

- The applicant herein be released on bail pending the hearing and $\dot{\iota}$ determination of his appeal Criminal Appeal No.17 of 2018 before this *Honorable Court.*

The applicant was indicted, tried and convicted of murder on count 1, attempted murder on count 2 and sentenced to 18 years and 12 years respectively the \$1\$ | Page

$\overline{5}$ sentences to run concurrently. Dissatisfied with the decision of the High Court, the applicant lodged an appeal in this Court vide Criminal Appeal No. 17 of 2018 against both the conviction and sentence. He subsequently filed this application for bail pending appeal.

The grounds of the application are set out in the notice of motion as follows:-

\$10\$ a. That the applicant was convicted on count 1 of murder contrary to sections 188 & 189 of the Penal Code Act and attempted murder on count 2 contrary to section 204 (a) of the Penal Code Act and sentenced to 18 *years and 12 years imprisonment respectively running concurrently vide* HCT-00-CR-SC-0036-2016.

- 15 *b. That the applicant being dissatisfied and aggrieved with the decision of* the learned trial Judge filed a Notice of Appeal and a Memorandum of Appeal and a supplementary Memorandum of Appeal vide Criminal Appeal No.17 of 2018.
- c. That the applicant's appeal is not frivolous and has great chances of succeeding.
- d. That throughout the trial in the High Court, the applicant remained on bail until the 16th day of January 2018 when he was convicted.
- *e.* That there is a likelihood of substantial delay before the applicant's appeal can be heard by this Honorable Court.

f. That the applicant is a first offender.

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- *g.* That the applicant has substantial sureties who are willing and ready to *stand for him.*
- *h. That the applicant will not abscond and will abide by the conditions set by this Honorable Court and will turn up to pursue his appeal.*
- *i.* That the discretion of this Honorable Court be exercised in favor of the applicant.

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The application is supported by an affidavit deposed to by the applicant essentially expounding on the grounds of appeal reproduced above.

The respondent objected to the application and filed an affidavit in reply sworn by Ms. Orogot Pamela from the office of the Director of Public Prosecutions. The 15 relevant paragraphs of the said affidavit are;

- 1. That the applicant was convicted of the offence of murder on count 1 contrary to section 188 and 189 of the Penal Code Act and attempted *murder on count 2 and sentenced to 18 years and 12 years respectively.*
- 2. That the offence for which the applicant was convicted of involves personal violence.
- 3. That the applicant has not presented any exceptional or unusual reasons.
- 4. That this Court has a constitutional duty to dispose of the appeal *expeditiously.*
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- 5. That the applicant has an incentive to jump bail.
- *6. That the appeal is frivolous and vexatious.*

\$3\$ | Page

At the hearing of the application, Mr. Henry Kunya appeared for the applicant \$\mathsf{S}\$ while the respondent was represented by Ms. Namatovu Annet, Senior State Attorney in the Directorate of Public Prosecution.

Counsel for the applicant submitted that the appeal was not frivolous and had high chances of success because it raised substantive points of law which merit consideration by this Court.

Counsel further submitted that the applicant was a first offender and of advanced age being 56 years old and relied on John Kashaka Muhanguzi v **Uganda, Criminal Reference No.797 of 2014** where the Court stated that a person of or above 50 years old was considered as one of advanced age.

Counsel contended that the applicant was diagnosed with HIV/AIDS and was 15 currently on treatment which he cannot readily access while prison.

He presented the following sureties for consideration by Court;

- \$i\$. Ms. Kabahinda Sarah Mugisha, a biological sister to the applicant and a resident of Bukoto Brown Flats situated in Naguru 2 Parish, Nakawa Division in Kampala. She is a holder of National ID No. CE6502510194UG and a business woman.
- ii. Bitature Jamil James, 50 years old, a biological brother to the applicant and a resident of Kakajjo 11 Zone, Bukesa Parish in Kampala Central Division. He is a holder of National ID No. CM680251005VTC and a driver with Link Bus Services Ltd.

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\$4\$ | Page

\$\overline{5}\$ \$iii\$ Ms. Nakawuki Fatuma, 45 years old, a sister in law of the applicant and a resident of Namungoona 1, Lubyia Parish, Rubaga Division, Kyadondo in *Kampala District. She is a holder of National ID No. CF71091104FK7F.*

Counsel submitted that the applicant had satisfied the bail terms set by the lower Court and had never absconded. He also had not withdrawn the cash deposit of shs. 200,000 which he had deposited in Court as security. He prayed

that this application be allowed.

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Ms. Namatovu opposed the application and submitted that the applicant was convicted and sentenced to a long term of 18 years and 12 years on count 1 of murder and count 2 of manslaughter respectively and because of these long sentences the likelihood of his abscondient was very high.

She further submitted that the offence for which the applicant was convicted of involved personal violence and according to the case of **Arvind Patel V Uganda, Supreme Court Criminal Application No. 1 of 2003**, it is one of the conditions that the Court must satisfy itself with when considering an application for bail pending appeal.

Counsel further submitted that the appeal was frivolous and vexatious. She submitted that she had perused the judgment of the lower Court and did not find any meriting ground of appeal. According to counsel, the evidence produced at trial was sufficient to support the conviction.

\$5\$ | Page

It was conceded for the applicant that the offence for which the applicant was \$\overline{5}\$ charged of involved personal violence but further argued that it was not necessary that the applicant proved all the factors.

I have perused the Notice of Motion and the accompanying affidavit. I have also studied the annextures thereto and listened to the submissions of both counsel.

\$10\$ The power to grant bail pending appeal is discretionary which discretion must be exercised judiciously. See Walubiri Godfrey Vs Uganda Court of Appeal Criminal Application No. 44 of 2012.

Article 23(6) of the Constitution 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 15 the court considers reasonable.

Section 132(4) of the Trial on Indictments Act Cap 23 and section 40(2) give this Court jurisdiction to grant bail. Section 132(4) provides that 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 is 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 allows the appellate Court if it sees fit, to admit an appellant to bail pending the determination of his appeal.

6 | Page

- The Supreme Court in **Arvind Patel Vs Uganda (supra)** set out the following considerations to be applied while determining applications for bail pending appeal;
- (a) The character of the applicant.
- (b) Whether he or she is a first offender or not.
- (b) Whether the crime of which the applicant was convicted involved personal violence.
- (c) Whether the appeal is not frivolous and has a reasonable possibility of success.
- (d) The substantial delay in the determination of the appeal.
- Whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of appeal (if any)." (Sic)

His Lordship Justice Oder JSC (RIP) further observed that it was not necessary that all the conditions should be present in every case. A combination of two or more criteria may be sufficient but each case must be considered on its own facts

and circumstances.

> Counsel for the applicant submitted that the appeal was not frivolous and had high chances of success because it raised substantive points of law which can only be considered by this Court. I have looked at the record and find that the applicant has filed a notice of appeal and a memorandum of appeal. His counsel

did not demonstrate without going into the detailed merits of the appeal why he

held the view that the appeal had chances of success. Counsel further submitted that the applicant was a first offender and a person of good character. I note that no specific evidence was provided to the contrary. I will therefore give him the benefit of doubt.

I have looked at the particulars of the said sureties and I have no reason to doubt that they will not be able to perform their role if the applicant was granted bail.

Counsel for the respondent submitted that the offence for which the applicant was convicted involved personal violence and the applicant conceded to this fact. Murder is the most violent crimes and Court has to guard against releasing a person convicted of such offence to the public before his sentence comes to and end least he repeats what he had done before. For the present applicant, the fear is even more because he was convicted not only of murder but also attempted murder.

Although the decision in Arvind Patel (supra) does not list the requirement of proving exceptional circumstances as one of the considerations for grant of bail pending appeal, the Court was careful to add that each case ought to be handled taking into account its peculiar circumstances. This may call for consideration of special circumstances as defined in Section 15 sub (3) of the Trial on Indictments Act (CAP 23) and they are;

> 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*

8 | Page

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2. The certificate of no objection from the DPP

3. Infancy or advanced age of the accused."

I agree with counsel for the Applicant that the Applicant who is 56 years old is of advanced age. In John Kashaka Muhanguzi v Uganda, Court of Appeal **Criminal Reference No. 797 of 2014**, Court stated that a person of or above 50 years old was considered as one of advanced age. See Lt. Colonel John Kaye V Attorney General, Constitutional Application No.25 of 2012.

The record shows that the sentencing Judge while sentencing the applicant also took into consideration the advanced age of the applicant.

Under paragraph 11 of the applicant's affidavit, he deposed to have been

diagnosed with HIV/AIDS and he is currently on treatment. It was not however shown to my satisfaction that he could not get treatment for this ailment while in prison.

In Mbabazi Lovence & Anor V Uganda Court of Appeal Criminal Application

No.47 of 2012, Court stated that Courts of law ought to act on credible evidence adduced before them and do not indulge in conjecture, speculation, attractive reasoning or fanciful theories.

I am not convinced that the applicant cannot receive the required treatment for HIV/AIDS while in custody. The applicant did not prove to the satisfaction of Court that his health condition could not be managed while in custody.

For the aforesaid reasons I decline to grant the application and the same is 5 dismissed.

I so order. 2019 Dated this.... day of....

HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

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