

UGANDA / JUDGMENT

Kalule v Uganda (Criminal Miscellaneous Application No. 001 of 2018.) [2018] UGHICID 1 (10 April 2018)

[2018] UGHICID 1

COURT

HC: International Crimes Division (Uganda)

BEFORE

Mukiibi, J

CASE / FILE NUMBER

Criminal Miscellaneous Application No. 001 of 2018.

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HOLDEN AT INTERNATIONAL CRIMES DIVISION KOLOLO

CRIMINAL MISCELLANEOUS APPLICATION NO. 001 OF 2018.

[Arising from the Chief Magistrate's Court of Jinja Holden at Jinja Case No. AA No. 25/2016, DPP Case No. HQS – CO- 0229 – 2016, Police Case No. CID HQTRS E/109/2016]

DR. ISMAIL KALULE:::::::::::::::::::::::::::::::::APPLICANT

VERSUS

UGANDA:::RESPONDENT

BEFORE: HONOURABLE MR. JUSTICE MOSES MUKIIBI

RULING

The Applicant, DR. ISMAIL KALULE, has applied to this Court to be released on bail pending his trial. The Applicant was arrested on the 26th day of May, 2016 at the High Court Criminal Division soon after his acquittal of several counts of terrorism and Murder by this Court. He was detained at Nalufenya Police Station. On the 2nd day of June, 2016 he was taken before the Chief Magistrate's Court at Jinja where charges in two counts were read to him. The charges were:

1. Terrorism Contrary to Section 7 (1) and (2) (w) of the Anti-Terrorism Act, 2002; and
2. Conspiracy to Commit Terrorism Contrary to Section 25 of the Anti-Terrorism Act, 2002.

The Chief Magistrate's Court ordered that the Applicant be remanded at Kirinya Prison. The Applicant claims that he was returned to Nalufenya instead.

The Applicant further claims that he was "remanded" at Nalufenya Police Station for several months. One wonders whether the Applicant was not attending Court for further remands. Why did it take his Advocate months to complain to the Chief Magistrate?

Eventually, the Applicant was remanded at Luzira Government Prison. The Applicant was committed on the 19th day of December, 2016 for trial for trial by this Court.

The Applicant filed this application on 15th February, 2018. By that date one year one month and twenty five days had gone by since his committal.

This Court has established that the Committal file has not been received by this Division from the Chief Magistrate's Court of Jinja. Therefore, the Applicant's Case has not yet been registered at the ICD Registry. It has not been established in which Division of the High Court the Applicant's case is pending trial. However, the Applicant has been on remand at Luzira Prison since the 19th day of December, 2016, waiting to hear from the High Court something concerning his trial. Hence, this application seeking to be released on bail.

The Applicant did not plead and does not seek to rely on the existence of exceptional circumstances provided for in Section 15 (1) (a) and defined in Section 15 (3) of the Trial on Indictments Act [Cap. 23].

Is the Applicant a person accused of an offence specified in Sub-Section (2) of Section 15 of the Trial on Indictments Act?

Sub-Section (2) of Section 15 provides in –

Parag. (a) an offence triable only by the High Court; and in

Parag. (b) an offence under the Penal Code Act relating to acts of terrorism-----.

The Applicant was charged under the Anti-Terrorism Act, 2002.

Section 6 thereof provides as follows:-

"The offence of terrorism and any other offence punishable by more than ten years imprisonment under this Act are triable only by the High Court and bail in respect of those offences may be granted only by the High Court."

So, Terrorism Contrary to Section 7 (1) and (2) being an offence triable only by this Court an application for bail in respect of Count I of the charges preferred against the Applicant should rightfully be made to this Court under both___

1. Section 6 of the Anti-Terrorism Act, 2002;

And

1. Section 14 (1) of the Trial on Indictments Act.

Section 15 (1) of the Trial on Indictments Act provides_____

“(1) Notwithstanding Section 14, the Court may refuse to grant bail to a person accused of an offence specified in Sub-Section (2) if he or she does not prove to the satisfaction of the Court_____

1. That exceptional circumstances exist justifying his or her release on bail; and
2. That he or she will not abscond when released on bail”.

In Constitutional Reference No. 20/2005 Uganda (DPP) Vs. Col. (Rtd.) Dr. Kiiza Besigye the Constitutional Court, on its own, offered to discuss a situation where the accused is charged with an offence only triable by the High Court but has not spent the Statutory period of 180 days in custody before committal. The Court observed that Court may refuse to grant bail where the accused fails to show to the satisfaction of the Court exceptional circumstances under S. 15 (3) of the Trial on Indictments Act.

The Constitutional Court observed that the sole purpose of the Trial on Indictments (Amendment) Act, No. 9 of 1998, and the Provision for exceptional circumstances, was to operationalise Article 23 (6) (c) for accused persons desirous of applying for release on bail before the expiry of the Constitutional time limit of 180 days.

The Constitutional Court, however, said –

1. That Article 23 (6) (a) of the Constitution confers discretion upon the Court whether to grant or not to grant bail; and
2. That the exceptional circumstances set out in S. 15 (3) of the Trial on Indictments Act are regulatory.

This Court is supposed to consider each application for bail on its own merits.

In an affidavit sworn in support of this application, ISMAIL KALULE, the Applicant stated__

In Parag. 2 – that he is a Medical Doctor;

In Parag. 4 – that he was granted bail by the High Court and he attended Court religiously whenever he was required to attend;

In parags 3 and 5 – that he was arrested in 2010 in connection with the bombing at Lugogo and the Ethiopian Village Restaurant and that he was charged with several counts of Terrorism and Murder, but he was tried and acquitted by the High Court of all the charges on 26th May, 2016.

In Parag. 6 – that on 26th May, 2016 while in the Criminal Division of the High Court of Uganda he was arrested and later detained at Nalufenya;

In parag. 8 – that on 2nd June, 2016 he was taken before the Chief Magistrate’s Court at Jinja where charges in two counts were read to him and he was remanded at Kirinya Prison, but the police disobeyed Court and took him back to Nalufenya.

In parag. 11 – that he does not intend to plead guilty.

In parag. 16 – that he has a family with a wife and children whom he looks after, and that he intends to appear in Court at all time to attend his trial in Order to clear his name of the charges levelled against him.

In Parag. 17 – that he has a fixed place of abode at Kiwatule, Kazinga Zone, Kira Municipality, Wakiso District.

In parag. 18 – that apart from the charges the subject matter of this application there are no other criminal charges pending against him.

In parag. 19 – that he has sound and substantial sureties within the Jurisdiction of this Court who have undertaken to ensure that he complies with the conditions of bail.

In parag. 20 – that there is no likelihood of him interfering with investigations or witnesses.

In parag 21 – that eversince his re-arrest and committal to the High Court he has spent over one and half years in custody with no indication as to when he will be tried.

In parag. 22 – that the offences areailable by this Court.

In parag. 23 – that he undertakes to abide by any and all the bail conditions imposed upon him by this court and that he will not abscond if released on bail.

In parag. 24 – that once released on bail he undertakes to abide by any conditions this court may set and that he will turn up for his trial as and when the Court wants him.

In parag. 25 – that it is only fair, Just, Constitutional and in the best interests of Justice that he be granted bail pending his trial.

In a Supplementary affirmation dated 21st March, 2018 the Applicant stated______

In parag. 3 – that as a Medical Doctor he had a Clinic, Homeopathic Clinic at Plot 51 Rashid Khamis Road, Kampala.

In Parag. 4 – that he is married to Ismail Hadijjah and the two have four school going children, namely______

1. Fatimah Ismail aged 12 years,
2. Azam Ismail aged 10 years,
3. Wasiim Ismail aged 8 years, and
4. Nadim Ismail aged 5 years.

In Parag. 5 – that he has, at Kiwatule Kazinga Zone, a permanent residential house where his wife and children reside.

He stated in parag. 4 _ _ _ _

He stated in parag 5______

He stated in parag. 2__________

I have a lot of respect for Police Officers but I wonder if anybody has educated them on the importance of the evidence by way of affidavits which they present to Courts.

The interest and concerns of the state would be taken into consideration if evidence is presented to court.

There is no evidence from the Respondent that investigations are still continuing, and that the Applicant may access important prosecution evidence and, may be, cause it to disappear.

Therefore, there is no evidence to satisfy this Court that it is for the protection of the public that the Applicant should not be released from custody.

The Applicant referred to his good conduct when he was previously granted bail. Etwop Ben Odurkami, D/ASP has not presented any evidence to controvert the Applicant's claim.

The Applicant stated that he has ever been charged with several counts of terrorism and murder. He claimed that he was put on trial but was acquitted by the High Court of all the charges on 26th May, 2016.

What this Court understands from the Applicant's reference to his past record is that he is not under great fear because of the present charges after his previous experience. He wants this Court to believe that he is not likely to run away because of any fear of the charges. Etwop Ben Odurkami, D/ASP has not presented any evidence to induce this Court to hold a contrary view.

If there are any genuine concerns on the part of the state they should be disclosed to court in a manner provided by law for that purpose.

Learned Counsel Mr. Ochieng Evans represented the Applicant. On the other hand the state was represented by the learned Senior State Attorney, Ms. Lilian Omara.

Learned Counsel Mr. Ochieng Evans submitted that the Applicant is seeking to be released on bail pending his trial. He made reference to an affidavit in support of the application dated 15th February, 2018 sworn by the Applicant. He also relied on a Supplementary affirmation made by the Applicant.

He submitted that the grounds for the Application stated in the Notice of Motion had been expounded in the two affidavits.

Learned Counsel Mr. Ochieng Evans submitted that the Applicant is presumed to be innocent. He cited Article 28 (3) (a) of the Constitution. Counsel submitted that under Article 23 (6) of the Constitution the Applicant is entitled to apply for release on bail.

Counsel made reference to the contents of the two affidavit/affirmation sworn/made by the Applicant. He submitted that the Applicant is a person who can be trusted to come back and attend his trial.

Counsel presented four sureties to court.

The first surety was FATUMA BIRABWA KABEGA, the biological mother of the Applicant. She is aged 70 years. She presented an introductory letter from Balintuma Zone LCI. She presented a residential identity card.

Learned counsel Mr. Ochieng Evans submitted that this surety has sufficient nexus to the Applicant and she is traceable.

The Second Surety was KAMBUGU MAKANGA JOSEPH.

He is aged 64 years. He is a retired Grade III Teacher. He is the LCI Chairperson of Kazinga Zone. He is engaged in farming. He has availed his National Identity Card. He owns a permanent home at Kazinga Zone. He has availed to Court a certificate of title for his land at Kazinga. He is an immediate neighbour to the Applicant. The surety has known the Applicant since the latter was a child. The two have been friends.

The third surety was WAMUBI JUMA MAJUGO. He is aged 36 years. He attached a copy of his National Identity Card. He resides at Kireka, Bbira, Musaaale LCI. He has a permanent home there. He is a Medical Practitioner holding a Diploma in Orthopaedic Medicine. He works with M/S Comfort Home Care, a Medical Centre at Nansana. He also works at M/S Galilee General Community Hospital at Masanafu.

He knows the Applicant and his place of residence.

The fourth surety was SSUNA SHAFIKI.

He is aged 38 years. He availed copies of his National Identity Card, Driving Permit and Passport. He resides at Lugala Zone, Lubyra Parish, Rubaga Municipality, in KCCA. He has a permanent house there. He is a Businessman/importer. He imports agricultural machinery spare parts from China. He has a shop at Shamba Complex along Nabugabo Road in Kampala. The Applicant is his religious instructor and personal Doctor. The two are brothers in Islam.

Learned Counsel Mr. Ochieng Evans submitted that he explained to the sureties their duties. He prayed this Court to find that they are substantial. Counsel submitted that the sureties will ensure that the Applicant attends his trial.

Counsel referred to ten (10) authorities furnished to Court which give the Principles for granting bail. He submitted that Court needs to be satisfied that the Applicant will turn up to

take his trial. Counsel prayed this Court to find merit in the application, and to impose reasonable terms of bail.

The learned Senior State Attorney, Ms. Lilian Omara clarified that the Applicant was granted bail in Nakawa Chief Magistrate's Court Case No. 29 of 2014. She informed Court that the 2010 bombing case was Nakawa Chief Magistrate's Court Criminal Case No. 574 of 2010. She submitted that the Applicant lied when he purported to relate his bail to the 2010 bombing case. She asserted that the Applicant was never granted bail in relation to the 2010 bombing case.

On this matter this Court observes that if there had been proper co-ordination between Etwop Ben Odurkami, D/ASP and the Learned Senior State Attorney the above clarification could have been part of Etwop's affidavit. An examination of the Applicant's bail bond form, attached to his affidavit in support of the application and marked Annexure "A", shows that the Applicant's bail application [HCT-MISC. APPL. NO. 94 of 2014 arising from Nakawa Chief Magistrate's Case No. 29 of 2014] related to charges brought under the Anti-Terrorism Act, 2002.

The bail bond Form shows that the Applicant executed the bond on 23rd July, 2014 and he, thereafter, duly attended Court in compliance with the bail terms on 22. 8. 2014, 22. 9. 2014, 22. 10. 2014, 24. 11. 2014, and 05. 01. 2015 as directed by the Deputy Registrar.

That evidence has not been controverted by any evidence from the Respondent.

The Learned Senior State Attorney submitted that all the sureties are not substantial. Concerning Fatuma Birabwa Kabega, the biological mother of the Applicant, the learned Senior State Attorney submitted that she appeared weak either from her age or possible ailment. Learned Counsel doubted her ability to monitor the Applicant's movements and report to Court.

This Court disqualifies this surety but for a different reason.

In Kenny's outlines of Criminal Law, 19th Edition at Page 586 Note 708 the Learned author advised Courts in exercising the discretion to admit a remand Prisoner to bail to consider what likelihood there is of his failing to appear for trial. The Courts were advised also to consider whether the proposed sureties are independent or are likely to be indemnified by the accused.

Whereas it is important that Fatuma Birabwa Kabega, as a biological mother, has sufficient and very close nexus to the Applicant, her age renders her vulnerable and erodes her independence as a surety. It is the view of this Court that she cannot independently meet cash requirements of a bond executed by her without recourse to the Applicant.

Concerning the second surety, Makanga Kambugu Joseph the learned Senior State Attorney pointed out that he also used the names Makanga Stephen Kambugu. She doubted the true identity of the surety. However, the view of this Court is that a photocopy of his National Identity Card shows the names Kambugu Joseph Makanga, and that is satisfactory.

The documents relating to this surety were served on the Respondent. Parag. 5 of D/ASP Etwop's affidavit contains a general statement that the proposed sureties are not substantial and will not be able to fulfil their duties. D/ASP Etwop did not state the basis of his assessment. Kambugu Joseph Makanga produced an introduction letter signed by the Secretary LCI, Kazinga Zone. This Court considers that sufficient.

The third Surety presented a copy of his National ID Card and an introduction letter signed by the LCI Chairman Kireka-Bbira, Musaale "A". He presented a Certificate of Good Standing issued by The Allied Health Professionals Council.

He also produced a copy of his Diploma in Orthopaedic Medicine issued to him by the Uganda Allied Health Examinations Board. He told Court his two places of work. This Court is of the view that this surety is sufficiently traceable.

The fourth Surety, Suuna Shafiki presented copies of his National ID Card, Driving Permit and Passport. He has a Permanent home at Lugala Zone, Lubya Parish, Rubaga Municipality. He produced a Certificate of Registration of the name of his business – SS AGRO MACHINERY & GEN. HARDWARE. He presented a Sale Agreement for a Plot of land at Lugala LCI executed by the parties thereto and LC Officials.

This Court is of the view that this surety is sufficiently traceable. His place of work is known.

Furnishing exceptional circumstances is not the sole consideration for applications for bail. The Court has to consider whether the applicant for bail will not abscond when released from custody. (see S. 15 (1) (b) and (4) of the T. I. A.)

I have considered the legal authorities cited by Counsel for the Applicant. I have particularly examined the circumstances in – High Court Criminal Misc. Appl. No. 075 of 2016 (arising from Jinja Criminal Cases No. 0059/2016 and 0064/2016):

His Majesty Omusinga Mumbere Charles Wesley

Versus

Uganda

In that case the applicant was Jointly with others charged Vide Kasese CRB 242/2016, Court Criminal Case No. A. 59/2016 and Kasese CRB 881/2016, Court Criminal Case No. A. 64/2016, with multiple offences of terrorism, murder, attempted Murder, aggravated robbery, treason, and malicious damage to property. At the time of the application for bail police investigations were still on going. The applicant was a cultural King of the Rwenzururu Kingdom and wielded considerable influence over his subjects in Kasese area.

In this position as King the applicant was entitled to Government Protection and Security over his person and home. He presented to Court six sureties, five being sitting Members of Parliament from Kasese area and the sixth being a former Prime Minister of the Applicant's Kingdom.

The learned Judge Eva K. Luwata relied on the well known principles –

1. That bail is a right guaranteed by the Constitution under Article 23 (6) (a).
2. That this right is founded on another right to a fair hearing enshrined in Article 28 of the Constitution, particularly, Clause 3 (a) which provides:

“(3) Every person who is charged with a criminal offence shall –

1. Be presumed to be innocent until proved guilty or until that person has pleaded guilty.”

The learned Judge reiterated what appears in almost all the authorities on bail. She said:

“In our law, the Primary purpose of bail should be to ensure that the applicant appears to stand trial without the necessity of being detained in custody during the period of trial.”

The various authorities have established the principle that the Court must be satisfied that the applicant will appear for trial and not abscond. If facts come to light that there is a substantial likelihood of the applicant offending bail, it is advisable to reject the application.

Regarding the severity of the charges, it was the view of Justice MULENGA, JSC (RIP) in ATTORNEY GENERAL VS. TUMUSHABE (2008) E. A. 26 QUOTED IN OKELLO AUGUSTINE VS. UGANDA, Criminal Misc. Application No. 006/2012 (unreported) where he said _____

“It is clear to me that Clause 6 of Article 23 applies to every person awaiting a trial for a criminal offence without exception. Under paragraph (a) of that clause, every such person at any time, upon or after being charged, may apply for release on bail, and the Court may at its discretion, grant the application irrespective of the class of criminal offence for which the person is charged.”

Courts have been cautioned not to treat refusal of bail as a punishment against the applicant or to deprive one of liberty unreasonably. The preference has been to allow the accused the full benefit of his Civil Liberties, the gravity of the charges against him/her notwithstanding.

The sureties were cautioned that they may be required to pay the value of their bonds in case the applicant absconds. None of them appeared shaken. I consider the three sureties presented substantial.

Unlike the case of Omusinga Mumbere Charles Wesley who was said to be aged 65 years in this case the Applicant has not pleaded any exceptional circumstances. However, in my view this is not fatal to the application.

In the instant case I have considered the following factors:-

1. The need to give the applicant for bail the full benefit of his constitutional rights and freedoms.
2. The absence of any evidence that the applicant may cause lawlessness to society if released on bail.
3. Absence of any evidence from the Respondent that there is a risk of the Applicant absconding.
4. Absence of any evidence that the Applicant has any likelihood of interfering with the course of Justice.
5. The seriousness of the charges against the Applicant.
6. Absence of any evidence that the Applicant is likely to commit other offences while on bail.
7. Absence of any indication that the Applicant is violent or threatens violence against anyone.
8. Absence of any evidence that the Applicant is likely to interfere with the prosecution's witnesses.

9. The status of the case that after more than one year and three months the Chief Magistrate's Court committal file has not been delivered to ICD.
10. The Constitutional requirement that the Applicant must be presumed to be innocent until he is proved guilty or until he pleads guilty.
11. The caution that bail should not be refused as a form of punishment for the Applicant.
12. The presence of sound sureties within the jurisdiction of this Court who are ready to undertake that the Applicant shall comply with the conditions of his bail.
13. The fact that the Applicant has a wife and children and leads a settled existence, with a fixed place of abode within the Jurisdiction of this Court.
14. The evidence furnished to this Court that on a previous occasion the Applicant was granted bail and he duly reported to the Deputy Registrar as he was directed.
15. Absence of any information from the Respondent that there are other charges pending against the Applicant.

Considering all the foregoing factors this Court is satisfied that the Applicant will return to attend his trial. Accordingly, this application is allowed, and the applicant shall be released on bail but with conditions.

However, before I set the bail conditions, I wish to make some observations for the education of the Security organs.

The Constitution of Uganda (1995) has confirmed and guaranteed fundamental rights of persons arrested and detained for and accused of serious criminal offences. Ordinarily a person exercises and enjoys his/her liberty. Such liberty is taken away when there is reasonable suspicion that the person has committed or is about to commit a criminal offence.

The Police undertake investigations to establish the truth of their suspicion. In capital offences the Police and Prosecution are given 180 days [the Statutory remand period] within which__\

1. To complete investigations or inquiries;
2. To prepare an indictment and a Summary of the case.
3. To cause the accused to be produced in Court for a Magistrate to read out and explain the indictment to the accused person and to commit him/her for trial by the High Court.
4. To give to the accused person a copy of the indictment and the summary of the case.

After Committal the accused person is entirely in the hands of the High Court.

Despite the indictment for Capital offences and the committal of the accused person for trial he or she is entitled to apply to the High Court to be released on bail. The Court has discretion to grant that person bail on such conditions as it considers reasonable.

When an accused person applies for bail the Prosecution and the police are given an opportunity to produce evidence of any serious concerns of the state in objection to the application.

Judicial Power is derived from the people of Uganda, and it is exercised by the Courts on their behalf. The people have never said that a person accused of terrorism related offences should never be released on bail.

Nor have they said that a person who is arrested by Counter-terrorism officers or a combination of security organs should never be released by Court on bail. Players in the criminal justice system have specific roles. It is important that we recognise, understand and respect each other's roles. Some public officers carry out their roles with the aid of weapons. Others do so with the aid of pens. Either method is empowered by the people through the Constitution and other laws.

As the different players execute their functions they should have clear vision and observance of the Constitutional provisions and the law. No organ should exercise too much power in total disregard of the roles of the other organs. The people of Uganda have not given any single organ of state all powers and responsibilities to do everything. The Constitution and other laws must be seen to operate and to have effect.

We should not believe in the existence of any "above" who gives orders which violate the Provisions of the Constitution and the Laws. For example, there is no "above" who can give Orders to overrule and render nugatory the Orders of any Competent Court.

It is only bad or uninformed officers in the security organs who can flagrantly disrespect Court Orders. We should all bow our heads to the governance of the Rule of Law.

Having Ordered the release of the Applicant on bail I give the following conditions which he must fulfil:-

1. The Applicant is to enter an undertaking with the Registrar, ICD, in an amount of shs. 20 Million (Not Cash) guaranteeing that he will attend Court to take his trial or otherwise as indicated by the Registrar.
2. Each of the three sureties for the Applicant will also enter an undertaking with the Registrar (ICD) in an amount of shs. 10 Million (Not Cash) guaranteeing that the Applicant will attend Court to answer the indictment against him or otherwise as indicated by the Registrar.
3. Within a period of one week from the date of this Order the Applicant must surrender to the Registrar (ICD) his Passport.
4. The Applicant, after his release on bail, must report to the Registrar (ICD) twice every month on every second Tuesday and on every last Tuesday of the month.
5. The Applicant shall at all times be disciplined, humble and co-operate with any security Officers who may from time to time approach him while carrying out surveillance work.

6. The Applicant shall not engage in any rhetoric or make addresses to any congregation or in any other way cause Public excitement, but he can lead fellow Muslims in Prayer using humble and sober language.
7. If the Applicant has to carryout any instruction of students or adult persons in religious matters he must allow security officers to Monitor his teachings and be ready to surrender any teaching materials or aids to the Security organs.
8. The Applicant shall restrict visitors to his place of residence and he should be prepared to identify any visitor to security officers when called upon so to do.

I so order.

Delivered on 10th April 2018

Hon. Moses Mukiibi

JUDGE and Head, International Crimes Division.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/ug/judgment/ughcid/2018/1/eng@2018-04-10>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/kalule-v-uganda-criminal-miscellaneous-application-no-001-of-2018-2018-ughcid-1-10-april-2018-unknown-topic-unknown-court-2018>

Prepared on 14 October 2026 · Esheria