

UGANDA / JUDGMENT

Kaawe v Uganda (Criminal Application 7 of 2021) [2021] UGSC 48 (9 September 2021)

[2021] UGSC 48

COURT

Supreme Court of Uganda

BEFORE

Arach-Amoko, JSC

CASE / FILE NUMBER

Criminal Application 7 of 2021

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THE REPUBLIC OF UGANDA**IN THE SUPREME COURT OF UGANDA AT KAMPALA****[CORAM: ARACH-AMOKO, JSC]****CRIMINAL APPLICATION NO.07 OF 2021**

(Arising from Criminal Appeal No.12 of 2021)

(Also arising from Criminal Appeal No. 103 of 2011)

(All arising out of Criminal Case No.167 of 2010 of High Court at Anti-Corruption Division)

KENNETH KAAWE..... λ S **VERSUS****UGANDA.....**

(Being an application for bail pending appeal pending determination of Supreme *Court Criminal Appeal No. 12 of 2021)*

RULING OF ARACH-AMOKO, JSC

This application is dated 29th April 2021 and was lodged in this Court on the 10th August, 2021. It seeks for an order that the applicant be released on bail pending the hearing of **Supreme Court Criminal**

Appeal No. 12 of 2021 that is pending before this Court. It is 25 brought under Article 23(6) (a) of the Constitution, Section 40(2) of the Criminal Procedure Code, Cap 116 of the Laws of Uganda and

Rule 5 of the Supreme Court Rules. The grounds for the application $\mathbf{\$}$ are set out in the Notice of Motion and the supporting affidavit sworn by the applicant on the 29th April 2021.

The respondent opposed the application through the affidavit in Reply sworn by the Assistant Director of Public Prosecutions, Josephine Namatovu, on 6th September, 2021.

BACKGROUND

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The applicant was employed by the United Bank of Africa as Head of Central Cash at the material time. He was charged with the offence of Embezzlement contrary to section 19(b) of the Anti-Corruption Act.

- 2016 at the Buganda Road Chief Magistrates Court in 2010. It was 15 alleged that he had embezzled 50,000 \$ from the Bank. He denied the offence. He was tried and convicted by the High Court and was sentenced on 17th May, 2011 to 8 years imprisonment. He was also ordered to refund the 50,000 \$ to the Bank after serving the sentence.
- He was dissatisfied with the decision and appealed to the Court of 20 Appeal against the conviction and sentence vide **Criminal Appeal No. 103 of 2011**. The Court of Appeal found that the conviction was proper but the sentence was illegal as the trial Judge did not take mathematically into account the remand period in accordance with the decision of this Court in **Rwabugande Moses v Uganda**, 25 Criminal Appeal No.25 of 2014. Consequently, the Court set it aside and passed a fresh sentence where it upheld the conviction but reduced the sentence to 7 years 11 months and 5 days imprisonment

and maintained the order for refund of the \$50,000 \$.

The judgment of the Court of Appeal was delivered on 6th January, $\mathbf{\$}$ 2020 and on 16th March, 2021, the applicant lodged **Supreme Court Criminal Appeal No. 12 of 2021** in this Court against both the conviction and sentence. The said appeal is pending before this Court, hence this application.

THE APPLICANT'S CASE 10

The main grounds for the applicant's case are set out in the Notice of Motion and repeated in his affidavit where it is stated:

- "5. That the applicant is a \$1^{st}\$ offender and the offence of embezzlement he was convicted of does not involve personal violence.
- 6. That the applicant's appeal is not frivolous, or vexatious, it has merits with great chances of success.
- 7. That the applicant was granted bail at the High Court and the Court of Appeal and throughout the trial and on appeal,
- he did not at any time skip until the determination of both 20 hearings.
- 8. That there is a possibility that the applicant's appeal will take some time before it is heard and determined.
- 9. That if the applicant's bail is not granted, the appeal shall
- be rendered nugatory, because a substantial part of the 25 sentence shall have been served.
- 10. The applicant is suffering from chronic illness of endomyo cardio fibrosis, gastritis and hypertension, which medical

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- conditions require routine specialized services that are not available and cannot be managed in prison environment.
- \$11.\$ That the applicant has substantial sureties who are willing and ready to stand for him.
- 12. That the applicant will not abscond and will abide by the conditions set by court and will turn up to prosecute his appeal pending before this Court.

13. That the discretionary jurisdiction of the court be exercised judiciously in favour of the applicant."

Learned Counsel Mugogo Edward who represented the applicant based his submission on the above grounds and the supporting 15 affidavit. He submitted that the applicant had filed an appeal in this Court against the decision of the Court of Appeal which has a high likelihood of success since the Court of Appeal had failed to properly re-evaluate the evidence from the trial court and thereby reached an erroneous decision regarding the applicant's guilt as well as the 20 Compensation Order of \$50,000\$ \

Counsel relied on the decisions from this Court in **Arvind Patel v Uganda**, Criminal Application No 1 of 2003; **Ochepa Godfrey v Uganda**, Misc. Application No.07 of 2020 and **Henry Bamutura v**

Uganda, Misc. Application No.19 of 2019 and submitted that the 25 Court has guided that the conditions for the grant of an application for bail pending appeal include the character of the applicant, whether the applicant is a first offender, possibility of success of the

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appeal, substantial delay in hearing the appeal and whether the S offence for which the applicant was convicted involves personal violence. He added that the authorities particularly **Arvind Patel v Uganda (Supra)**, guide that any two of the said conditions suffice. The applicant need not satisfy all of them. He submitted that the applicant had met all of them and his application should be granted. 10

Lastly, he submitted that the applicant had three substantial sureties and namely:

- 1. Mr. Kaawe Fred Kawesa, the applicant's father, a retired civil servant. A resident of Ibanda Municipal Council and holder of National ID Card No. CM5706686100CK.
- 2. Linda Kisubi, the applicant's wife, a resident of Kulambiro, Kyanja, Nakawa Division and holder of National ID Card No. CF7610071017BA.
- 3. Mr. Emmanuel Tashobya, a resident of Bweyogere, Wakiso District and holder of National ID Card No. CM7103414 FTE.

Counsel introduced them before Court and presented their original National Identity Cards together with letters from the area LCs for the said sureties. He informed Court that he had explained to them the duties of sureties and they had understood and undertaken to ensure that he attends Court whenever he is required to do so.

THE RESPONDENT'S CASE

Ms. Gloria Nzikuru, the Chief State Attorney Counsel who represented the respondent opposed the application. She relied on

- the affidavit in reply where it is contended that the applicant is not a S first offender as he has been convicted by two courts. He is not of good character because he is a two-time convict. Counsel submitted that the circumstances under which the applicant complied with bail terms in the lower courts have changed following his conviction by
- the High Court and subsequent confirmation of his conviction by the 10 Court of Appeal which upheld the conviction and sentence of 7 years, 11 months and 5 days as well as the compensation Order to refund the 50,000 \$. He is therefore no longer presumed innocent.

- Counsel disagreed that the appeal is likely to delay since the Supreme Court is fully constituted and it has been the practice of the Court to 15 schedule cases for expeditious disposal and cases are expeditiously disposed of. She argued that in the circumstances, the appeal should be expeditiously handled instead of granting the applicant bail.
- Counsel contended that the applicant's appeal had no likelihood of success since the Court of Appeal properly evaluated the evidence. 20 She further contended that although the applicant was convicted of a non-violent offence, nevertheless, the offence of embezzlement for which the applicant was convicted is a serious financial crime, which he committed with impunity and which resulted into a financial loss of \50,000 to his employer. 25
- Regarding sureties, Counsel contended that the applicant had not provided the sureties' details in his affidavit to enable the respondent verify their particulars. Counsel took exception to the 2nd and 3rd sureties on the ground that they had not indicated their place of work

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- or whether they were tenants or permanent residents in their 5\$ respective places of abode. Otherwise, Counsel had no problem with Mr. Kaawe the applicant's father as surety. She stated that he was a substantial surety.
- Lastly Counsel argued that she was alive to the law that the grant of bail pending appeal is a discretionary power of the Court but 10 contended that the applicant had no Constitutional right to bail as a convict since he no longer enjoyed the presumption of innocence. Counsel relied on *Magombe Joshua v Uganda*, Misc. Application No 11 of 2019 (SC), in support of her submissions.
- Counsel prayed that Court should dismiss the application on the 15 basis of the foregoing.

In the alternative but without prejudice to the above submissions, Counsel submitted that in the event that Court is inclined to grant the order sought, Court should impose stiff conditions. Counsel proposed cash bail of Shs.50 00,000 (fifty million) based on the fact that he had deposited shs. 20,000,000 (twenty million) in the lower courts. He should deposit his travel documents in Court as well.

ISSUES FOR DETERMINATION

The only issue is whether the applicant has satisfied the conditions for the grant of bail pending appeal. 25

DETERMINATION OF THE APPLICATION

Article 132(2) of the Constitution empowers this Court to hear appeals from the Court of Appeal. It reads:

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"Jurisdiction of the Supreme Court

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- (2) An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law."

This jurisdiction in my opinion, includes the power to entertain all 10 applications arising from appeals before the Court. Applications for bail pending appeal falls in that category. $\frac{1}{2}$

Further, Rule 6 (2) (a) of the Rules of this Court provides that:

"... the court may-

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- (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...\$

It is gainsaid that the above stated law empower this Court to grant bail pending appeal and the Court has exercised that discretion in 20 numerous cases including the ones cited by the applicant's Counsel. The discretion must, of course, be exercised judicially, bearing in mind the fact that although the applicant is a convict, there is also a possibility of error by the lower court which this Court must finally address, as the last Court in order to ensure that the ends of justice 25 is achieved.

The conditions for the grant of bail pending appeal are well settled as S indicated in the authorities cited herein by Counsel for the applicant. I shall not repeat them.

I have carefully considered this application, the law, the affidavits and submissions by Counsel.

- As Counsel for the respondent rightly pointed out, except for the 10 judgment, the record of proceedings was not availed to Court, it is therefore impossible for me to assess with certainty the likelihood of success of the appeal at this stage. However, I note that the grounds of appeal do not appear frivolous. The applicant complains that the
- learned justices of the Court of Appeal: 15
- 1. Erred in law in upholding the trial court's decision without thoroughly evaluating the evidence;
- 2. Erred in law when, despite trying to reduce the sentence, merely added the remand period and still arrived at a sentence which *was harsh and excessive; and*
- 20
- 3. Erred in law when they upheld the compensation order.

I also find that the applicant has filed a Notice of Appeal and a Memorandum of Appeal, the offence he was convicted of is nonviolent, he complied with bail conditions in the lower courts and he has produced substantial sureties. Further and most importantly 25 according to me, counsel for the applicant has presented a medical report dated 6th September, 2021, from Dr. Kakoraki Alex, the AG. Medical Superintendent of Murchison Bay Hospital to the effect that

- the applicant suffers from conditions for which specialized services {5} are not available in the Prisons health facility, namely:
- Endomyocardiofibrosis {bullet}
- Chronic Gastritis
- Ascites
- Hypertension 10

Counsel for the respondent did not adduce any contrary report in the affidavit in Reply nor did she challenge the said report in her submissions. I therefore accept it. In Chandi Jamwa v Uganda, Misc. Application No. 09 of 2018 (SC), I granted the application on the basis of the medical report that had indicated that the applicant 15 was suffering from a serious medical condition that could not be managed from Prisons. He was able to get treatment and by the time his appeal was heard, he was much better. I shall follow that decision in the instant application.

- I would add that the operations of this Court have been greatly 20 impacted upon by the effect of Covid 19 pandemic. According to the recent Circular dated 3rd August, 2021, by the honourable Chief Justice, courts have been directed to operate and are in fact operating at 20% for some time. Therefore, there is a real likelihood that the
- appeal will delay. 25

For the foregoing reasons. I hereby grant the application and order that the applicant be released on bail pending appeal on the following conditions:

- 1. The applicant shall deposit in this Court cash bail of shillings 50,000,000. (Fifty million shillings).
- 2. The Registrar of the Court of Appeal shall hand over the applicant's passport to the Registrar of this Court within 5 days of this Order. The applicant shall not apply for any new passport until the final disposal of the appeal or until such further orders of this Court.
- 3. The sureties shall bind themselves by each signing a non-cash bond of shillings \$100,000,000/= \$.
- 4. The sureties shall ensure that the applicant complies with the bail conditions.

- 5. The applicant shall report to the Registrar of this Court every last working day of the month starting from the 30th of September, 2021 until his appeal is heard and disposed of or until further orders of this Court.
- 6. A breach of any of these conditions by the applicant shall render the bail pending appeal herein granted to him liable to automatic cancellation.

.day of.... Sente \$N_{2021}\$ Dated at Kampala this...

M. S ARACH-AMOKO. JUSTICE OF THE SUPREME COURT

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Prepared on 13 October 2026 · Esheria