

UGANDA / JUDGMENT

Mungu & 2 Others v Uganda (Criminal
Miscellaneous Application 16 of 2023)
[2024] UGHC 715 (23 July 2024)
[2024] UGHC 715

COURT
High Court of Uganda

BEFORE
Acellam, J

CASE / FILE NUMBER
Criminal Miscellaneous Application 16 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA CRIMINAL MISCELLANIOUS
APPLICATION NO. 0016 OF 2023 (ARISING FROM NEBBI CRIMINAL CASE NO. 0185
OF 2021)

1. MUNGU ACEL JENARO
THEKO MARTIN \$2.\$
3. OWECI ROBERT:.....

VERSUS

1. UGANDA:.....

RULING

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BEFORE HON. JUSTICE COLLINS ACELLAM**Brief Introduction**

- The Applicants lodged this application on the 5th of September 2023 seeking to be released on bail pending trial of Criminal case No. 0185 of 2021. The Applicants are indicted on the offence of Aggravated Robbery contrary to sections 285 and 286 and Attempted Murder C/S
- 204 of the Penal Code Act Cap 120. They were committed to the High Court for trial and 20 remanded in custody at PAIDHA Central Government Prison.

This Applicant brought this Application by way of Notice of Motion under Article 23 (6) a & 28 (3) (a) of the 1995 constitution of the Republic of Uganda, sections 14(1) & 15 of the Trial Indictment Act Cap 23, for orders that the Applicants be granted bail pending hearing and

25 disposal of the case Criminal Case No. NAB-CRB 0185/2021.

Grounds of this Application

The grounds on which this Application is based are briefly;

- 1) That the Applicants were remanded in custody at PAIDAH Central Government Prison in July 2021 by the Chief Magistrate Court of Nebbi at Paidha under Criminal Case No.
- 0185 of 2021 pending their trial on the offences of Aggravated Robbery C/S 285/286 and Attmpted Murder C/S 204 of the Penal Code Act.
- 2) That the offences with which the Applicants are indicted are only Bailable by this honourable court which has discretion to grant bail to the Applicants.

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- 3) That the Applicants have a right under Article 28 (3) a of the Constitution to be presumed innocent until proven guilty and actually believes they are innocent as they have a good defence to the Allegations against them.
- 4) That the Applicants have substantial sureties willing to abide by bail conditions that this court may consider reasonable to impose.
- 5) That the Applicants have a fixed place of abode within the jurisdiction of this court.
- 6) That it is in the interest of substantive justice that the Applicant be admitted and released on bail pending his trial at Arua.

Grounds of Opposition

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In reply, KISOMOSE BRIAN, a State Attorney of Arua deponed an affidavit in opposition to

the Application of the 1st Applicant briefly that the 1st Applicant is likely to interfere with 15 prosecution witnesses since the severity of the sentence upon conviction is death penalty. The deponent adds that the Applicant's prospect of abscondment is extremely high since he is already committed to the high court.

Grounds in Rejoinder

In Rejoinder, the 1st Applicant contend that he has a fixed place of abode at Ondreko Village, \$20¹\$ Paduba Parish, Oraa County in Zombo district and cannot abscond and that he has a right to apply for bail as the law presumes him innocent till proven guilty.

ISSUE

Whether the Applicant has satisfied all grounds to warrant grant of Bail pending Trial.

Determination 25

Court has duly considered the submission of counsel for the Applicant. Court notes that although several court decisions were cited by the officers of court, they were not courteous enough to furnish copies to court. Officers of court should always ensure that whatever authorities cited are availed to court to aid court in discharging its judicial duties. Court has nevertheless accessed the authorities on its own, considered them as well as those not cited in arriving at its decision. Nevertheless, court remains grateful.

I wish to note upfront that the Application is omnibus in nature yet bail application should be made by each accused person even when they are jointly charged.

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- This is the legal position settled in the case of Katebaraine Alfred & Komakech Ephraim vs \$ \mathsf{S} \$ Uganda, Criminal App No. 165 of 2019 (Court of Appeal) where KAKURU JA held that each Applicant for bail ought to file separate application stating reasons peculiar to him or her.
- In this case, I have ignored the defect and save the application from a strike out order by calling on to Article 126(2) of the Constitution by disregarding the omnibus nature of the Application
- as a technicality. However, legal practitioners ought to take heed and act accordingly. 10

Position Of Law

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Where a person is arrested in respect of a criminal offence, the person is entitled to apply to court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable. See Article 23(6) (a) of the 1995 Constitution.

- Bail is the release from custody by a court of law of a person accused of a criminal offence after 15 such person has entered a recognizance consisting of a bond with or without sureties, for a reasonable sum of money to the effect that he or she would appear before court for his or her trial.(See:BJ Odoki, A Guide to Criminal Procedure in Uganda 2nd Edition 1990 at page 71, Aganyira Albert Versus Uganda, Criminal Misc. Application No. 0071 of 20-23.
- Bail is a fundamental aspect of any criminal justice system that guarantees the accused the right 20 to a fair trial. The practice of granting Bail grew out of the need to safeguard the fundamental right to liberty.

Under Article 23 of the Constitution of the Republic of Uganda, 1995, no person shall be deprived of his or her personal liberty unless so prescribed by a reasonable form and just procedure.

In the criminal law context, this freedom is embodied generally in the right to be presumed innocent until proven guilty and especially in the right of bail.

The object of bail is to ensure that the accused person appears to answer the charge against him 30

or her without being detained in prison on remand pending trial. The effect of bail is therefore to temporarily release the accused person from custody. SEE OPIYO Charles Alias Small Vs Uganda, Criminal Miscellaneous Application No. 26 Of 2022

The paramount consideration for granting or refusing to grant bail is to strike a balance between individual rights and the interest of society. In other words, bail is devised as a technique for affecting the synthesis of two basic concepts of human values, namely, the right of the accused $\mathcal{S}$ person to enjoy her personal freedom and the public interest, subject to which the release is conditional on the surety to produce the accused person in court to stand his or her trial. See Ssendaula Eria Vs Uganda Criminal Miscellaneous Application No. 9 Of 2018.

The right to personal liberty enjoins a right to apply for and be granted bail basing on courts discretion.

It is important therefore to take note of what Justice E. Lugayizi stated in Alipwasadi Matovu Vs. Uganda, Miscellaneous Criminal Application No. 15/2005

"That in matters under consideration and in other matters of bail, court must bear in mind a few important principles; 15

- a) Firstly, that right to bail is not automatic.
- b) Secondly, that article 23(6)(a) of the constitution limits courts discretion in such Matters to setting conditions that would guarantee the return of the accused person to court to answer the charges against him or her before releasing him or her on bail.

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The rationale behind this reasoning is that the constitution recognizes the presumption of innocence as a fundamental human right and therefore, such recognition is not in vain and should lead to the liberty of an accused person.

- 25 Further, the discretion to grant bail under Article 23 (6) of the Constitution of the Republic of Uganda, 1995 and Section 14 of the Trail Indictment Act, Cap 23 should be balanced between two conflicting demands, that is, shielding the society from misadventures of the person allegedly involved in the crime and presumption of innocence of the accused till he or she is proved guilty or pleads guilty as stipulated under Article 28 (2) a of the Constitution of the Republic of
- 30 Uganda.

Hon. Justice Musene in Col. (Rtd.) Dr. Kizza Besigye Vs. Uganda, H. C. Kampala, Criminal Application No. 83 Of 2016 held that the court is given or left with the discretion to grant or refuse bail. It must always be born in mind that where any legislation confers upon court the discretion to do or refrain from doing a grant or refuse to grant a relief sought, such discretion

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- must be exercised without any malice, ill will, ulterior motive or regard to external influence or 5 circumstances.
- However serious the nature of the charge against the accused, it remains an allegation until proved. The seriousness of the offence must be balanced against the application of the presumption of innocence and other relevant factors when considering whether or not to grant
- bail. See Ssendaula Eria Vs Uganda Criminal Miscellaneous Application No. 9 of 2018. 10

The law is well settled in cases where the Applicant is charged with a very grave offence in respect of which the law stipulates that in order to be released on bail; the applicant must prove exceptional circumstances.

The test this court has set is that the burden is upon the Applicant to satisfy court by putting forth before court a set of facts beyond the ordinary consideration for bail upon which the court 15 can act in exercise of its discretion to admit the Applicant on bail . SEE Bongomin Richard Vs Uganda, H. C. MISC. APPLICATION NO. 0057 OF 2008 (UNREPORTED)

Section 15 (1), (3) & 4 of the Trial Indictment Act sets conditions under which court may refuse to grant bail. It provides thus;

- (1) Notwithstanding section 14, the court may refuse to grant bail to a person accused of an 20 offence specified in subsection (2) if he or she does not prove to the satisfaction of the court;
- 1. that exceptional circumstances exist justifying his or her release on bail; and
- 2. that he or she will not abscond when released on bail.
- In this section, "exceptional circumstances" means any of the following-25
- 1. grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody;
- 2. a certificate of no objection signed by the Director of Public Prosecutions; or
- 3. The infancy or advanced age of the accused. 30.

In considering whether or not the accused is likely to abscond, the Court may take into account the following factors-

1. Whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda;

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2. Whether the accused has sound securities within the jurisdiction to undertake that the accused S shall comply with the conditions of his or her bail;
3. Whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and
4. Whether there are other charges pending against the accused.

10 Existence of a fixed place of abode

There is always a concern as to whether the Applicants if granted bail will return to face trial. Therefore, conditions ought to be met to eliminate such risks especially for offences that infer great /severe penalties.

Regarding the consideration of whether the Applicants has a fixed place of abode, it is trite that

- the onus is on the Applicant to satisfy court that he or she has a permanent place of abode within 15 the jurisdiction of court and that he or she is not a resident outside Uganda.
- The onus of proof is on the Applicants to satisfy court that he has a permanent place of abode in a particular known village, sub-county, county and district. See Mugenyi Steven Vs Uganda Criminal Misc. Application 65/2004, Justice Remmy Kasule (as he then was)
- 20 This in my view, is to enable court exercise jurisdiction over the Applicant while on bail and to be able to trace his or her whereabouts whenever necessary.

In the instant Application, counsel for the application submits that the Applicant has a fixed place of abode within the Jurisdiction of this honorable court. What amounts to a fixed place of abode within court's jurisdiction is a matter of evidence and not mere speculation. In my view,

\$25.\$ having a fixed place of abode means a permanent place of residence, or a place of stay for some time or a place where someone ordinarily resides. It is a place where the Applicant can with certainty or at least predictability be traced if required. Having a fixed place of abode is a question of fact.

Clause 12 of the Bail Guidelines requires that an Applicant provide a copy of their national Identity card and an introductory letter from the LC1 Chairperson of the area where the 30 Applicant resides.

In all clarity, these documents are meant to provide the essential details showing that the Applicant can be easily tracked down and located if required.

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In absence of the above, the Applicant falls short of an indispensable requirement. \$ \mathsf{S}\$

On record, in respect to the 2nd Applicant, THEKU MARTIN, there is no introduction Letter of the LC1 of Ondreko village, Paduba Parish, Kango sub-county, Okoro County in Zombo District but rather the Applicant's national Identification which shows the that the 2nd Applicant is a resident the above Address.

In respect to the 1st Applicant, MUNGU ACCEL JENARO, counsel submits that he is from 10 Ondreko village, Paduba Parish, Kango sub-county, Okoro County in Zombo District. There was no LC1 Introduction letter nor national Identification card filed on record to back up the same. Court resides on evidence and so an assertion must be backed up by evidence.

In respect to the 3rd Applicant, OWECI ROBERT, counsel submits that he is a resident of

Ondreko village, Paduba Parish, Kango sub-county, Okoro County in Zombo District. There was 15 no LC1 Introduction letter nor national Identification card filed on record to back up the same. Court makes decisions based on evidence and so an assertion must be backed up by evidence.

The 2nd Applicant has produced an identification card to show where he resides hence, he is from within the jurisdiction of this court. The 1st and second Applicants brought no evidence other than a contention in their submissions thus hasn't satisfied this condition.

Existence of Substantial sureties

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This court has also considered the sureties presented before this court by the Applicants' counsel. The sureties were presented and identified by their national ID as follows;

The 1st Applicant, MUNGU ACEL JANARO relied on one surety, a one MR. OKUMU JOHNSON, 49 YEARS, a Teacher of Kango Primary School in Kawuwa Village, Paduba Parish, 25 Kango Sub-County in Zombo District. Tel: 0760735572. An Introduction letter from the LC1 of Ondreko village, Paduba Parish, Kango Sub-County in Zombo District was filed on record. His National Identification Card was also filed on record.

I wish to note that when presenting a surety, each Applicant must present a minimum of 2 sureties, however, the 1st Applicant has only presented 1 surety. 30

The 2nd Applicant, THEKO MARTINE, 73 years presented two sureties, the 1st surety is a one Mr. JANEGA VINCENT, 60 years of age, a peasant farmer and a retired Parish Chief. He is a resident of Thongu village, Omua Parish, Kongo sub-county in Zombo District. TEL:

0782829378. An Introduction letter from the LC1 of Thongu village, Paduba Parish, Kango \$ \mathsf{S} Sub-County in Zombo District was filed on record. His National Identification Card with NIN: CM640871044A6H was also filed on record.

The second surety is a one OKELLO SANTO, 62 years of age, a farmer from Lua Village, Paduba Parish, Kango Sub- County in Zombo District. An Introduction letter from the LC1 of Lua village, Paduba Parish, Kango Sub-County in Zombo District was filed on record. His National 10. Identification Card with NIN: CM630871039YGC was also filed on record.

The sureties of the 2nd Applicant presented to this honourable court are satisfactory. When asked of their duties, they could clearly relate to this honourable court.

In respect to the third Applicant, OWECI ROBERT, he relied on one surety, a one MR. MUGISHA FRED, aged 54 years, a businessman and a timber dealer and an in-law to the 15 Applicant. He is a resident of Mvuli Cell, Central Ward, Paidha Town Council in Zombo District. An Introduction letter from the LC1 of Mvuli Cell, Central Ward, Paidha Town Council in Zombo District was filed on record. His National Identification Card with NIN: CM700471007YEH was also filed on record.

In both the high court and Magistrate court, an Accused person applying for bail must present 20 at least a minimum of 2 sureties. In this case, the 1st and 3rd Applicant relied and presented only one surety. This requirement cannot be dispensed with.

The substantiality of a surety is connected to the ability to ensure the Applicant makes appearance on the due date appointed by court for hearing. This is a capital offence and all doubts in respect to the return of the accused ought to be satisfied. Therefore, in light of the \$25.\$ above, the sureties presented before this honorable court is substantial in light of only the 2nd Applicant.

Existence of exceptional circumstances

The supreme court of appeal addressed the meaning of exceptional circumstances in *S verses Bruintjies* 2003 (2) SACR 575 AT 577 as follows; 30

> "What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release ". What is exceptional cannot

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be defined in isolation from the other relevant factors save that the legislature clearly had in mind circumstances which remove the Applicant from the ordinary run".

This simply means that court can't deal with exceptional circumstances solely without reliance on other factors/principles. Much as exceptional circumstances are no longer mandatory, the same ought to be exercised judiciously and where circumstances of the case warrant its consideration, the same shall be done to avoid defeat of Justice.

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In consideration of exceptional circumstances, Clause 14 (2) of the Bail Guidelines provides that exceptional circumstances referred to is grave illness certified by a medical officer of Prison or other institution or place where the Applicant is detained as being incapable of Adequate medical treatment while the Applicant is in Custody. Second is Advanced age of the Applicant.

In light of the facts, on account of the 2nd Applicant, he is 73 years of age. Clause 4 of the Bail 15 guidelines define Advanced age to be persons of 60 years and above thus the second Applicant meets the criteria.

In light of the medical forms dated 21st /01/2021 filed on record by the 2nd /^{sup} and 3rd /^{sup} Applicant marked Annexure 'B' and 'A' respectively, it indicates that the 2nd /^{sup} Applicant is suffering chest

pain, headache, prolonged weakness. As a person of advanced age, he is prone to such illness 20 and its only right that Justice meets its course. If he was a young man, such illness would have been ably managed from Prison.

Annexure 'A' is a medical form dated 16th /03/2021 was filed relating to the medical condition of the 3rd /^{sup} Applicant as suffering from a burning pain which is increased by eating beans or sour

foods. The 3rd /^{sup} Applicant's age is uncertain as no ID was filed on record. There is no certification 25 from medical personnel of Prison to confirm that this condition cannot be managed from prison.

Much as it is not mandatory to prove exceptional circumstances, there is need to do so in circumstances where the offence with which the Applicants is charged with is grave. Circumstances of each case are examined differently.

On the basis of the evidence put forward by the 1st /^{sup} and 2nd /^{sup} Applicant, this court is not satisfied 30 that this is a case where this court should exercise its discretion to grant bail to the Applicants. However, the 2nd /^{sup} Applicant, THEKO MARTINE is granted bail on grounds of advanced age.

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- In respect to the 1st /^{sup} and 3rd /^{sup} Applicants, the Registrar of this court is directed to fast track and \$\mathsf{S}\$ cause list the Applicants' case for hearing at the next criminal session this year or early next year. Bail is therefore granted on the following conditions;
- 1) Each of the sureties will execute a non-cash bond of Ug. Shs. 3,000,000/= (Uganda Shillings Three Million only)
- \$10\$
- 2) The Applicant is to report to the Deputy Registrar of this court on the 1st /^{sup} day of August, 2024 and thereafter until further orders of this court.

I SO ORDER.

15 JUDGE

DATED \$23/7/24\$

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