pending appeal is disallowed.

I so order.

Dated at Kampala this.....

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Insalem,

PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA JUSTICE OF THE SUPREME COURT.

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