

UGANDA / JUDGMENT

Namusoke Vs Uganda (Criminal Application No. 56 of 2016)

[2019] UGCA 129 (9 April 2019)

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COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

Criminal Application No. 56 of 2016

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THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA****CRIMINAL APPLICATION NO. 56 OF 2016****(Arising from Criminal Appeal No.69 of 2018)****NAMUSOKE ANNET KIRABO:.....**

\$10\$

 $\$S$ **VERSUS****UGANDA:.....****CORAM: HON. MR. JUSTICE BARISHAKI CHEBORION, JA****(SINGLE JUSTICE)****RULING**

This application was brought under the provisions of Article 23(6) of the \$15\$ Constitution, Section 132 (4) of the Trial on Indictments Act, section 40 of the Criminal Procedure Code Act and Rules \$6(2)\$, \$43(1)\$ and \$(2)\$ of the Rules of this Court. It is for an order that the applicant be granted bail pending appeal.

The background to the application is that the applicant was indicted, tried and \$20\$ convicted of the offence of kidnap with intent to procure a ransom contrary to section 243 (1) (C) of the Penal Code Act and sentenced to 11 years and 9 months imprisonment. Being dissatisfied with the decision of the High Court, she lodged

\$\mathsf{S}\$ an appeal in this Court against both the conviction and sentence. She subsequently filed this application for bail pending appeal.

The grounds upon which the application is premised are contained in the Notice of Motion and the applicant's affidavit dated 26th July, 2018 and briefly are that:

- 1. the applicant has filed an appeal against the conviction and sentence of Justice Stephen Mubiru in Criminal Session Case No.461 of 2017 delivered on 13th July 2018 vide Criminal Appeal No.69 of 2018.
- 2. The applicant is a \$1\$ st offender and her appeal is not frivolous and has a high *possibility of success.*
- *3. There is a possibility of substantial delay in the hearing of the appeal.*
- 4. The offence upon which the applicant was convicted of is bailable and does 15 *not involve personal violence.*
- 5. The applicant has substantial sureties who stood for her in the lower Court and she complied with the bail terms and she will do the same if granted bail.
- \$20\$ At the hearing of the application, Mr. Kitimbo Palsen appeared for the applicant while the respondent was represented by Ms. Annet Namatovu Ddungu, Senior State Attorney from the office of the Director of Public Prosecutions.

Counsel for the applicant submitted that the applicant was convicted of Kidnap with intent to procure a ransom and has filed an appeal in this Court vide

\$25\$ Criminal Appeal No.69 of 2018. He referred Court to the case of **Arvind Patel V Uganda**, Supreme Court Criminal Application No.1 of 2003 which lists the

\$2\$ | Page

guidelines upon which Court may grant an application for bail pending appeal \$\mathsf{S}\$ and argued that the applicant meets these guidelines and should therefore, be granted bail pending the hearing of her appeal.

He submitted that the applicant was a first offender with no known criminal record and the appeal had a high likelihood of success.

He further submitted that the offence for which the applicant was convicted does 10 not involve personal violence.

Counsel submitted that there was a possibility of substantial delay in the determination of the appeal and that the applicant had complied with all the bail conditions during trial.

- 15 Counsel presented the following four sureties for consideration by Court;
- 1. Mr. Walid Ausi, a 49 year old businessman. He is a resident of Nakuwadde/ Lubanyi LC 1, Musaale "A", Wakiso District. He is a holder of Passport No. B0845126 and a holder of National ID No. CM700411017VUA. He was said to be a brother in law to the applicant.
- 2. Mr. Kyendiwulira Thomas, a 36 year old Supervisor at Shell Ndeeba fuel 20 station. He is a resident of Kyebando Village in Wakiso District. He is a holder of National ID No. CM83012105316F and was said to be an uncle to the applicant.
- 3. Ms. Natterbo Violah a resident of Nakuwadde, Lubanyi LC1, Musaale "A" in Wakiso District. She is a holder of Passport No. B0881963 and holder of National ID No. CF820231028HCH.

3 | Page

4. Mr. Muwanga Alfred a 21 year old gym instructor. He is a resident of Tree Shadow Village LC1-Zone 9 in Nakulabye Parish, Rubaga Division. He is a holder of National ID No. CM78023101CRYJ. He was said to be a sister to the applicant.

He then prayed that Court finds these sureties substantial and grants the \$10\$ application.

Ms. Namatovu opposed the application and submitted that there was a likelihood that the applicant will abscond given the long term of 12 years which the applicant had been sentenced to.

She further submitted that the offence for which the applicant was charged 15 involved personal violence because when the child was kidnapped, her images were sent to the parents by the kidnapper and the child had a running nose and tears were rolling down her eyes an indication that she was distressed while under confinement by the applicant.

Counsel submitted that the applicant had not presented any exceptional 20 circumstances to warrant her release on bail and prayed that the application be dismissed.

In rejoinder, counsel for the applicant submitted that the applicant would not abscond because she had complied with the bail conditions while she was on bail which the lower Court had granted her during the trial of the case.

4 | Page

In response to the claim that there were no exceptional circumstances, counsel 1 submitted that exceptional circumstances are not mandatory and the grant of bail is at the discretion of Court.

I have listened to both counsel, perused the application, the accompanying affidavit and the annextures to it.

The law relating to bail pending appeal is provided for under section 132(4) of the Trial on Indictments Act and section 40(2) of the Criminal Procedure Code Act. The grounds upon which this Court may grant an application of this nature have been discussed by this Court in a number of authorities. See **Arvind Patel V Uganda**, Criminal Application No.1 of 2003 and **Igamu Joanita V Uganda CACA No.107 of 2013**. 15

In the instant application, counsel for the applicant submitted that the applicant was a first offender with no known previous criminal record. It appears from my perusal of the judgment of the lower Court that the applicant is a first offender. During sentencing, the Judge so did state that she was a first offender.

- Counsel stated that the applicant's appeal had a high likelihood of success. I have looked at the annextures attached to the applicant's affidavit. She only attached a copy of the judgment of the lower Court which he marked as annexure "A" and a copy of the record of proceedings marked as annexure "B". She did not attach the Memorandum of Appeal which would have enabled Court
- to determine whether the grounds therein raise issues that merit consideration. \$25\$

5 | Page

Without the memorandum of appeal, it is not possible for Court to conclude whether or not the appeal has any chances of success.

The applicant was convicted of the offence of kidnap with intent to procure a ransom contrary to section 243 (1) (c) of the Penal Code Act. The trial Judge noted at page 21 of the judgment that although the manner in which this offence was committed did not create a life threatening situation, in the sense that death was not a likely consequence of the act such as would have justified the death penalty, it was sufficiently grave to warrant a deterrent custodial sentence. The conditions of aggravation were mainly the very tender age of the victim and the fact that kidnapping or abduction was accompanied by the administration of a

threat of causing death or harm on the one hand and greed as the underlying purpose of the kidnapping or abduction on the other.

Section 243(1) of the Penal Code Act defines the offence of kidnapping or detaining with intent to murder in the following words;

Any person who by force or fraud kidnaps, abducts, takes away or detains any person against his or her will.

Kidnap is done against the will of the person being kidnapped and there is use of force. I therefore find that the offence for which the applicant was convicted involved personal violence.

Counsel submitted that there was a possibility of substantial delay in the determination of the appeal. He did not demonstrate to Court how the applicant's \$25\$ appeal will be delayed. This ground has therefore not been proved.

6 | Page

- No evidence was adduced to show that the applicant had complied with the bail \$\\mathsf{S}\$ conditions when she was granted bail in the lower Court. I therefore find that the applicant has not demonstrated her ability to comply with bail conditions if this Court grants her bail.
- \$10\$

I have considered the particulars of the 4 sureties presented for the applicant and find them substantial. The said sureties proved to Court that they have fixed places of abode by presenting their LC1 letters and National IDs. Further, the 1st surety, Mr. Walid Ausi and 3rd surety, Ms. Nattembo Violah availed to Court their land agreements confirming that they are owners of the property.

One of the considerations in determining whether an applicant for bail pending 15 appeal will not abscond is the place of residence. In this case it was neither averred in the applicant's affidavit nor did her counsel submit on it. Counsel simply mentioned that the applicant was before the loss of her job a resident of Muyenga Bukasa in Makindye Division but after the loss of her job she started staying with the 1st surety, Mr. Walid Ausi. It is important that the Court is certain of the place of permanent residence of the applicant for there may be \$20\$ need to trace her if she failed to comply with the bail conditions in the event that her application was allowed.

The length of the term of imprisonment against which the applicant is appealing can be one of the factors which can induce a convict to abscond. The longer that term the more likely she will be tempted to abscond and possibly to leave the country. See Chimambhai V Republic (No.2) (1971) E. A 343.

\$7\$ | Page

The applicant was sentenced to 11 years and 9 months. I consider this long \$\\mathsf{S}\$ enough to influence her decision to flee.

For the above reasons, I find no merit in this application and dismiss it. The Registrar of this Court is directed to fix the applicant's appeal as soon as possible.

I so order. \$10\$

Dated this.....

HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

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