

Kyambadde v Uganda (Hct) [2003]
UGHC 101 (5 November 2003)
[2003] UGHC 101

COURT
High Court of Uganda

BEFORE
Mukasa, J

CASE / FILE NUMBER
Hct

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT - 01- CR - 0010 - 2003

(Arising from FPT-00-cr-520/2003)

BETTY KYAMBADDE:.....APPLICANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application by Notice of Motion brought under Sections 14(1), 14a(1), (2),(3)(c) and (4) of the Trial on indictments Decree, 1971 as amended, Article 23(6) (a) of the Constitution and Rule 2 of the Criminal procedure (Applications) Rules SI 41- 1) seeking the Applicant to be released on bail pending trial. The Applicant was on 3rd October, 2003 charged with Embezzlement and remanded at Fort Portal Government Prisons.

The Application is Supported by an affidavit sworn by the Applicant Kyambadde Betty. The grounds of the application are basically:-

1. That the Applicant is aged 52 years.
2. That the Applicant has been married for 33 years, has seven children, two of whom are school going.

3. That the Applicant has a fixed place of a dode at Busitwa village. Ngogwe Sub-County, Buikwe County, Mukono District.
4. That the Applicant has for long time been suffering from Hypertension and has been attending to her Doctor one Luleme Micheal of Buziga Nsambya General clinic.
5. That the Applicant has no other pending and has never absconded from bail.
6. That the Applicant has substantial sureties.
7. That it is just, fair and equitable that the Applicant be granted bail.

the Cardinal principle of our Penal Systems is the presumption of innocence entrenchment and guaranteed in Article 28 (3) of the Constitution which provides that every person who is charged with a Criminal offence shall be presumed to be innocent until proven guilty or until that person has pleaded guilty. Based on this principle the Constitution under Article 23 (6) (a) authorises any person charged with a criminal offence to apply for bail. The rationale is that instead of keeping a suspect on remand, who might in the end be found innocent, he should not be incarcerated if the court is satisfied that he will fix turn up to answer the charge. When granting bail, Court must be satisfied that the accused person will turn up to answer the charge at his trial or when he is required by Court with the above in mind I have carefully listened to both Counsel and perused all the documents and the authorities cited in support of this application.

Section 14 (1) of the T. I. D empowers this Honourable Court at any stage of the proceedings to release the Accused person on bail. However under Section 14A of the T. I. D. the Court may refuse to grant bail to a person accused of an offence specified in subsection (2) of this section, if he does not prove to the satisfaction of the Court:-

1. That exceptional circumstances exist justifying his release on bail, and
2. That he will not abscond when released on bail. Among the offence specified in Sub-Section (2) above is:-
3. Embezzlement Contrary to Section 257 of the penal code: and it is this offence that the Applicant is charged with Sub-Section (3) of the above Section defines “exceptional Circumstances” to mean any of the following:-
4. Grave illness certified by a medical officer of the prison or other as other Institution or place, where the Accused is detained as being incapable of adequate Medical treatment while the Accused is in custody.

Indicating the exact date of birth deponed to b the Applicant’s parent or other person who know the Applicant’s date of birth to prove her age. I am alive to the fact that common sense and observation is a conclusive method of proof of age.

I must confess on the basis of my observation of the Applicant I was unable to determine whether the Applicant is anywhere near 50 years of age. In the circumstances I am unable to find that the Applicant qualify to be considered for bail on account of advanced age under Section 14A (c) of the Trial on Indictment Decree.

In paragraph 6 of the Applicant's affidavit in support, the applicant avers that for a long time she has been suffering from Hypertension and has been attending to Doctor Lulema Micheal of Buziga Nsambya Clinic. The Accused's grave illness is an exceptional circumstance under Section 14 A (3) (A) of the T. I. D. There are numerous authorities where this Honourable Court has found Hypertension such grave illness. However the Sub-Section requires that such grave illness must be certified by a medical officer of the prison, Institution or place where the Accused is in custody. According to paragraph 2 of the Applicant's affidavit she is reminded in Fort Portal Government prison. There is no such certificate from the Medical officer of that prison.

I agree with Mr. Bwiruka Counsel for the Applicant that by the use of the word "may" in section 14A of the T. I. D it is therefore not mandatory that an Accused shall not be released because exceptional circumstances are not proved. See Mureeba Vs Uganda Misc.crim. Appl. No. 0136/1999. However I equally agree with Mr. Asimwe that Court should exercise its discretionary powers to grant bail judiciary. In the instant instant Applicant court would have been helped in this regard if the Applicant's treatment records from her alleged helped in this regard if the Applicant's treatment records from her alleged Doctor, referred to in paragraph 6 of her affidavit. Were availed to it, but were not. In the circumstances I am unable to find the Applicant qualifies to

1. A certificate of no objection signed by the Director of public prosecution. Or
2. The infancy or advanced age of the Accused.

The instant application is particularly made under Sub section (3) (c) of the Section, therefore the basic ground is advanced age since the Applicant is not an infant. In paragraph 4 of her affidavit, the Applicant avers that she is aged 52years. There is a long list of cases where this Honourable Court has held that the age of 50 and above may be regarded as advanced age for purposes of a bail application, of which I will just mention a few:-

See:- Erika Mutiiba Vs. Uganda

Misc. cim. Appl. No. 04 of 1992.

-Francis Ogwang Olebe Vs. Uganda

Misc. crim. Appl. No. 25 of 2003

-Andrea Adimola Vs. Uganda

Misc.crim Appl. No.9 of 1992

-Hon. Vicent Nyanzi Vs. Uganda

Misc. Crim. Appl. Appl. No.7 of 2001

Mr. J. B. Asiimwe, The Resident state Attorney, opposed the Application. With regard to the Applicant's age, he submitted that in both the Accused's plain statement recorded on the 24th September, 2003 and her charge and caution statement recorded on 25th September, 2003 at the police the Accused's age is stated to be 43 years old. The learned Counsel's submission was a statement from the bar, it ought to have been made on oath by way of an affidavit in reply. Where a fact is deponed to by affidavit and there is no opposing affidavit in reply. Where a fact is deponed to by affidavit and there is no opposing affidavit or the averment is not rebutted the presumption is that such averment is true. See *Samwiri Massa vs Rose Achieng* (1978) HCB 297. The above notwithstanding, under Section 100, 101 and 102 of the evidence Act, whoever alleges a fact is supposed to prove it. The burden of proof is upon the Applicant to adduce sufficient evidence to prove that she qualifies to be considered for bail on account of advanced age. The best evidence as to prove the age in the instant case would have been a birth certificate, baptism certificate or in lieu thereof an affidavit be considered for bail on account of grave illness.

The applicant having failed to satisfy Court on the above two basic grounds, I do not find it appropriate at this stage to consider the other grounds with regards to the Applicant's sureties and the likeness to absorb if granted bail.

The Applicant's prayer for bail is hereby rejected. The Applicant is free to re-apply for bail if any of the above two grounds are satisfied.

Sgd: (LAMBOCK N. MUKASA)

AG. JUDGE.

5/11/2003

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