

UGANDA / JUDGMENT

Kermundu v Uganda (Miscellaneous Criminal Application No. 0021 of 2016)

[2016] UGHCCRD 100 (1 November 2016)

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COURT

HC: Criminal Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Miscellaneous Criminal Application No. 0021 of 2016

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CRIMINAL APPLICATION No. 0021 OF 2016

KERMUNDU PASTORE APPLICANT

VERSUS

UGANDA RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

This is an application for bail. The applicant is indicted with one count of Murder c/s 188 and 189 of The Penal Code Act. It is alleged that on 29th March 2015 at Ali village, Pagei Parish, Warr Sub County in Zombo District, the accused together with another person and other persons at large murdered a one Orwinya Rufino. He was on 7th August 2015 committed for trial by the High Court but is yet to be tried and hence this application by which seeks to be released on bail pending his trial.

His application is by notice of motion under Article 23 (6) (a) and 28 of the *Constitution of the Republic of Uganda*, sections 14 (1) and 15 (1), (3) and (4) of the *Trial on Indictments Act Cap.23* and rule 3 of the *Judicature (Criminal Procedure) (Applications) Rules S. I 13-8*. It is dated 30th September 2016 and it is supported his affidavit sworn on 29th September 2016. The main grounds of his application as stated in the notice of motion and supporting affidavit are that; the offence with which he is indicted is bailable, he has a fixed place of abode within the jurisdiction

of the Court, and he is a person of advanced age with a sight problem.

In an affidavit in reply sworn by a one No 28815 D/Cpl. Ofoyoru Charles on 20th October 2016, he states that he is investigating officer of the case, and that the state is opposed to the grant of bail to the applicant mainly on grounds that; the accused is facing a charge carrying a maximum penalty of death and is likely to jump bail, although he is a person of advanced age, there is evidence to show that he actively participated in the commission of the offence and since the death of his wife, he is better off in custody where he is cared for by fellow inmates.

At the hearing of the application, the applicant was represented by Mr. Komakech Dennis Atiine while the state was represented by Mr. Emmanuel Pirimba, State Attorney. Counsel for the applicant, in his submissions, elaborated further the grounds stated in the motion and supporting affidavit and presented two sureties for the applicant. In his response, the learned State Attorney too elaborated further the grounds for opposing the application as contained in the affidavit in reply, and opposed the suitability of the second surety who ordinarily resides in Nebbi and has full time employment there which might prevent him from fulfilling his duties as surety.

Persons accused of criminal offences have a right to apply for bail by virtue of Article 23 (6) (a) and 28 (3) of the *Constitution of the Republic of Uganda*. However, the grant of bail is discretionary to the court (see *Uganda v Kiiza Besigye; Const. Ref No. 20 of 2005*). By virtue of sections 14 and 15 of the *Trial on Indictments Act*, a person indicted may only be released on bail if he or she proves to the satisfaction of the court that exceptional circumstances do exist to warrant his or her being released on bail. The circumstances which are regarded as exceptional include grave sickness, infancy or old age, and if the state does not oppose the applicant being released on bail. These exceptional circumstances though are not mandatory as courts have the discretion to grant bail even where none is proved.

In this case, the applicant in his affidavit claims that he is 80 years old. I have however perused a copy of the indictment attached to his application and the summary of the case indicates that he was found to be 73 years old at the time of his medical examination on PF 24, sometime during last year. This discrepancy in age has not been explained. Despite the discrepancy, advanced age for purposes of exceptional circumstances in bail applications has generally been settled as being 50 years (see *Andrew Adimola v Uganda, H. C. Misc. Crim Appl. No.9 of 1992* and Hon. Vincent *Nyanzi v Uganda, H. C. Misc. Crim. Appl. Appl. No.7 of 2001*). Either way he would qualify as a person of advanced age. I also had the opportunity to see the applicant in court and I have no doubt in my mind that he is a person of advanced age. The Investigating Officer in paragraph 6 of the affidavit in reply expressed the same opinion and so did the learned State Attorney in his submissions opposing the application. For those reasons, I find that the applicant has proved the exceptional circumstance of advanced age.

Be that as it may, the court has to consider the applicant's likelihood of escaping trial, interfering with state witnesses or tampering with evidence before granting him bail on account of advanced age. Considering that he was committed for trial in August last year, releasing the applicant on

bail is unlikely to cause interference with the prosecution case since investigations are complete. There is no averment either in the affidavit in reply expressing any basis for harbouring such a fear and neither has it been stated that he is likely to abscond. I have no reason to believe that the applicant is a flight risk.

Attendance of trial, when it is subsequently fixed, can be guaranteed by the imposition of rigorous terms as conditions for his release on bail. I am satisfied with the sureties that he presented in court as persons capable of guaranteeing his attendance of the trial, when the case is eventually fixed. Although the learned State Attorney opposed the suitability of the second surety on account of the distance of his residence from that of the accused, considering the fact that Nebbi District is within the geographical jurisdiction of this court, performance of his duties can be guaranteed by requiring him to execute a substantial bond.

In the circumstances I do find merit in the application and hereby order the accused to be released on bail on the following terms; -

1. The applicant is to execute and pay a cash bond of Shs. 2,000,000/=.
2. The first surety is to execute a non-cash bond of Shs. 5,000,000/= and the second surety a non-cash bond of Shs. 10,000,000/=.
3. The applicant is to report to the Assistant Registrar of this Court on the first Tuesday of every Month until the commencement of his trial or further orders of the court and to the Officer in Charge of Criminal Investigations at Alangi Police post on the last working day of every month until the commencement of his trial or further orders of the court.

In the circumstances, this application is allowed. I order the release of the applicant on bail subject to him meeting the above conditions, failure of which he is to be remanded. I so order

Dated at Arua this 1st day of November, 2016.

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Stephen Mubiru

Judge.

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