

UGANDA / JUDGMENT

# Nsubuga and Another v Uganda (Criminal Miscellaneous Application 27 of 2023)

## [2023] UGHCCRD 142 (17 October 2023)

**[2023] UGHCCRD 142****COURT**

HC: Criminal Division (Uganda)

**BEFORE**

Elubu, J

**CASE / FILE NUMBER**

Criminal Miscellaneous Application 27 of 2023

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**THE REPUBLIC OF UGANDA****IN THE HIGH COURT OF UGANDA****(CRIMINAL DIVISION)****CRIMINAL MISCELLANEOUS APPLICATION No. 27 OF 2023**

(Arising from Criminal Session Case No. 14 of 2023)

**1. EDWARD NSUBUGA****2. RICHARD MAWAYIRA****APPLICANTS**

Versus

**UGANDA**

..... RESPONDENT

**BEFORE: HON. MR. JUSTICE MICHAEL ELUBU RULING**

This Application is commenced under Article 23 (6) of the Constitution of the Republic of Uganda, 1995; and Sections 14 and 15 of the Trial on Indictment Act Cap. 23.

The Applicants, Edward Nsubuga and Richard Mawayira seek Orders that they be released on bail pending the hearing of \*Criminal Session Case No. 14 of 2023\*.

The Application is premised on grounds set out in the Notice of Motion and particularized in the affidavits in support deposited by both Applicants.

The 1<sup>st</sup> Applicant, **Edward Nsubuga**, averred that he was charged with the offence of murder which he did not commit. That he is presumed innocent until the Court proves otherwise. That it is his constitutional right to apply for bail. He adds that he has substantial sureties who are ready and willing to stand for him. That he also has a fixed place of abode at Nakulabye- Kiwunya. That he has spent six months on remand and yet the hearing of the case is likely to take long as is usually the case.

Richard Mawayira, the 2<sup>nd</sup> Applicant, affirmed an affidavit that is virtually identical to Nsubuga's, save that he named a different set of sureties

The State opposes this Application. In an affidavit in reply deposited by one Adong Harriet, a Senior State Attorney in the Office of the Director of Public Prosecutions, it is stated that the Applicants are charged with a serious offence, Murder c/ss 188 and 189 of the **Penal Code Act** and are already committed to the High Court for Trial. That both applicants had failed to prove that they have fixed places of abode. That in light of the daily hearing sessions, the applicants have failed to prove that their matter may take long to be brought to trial. The respondent submitted that it was in the interest of justice that the Application be denied.

## Submissions

The Parties filed written submissions which are on Court record. Although they are not reproduced here, the submissions were studied carefully and utilized in the determination of this Application.

## Determination

Bail is defined in the 5<sup>th</sup> Edition of the Oxford Law Dictionary as release by the Court of a person held in legal custody while awaiting trial.

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It is true the applicants have a right to apply for bail. That right is provided for in Article 23 (6) (a) of **The Constitution** which stipulates,

> Where a person is arrested in respect of a criminal offence, the person 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

The above provision stems from the presumption of innocence. That any person charged with any criminal offence shall be presumed innocent until proved guilty or until that person has pleaded guilty. It is also expressly gives the court the discretion to determine whether or not to grant bail.

In certain circumstances therefore, the accused shall not be detained in custody before determination of culpability.

The constitutional provision was interpreted by the Supreme Court in *John Muhanguzi Kashaka v Uganda Supreme Court Miscellaneous Application No. 18 of 2019* where it was held that although the Applicants have a right to apply for bail, the decision whether to grant bail pending trial or pending appeal, is at the discretion of Court, which discretion must be exercised judiciously, with each case being determined on its merits.

When a court has judicial discretion, it is exercised by Court considering all that is before it and reaching a decision without taking into account any reason that is not a legal one. The Court acts within the rules of reason, justice and law, within the limits and the objects intended by a particular legislation. (See: *R v Board of Education [1990] 2 KB 165*)

As can be seen from the decisions above, discretion is exercised within the confines of particular legislation. The relevant provisions of the law governing release on bail

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by the High Court in Uganda, within which the court exercises its discretion, are Sections 14 and 15 of the Trial on Indictments Act (TIA) and Guidelines 13 and 14 (2) of The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022.

Section 14 §(1) of the TIA stipulates:

The High Court may at any stage in the proceedings release the accused person on bail, that is to say, on taking from him or her a recognisance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date and at such a time as is named in the bond.

In the instant case, the Applicants are charged with the offence of Murder C/s 188 & 189 of the Penal Code Act Cap. 120. The offence of Murder is only bailable by the High Court.

Ultimately the grant of bail falls to the discretion of the court. The primary consideration, and the goal in all the legislative provisions is proof that the Applicants will not abscond and will attend court if granted bail. The Court has to satisfy itself that the Applicants have fulfilled the considerations in Section 15 (4) of the TIA above.

The Applicants aver that they have a fixed place of abode at Nakulabye-Kiwunya. In both affidavits in support of the application, reference is made to Annexures "A" and "B" as evidence to show that they have places of abode at Nakulabye-Kiwunya.

I have studied these annexures. There is no evidence of the applicants fixed place of abode. They have not attached any evidence of their residences, identification papers or other means, either to identify themselves or show where they live.

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In my view a fixed abode in this case signifies a predictable known dwelling place or residence. It is a place where the applicant can, with certainty, or at least predictably, be traced if required. Having a fixed place of abode is a question of fact.

For that reason, Clause 12 of the **Bail Guidelines** (supra) requires that an applicant provide a copy of their national identity card and an introductory letter from the Local Council 1 chairperson of the area where the applicant resides. Clearly these documents are meant to provide the essential details showing that the applicant can be easily tracked down and located if required.

In the absence of the above this application falls short of an indispensable requirement.

This court has also considered the sureties relied on. Each applicant has named three sureties and given their introductory letters and identification papers.

However, the substance of a surety goes beyond identification. It is the duty of the surety to ensure that the applicant will be in court whenever required. That is why the suitability of a surety has to be evaluated by court. For example, in Clause 15 of the **Bail Guidelines** (supra), the relationship between the surety and the applicant should be established, as that will enable the court to ascertain whether the surety will know the whereabouts of the applicant or have the means to compel his/her presence in court.

The application should also provide the age, work and residence of the surety.

All these details were not given in this case.

This court has also taken into consideration the gravity of the offence that has been preferred. The offence of murder is a serious offence that carries a maximum sentence of death.

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Seriousness of the offence is a factor. The respondent relied on **Hurnam vs State of Mauritius** (2006) 1 WLR 857 PC where it was held that a person charged with a serious offence, facing severe penalty if convicted, may well have a powerful incentive to abscond or interfere with witnesses likely to give evidence against him.

The above holding is not binding on this court; however, I am persuaded by the reasoning advanced.

When this application is considered in its entirety, well aware that the applicants have not proved a fixed place of abode; that the suitability of their sureties is wanting; and taking into account the seriousness of the offence, it is clear that this application has no merit and must fail.

It is accordingly dismissed.

**Michael Elubu**

Judge

17.10.2023

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