

UGANDA / JUDGMENT

Kasangaki Vs Uganda (Criminal Appeal No.53 of 2017) [2017]

UGCA 49 (10 November 2017)

[2017] UGCA 49

COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

Criminal Appeal No.53 of 2017

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THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA****CRIMINAL APPLICATION NO.53 OF 2017**

(Arising from Criminal Appeal No. 15 of 2017)

1. KASANGAKI ASTON KYOMYA

2. OKOT PETER:..... $\$10\$ \mathcal{K}_{\mathcal{M}_1}(\cdot)=\mathcal{K}(\cdot)^{1/2}\$$ **VERSUS**

UGANDA:.....**CORAM: HON. MR. JUSTICE BARISHAKI CHEBORION, JA****(SINGLE JUSTICE)** $\sim 10^{-10}\$ m^{>2}/sup>$ **RULING \$15\$**

This is an application brought under $\$R(6/2)\$$ of the Rules of this Court, Section 40(2) of the Criminal Procedure Code act CAP 116 and Section 132(4) of the Trial on Indictments Act CAP 23 for orders that:-

a) The applicants be granted bail pending the hearing and determination of

their Appeal N0.53 of 2017 in this Court. \$20\$

> b) Any other order deemed fit by this honorable Court as regards this application.

The 1st applicant, Kasangaki Aston Kyomya was convicted of abuse of office and embezzlement contrary to sections 11 and 19(a) (iii) of the Anti-Corruption Act, 2009 respectively. The 2nd applicant, Okot Peter was

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convicted of the offences of embezzlement and fraudulent false accounting S contrary to sections 19(a) (iii) and 23(b) of the Anti- Corruption Act, 2009 respectively.

The 1st applicant was sentenced to 2 years imprisonment on count 1 and 3 years on count 2 to run concurrently and ordered to pay \$20,000,000/= (Twenty Million Shillings) to the state while the 2nd applicant was sentenced to 4 years imprisonment on count 1 and 2 years on count 2 to run concurrently and ordered to pay \$150,000,000/= (One hundred fifty million shillings) to the state.

Being dissatisfied with both the convictions and the sentences, the applicants 15\$ appealed to this Court vide Criminal Appeal No.15 of 2017. They applied for bail pending Appeal to this Court but the same was denied by the single justice on grounds that they lacked proof of fixed places of abode.

This is therefore, the applicants' second application for bail pending Appeal.

The grounds upon which the Application is premised as can be discerned from the Notice of Motion are that; \$20\$

- 1. The applicants have appealed against the conviction and sentence in *High Court Criminal Session No.03 of 2015 at Anti-Corruption Court.*
- 2. The hearing of the Appeal is likely to delay owing to the Court's busy schedule.
- \$25\$
- *3. The appeal is not frivolous and has merit.*
- 4. *The applicants have a fixed place of aboard within the jurisdiction of this* Court.

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- 5. There are no other pending charges against the applicants $\frac{1}{2}$

- 6. The 1st applicant suffers ailments such as hypertension which cannot be adequately attended to by prison health facilities.
- 7. It is fair and in the interest of justice that the applicants be released on bail.
- The motion is supported by the affidavits of the applicants, Kasangaki Aston \$10\$ Kyomya and Okot Peter sworn on the 24th day of July 2017. The grounds in support are substantially the same as in the Motion and as such, I will not belabor to reproduce them here.

At the hearing of the Application, Mr. Tumwesige Wycliffe appeared for the applicants while the respondent was unrepresented.

Counsel for the applicants informed Court that the respondent had been served but declined to receive the Hearing Notices as all the State Prosecutors were on strike. Counsel applied for leave to proceed ex parte and the application was granted since there was an affidavit of service on Court record showing that the respondent had declined to accept service.

Counsel reiterated the contents of the Applicants' Notice of Motion and the affidavits in support and submitted that there was new evidence that the Applicants had fixed places of abode. The 1st applicant, Kasangaki Aston Kyomya was said to be a resident of Green Valley Zone in Kamwokya II Parish, Kampala District where he has a permanent home. Counsel presented an \$25\$ assessment for property rates from KCCA in the names of the 1st applicant and a payment slip to KCCA by him.

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He further submitted that the 1st applicant also has a home in Kigaraale LC1 \$ \overline{5}\$ in Kyenjonjo district. He attached a letter from Kyalimpa Augustin, the Chairman LC1, Kigaraale Sub-County in Kyenjonjo District as proof.

As for the 2nd applicant, Okot Peter, he was said to have a fixed place of abode in Layibi Techo Sub-Ward, Techo Parish, Layibi Division in Gulu Municipality. Counsel presented a letter from Ojok Patrick Bongomin holder of National ID \$10\$ No. 005996496 the LC1 Chairman Techo Parish.

Counsel submitted that the applicants were granted bail in the lower Court and they fully complied with the bail terms and are breadwinners for their families. That for this application, they had substantial sureties who he presented to Court. For the 1st applicant, he presented the following;

- Mr. Henry Akiiki Mugisha, a 61 year old resident of MUT. Kitawuluzi Zone \$\vec{\iota}\$. LC1, Rubaga Division, Kampala District and a close friend to the applicant. He is a holder of National ID No.000070368.

- Mr. Kyaligonza Aloysius Kyaligaba, a 55 year old Engineer at Uganda ii. Broadcasting Corporation. He is a resident of Rugombe T/C Nyamasobya LC1, Kyenjojo District. He is a holder of National ID No.000608966 and a Staff ID No.5045. He is a close friend to the applicant.
- Mr. Muhire Stephen, the LC1 Chairman and resident of Green Valley iii. Zone, Kamwokya II Parish, Kampal Central Division.
- \$25\$ Mr. Magezi Alex, an Electrician at Ministry of Tourism, Wildlife and iv. Antiquities. He is a resident of Kisalosalo Village Urban Council, Kyebando Ward- Kawempe Division Urban Council and a close friend to the applicant.

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- Mr. Businge Dan Denis, a 33 year old Engineer and a resident of $\$ \overline{\nu}$. \$ Kalambi- Kiwumu LC1, Buloba MIT. V. Buloba Parish, Wakiso Sub-County. He holds National ID No.010455075 and passport No. B0966329 and a close friend to the applicant.
- Mr. Rwija Deogratias, a 65 year old resident of Green Vaaley Zone, vi. Kamwokya II Parish, Kampala Central Division working with the National Identification Registration Authority as Ag. Senior Stores Assistant. He holds National ID No.018317956 and a close friend to the applicant
- Mr. Livanga David, a 48 year old Councillor working with Kampala vii. Capital City Authority. He is a resident of Green Valley Zone, Kamwokya II Parish, Kampala Central Division and a son in law to the applicant.

For the \$2^{\text{nd}}\$ Applicant, the following were presented as sureties;

- Mr: Kibwota Wilfred, a 46 year old Director at GS Energy Ltd and a cousin i. brother to the applicant. He is a resident of Kulambiro Central Zone, Kyanja Parish, Nakawa Division. He is a holder of National ID No.005982575.
- ii. Ms. Aciro Lilly Rose, a 38 year old business woman in Kasangati Town Council and a wife to the applicant. She is a resident of Kayebe LC1, Kasangati Town Council in Wakiso District and a holder of National ID No.004667163.
- iii. Mr. Anywar Geoffrey, a 47 year old law clerk at Kakuru & Co. Advocates. He is a resident of Kirombe "B" Local council 1, Butabika Parish, Nakawa

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- Division and a holder of National ID No.013080812. He is a close friend to the applicant.
- \$iv.\$ Mr. Mwaka Stephen, a 43 year old Accountant working with Uganda Tourism Board. He is a resident of Kasalirwe Local Council 1, Nasse *Ward, Gombe Division- Nansana Municipality in Wakiso District. He is a close friend to the applicant.*
- *Mr. Acire Denis Otim, a resident of Kayebe LC1, Bulamu Ward, Kasangati* \$
 $\overline{\mathcal{U}}$. \$ *Town Council in Wakiso District and a Loss Control Officer at Century Bottling Company Limited. He is a close friend to the applicant.*
- *Mr. Watum Francis Katumba, a resident of Kayebe LC1, Bulamu Ward,* vi. *Kasangati Town Council in Wakiso District. He is a holder of National ID No.004895947* and a close friend to the applicant.

Counsel submitted that this was the applicants' second application for bail. That in the first application, the Judge declined to grant bail because the applicants had not established that they had permanent places of abode. He prayed that this Court grants the applicants bail pending the determination of their appeal with lenient terms because they have not been in any gainful activity as they have been in prison for more than a year and were not working during their trial for more than 4 years.

In this Country, it is a constitutional right for a person to apply for bail and the Court has the discretion to allow or deny such application.

This discretion is clearly spelt out in Section 132 subsection (4) of the Trial on Indictments Act which provides that except in a case where the appellant has been sentenced to death, a judge of the High Court or the Court of Appeal

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may, in his or her or its discretion, in any case in which an appeal to the S \$ Court of Appeal is lodged under this section, grant bail, pending the hearing and determination of the appeal.

For this Court, the discretion is specifically provided for in Rule 6(2) of the Rules of this Court which provides that the court may in any criminal proceedings, where notice of appeal has been given in accordance with rules 59 and 60 of the Judicature Court of Appeal Rules order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.

It has been held by this Court that the essence of bail pending appeal is not to enable the innocent accused attend his trial but rather to enable the \$15\$ convicted accused person pursue his appeal. See *Igamu Joanita Vs Uganda CACA No 107 of 2013*.

In my view, while I appreciate the fact that many appeals against conviction have succeeded thus reinstating the presumption of innocence, the Court should not ordinarily grant bail pending appeal to a convict already serving his/ her sentence unless there are peculiar or unusual reasons or circumstances which must be presented by the applicant to the satisfaction of Court.

The principles to consider when determining this type of application have however been set out by the Supreme Court in *\$Arvind\$ Patel \$v\$ Uganda SC \$25\$ Criminal Application No. 1 of 2003* where the following six considerations were listed; \$\sim\$

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- \$\dot{\{\boldsymbol{t}\}}\$. the character of the applicant;
- whether he/she is a first offender or not; \$\{it\}.\$
- whether the offence of which the applicant was convicted iii. involved personal violence;
- the appeal is not frivolous and has a reasonable possibility iv. of success;
- the possibility of substantial delay in the determination of \$\mathbf{f}\$ \$\boldsymbol{v}\$. the appeal.
- whether the applicant has complied with bail conditions vi. granted after the applicant's conviction and during the pendency of the appeal (if any).

The Court went further to clarify that it is not necessary that all the six conditions should be present in every case. That a combination of two or more criteria may be sufficient but each case must be considered on its own facts and circumstances.

I note that this is the Applicants' second application for bail pending Appeal, \$20\$ the same having been denied by a single Justice for lack of proof of fixed places of abode of the applicants. In the first application, the learned Justice of Appeal found that the applicants had complied with the bail terms and conditions in the lower Court. Further that there was no guarantee of an expeditious disposal of the appeal given the busy schedule of this Court as \$25\$ Election Petitions take precedence and that the offences of which the

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applicants were convicted of did not involve personal violence and the appeal \$\mathsf{S}\$ is not frivolous as it raises some issues that merit consideration.

However, the Learned Judge denied the applicants' application for bail pending appeal for lack of proof of fixed places of abode.

This time, it was submitted by counsel for the applicants that the 1st applicant, Kasangaki Aston Kyomya has a fixed place of abode in Green Valley \$10\$ Zone in Kamwokya II Parish, Kampala District where he has a permanent home. Counsel presented an assessment for property rates from KCCA in the names of the 1st applicant, Kasangaki Aston and a payment slip to KCCA from the 1st applicant. Counsel added that the 1st applicant is also a resident of Kigaraale LC1 in Kyenjonjo district. Counsel attached a letter signed by 15 Kyalimpa Augustin, the LC1 Chairman of Kigaraale Sub-County in Kyenjonjo District and holder of National ID No.013001052.

The 2nd applicant, Okot Peter was said to have a fixed place abode in Layibi Techo Sub-Ward, Techo Parish, Layibi Division in Gulu Municipality. Counsel presented a letter from the LC1 Chairman Layibi Techo Sub-Ward, Ojok Patrick Bongomin holder of National ID No. 005996496.

As pointed out in **Arvind Patel** (supra), the Supreme Court observed that an Applicant need not prove all conditions to be granted bail pending Appeal. A combination of two or more would suffice.

Having regard to all the circumstances of this application, I am satisfied that \$25\$ the Applicants are first offenders, the offences with which the applicants were charged and convicted of do not involve personal violence, their Appeal is not

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frivolous and has a possibility of success, there is a possibility of substantial \$\mathsf{S}\$ delay in determining their Appeal as this Court is still struggling to complete election petitions. I note that the applicants complied with all the conditions for bail granted to them by the Court below. They have proved to Court that they have fixed places of abode in Green Valley Zone in Kamwokya II Parish, Kampala District and Kigaraale LC1 in Kyenjonjo district for the 1st applicant \$10\$ and Lavibi Techo Sub-Ward, Techo Parish, Lavibi Division in Gulu Municipality for the \$2^{\text{nd}}\$ applicant within the jurisdiction of this Court. This is evidenced from the LC1 letters confirming their places of residence. The applicants further have substantial sureties. These factors lend credence to their application. I am therefore inclined to grant the application sought for. \$15\$

I therefore, grant the application and release the Applicants on bail pending the determination of their appeal on the following conditions;

- a) Payment of cash bail of shs 5,000,000 (Five Million shillings only) by each of the Applicants.
- b) The Applicants should report to the Registrar of this Court every month \$20\$ at 9.00 am, beginning on 1st of December 2017, for extension of their bail until their appeal is heard and disposed of or until further orders of this Court.
- c) The sureties should each bind themselves by signing a bond (not cash) of shs. \$20,000,000/\$ = (Twenty million shillings)
- d) A breach of any of the above conditions shall render the bail pending \$\mathsf{S}\$ appeal herein granted to the Applicants liable to an automatic cancellation.
- e) Bail will be cancelled if, any of the Applicants upon release, commits an offence injuring, the person or property of the complainants.
- I so order. \$10\$

10th day of November 2017 Dated this.....

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HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

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