

UGANDA / JUDGMENT

Natukunda v Uganda (HCT-00-AC-CM 9 of 2023) [2023] UGHACD 13 (6 March 2023)

[2023] UGHACD 13

COURT

HC: Anti corruption Division (Uganda)

BEFORE

Okuo-Kajuga, J

CASE / FILE NUMBER

HCT-00-AC-CM 9 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA ANTICORRUPTION DIVISION HOLDEN AT KOLOLO

HCT-00-AC_CM_0009 OF 2023

(Arising from ACD Criminal Case No 912}2gl

NATUKUNDA BRIAN APPLICANT

VERSUS

UGANDA (ODPP) RESPONDENT

Before: Okuo Jane Kajuga, I

RULING

Representation:

Counsel for the applicants: Advocates Peter Kimanie Nsibambi, Muwanga Isaac and Mugabi Connie

Counsel for the Respondent: Agaba Abigail (Chief State Attorney) and Gloria Inzikutu (SSA) from the ODPP

Introduction:

The applicant is seeking bail under the provisions of Article 23 (6Xa)(c) and 28 (3Xa) of the Constitution, and Section 14 of the Trial on Indictments Act, Cap 23. The application is by way of Notice of Motion, supported by the applicant's affidavit sworn on the 17th of February 2022.

The applicant and 10 others were charged together in ACD Case No 912023 with various offenses relating to fraud involving Stanbic Bank Uganda. The specific charge against the applicant under count 7 of the charge sheet, is

conspiracy to defraud c/s 309 of the Penal Code Act. It is alleged that he together with Tefera Okuba Classie Robel (A1) and Ayesiga Moses (A2), during the month of January 2023 in various places in Kampala conspired together to defraud Stanbic Bank of USD 582,000 that was fraudulently transferred from Stanbic Account No 9030008020336 in the name of Nile Energy Limited.

The grounds of the application are as follows:

- 1. That it is the applicant's right to apply for bail and the offense with which he is charged is bailable
- 2. That the applicant is a law-abiding citizen with no criminal record or pending charges in any other court
- 3. That he has a fixed place of abode where he resides with his family at Sitabaale, Bupayi Cell, Nansana Municipality in Wakiso District which is within the jurisdiction of this Court
- 4. That he is willing to abide by the terms or conditions that may be imposed by the Court and undertakes specifically not to abscond or interfere with the witnesses or the course of justice
- 5. That he has a young family with two children of tender age of 14 years and 1 year respectively plus an elderly mother who all rely on him for their livelihood and sustenance
- 6. That the offense with which he is charged does not involve personal violence hence he does not pose any threat to the society
- 7. That it is in the interests of justice that he is released on bail to enable him regain his liberty

Four sureties were presented to court. These were:

1. Atukunda Lorna, wife of the applicant. A marriage certificate issued by Ankole Diocese Anglican Church on 28th December 2016 was submitted as proof of marriage. She holds National ID No CF89004101769K, is employed as an Economist with the Ministry of Justice and Constitutional Affairs and is a resident of Sitabaale-Bupayi

Cell, Nansana Municipality in Wakiso District. Her work Identity Card, letter of confirmation in appointment and an introduction letter from the area LC 1 Chairman were all furnished to court. Copies of all relevant documents are Annexure D to the applicants' affidavit in support of the application. Her Tel. No. is 0775036637

- 2. Musinguzi Patrick, a brother to the applicant, employed as Head Legal-Affairs at Uganda National Meteorological Authority and holder of National ID No CM80101100QJ5E. He is a resident of Kitukutwe Local Council, Kimwanyi Road in Kira Division, Kira Municipality in Wakiso District. All relevant documents are Annex E to the applicant's affidavit in support. His Tel Nos. are 0782447561 and 0704809190
- 3. Yesigye Mucunguzi Frank, Father-in-law to the applicant and employed as Manager-Expedited Mail Services, Posta Uganda. He holds National ID No CM61406101UQ5A and is a resident of Bugolobi Parish Nakawa Municipal Council, at Block 11A1 for over 15 years. Introduction letter signed by the area Chairman LC1, work and National ID Cards and an introduction letter from his employer are annex F to the affidavit in support.
- 4. Barbara Atwine, Resident of Najjera Village Council, Wakiso District and employee of the Bible Society of Uganda as Program Manager. An introduction letter from Chairman LC 1 is provided. She holds National ID No CF88101101K5L and all relevant documents were furnished to court.

It was submitted for the applicant that the offense with which the applicant is charged is bailable by a Magistrates Court, and that failure of the Chief Magistrate to exercise her power to entertain the application has been prejudicial to the applicant who has been on remand since he first appeared in court. It was also submitted that the highest penalty prescribed under the law for the offense charged is 3 years and that the court should consider this in favour of the applicant. It is also for this reason that the application is not based on proof of exceptional circumstances.

Counsel prayed that the application was meritorious and that court be pleased to exercise its discretion to grant bail on reasonable terms. Additional security of log book for M/Vehicle Registration No UBA442J registered in the name of Mucunguzi Frank (the applicant's father-in-law) and certificates of title for land comprised in Block 159 Plots 345, 346, 354, 353 and Block 167 Plots 10198, 10199 and 10200 at Sitabaale, Wakiso District were offered. The said titles were reported to have been seized by and in possession of the Uganda Police Force.

The respondent opposed the application and filed an affidavit in reply deponed by No 64753 D/C Ayebazibwe Owen on 2nd March 2023. The following were the grounds;

1. That the applicant has failed to prove he has a fixed place of abode within the jurisdiction of the court. In paragraph 8 and 9 of the affidavit in reply, the deponent avers that when statements were recorded from the applicant on 6th February 2023 he indicated his place of residence as Kiwenda Balita Parish Wakiso District. These were annexures B and C to the affidavit in reply. It was submitted that the same address appears on the applicant's particulars on the charge sheet and was read to him when he first appeared in court. He did not raise any objection to them.

Further, the National Identity Card No CM88101102C3MF indicates a different place of abode, Ntebentebe village in Bweyogerere Kira Town Council in Kyadondo, Wakiso District.

2. That all the proposed sureties do not meet the requirements under High Court (Anti-Corruption Division) (Case Management Rules)
- 3. The applicant's evidence of employment is deceptive as it reflects the date of employment as 1011012023 which is yet in the future.
- 4. Whereas the offense of Conspiracy is a misdemeanor the court should pay attention to the fact that the value of the subject matter is very high, specifically involving 582,000 USD. In addition, the court was requested to consider the interests of the complainant.

Counsel for the respondents submitted further that the case is yet at the investigations stage and that in light of the foregoing, the interests of justice demand that bail be denied. In the alternative, and without prejudice to the foregoing, that if the court is inclined to grant bail, stringent terms should be imposed.

When asked by Court to confirm if the land titles referred to in Paragraph 21 of the applicant's affidavit in support were indeed in possession of the State she answered in the affirmative, though she did not know whether they were seized as proceeds of crime or to satisfy a court order of compensation in the event that the applicant is convicted.

In rejoinder, it was argued that the respondent's affidavit in reply was speculative and did not address the issues raised in the applicant's application. The police investigators visited the applicant's place of abode at Sitabala and carried out a search, recovering titles that are in police custody. There was therefore no ground to disbelieve that it was his place of abode. It was further submitted that the two descriptions all refer to the same place.

The prayer for the application to be granted was reiterated.

The Law:

This application is not based on exceptional circumstances provided in Section 15(1)(a) and defined in Section 15(3) of the Trial on Indictments Act' These circumstances apply to offenses set out in subsection (2) of section ¹⁵ of the Trial on Indictments Act.

Is the applicant a person charged under the above Subsection (2)?

The import of Section 15 of the Act is that the court may refuse to grant bail to a person accused of the offenses in subsection (2) if he or she does not prove exceptional circumstances justifying his or her release on bail. These offenses are set out in (a) - (j) and do not include offenses for which the magistrates court has jurisdiction to grant bail.

There is no contention that the offense of Conspiracy to defraud c/s 309 of the Penal Code Act is a misdemeanor for which imprisonment of 3 years may be imposed. Under Section 161 of the Magistrates Courts Act, jurisdiction is vested in the magistrates' court. The applicant is not charged with any of the offenses under Subsection (2), nevertheless, this court is vested with original jurisdiction in all matters under Section 14 of the Judicature Act Cap 13.

In light of the foregoing, this court has the jurisdiction to handle this bail application, but will not require exceptional circumstances to be proved.

The main consideration for grant of bail in this case, therefore, is whether the applicant is likely to abscond when granted the same. Section 15 (4) of the Trial on Indictments Act provides the factors which the court should take into consideration in determining this. I will first address the issues raised by the respondent as grounds to oppose bail.

S 15(a) TIA: whether the accused has a fixed place of abode within the jurisdiction of the court or is ordinarily out of Uganda

In paragraph 11 of his affidavit, the applicant avers that he has a fixed place of residence at Sitabaale, Bupayi Cell, Nansana. Whereas there is no letter from the area Chairperson confirming this, I note that the introduction letter in respect of the 1st surety who is the applicant's wife, signed by the area Chairman LC1 Bugembe Matiya and other executives of the committee including the treasurer, Mutesigensi Boss, states that she is a permanent resident of the zone at Jimko Estate Plot No 355. The letterhead used is for Sitabaale-Bupayi cell, Guluddene Ward, Busukuma Division, Nansana Municipality in Wakiso District.

A certificate of search prepared by police officers from Kampala Metropolitan East Region on 71212023 is part of the documents relied upon. The officers therein wrote that they conducted a search in the house/premises of Natukunda Brian at Jimko Estates Sitabaale Cell Busukuma Division and seized certificates of title, land sale agreements, prepaid visa card for Stanbic bank and a laptop. There is no observation thereon that the place they searched was not the applicant's home. This search was conducted in the presence of the Secretary for Finance Mutesigensi Boss and the Secretary for Defense, Mukasa Richard. It should be noted that the former is one of the authors of the letter of recommendation for the applicant's wife, confirming residence in this area. It is doubtful that these local authorities would superintend over a search and sign the search certificate in the circumstances of this case if he was not their resident.

It is not unusual that holders of national ID cards relocate from the addresses they provided to NIRA at the time of registration, so the disparity in the address reflected on the National ID does not negative the applicants assertions. The respondent did not produce any evidence to controvert this. In fact in paragraph 10 of the affidavit in reply, the deponent avers that "on the 7.2.2023, the applicant led the investigation to what he called his place at Jimko estates sitabaale cell Busukuma Division, where a search was conducted and some of his personal property linked to our investigation was recovered"

There is similarly no proof that the place cited in the police statements of the applicant, Annexures B and C of affidavit in reply is indeed the actual place of residence, or is an alternative residence. There should have been investigations to verify this. Counsel for the applicants submitted that the two places are in fact the same. One would wonder then why they then have such varying descriptions. Nevertheless, the court is satisfied that the applicant has a fixed place of abode within the jurisdiction of the court at Sitabaale.

Section 15 (4)(b) TIA; Whether the applicant has sound sureties within the jurisdiction of the court to undertake that he shall apply with the conditions of his bail

Rule 7 of the High Court (Anti-corruption Division) (Case Management) Rules, 2021 provides that the court shall, before considering any person to stand as surety for an accused person, determine that the person has the capacity to a) influence and compel the accused person to attend trial; and b) meet the terms of the bond.

I have considered the fact that all the sureties are gainfully employed in Senior/managerial positions in Government and other bodies. The introduction letters from their places of employment and copies of work identity cards confirm this. They are educated people holding positions of responsibility in the community, and they are expected to understand the seriousness of the duty they are undertaking as sureties. Proof of this lies in the willingness of his father-in-law to deposit the log book of his motor vehicle as extra security. I am also satisfied that they are capable of ensuring the applicant returns to court if released on bail. It is expected that he would not want to put his close family and friends in trouble if he absconds.

I find the sureties substantial and capable of meeting the terms of the bond that this court may impose if bail is granted. In Kenny's Outlines on Criminal Law, 19th Edition at page 586 courts are advised to consider whether the proposed sureties are independent or likely to be indemnified or controlled by the accused. All the sureties are gainfully employed and can meet cash requirements without going back to the accused for the money.

Seriousness of the offense:

Counsel for the respondent asked this court to consider the seriousness of the charge. I have already pointed out that the applicant is charged with a misdemeanor. Nevertheless, the amount of money that he and the coaccused are alleged to have conspired to defraud translate to billions in Ugandan currency.

This court considers the right of the complainant and the community in addressing crime, balancing the same against the presumption of innocence and other factors. The overarching consideration for court is whether the accused person/ if granted bail is likely to abscond and whether the ends of justice and the interests of the community to be protected against crimes are satisfied by the grant. I am in agreement with the holding in *Abacha Yassin Versus Uganda*, Arua Miscellaneous Application 4/2076 that courts should lean in favour of and not against the liberty of the accused as long as the interests of justice will not be prejudiced.

The purpose of bail is not to free an accused person from any charges that he may be facing, but rather to allow the person to stand trial without being necessarily detained in custody during that time. An accused person therefore need not suffer incarceration unreasonably as he or she is not yet a convict.

I observe as follows;

- 1. Bail is premised on the presumption of innocence under Article 28(3)(a) of the Constitution. I am therefore mindful of the need to grant the applicant the full benefit of his rights
- 2. There is no evidence that the applicant will interfere with investigations or the course of justice nor a risk that he will abscond.
- 3. There is no evidence that the applicant threatens violence against anyone
- 4. There are sound sureties willing to stand for him, and even deposit title to personal property as security
- 5. The applicant has a wife and children, and an elderly dependant mother, and a fixed place of abode where he resides with the family within the jurisdiction of this court
- 6. There is no evidence of other charges pending against the applicant
- 7. There is no evidence that he has previously been released on bail or bond and failed to honour the terms imposed
- 8. The offense is bailable
- 9. Investigations are still ongoing

For the reasons given above, I hereby grant the applicant bail on the following terms which I consider reasonable in the circumstances of this case and considering the nature of the allegations against the applicant:

- 1. The applicant shall execute a cash bond of Ushs 5 million
- 2. Each of the sureties shall each execute a bond of Ushs 20 million (not \$cash)\$
- 3. The applicant's passport shall be deposited with the Registrar of the Court until disposal of the case or otherwise determined by the court.
- 4. Original Registration document for M/V Reg No UBA442J Harrier TA-ACU10W in the names of Surety No 3, Mucunguzi Frank shall be deposited with the Registrar of this court
- 5. Duplicates certificates of title registered in the applicant's names for Block 159 Plots 353, 345, 346, 354 and 353, and for Block 167 Plots 10198, 10199 and 10200 should be deposited as security with the Registrar of this court. By the admission of the respondent, these are in custody of police.
- 6. The applicant shall continue to report as required by the Magistrate before whom the matter currently is allocated.

Okuo Jane Kajuga Judge of the High Court \$6/3/2023\$

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Prepared on 14 October 2026 · Esheria