

UGANDA / JUDGMENT

Kiwanuka v Uganda (Criminal Miscellaneous Application 4 of 2022) [2022] UGSC 22 (28 July 2022)

[2022] UGSC 22

COURT

Supreme Court of Uganda

BEFORE

Opio-Aweri, JSC

CASE / FILE NUMBER

Criminal Miscellaneous Application 4 of 2022

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**⁵ THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF UGANDA
AT KAMPALA CRIMINAL MISCELLANEOUS APPLICATION NO. 04 OF 2022 (ARTSTNG
FROM CRIMTNAL AppEAL NO.38 OF 20211**

**KIWANUKA KUNSA STEPHEN:::APPLICANT VERSUS 10
UGANDA::::::::::::::::r:::f,IESPONDENT**

EU4wG !r:UBBY OPrO-AWERr. JSC

Introduction:

Kiwanuka Kunsa Stephen hereinafter the applicernt brought the instant application under Rules 6(21(a1,42'and 43 of the ruies of this court seeking orders that he be releascd on bail pending the hearing and determination of Criminal Appeal No. 38 of 2021 liled in this court and that costs of the

Background:

application be provided for.

The applicant together with others werc indicted with Eight (8) counts of Diversion of Public Funds and Onc (1) count of Conspiracy to Defraud the

Government of Uganda before the Ant-Corruption Court. After trial, the High Court found the applicant guilty, convicted him and sentenced him to Seven (7) years imprisonment in respect of the offences of Diversion of Public Funds to run concurrently and Two (2) years imprisonment in regard to the offence of Conspiracy to defraud. The sentences were to run 25

consecutively. 30

> Dissatisfied with the finding of the High Court, the applicant appealed to the Court of Appeal which confirmed the conviction and sentence but Page 1 of 16

⁵ ordered that the sentences be served concurrently. The applicant was however aggrieved with the finding of the Court of Appeal and consequently instituted Criminal Appeal No.38 of 2021 in this court which is pending hearing. It is from that appeal that the instant application emanates.

1o Representation:

At the hearing of the application, Mr. Asiku Nelly appeared for the respondent while Mr. John Isabirye appeared for the applicant. The applicant followed the proceedings virtually via video conferencing from Luzira Prison.

1s Grounds for the application:

The grounds for the application are that the applicant is of advanced age and in very poor, ever declining health which requires urgent specialized medical attention which he is unable to access while serving his custodial sentence in prison. The applicant also averred that the offences with which

- 20 he was convicted with did not involve personal violence, the appeal filed by the applicant is not frivolous and has high chances of success and that there is a possibility of substantial delay in the hearing and determination of the appeal. The applicant also contended that he is ready, willing and committed to comply with such terms as shall be set by this court.
- The application was supported with an affidavit and another supplementary affidavit all deposed by the applicant, the sum total of which can be summarized as hereunder;
- a) That he was charged with the offences of Diversion of Public Funds and Conspiracy to defraud the government of Uganda and later convicted on 21st December, 2018 before Lady Justice Margaret Tibulya.
- ⁵ b) He is currently serving a concurrent Seven (7) year term at Luzira Prison, Murchison Bay.
- c) That he has appealed to this court against conviction and sentence and that his appeal has high chances of success.

- d) That the administrative constraints of this court are that matters are heard on a first come basis and as such, there will be a substantial
- delay in hearing and determining the appeal.
- e) That in October 2019, the applicant suffered a hypertensive stroke which left his body paralyzed rendering him immobile and in great physical pain and as result, he is in need of urgent medical attention which cannot adequately be provided by Luzira Prison Murchison Bay Hospital as per the medical report annexed to the application and marked 'C'.
- f) That in 2021, he suffered a second hypertensive stroke which is an illustration that medical services at the said hospital are not adequate and thus not capable of coping with his ever deteriorating health condition.
- g) To demonstrate that Luzira Prison Murchison Bay Hospital lacks the capacity to handle any serious medical conditions which require specialized attention, two of his co-accused in criminal appeal No.183 of 2021, that is the late Christopher Obey and Bob Kasango passed on despite having been significantly younger than him.
- h) That if the applicant is not granted bail and his appeal succeeds, the time that he has served and continue to serve will not only render the appeal academic but will also occasion a miscarriage of justice.
- i) That the applicant was granted bail pending appeal in the Court of Appeal and obliged to the bail conditions.
- j) That the applicant has a fixed place of abode at Nyakinyugu zi Zone LC1, Luwafu Parish, Makindye Division Kampala with substantial sureties in the names of Mrs. Nakirilia Sarah Kunsu his wife, Mr. Page 3 of 16
- ⁵ Yiga Balilonda his brother, Mr. Sembajje Henry his friend and Mr. Asuman Matongolo also a friend, who all possess their respective National Identity cards and introductory letters from their areas of residence; and
- k) That it is just and equitable that he be granted bail pending the hearing of his appeal filed in this court.

The respondent opposed the application when she filed an affidavit in reply deposed by one Bireke Salina, a Senior state Attorney from the office of the Director of Publications.

In her reply, Ms. Bireke averred that the applicant was convicted with 1st offences involving Public funds which touch the economy with adverse implications. She also contended that the perusal of the judgment of the court of Appeal is conclusive that the appeal from which this application emanates is frivolous and has no possibility of success. That she took time to study the medical report from Uganda prisons and the same does not show that the applicant's condition cannot be managed by the prison facility. As regards the applicant's place of abode, the respondent contended that the applicant did not adduce evidence to show that he indeed resides at

Nakinyugu zi Zone LC.1, Luwafu parish, Makindye Division Kampala District. The respondent also averred that the circumstances under which the applicant complied with bail terms in the High court and court of Appeal have changed following his conviction by the High Court and subsequent confirmation by the Court of Appeal. Ms. Bireke prayed that the applicant be denied bail.

Submissions:

For the applicant, it was argued that this application is premised mainly on his ill health and ever declining physical state and unusual facts that warrant his release on bail pending the determination of the appeal. 30

Page 4 of 16

⁵ counsel for the applicant submitted that though the application for bail pending appeal is subject to a more stringent test than bail pending trial, the applicant wholly satisfies the stringiest test warranting the grant bearing in mind that bail pending appeal recognizes the possibility of the conviction being erroneous or the punishment being manifestly harsh and excessive. Counsel enlisted the principles that could compel court to release an appellant on bail pending as restated in the case of *Argind Patel versus Uganda* SCA No. 01 of 2003. 10

Counsel went on to highlight the applicant's ill health when he stated that in 2019, the applicant suffered a hypertensive stroke which left him paralyzed leaving him immovable, immobile and in great physical pain. Counsel further submitted that the applicant has since suffered from chronic Allergic Bronchitis, chronic clinical Gastritis with a possibility of Peptic ulcer disease. Counsel referred court to the medical report attached to the application marked 'C'. Counsel was thus of the view that the medical service in Luzira Prison Murchison Bay hospital lacks adequate specialized services and is unable to handle and cope with the appellant's ever-deteriorating medical condition. 15 20

To further bring to light the state of medical services in Luzira prison, counsel informed court that two of the applicant's co-accused in criminal Appeal No.183 of 2021, Christopher Obey and Bob Kasango passed away from less medical conditions whilst under the custody and treatment of Luzira prison Murchison Bay Hospital yet they were significantly younger and healthier than the applicant. 25

It was also the argument of the applicant that the offences with which he was convicted did not involve personal violence and that there is ^a likelihood of delay of determination of the appeal by this court owing to the court's policy of first come first serve basis. Counsel further argued 30

Page 5 of 16

⁵ that the applicant's appeal is not frivolous but rather has a higher possibility of success. To buttress this argument, counsel referred court to the case of David Chandi Jamwa versus Uganda, Supreme Court Misc. Application No.9 of 2018.

Counsel further submitted that the applicant has a fixed place of abode at Nakiyunguzi Zone LCI, Luwafu Parish Makindye Division Kampala District. Counsel also highlighted the fact the applicant was granted bail in a similar manner by the Court of Appeal and he religiously complied with the terms set which were depositing a cash bond, depositing his passport with the Registrar and reporting to court every last working day of the month. Counsel thus proposed that these circumstances are sufficient to diminish the risk of jumping bail by the applicant if this court was to exercise its discretion to grant bail. Counsel also submitted that the applicant has substantial sureties who include Nakirijja Sarah his wife, Mr. Yiga Richard his brother, Mr. Ssembajjwe Henry a friend and Mr. Asuman Matongolo also a friend. 10 15

For the respondent, it was argued that the applicant has no sufficient grounds to justify his release on bail pending appeal. Counsel for the respondent referred court to Rule 6(2)(a) of the rules of this court which in her view gives court wide discretion to the court whether to grant bail to the applicant or not. To the respondent, the exercise of discretionary power in applications of such a nature was re-emphasized in the cases of Arvind

Patel versus Uganda and David Chandi Jamwa versus Uganda (Supra).

Highlighting the medical condition of the applicant, counsel for the respondent submitted that the medical form that the applicant refers to does not show that the medical facilities in prison are incapable of managing his condition and that with that missing, the applicant's condition cannot fall within the meaning of grave illness to qualify as an

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- ⁵ unusual and exceptional circumstances to justify his release. Citing the case of Nakiwunge Racheal Muleke versus Uganda, SC Criminal Reference No.12 of 2020, counsel argued that exceptional circumstance were defined to mean;
- a) Grave illness certified by a medical officer of the prison or other institution where the accused is detained as being incapable of medical treatment while the accused is in custody.
- b) A certificate of no objection signed by the Director of Public Prosecutions, or
- c) The infancy or age of the accused

- To the respondent, the death of Christopher Obey and Bob Kasango to justify the applicant's prayer for release on bail is speculative. To sustain this line of argument, counsel insisted that there is no evidence adduced by the applicant to show that the two suffered and died of similar conditions as that of the applicant. That the applicant is further being speculative when he submits that he might die as the medical report attached to his application does not indicate that he might die if he is not released from prison to get proper medical care. 15 ?o

As to whether the applicant was convicted of offences involving personal violence, counsel submitted that the requirement of personal violence does

not apply to financial crimes. Counsel cited *John Muhanguzi Kashaka versus Uganda SC*. Miscellaneous Application No. 18 of 2019 where this court observed that the requirement for personal violence in granting bail pending appeal should not be applied to corruption and corruption related cases. Counsel thus submitted that in the instant appeal, the applicant was convicted of offences involving public funds which touch the economy with adverse implications on savers, the majority being low income earners. 25 30

Page 7 of 16

⁵ As to whether there would be a delay in the determination of the appeal, respondent counsel argued that this is speculative as there is no evidence to that effect and that the possibility of success of the appeal can only be assessed by perusing the record of proceedings, the judgment of the court from which the appeal emanates and the memorandum of appeal in question. In regard to the applicant, counsel was of the argument that the record of proceedings and judgment of the Court of Appeal have not been availed court's perusal in determining the success of the appeal. That what is only on record is the Judgment of the trial court and the memorandum of appeal to this court and their perusal indicates that the appeal is frivolous with no possibility of success. 10 15

Counsel for the respondent concluded by submitting that the factors that would warrant grant of bail pending appeal do not favour the applicant and that the appeal should be dismissed with an order that the appeal be fixed for expeditious hearing on merit but should this court be inclined to allow the application; stringent terms be imposed.

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Consideration:

This court is empowered under Rule 6(2)(a) of the rules of this court to release an appellant on bail pending the determination of his/her appeal where a notice of appeal has been given in accordance with rules 56 and 57.

It is trite that the power to grant bail pending appeal just like the power to grant bail pending trial is at the discretion of court which discretion has to be exercised judiciously. It is however important to note that each case is determined based on the existing facts and circumstances. This court as a court of last resort has jurisdiction to release an applicant at any time before the determination of the appeal as long as it deems it fit. The main Page 8 of 16

⁵ criteria for granting bail pending appeal is that the court must be satisfied that the appellant shall in compliance with bail conditions be available to attend the trial. See Kyeyune Mitala versus Uganda, Supreme Court Misc. Application No. 04 of 2017.

In applications of such a nature, the legal status of the applicant is amenable to the provisions of article 28(3) (a) of the Constitution. At this stage, the applicant though a convict still enjoys the presumption of innocence as provided by article 28(3) of the Constitution. The presumption of innocence continues as long as someone decides to exercise the right of appeal. The presumption does not stop at the trial level. Under the Constitution, the presumption of innocence acts as a rail guard to the protection of personal liberty and the right to a fair hearing. 10 15

See Kyeyune Mitala (Supra).

The guiding principles in the determination of applications such as the instant one have been laid down by this court in a number of decisions. These principles include;

- i) The character of the applicant
- ii) Whether the applicant is a first offender or not
- iii) Whether the offence with which the applicant was convicted involved personal violence
- SUCCSS iv) The appeal is not frivolous and has a reasonable possibility of
- v) The possibility of substantial delay in the determination of the appeal
- vi) Whether the applicant has complied with bail conditions granted before the applicant's conviction and during the pendency of the appeal if any.

⁵ See Arvind Patel versus Uganda, SC Misc. Application No. 01 of 2003 and David Chandi Jamwa versus Uganda (Supra). The applicant however does not need to prove all the above grounds. Proof of two or more is sufficient to warrant the grant of the application. It must be noted however, that the application for bail pending appeal must be subjected to strict conditions than one pending trial.

Regarding the character of the applicant, it was the argument of counsel that the applicant has a fixed place of abode at Nakiny'uguzi Zone L. C. I, Luwafu Parish, Ma-kidye Division Kampala District. Counsel described the applicant as a law abiding citizen, a family leader and a strong pillar of his community. That the applicant was granted bail by the Court of Appeal and religiously complied with the terms set by that court.

I have looked at the application and its supporting documents and what purportedly confirms the residential status of the applicant at the above address is the L. C1 introductory letter of Nakinyuguzi Lower L. C. I dated 17th May, 2022, annex 'A' to the application. In that letter, the L. C.1 chairperson states that the applicant is a resident of his area of jurisdiction. It can be deduced from the face of that letter that the applicant could indeed be a resident of that village but in my view, that is not sufficient enough in the circumstances of such an application. Like I observed before, the court is more stringent at this stage as this is not an ordinary application like one pending trial. The applicant is already a convict and must do more than mere proof to satisfy court that he should be released on bail pending the determination of his appeal. In this respect, a clear indication of the Block and Plot number of his area of residence would suffice in the circumstances. It is surprising that the applicant did not see that as important!

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⁵ Secondly, it was the argument of counsel that the applicant was granted bail by the Court of Appeal pending appeal and he religiously complied with the terms set by the Court of Appeal. I have perused the ruling of Kavuma J. A. in which the applicant was granted bail. The Court imposed stringent terms which in my view the applicant complied with as there is no evidence to the contrary.

Whether the applicant is a family leader and a strong pillar of his community, all these go to the background when weighed with the seriousness of the offence and whether or not there is a likelihood that the appeal would succeed. Good character alone can never be enough because there is nothing exceptional or unusual in having good character. These may not be exceptional and unusual factors. See, John Muhanguzi

Kashaka versus Uganda(Supral.

Counsel also advanced the argument that the applicant is a law abiding citizen as an element to describe the applicant as of good character. I think this is not convincing enough and not logical to say the least, that a person who has been convicted by two courts can be described as law abiding! A better description of the applicant should have been sought and not necessarily law abiding as the applicant has already been adjudged to have contravened the law when he was found guilty.

Whether the applicant is a first offender, the record of court does not show that the applicant has a previous criminal record. The respondent did not contest this assertion by producing any contrary evidence. Consequently, this court shall find that the applicant is indeed a first offender. 25

Whether the offence with which the applicant was convicted involved personal violence, it is now settled that the gravity of the offence must not and cannot be exclusively defined in terms of whether it involved violence or not. See the dictum of my learned sister Tibatemwa J. in John
Page 11 of 16 30

⁵ Muhanguzi Kashaka versus Uganda SC Misc. Application No.18 of 2019. It can of course be argued that the offence of Diversion of Public Funds and Conspiracy to defraud cannot involve personal violence. Like this court observed in John Kashaka, a person who commits a serious financial crime should not be treated with light gloves than one who commits violent related offences. The consideration should be the extent of loss to the tax payer and the potential implication for the country's development. 10

Whether the intended appeal is not frivolous and has a reasonable possibility of success, at this stage, the only way to assess that possibility

is by perusing the relevant record of proceedings, the judgment of the court from which the appeal emanates and the memorandum of appeal in question. See Arvind Patel versus Uganda (Supra) . 15

Attached to the supplementary affidavit in support of the application is the judgment of the trial court annex 'F', Judgement of the Court of Appeal annex 'H' and the draft Memorandum of Appeal. The notice of appeal is equally attached to the affidavit in support. I have had the benefit of perusing the above documents and observe that the same raise serious questions of law that require consideration by a full bench of this court. Those issues cannot of course be considered in this application. They can only be evaluated by the full bench when considering the appeal. I would 20 25

therefore agree with counsel for the applicant that the appeal is not frivolous.

Whether there will be a substantial delay in the determination of the appeal, like counsel for the applicant rightly pointed out, the policy of this court is that appeals are considered on the basis of first in first out. The applicant's appeal being recently filed (in 2021, I am sure there are other appeals that were filed earlier than his which merit to be considered first.

⁵ It is thus true that the applicant's appeal will definitely delay to be heard by this court as the same will receive no special treatment in being heard before those filed earlier.

The other aspect that was over emphasized by counsel for the applicant was the health condition of the applicant which he described as worrying. Counsel argued that the applicant suffered a hypertensive stroke which left him paralyzed on the left side of his body leaving him immobile and in great physical pain and thereafter developed other related diseases. He referred court to the medical report attached to the application. 10

I have taken time to peruse the medical report from Murchison Bay Hospital. The Medical Superintendent describes the health status of the applicant, as one suffering from several ailments where he has been undergoing treatment. The Medical Superintendent confirms that on 30th October, 2019, the applicant developed a left hypertensive stroke for which he is still admitted at the hospital with little improvement. He concluded thus; 15 20

> " Kiwanuka Kunsu Stephen aged 62 years in U. G Prison Murchison Bay suffers from:

- Left sided Hypertensive stroke
- Chronic Allergic Bronchitis (with asthmatic components)
- Chronic Clinical Gastritis with a possibility of Peptic Ulcer Disease
- Benign Prostatic Hyperplasia
- Chronic Liver Parenchymal Disease
- Old age (Elderly)
- Underlying ISS (HIV/ AIDS)".
- The Medical Superintendent observed that all the above are serious health conditions which are life threatening. The ailments as described by the medical superintendent of the hospital are indeed life threatening that Page 13 of 16 30

5 required specialized medical attention. what however this court is not sure of is whether the Hospital (Murchison Bay Hospital) is in position to provide the necessary medical attention to address the ailments the applicant is suffering from. The best the Medical Superintendent ought to have done, is to state in the medical report as to whether the hospital is in position or not to give the necessary medical attention for the different ailments stated. The report is silent in that regard which leaves this court in doubt. That doubt should, in all circumstances be resolved in favour of the applicant in my view. This court will therefore conclude that Murchison Bay Hospital is not in position to give the required medical attention to the applicant which have been described as life threatening. 10 15

As to whether the applicant complied with bail conditions granted before his conviction and during the pendency of the appeal in the Court of Appeal, it was the argument of Counsel for the applicant that the applicant was released on bail during the pendency of his appeal in the Court of Appeal and he religiously complied with the terms set by that Court.

In *David Chandi Jarnwa versus Uganda* (Supra), my Sister Arach-Amoko citing *Kato Kajubi versus Uganda* observed that the main purpose of bail pending appeal is that the court must be satisfied that the applicant will comply with bail conditions and be available to attend trial or the appeal. The burden therefore lies on the applicant to satisfy court that the application warrants the grant of bail pending appeal and that if granted bail, the applicant will not abscond.

The applicant has restated in this application that he was granted bail in the Court of Appeal and that he complied with the conditions set by that Court. No contrary evidence has been produced by the respondent to controvert this assertion by the applicant. This court will as such accept that assertion.

PaBe 14 of 16

- ⁵ The applicant has also named four sureties who, according to his counsel have been explained to, and understand their respective roles as sureties. Two of those sureties, Mrs. Nakirijja Sarah and Mr. Ssembajjwe Henry stood surety for the applicant in a similar application before the court of Appeal. I have perused the ruling of the Court of Appeal in regard to the bail application and I indeed find that the duo were approved as sureties 10
- for the applicant though I find that Ssembajjwe herein was addressed as Sembajo and Nakirijja Sarah as Mrs. Kiwanuka Kunsu Sarah Nakirijja. These in my view, were spelling errors on the part of Ssembajjwe and the wife of the applicant having taken on the husband's name respectively which can be clarified. 15

Though there are minor gaps that need clarification, overall, I find that the applicant has largely satisfied the conditions for grant of bail pending appeal and I accordingly allow the application in the following terms.

- 1. The applicant shall be released on a cash bail of UGX. 10,000,000/- (Uganda Shillings Ten Million)
- 2. The sureties herein, Nakirijja Sarah, Ssembajjwe Henry, Yiga Richard and Asuman Matongolo shall appear before the Registrar of this court with their original National Identity Cards for purposes of authenticity and the Registrar shall after ascertaining the authenticity of each of the identity cards take a record and keep a copy of each on the Court file.
- 3. Each surety shall execute a bond of UGX. 50,000,000/= (Uganda Shillings Fifty Million) not cash.
- 4. The applicant shall produce before the Registrar of this court the Duplicate Certificate of title of the land of his place of residence as described by the L. C.1 chairperson of his area, and the applicant is precluded from transacting in the same during the pendency of his appeal.

Page 15 of 16

- ⁵ 5. The applicant shall deposit with the Registrar of this court his passport and shall not, during the pendency of his appeal apply for a new passport in the event it expired before the determination of his appeal.
- 6. The applicant shall report to the Registrar of this Court on the last

¹⁰ Friday of every month with effect from the month of determination of
| this application. | tt" | |

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| Dated at Kampala the |)-s | a^y of JU\T
2022 |

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¹⁵ RUBBY . AWERI JUSTICE OF THE SUPREME COURT

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