

UGANDA / JUDGMENT

Mubarak Vs Uganda (Criminal Appeal No.0042 of 2017) [2017] UGCA 57 (22 November 2017)

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COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

Criminal Appeal No.0042 of 2017

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA (COA) AT KAMPALA CRIMINAL APPLICATION NUMBER 0042 OF 2017

SHAFIQ MUBARAK ::::::::::::::::::::::::::: APPLICANT

VS.

UGANDA :::::::::::::::::::::::::::

CORAM:

\$10\$

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HON. MR. JUSTICE. S. B. K. KAVUMA, DCJ

RULING OF COURT

Introduction

This is an Application brought under Section 132(4) of the Trial on Indictment Act, Section 40(2) of the Criminal Procedure Code Act 15 and Rule 6(2) of the Judicature (Court of Appeal Rules) Directions. The Application seeks for an order granting the applicant bail pending the determination of his Appeal No. 184 of 2017 filed and pending in this Court.

The Application is brought by way of Notice of Motion supported by 20 the applicants' Affidavit(s) in support of the same which are on court record.

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Representation

At the hearing of the Application, Mr. Robert Mackay and Sam Osongol (counsel for the applicant) appeared for the applicant while Mr. Mugisha Peter, a Senior State Attorney at the chambers of the Director of Public Prosecutions, (DPP), (counsel for the respondent) was for the respondent.

Background

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The background to the Application is that on 31st May 2017, the applicant was convicted of the offence of Money Laundering contrary to Sections 116(c) and 136(1)(a) of the Anti-Money Laundering Act, 2013 and sentenced to imprisonment for 5 years and a compensation order for USD \$20,000/=. The applicant had been arrested on the 18th of May 2015 from Logogo Bypass Mall and taken to a safe house in Kololo where he was kept for 21 days before being taken to Kireka SIU Police Station where he spent \$15\$ another 9 days. While in detention at Kololo he was told that he had been involved in theft of money from Equity Bank, Oasis branch. The applicant had been on remand for two (2) years and he now seeks to be released on bail pending the determination of his Appeal. \$20\$

The application is premised on grounds set forth in the Notice of Motion and are:

1. That the Applicant was arraigned before the Anti-Corruption Court on the 16th day of June 2015 and charged under the

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Money Laundering Act, 2013 with Conspiracy to Commit a Felony c/S 390 of the Penal Code Act.

- 2. That on the 31st May, 2017, the applicant was acquitted of conspiracy to commit a felony but convicted of Money Laundering and was sentenced to imprisonment of 5 years and compensation order of USD 20,000.
- 3. That before his sentence throughout the trial he had been on remand nearing to 2 years.
- 4. That the applicant has no previous criminal record and the offence for which he was convicted did not involve any form of personal violence.
- 5. That the applicant has substantial sureties who are willing and ready to stand for him.
- 6. That the applicant's appeal has very high chances of succeeding.
- 7. That the appeal is likely to take some time to be heard as the court has a heavy backlog of cases and is now in the process of concluding election appeals backlog.
- 8. That the discretion of the court be exercised in favour of the applicant and he be released on bail pending the hearing and determination of his appeal pending before this court. (Sic)

Submissions of counsel

In their submissions, counsel for the applicant referred to the the authority of Arvind Patel vs. Uganda Supreme Court criminal application number 1 of 2003 and Sarah Birete vs. Uganda, \$25\$

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Supreme Court Criminal Application No.4 of 2016. That the guidance in the two authorities is that in an application of this nature, the applicant must show;

1. That he is a first offender.
- 2. That the offense with which he was found guilty of by the trial court did not involve personal violence.
- 3. That there is a possibility of substantial delay in the determination of the Criminal Appeal.
- 4. That there is a high chance of success of his Appeal, which is not frivolous.
- 5. That the applicant is of good character.

Counsel further submitted that the guidelines have since been followed by this Court in many cases some of which are **Teddy** Seezi Cheeye Miscellaneous Application Number 37 of 2009, Mugisha Gregory vs. Uganda Reference Number 179 of 2011, 15 Damian Akankwatsa vs. Uganda. Criminal Application Number 140 of 2015, Juma Nkunyaingi vs. Uganda; Criminal Application Number 104 of 2016.

He contended that if the applicant is not granted bail pending appeal, his appeal will be rendered nugatory. That having spent 2 \$20\$ years in custody on remand and having been sentenced to imprisonment for 5 years, that sentence is excessive. $\overline{f}$

Counsel further submitted that the applicant is a first time Offender and has a permanent place of abode in Lukuli Zone, Upper Konge

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Makindye Division within the jurisdiction of this Court and has been profiled by the area Local Council Chairperson. That prior to his conviction, the applicant was of good character engaging in the importation of second hand vehicles.

- He presented four sureties namely; $\overline{5}$

- 1. Walakira Zake Mubarak aged 59, a resident of Upper Konge Zone Lukuli Konge Parish Makindye Division. He is the father to the applicant and the Managing Director of Uganda Driving Standards Agency located at Plot 79 Buganda road. He is the holder of diplomatic passport Number DA025488. He was introduced by the area Local Council Chairperson. He has a National ID Number 005623583.
- 2. Zam Nampeera Mubarak, aged 49. She is a business lady dealing in the importation of jewelry and general merchandise trading under Zam Zam jewelry. She is a resident of Upper Konge Zone Lukuli Konge Parish Makindye Division and is the mother of the applicant. She has a passport Number B0466466. She also has an LC1 letter of introduction. She has a land title for their matrimonial home together with Hajji Mubarak and they are willing to deposit it with this Court to secure the attendance of Court by the applicant. The property is private mailo comprised in Kibuga Block 13 Plot 478 situate at Upper Konge.
- 3. Asio Omar Majende aged 49, the managing director of East African Mining Company Ltd, operating in Karamoja. He is a

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resident of Kintu Village Council, Lukuli Urban Ward Makindye Urban Council. He is the holder of a National ID Card Number 000070537. He is also the holder of passport and has been introduced by the LC1 Chairperson of the area where he stays. He is a longtime family friend to the Hajji Mubarak family.

Counsel prayed that this Court grants the Application as the applicant is suffering from Hepatitis B. He referred to the medical report that is on record indicating that since 2015, the applicant's health has deteriorated. The applicant is also willing and ready to deposit his passport number B0840447 in Court.

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In conclusion, counsel prayed that this Court be pleased to grant the applicant bail pending the determination of his Appeal.

In reply, counsel for the respondent opposed the application on the grounds that it lacks merit. That the offence of which the applicant \$15\$ was convicted is serious in nature involving colossal sums of money. Counsel cited **Patrick Ssentongo vs. Uganda Court of Appeal** Criminal Application Number 17 of 2017 in support of this submission. In respect of the fact that the hearing of the Appeal is likely to delay, counsel submitted that this Court is fully \$20\$ constituted to handle Appeals that have been lodged before it.

With regard to the ground that the Appeal has a likelihood of success, and that the trial learned judge shifted the evidential burden to the applicant, counsel contended that the evidential burden was never, at any time, shifted as alleged. Counsel stated \$25\$

\$\overline{6}\$ that the medical report presented before court is not backed by sufficient documentation to enable this Court to independently make analysis as to what the offender is suffering from.

Counsel prayed that this Court dismisses the Application. However, he also prayed, in the alternative, that should Court be inclined to \$\mathsf{S}\$ grant the Application, stringent conditions should be imposed on the applicant given the colossal sums of money involved in the matter before court.

Court's consideration of the Application \$10\$

The power to grant bail pending appeal is discretionary but must be exercised judiciously (See Walubiri Godfrey Vs Uganda Criminal Application No. 44 of 2012 Court of Appeal)

The right to apply for bail is grounded in **Article 23(6)** of the Constitution which provides: 15

23. Protection of personal liberty.

"(6) Where a person is arrested in respect of a criminal offence-

- (a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail \$20\$ on such conditions as the court considers reasonable:"

The law relating to bail pending appeal is found in Section 132(4) of the *Trial on Indictments Act Cap 23* which provides:

Section \$132(4)\$;

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"Except in a case where the appellant has been sentenced to death, a judge of the High Court or the Court of Appeal may, in his or its discretion, in any case in which an appeal to the Court of Appeal is lodged under this section, grant bail, pending the hearing and determination of the appeal."

Similarly Section 40(2) of the Criminal Procedure Code Act Cap 116 provides:

Section \$40(2)\$;

"The appellate Court may, if it sees fit, admit an appellant to bail \$10\$ pending the determination of his appeal, but when a magistrate's court refuses to release a person on bail, that person may apply for *bail to the appellate court.*"

The case of **Arvind Patel Vs Uganda** (supra) set out the conditions to be considered by Court as special circumstances in granting or refusing to grant bail pending appeal to an applicant as follows:

The character of the applicant. "(a)

Whether he or she is a first offender or not. \$(b)\$

Whether the crime of which the applicant was convicted \$(b)\$ involved personal violence. \$20\$

Whether the appeal is not frivolous and has a reasonable \$(c)\$ possibility of success.

The substantial delay in the determination of the appeal. \$(d)\$

Whether the applicant has complied with bail conditions \$(e)\$ granted after the applicant's conviction and during the pendency of appeal (if any)." (Sic)

His Lordship Justice Oder JSC (RIP) observed in that case:

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"In my view, it is not necessary that all the conditions should $\mathcal{S}$ be present in every case. A combination of two or more criteria may be sufficient. Each case must be considered on its own facts and circumstances".

See also David Chandi Jamwa vs Uganda (supra) and Gregory Mugisha Vs Uganda Criminal Reference No. 179 of 2001.

In the instant Application, I am satisfied that the applicant is a first offender. The offences with which he was convicted neither attracted the death sentence nor did they involve personal violence. The contention by counsel for the respondent that the matter involves colossal sums of money is, in my view, better suited for consideration at the time of sentencing when appropriate levels of the sentence imposed shall be set should the applicant's Appeal fail.

It is on record that the applicant suffers from condition called Hepatitis B which at times results into sudden death. This, to my mind, puts the applicant's health condition in a situation which is $\mathcal{N}$ potentially life threatening.

In addition, the applicant has served one of the five years of his sentence. By the time his Appeal may be heard and disposed of, he may as well have served a substantial part of that sentence and should his Appeal succeed, he would have suffered injustice. See **Arvind Patel** (Supra)

I take judicial notice of the fact that due to various constraints faced by this Court and given that it is currently handling Election Petition Appeals which, by law, may take precedence over the $\$ \text{applicant's Appeal}$, Chances are that the hearing of his Appeal may not be conclusively disposed of anytime soon. (See **Criminal Appeal** No. 20 of 2011 David Chandi Jamwa Vs Uganda, and Criminal Reference No. 179 of 2011 Mugisha Gregory Vs Uganda)

I note that Court has been urged by counsel for the respondent to $\$10$ set stringent conditions for the applicant's bail pending appeal should it be granted. I agree that such terms should be stringent but also reasonable. The purpose should be for such conditions to cause that the applicant attends Court whenever required to do so during the Court hearing of his Appeal. $\$15$

I find all the sureties presented to court by counsel for the applicant substantial.

In the circumstances, I am persuaded that this Court should grant the applicant bail pending the disposal of his Appeal as indeed I hereby do, on the following terms: $\$20$

- 1. He will deposit a cash bail of 5,000,000= in this Court.
- 2. He will deposit his passport NO. B0840447 with the **Registrar of this Court**.
- 3. The $\$1^{\text{st}}$ and $\$2^{\text{nd}}$ sureties. Walakira Zake Mubarak and Zam Nampeera Mubarak shall deposit the land title for the land comprised in Upper Konge Kibuga Block 13 Plot 478 which is their matrimonial home with the Registrar of this Court.
- 4. The four persons presented to Court as sureties are approved and they will each execute a bond of Shs. $\$20,000,000/\$ =$ (twenty million) each, not cash and deposit the same with this Court.
- 5. The applicant shall report to the Registrar of this Court on every last working day of the month starting from the $\$31^{\text{st}}$ of August 2017 for extension until his Appeal shall have been heard and disposed of or until such other or further orders of this Court.
- I so order. $\$15$

$\$ \text{applicant's Appeal}$

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Dated at Kampala this S. B. K Kavuma, DEPUTY CHIEF JUSTICE $\$$

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