

UGANDA / JUDGMENT

Mwizera v Uganda (Miscellaneous
Application 408 of 2024) [2024]
UGHCCRD 69 (5 December 2024)

[2024] UGHCCRD 69

COURT

HC: Criminal Division (Uganda)

BEFORE

Muwata, J

CASE / FILE NUMBER

Miscellaneous Application 408 of 2024

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL DIVISION MISC. APPLICATION NO.0408 OF 2024 (ARISING FROM CHIEF
MAGISTRATES COURT OF ENTEBBE AT ENTEBBE CRIMINAL CASE NO. AA 27 OF
2024) MWIZERA ALI:.....

VERSUS

UGANDA:..... BEFORE HON: JUSTICE ISAAC MUWATA \$10\$

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RULING

The applicant filed this application seeking to be released on bail pending the hearing and determination of the criminal case No.27 of 2024 on such terms and conditions that the court deems fit and just.

The grounds of the application as contained in the affidavit in support 15 sworn by the applicant.

The applicant stated that he was arrested, charged, and detained on the 30th day of September 2024 at Kajjansi Police Station for about 7 days and thereafter on the 11th day of October, 2024, arraigned in court and charged with the offence of aggravated defilement contrary to sections \$116(3)\$ and 4(c) of the Penal Code Act and subsequently remanded to Kigo Prison

He also stated that when the matter came up in the lower court on the \$30th October, 2024, the prosecution had not concluded with the investigation and therefore there is a real likelihood of substantial delay in hearing the case.

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The applicant further stated that he has a fixed place of abode at Bulenga-Kikaaya A Zone, Ssumbwe Parish, Wakiso Sub county as well as Bweya, Kajjansi Town Council which are all within the jurisdiction of this court.

Further, in his affidavit the applicant states that he is a law abiding citizen with no previous criminal record and has neither absconded or jumped bail. He also states that his family continues to suffer mentally, psychologically since his arrest.

The applicant further stated that he has substantial sureties ready to ensure that he attends court and the proposed sureties have been advised on their duties which is to ensure that he is always available whenever required by the court. That the sureties are sound, responsible and with a financial standing and all live within the jurisdiction of this court.

The applicant also further stated that the offence with which he was charged with is bailable by this court and the applicant still enjoys the presumption of innocence and has a constitutional right to apply for bail.

The applicant further stated that he suffers from grave illness whose 40 treatment may not be adequately managed while his is custody and that it is just, equitable and in the interest of substantive justice that this application is granted.

Grounds opposing the application

In response, the prosecution opposed the application on the following 45 grounds contained in the affidavit sworn by D/ASP Sabila Abdella of Kajjansi Police Station. I shall summarise them below;

That the offence with which the applicant is charged with is an offence of utmost severity carrying a maximum penalty of death and as such the

seriousness of the offence warrants denial of bail to prevent undue risks to public safety and justice.

The respondent also acknowledged that at the time the applicant first appeared in court, the investigations were still ongoing and the claim that there is likelihood of substantial delay is premature and unsubstantiated.

That while the investigations are now complete, it remains in the public interest and safety to keep the applicant in custody in order to safeguard against undue interference with witnesses or evidence.

On the question of having a fixed place of abode, the respondent argued that the rural nature of his claimed residencies in Bulenga and Bweya cannot be verified. He argued that the applicants established home in Juba, South Sudan where he frequently resides during business trips amplifies the risk of absconding.

He further argued that the applicant has dual residency here in Uganda and South Sudan and the limited lack of commitment to remain within the courts reach possess a substantial risk that the applicant may evade justice if granted bail.

On the potential interference with witnesses, the respondent/prosecution argued that there is evidence of previous intimidation attempts directed towards the victim and the witnesses. It is argued by the respondent that the court must strike a balance between the rights of witnesses to testify against the applicant's rights particular if the case involves sexual abuse of minors as it is alleged in this case.

The respondent also had an objection as to the suitability of the sureties presented by the applicant, he argued that despite their acquaintance with

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the applicant, they lack the necessary legal, moral, and logistical competence to fulfil the serious obligations required of a surety in a matter of such gravity.

The respondent also argued that the close relationship between the applicant, the victim and other potential witnesses poses a risk of intimidation or undue influence. That the victims remain in severe fear of retaliation from the applicant if he is granted bail.

That the hostility and the intimidation towards the victim and the complainant possess a great risk and underscores the need to prioritize their security by denying the applicant bail.

Furthermore, that there will be an exacerbation of the threats towards the complainant if the applicant is granted bail.

With regard to the applicant's health condition, the respondent argued that there is no medical evidence to support this claim. That ailments in the chest can be adequately managed in prison in the absence of any evidence that the same cannot be managed in the prison facility

Furthermore, the respondent also argued that the applicant has actively sought to manipulate the evidentiary narrative through orchestrated media propaganda to garner public sympathy. That these actions constitute an attempt to taint the integrity of the evidence and unfairly malign the complainant's character.

The prosecution further argued that there has been a persistent attempt to coerce the complainant by the applicant's associates to withdraw her interest in the case and this highlights the applicant's attempts to interfere with the judicial process even while incarcerated

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Scanned with CS CamScanner[®] The respondent further argued that the magnitude of public interest surrounding the case necessitates the denial of bail and the granting of bail could undermine public confidence in the judicial process. He added that even when granted bail, the police may not have the capacity to monitor interactions with the potential witnesses owing to the fact that the applicant has control over the victim's daily lives

In totality of the respondent's averments, he argued that grave risks spanning from public safety, direct threats to the complainant and the victim coupled with the applicant's international ties make it imperative for this court to deny bail. That the refusal to grant bail will not only uphold the integrity of the criminal justice system but also affirm the courts commitment to safeguard victims of alleged sexual abuse

In conclusion and in the alternative, the responded prayed that if bail were to be granted, then stringent conditions should be imposed to compel the applicant to attend trial.

Consideration 115

Before I delve into the merits of the application, I wish to address a few concerns raised by the respondent with regard to seeking leave to cross examine the applicant and the contents of a letter addressed to me in respect of the proceedings of 2nd December 2024 before the Assistant Registrar of this court.

When the matter first came up on the 18th November 2024, the court issued directives to the parties to file their written submissions and adjourned the matter wherein at the next sitting, the proposed sureties would be identified and oral highlights of the submission if any would be made by the parties.

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At no point did the respondent indicate that he intended to cross examine the applicant. The prayer to cross examine was therefore brought at the time when all parties had filed all their affidavits and submissions.

Considering that bail applications proceed by way of affidavit evidence and the respondent made a reply to the application and the fact that respondent did not indicate to the court at the earliest opportunity that he sought to cross examine the applicant, the prayer cannot be allowed.

With regard to the proceedings of 2nd December, 2024 before the assistant registrar, I only instructed the registrar to receive the particulars of the sureties, it goes without saying that the particulars of the sureties were already on record, and the respondent had also already submitted his written objections to the said sureties by way of written submissions and affidavit evidence.

Bearing in mind that bail applications must be disposed of within 30 days of filing the application, the directive to the learned registrar was therefore to only record and identify the sureties whose particulars were already on record. The overall discretion in bail applications rests with the judge and I shall determine this application based on the written submissions filed by both parties.

I now move to determine the application on its merits while carefully considering the submissions filed by both parties. Where necessary I shall refer to them in the course of consideration of this bail application.

The law that governs bail in Uganda is contained in Article 23(6)(a) of the Constitution. It provides that where a person is arrested in respect of a criminal offence, he or she is entitled to apply to the court to be released on

bail and the court may grant that person bail on such conditions as the court considers reasonable. Bail therefore is granted at the discretion of the court taking into account all the interests of the parties involved and the society as a whole.

The court shall consider the following while determining an application for bail, the gravity of the offence, nature of the offence, antecedents of the applicant so far as they are known, the possibility of a substantial delay in the trial, the applicants age, physical and mental condition, the likelihood of the applicant to attend trial, the likelihood of the applicant to commit an offence while on bail, the likelihood of the applicant interfering with witnesses.

The court further considers the safety of the applicant, the community and the complainants. It also considers whether the applicant has a fixed place of abode within the jurisdiction of the court or whether the applicant is ordinarily resident outside Uganda. The court further considers whether the applicant has substantial sureties ready to undertake that the applicant complies with the conditions of the bail.

The other considerations may be whether there are other charges pending against the applicant and whether the offence the applicant is charged with involved violence. See: Guideline 13 of the Constitution (Bail Guidelines

for Courts of Judicature) (Practice) Directions, 2022 170

The considerations for bail are therefore guided by following principles enshrined in the constitution which include the applicant's right to be presumed innocent, the applicant's right to liberty, the applicant's obligation to attend trial, and the need to balance the rights of the applicant and the

interests of justice. 175

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In the instant case, the applicant is charged with the offence of aggravated defilement contrary to section 116(3) and 116(4)(c) of the Penal Code Act. There is no doubt that this offence is serious however the applicant still enjoys the presumption of innocence. The presumption of innocence is a cornerstone of our criminal justice system.

The respondent largely based his objections on the fact that the applicant may interfere with the investigations or potential witnesses through undue influence and act of retaliation. I agree with the respondent that in cases such as this that involve victims and complainants with close family ties, cases of interference may occur. However, these are allegations that have not been proved before this court.

In the case of Panjur V R (1973) EA 282, it was held that if courts are simply to act on allegations, fears, or suspicion then the sky is the limit and one can envisage no occasion when bail would be granted whenever such allegations are made". Therefore, the allegations of intimidation and interference can only be proved by the respondent adducing evidence to that effect.

The respondent submitted that the applicant lacks a fixed place of abode owing to his business engagements in Juba, South Sudan. A fixed place of abode is a critical factor in bail considerations as it ensures the accused availability for trial. The applicant must therefore present precise information touching on his residence to mitigate the risk of any absconding.

In his affidavit, the applicant stated he has two places of residence one at Bulenga Kikaaya A Zone in Wakiso, and the other in Bweya, Kajjansi Town Council. He presented evidence from Area Chairperson to indicate that he has been a permanent resident at Bulenga Wakiso for over 20 years. This in

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my view is sufficient to prove that the applicant has a fixed place of abode within Uganda. As to the question of the dual residency between Uganda and South Sudan, this court has power to restrict movement of an accused person to ensure that he is within the jurisdiction of the court and the court may issue any order to that effect.

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The respondent also opposed the application on grounds that the applicant had not demonstrated any exceptional circumstances to warrant his release on bail. What amounts to exceptional circumstances cannot be exhausted but Guideline 14(a) and (c) of the bail guidelines provides that advanced age and grave illness of the applicant may amount to exceptional circumstances. Demonstration of existence of exceptional circumstances in an application for bail is not mandatory but maybe justified in certain instances.

It has been indicated in a medical report from Murchison Bay Prison dated 16th November 2024 that the applicant complained of severe gastric pain, 215 vomiting, diarrhoea, yellow eyes and passing of melena stool. Upon examination by the Prison Medical Superintendent, it was concluded that the applicant suffers from Chronic Gastritis with high suspicion of peptic Ulcer disease and has some intestinal Tract Bleeding. The report also states that the applicant suffers from mild anaemia. This is a serious condition. 220

I note that the report from prison is not clear as to whether or not condition can be handled in the prison facility, however a mere demonstration that such condition exists may compel court to grant the applicant on health grounds. Rule 14(2(a)) of the bail guidelines that deals with grave illness as an exceptional circumstance does not take away the discretion of the court to grant bail on health grounds since the provision merely provides guidance not direction. Each case however must be determined on its own merits.

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Scanned with CS CamScanner[®] With regard to the sureties, the respondent was opposed to their suitability on grounds that they had not clearly demonstrated that they understand their duties. The suitability of sureties are critical considerations while handling bail applications. The court must be satisfied that the sureties presented by the applicant are substantial and capable of ensuring the applicants compliance with bail conditions. See: Uganda V Kiwanuka Kizza **Criminal Application No.319 of 2004**

Rule 15 of the bail guidelines provides certain considerations such as age, 235 work and residence, character and antecedents, relationship to the accused person and any other factor the court may deem fit. Sub rule (2) of Rule 15 also requires that the proposed sureties provide documentary proof which includes a copy of the national I. D or passport and an introduction letter from the local council chairperson of the area where they are ordinary 240 resident.

The applicant presented the following sureties as indicated in his application;

- 1. Mukasa Yusufu aged 52 years, resident of Bulenga B LC1 Musaale B Ssumbwe Parish, a holder of NIN CM72099103M4FD a director of Doctors Clinic in Bulenga, a business man and a long-time friend to the applicant.
- 2. Bamenya Aristo aged 53 years, resident of Lwadda B Local Council 1 Matuga Ward holder of NIN CM710321045N7L, an uncle to the applicant and a businessman in Mattuga.

3. Muhereza Dan aged 47 years resident of Mutundwe 1 Rubaga Division holder of NIN CM77034100XP0F a vice chairperson of

Mutundwe 1 village, a businessman and a long-time friend to the applicant

4. Lwanga Siraje aged 63 years, resident of Mutundwe 1 village Rubaga Division holder of NIN CM610121041TMG an Imam of Mutundwe mosque, neighbour and a long-time friend to the applicant

Acting on my instruction, I directed the assistant registrar of this court to receive and verify the particulars of the proposed sureties. I have also since verified and confirmed that the said particulars of the sureties and the documents presented in court as required by directive \$15(2)\$ of the bail guidelines.

In considering their suitability, I have considered their age in relation to the applicant's age, there status in society and their relationship to the applicant. They have known each other for a long time. I find that the proposed sureties will be able to prevail over the applicant.

Lastly any risk of interference with the investigations was not proved by the respondent, equally there was no evidence to show that the safety of the victim and the complainant would be prejudiced by granting the applicant bail. They remain allegations in the absence of any proof.

In the result, the application succeeds. The applicant is granted bail on the following conditions:

- 1. The applicant shall deposit a cash bail of \$Ugx.2\$, 000,000/= (Two million Uganda shillings).
- 2. Each of the sureties presented in court shall execute a non cash bond of UGX. 10,000,000/= not cash.

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- 1. The applicant shall also deposit his passport with the Deputy Registrar of this court and shall not travel outside the jurisdiction of the court without the express permission of court.
- 4. The applicant should also desist from threatening, interfering with or intimidating the complainant or victim. If he does the matter should be referred back to court for appropriate action.
- 5. The applicant shall also report to the Deputy Registrar of the Criminal Division every last Monday of each month beginning

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27th January 2025.

I so order Judge 5/12/2024

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