

UGANDA / JUDGMENT

Elasu v Uganda (Criminal
Miscellaneous Application 148 of
2024) [2025] UGHC 483 (30 June 2025)
[2025] UGHC 483

COURT

High Court of Uganda

BEFORE

Boniface Wamala, J

CASE / FILE NUMBER

Criminal Miscellaneous Application 148 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT SOROTI CRIMINAL
MISCELLANEOUS APPLICATION NO. 148 OF 2024 (ARISING FROM CRIM. SESSION
CASE NO. 0139-2024) ELASU SAMSON :..... VERSUS
UGANDA :.....

BEFORE: HON. JUSTICE BONIFACE WAMALA RULING ON BAIL

Introduction

- [1] Elasu Samson (the applicant) was charged with the offence of Aggravated Defilement contrary to section 116 (3) & (4)(a) of the Penal Code Act (PCA) Cap 128. It is alleged that the applicant, on 17th and 18th day of November 2024 at Cell E, in Soroti City, being a person infected with Human Immunodeficiency Virus (HIV) performed a sexual act with Akello Jane a girl aged 15 years.
- [2] The applicant brought this application by Notice of Motion under Articles 23(6)(a) and 28(3) of the Constitution of the Republic of Uganda and Section 14(1) [now section 15(1)] of the Trial on Indictments Act Cap 25 (TIA) seeking an order to be released on bail pending his trial by the High Court.
- [3] The grounds of the application are summarized in the Notice of Motion and also set out in the affidavit in support of the application deposed by the applicant. Briefly, the grounds are that the applicant is charged with aggravated defilement and has been on remand at Soroti Main Government Prison since 27th November 2024. He is a school going

student who had finished A level and had applied to Kyambogo University Soroti Branch for undergraduate studies. He was born HIV positive and was advised by medical doctors that he needs a balanced diet in order to boost his immunity. He stated that he is innocent until proven guilty and has the right to apply for bail. He $\mathbf{1}$

will not interfere with any investigations or the state witnesses. He has a fixed place of abode at Cell E, Senior Quarters Ward, West Division, Soroti City and has substantial sureties who fully understand their duties and responsibilities and are willing to abide by the conditions set by the Court.

- [4] The application was opposed through an affidavit in reply deposed by Ms. Adero Doreen Olwo, a Senior State Attorney C/O ODDP Soroti Office, who stated that although the applicant enjoys a presumption of innocence and a right to apply for bail, the said rights are not absolute and the court should weigh them against potential risks to the community, the victim and public safety given the applicant's risk factors. She stated that the offence of aggravated defilement with which the applicant is charged attracts a maximum penalty of death upon conviction, which underscores the necessity for a restrictive stance on bail. She further stated that the inquiries in the matter have progressed well and it remains in public interest to keep the applicant in custody to safe guard against undue interference with witnesses or the evidence. She also stated that the sureties presented, despite their acquaintance with the applicant, due to the gravity of the offence, lack substantive credibility and are unsuitable. She averred that there is no evidence that the prison facility is not providing a balanced diet to the applicant. She further averred that the prosecution is ready to proceed with the case any time it is scheduled for hearing and the applicant has not demonstrated any exceptional circumstances justifying his release on bail. She concluded that it is in the interest of justice that the bail application is denied and the case be fixed for hearing.

Representation and Hearing

- [5] The applicant was represented by Mr. Engwau George on brief for Mr. **Engulu Phillip** of M/s Engulu & Co. Advocates while the respondent (State) was represented by Mr. Okello Paul from the Office of the Director of Public

$\overline{2}$

Prosecutions (ODPP). The hearing proceeded by way of written submissions which were duly filed by both counsel and have been adopted and relied on by the Court.

- [6] The issue for determination by the Court is whether the applicant has established sufficient grounds for his release on bail.

Resolution by the Court

- [7] Bail is an agreement between the court and an applicant consisting of a bond, with or without surety, for a reasonable amount as the circumstances of the case permit, conditioned upon the applicant appearing before such a court on a date and time as named in the bond to attend his/her trial. See: Section 15(1) of the Trial on Indictments Act, Cap 25 and *Uganda v Lawrence Luzinda* 1986 (HCB) 33.
- [8] The foundational basis upon which the court is enjoined to exercise its discretion to allow or reject an application for bail is the presumption of innocence, based in law and particularly on Article 28(3)(a) of the Constitution. Article 28(3)(a) of the Constitution of the Republic of Uganda provides that "every person who is charged with a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty". This legal position is also based on Article 11(1) of the Universal Declaration of Human Rights and Article 14(2) of the International Covenant on Civil and Political Rights.
- [9] Under Article 23(6)(a) of the Constitution, it is provided that where a person is arrested in respect of a criminal offence, he/she is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable. As such, the core aspects to be taken into consideration by the court when dealing with an application for bail

are the presumption of innocence of an accused person, the right of the accused person to apply for bail, and the discretion of the court to either grant or reject the bail application.

- [10] When exercising discretion to grant or refuse bail, the court is given further guidance through The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions 2022, which under paragraph 5 thereof sets out the following general principles to be taken into account by the court when considering a bail application, namely;
- a) the right of an applicant to be presumed innocent as provided for in article 28(3) of the Constitution;
 - b) the applicant's right to liberty as provided for in article 23 of the Constitution;
 - c) the applicant's obligation to attend trial;
 - d) the discretion of the court to grant bail on such terms and conditions as the court considers reasonable; and
 - e) the need to balance the rights of the applicant and the interest of justice.
- [11] Under Section 16(1) of the Trial on Indictments Act, the High Court may refuse to grant bail to any person charged with any of offences stipulated under Section 16(2), aggravated defilement being one of them, unless such applicant proves, to the satisfaction of the court, that he or she will not abscond when released on bail and that exceptional circumstances exist justifying his or her release on bail. However, under the law, an applicant for bail is no

longer required mandatorily to plead or prove exceptional circumstances following the decision of the Constitutional Court in *Foundation for Human Rights Initiatives v Attorney General*, Constitutional Petition No. 20 of 2006 wherein it was held that it is no longer mandatory to prove exceptional circumstances given the fact that the courts have the discretion to grant bail even when none is proved. In *Uganda v Kizza Besigye*, Constitutional Reference No. 20 of 2005 the Court held

$\overline{4}$

that both "High Court and subordinate courts are still free to exercise their discretion judicially and to impose reasonable conditions on the applicant" in an application for bail.

[12] On the case before me, the applicant's bail application has been opposed by the respondent on the following grounds;

- (i) That the applicant is likely to abscond due to the gravity of the offence and the severity of the likely sentence upon conviction;
- (ii) That the applicant is likely to interfere with key prosecution witnesses who are currently not under any protection;
- (iii) That the sureties presented by the applicant are not substantial;
- (iv) That the state is ready with its witnesses to proceed if the case is scheduled for hearing; and
- (v) It is in the interest of justice that the bail application is denied.

[13] Regarding the possibility of absconding the applicant if released on bail, it is provided under Section 16(4) of the TIA that in considering whether or not the accused is likely to abscond, the court may take into account the following factors;

- *a) whether the accused has a fixed 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 accused shall comply with the conditions of his or her bail;*
- c) whether the accused has on a previous occasion when released on bail *failed to comply with the condition of his or her bail; and*
- *d) whether there are other charges pending against the accused.*

[14] On the evidence before me, it was stated by the applicant that he has a fixed place of abode at Cell E, Senior Quarters ward, Western Division, Soroti City. The applicant produced his National Identity Card and a copy of a letter

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from the area L. C 1 Chairperson. I find these as constituting sufficient proof that the applicant has a fixed place of abode within the jurisdiction of this Court.

[15] Concerning the sureties, Paragraph 15 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, sets out the determinants on the suitability of a surety as follows;

"Determining suitability of surety

- 1) When considering the suitability of a surety, the court shall take into *account the following factors;*
- a) the age of the surety; $\frac{1}{2}$
- *b) work and residential address of the surety;*
- *c) character and antecedents of the surety;*
- *d) relationship to the accused person; and*
- *e) any other factor as the court may deem fit".*

[16] In sub-paragraph (2) of paragraph 15 of the Bail Guidelines, it is provided that the proposed surety shall provide documentary proof, which may include a copy of his or her National Identity Card, passport or alien's Identification Card; an introduction letter from the local council 1 chairperson of the area where the surety is ordinarily resident, among others.

[17] In the instant case, the applicant produced two sureties before the Court who were identified and observed by the Court, namely; Alaso Christine, a 65year-old mother to the applicant and Alamo Christine, a 27-year-old elder sister to the applicant. The two sureties produced introductory letters from their area LC1 chairpersons. The first surety produced her original National Identity Card. The second surety indicated that her original National ID has been stolen but produced a letter of confirmation of registration from the National Identification Registration Authority (NIRA). The relationship of both

sureties with the applicant was established. The sureties established that they are permanent residents within the court's jurisdiction and are traceable in case the court requires their presence. As such, I have found the sureties produced by the applicant to be substantial. I am satisfied that the applicant has proved that he will not abscond when released on bail.

[18] The other ground of objection raised by the respondent is that the applicant is likely to interfere with key prosecution witnesses who are currently not under any protection. For the court to arrive at a conclusion as to whether or not an applicant for bail is likely to interfere with witnesses or not, the court has to look at a number of circumstances including the nature of the offence, the age of the applicant, how long the applicant has been on remand, how influential the applicant is in the community, among others. In this case, I have taken note of the fact that the applicant is a student, he is said to have been born with and is living with HIV and has been on remand for about eight months. Inquiries in the

matter were complete and the applicant was committed to the High Court on 13th March 2025. I find reason to believe that he will not interfere with prosecution witnesses in the matter.

- [19] The other ground of objection was that the state is ready with their witnesses to proceed with the hearing of the criminal case. However, this is not a parameter upon which the Court can base to refuse a bail application. This is because it is a known fact that the question as to whether or not an accused person in a capital offence will stand trial and when, is a function of the capacity and readiness by the court to organize a criminal session. The court's capacity and readiness are dictated by a number of factors which include availability of funds, availability of a Judge, among other factors. As such, the singular readiness of the state and its witnesses is incapable of offering a prediction as to when the applicant is likely to stand trial. This ground of objection is also not made out.
- [20] Given the above findings, I find that the applicant has satisfied the Court that he deserves to be released on bail. It is in the interest of justice that the bail application by the applicant be granted. Accordingly, the application is allowed on the following terms;
- (a) The applicant shall make a cash deposit of UGX 500,000/ \$=\$.
 - (b) Each of the two sureties presented shall execute a bond in the sum of UGX 5,000,000/ \$=\$ not cash.
 - (c) The applicant shall report to the Registrar of this Court once a month on every 30th day of the month or the next working day if the day falls on a non-working day; until otherwise directed by the Court.

It is so ordered.

Dated and signed this 30th day of June, 2025.

(DKm) Pm Boniface Wamala **JUDGE**

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