

UGANDA / JUDGMENT

Nuwagira v Uganda (Miscellaneous Application 22 of 2023) [2023]

UGHCCRD 109 (2 August 2023)

[2023] UGHCCRD 109

COURT

HC: Criminal Division (Uganda)

BEFORE

Adonyo, J

CASE / FILE NUMBER

Miscellaneous Application 22 of 2023

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The Republic of Uganda

In The High Court of Uganda at Soroti

Miscellaneous Application No. 0022 of 2023

(Arising from Criminal Case No. SOR-00-CR-AA 038/2022)

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Nuwagira Steven :::::::::::::::::::: \$10\$

Versus

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Uganda ::::::::::::::::::::

Before: <u>Hon. Justice Dr Henry Peter Adonyo</u>**Ruling****1. Background:** $\$S\$\$$

Nuwagira Steven (hereinafter referred to as "the applicant") was charged with the offence of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120 as amended.

The prosecution alleges that the applicant who is the DISO (District Internal 20 Security Officer) of Soroti District, on the 21st of December 2022, along the Soroti-Lira highway opposite the maternity ward of Soroti Referral Hospital in Soroti City with malice aforethought unlawfully killed one Kayiwa Sedric.

2. Legal basis of this application:

The applicant brought this application by Notice of Motion under Articles 25 23(6)(a), 28 and 126 (1) of the Constitution of the Republic of Uganda, 1995 as

amended, sections 14 and 15 of the Trial on Indictment Act, Cap 23 and Rule 3 of the Judicature (Criminal Procedure) (Applications) Rules S. I 13-8, for orders that;

- a) The Applicant be released on bail pending trial against him in the High Court of Uganda Holden at Soroti in criminal case No. SOR-00-CR-AA-038 of 2022 on such terms the court deems fit.
- The grounds of this application as briefly stated in the application and further 10 detailed in the affidavit in support deposed by the applicant are that;
- a. The Applicant has a fundamental right to apply for bail under Article 23(6) of the Constitution of Republic of Uganda.
- b. The Applicant is presumed innocent until he pleads or is proven guilty under Article 28 of the Constitution.
- c. This honourable court has the power and discretion to grant bail on conditions it considers reasonable regardless of whether or not any special circumstances have been shown by the Applicant.
- d. There is uncertainty as to when the substantive trial of the case would start.
- e. The Applicant has a fixed place of abode within the jurisdiction of this court.
- f. The Applicant has substantial sureties also living in areas within the jurisdiction of this court.
- This application was objected to by the State Attorney Emasu Michael, on the \$-25\$ following grounds;

The court has already cause listed the applicant for trial which commences on 25th August, 2023 and the prosecution is ready to proceed with its case against the applicant.

$\$S\$\$$

That the applicant may at any time decide to leave his place of abode and move 5 to another place or when he is transferred, he cannot maintain the same place.

That the Applicant's claim of substantial sureties is subjected to the applicant's disclosure of his rank and producing the official organization identity card.

The applicant in rejoinder stated that at the time of filing this application his case had not yet been fixed and cause listed for hearing.

That, furthermore, he has been informed by his advocates that disclosure of evidence against him by the state as required by the law has not been done yet by the Respondent and as such even if the matter came up on the cause listed date it would be merely mentioned and not heard. That this court has the discretion to release him on bail at any stage of the trial.

3. Submissions:

The Applicant is represented by M/s Muwema & Co. Advocates and Respondent represented by Senior State Attorney Soroti. Both sides filed written submissions which have been duly considered where necessary.

4. Determination: 20

a. The law:

The applicant brought this application by a Notice of Motion under Articles 20(2), 23(6)(a) of the Constitution of the Republic of Uganda, 1995; Section 14 (1) of the Trial on Indictments Act Cap 23, Section 17(2) of the Judicature Act for orders that the applicant is currently on remand for the offence of aggravated robbery be released on bail pending trial.

The primary principle for which a court may release an accused person on bail pending trial is the presumption of innocence. This legal principle is enshrined under Article 23 of the Constitution of the Republic of Uganda, 1995 which is

under Chapter Four (Protection and promotion of fundamental and other human S rights and freedoms) of the Constitution.

Article 23 of the Constitution is about the protection of personal liberty with Article 23(6) of providing that;

Where a person is arrested in respect of a criminal offence, he/she is entitled to apply to the Court to be released on bail and Court may grant that person bail on 10 such conditions as Court considers reasonable.

Further, under Article 28 (3) (a) of the Constitution it is provided that,

Every person who is charged with a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.

In addition, under Section 14(1) of the Trial on Indictments Act, Cap 23 the 15 provisions outlined in Article 23(6)(a) of the Constitution are articulated and it empowers the High Court with the discretion to release an accused person on bail at any stage of the proceedings, on taking from him or her a recognizance 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 20 a date and at such a time as is named in the bond.

The Constitution (Bail Guidelines for Courts of Judicature) Practice Directions, 2022, No. 5, reinforce the above legal positions by providing the general principles which a court may take into account while considering a bail application while being guided by the relevant constitutional principles.

The Guidelines are that the Court while considering bail should take into account the following;

The right of an applicant to be presumed innocent as provided for in article \$a)\$ \$28(3)\$ of the Constitution;

\$\mathsf{S}\$ \$b)\$ The applicant's right to liberty as provided for in Article 23 of the Constitution;

\$c)\$ The applicant's obligation to attend the trial;

\$d)\$ The discretion of the court to grant bail on such terms and conditions as the court considers reasonable; and

The need to balance the rights of the applicants and the interest of justice. 10 \$e)\$

In relations to personal liberty, the position of the law, which has been judicially noticed, is that an accused person must not be deprived of his freedom unnecessarily or as a mere punishment if he has not been proved guilty by a competent court of law. (See: Tumwirukirire Grace v. Uganda; Miscellaneous

Criminal Application 94 of 2019 [2020]). 15

> This principle of protection of personal liberty was similarly articulated in the case of Col (Rtd) Dr Kiiza Besigye v Uganda Criminal Application No.83 of 2016, wherein the late Hon. Justice Masalu Musene (as he then was) observed that;

"...court has to consider and balance the rights of the individual, particularly with regard to personal liberty..." The active principle in granting bail is that of upholding the liberty of the individual while simultaneously protecting the administration of justice. (See: Abindi & Another v Uganda; Miscellaneous Criminal Application 20 of 2016 [2017])."

Arising from all the above, an accused person may be granted bail if he /she fulfils the set conditions for his or her release, has a fixed place of abode, and has sound 25 sureties capable of guaranteeing that he will comply with the conditions of his or her bail, and is willing to abide by all other conditions set by the court.

Additionally, although Sections 14 and 15 of the Trial on Indictments Act provides that a person indicted of a serious offence is stated to only be able to be released

on bail if he or she proves to the satisfaction of the court that special $\$ \mathit{S} \$$ circumstances exist to warrant his or her being released on bail with the circumstances being regarded as "special" including grave sickness, infancy or old age, the fact that the applicant has been on remand for over 12 months before committal for trial as per Article 23(6)(c) of the Constitution, and that the state does not oppose the applicant being released on bail, the proof of these 10 circumstances, nonetheless, is not mandatory as the courts have the discretion to grant bail even when none is proved.

This position of court in the case of Foundation for Human Rights Initiative Vs Attorney General, Constitutional Petition 20 of 2006 where it was held that exceptional circumstances are no longer a requirement for release on bail as the court found section 15 (1) (a) of the Trial on Indictment Act (TIA) contravened the Constitution.

Capital offences such as murder in this instance are bailable, however, whether the court is inclined to exercise the discretion to grant or not, is a matter depending on the circumstances of each case.

Section 14(1) of the Trial on Indictment Act amplifies Article 23(6)(a) of the Constitution thus;

- (1) 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.

$\$ 25 \$$

The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, $\$ \mathit{S} \$$ 2022 under paragraph 5 provide for the general principles applicable in the consideration of a bail application thus;

The court shall, in considering a bail application, be guided by the following principles as enshrined in the Constitution—

- (a) the right of an applicant to be presumed innocent as provided for in article 10 28(3)(a) of the Constitution;
- (b) the applicant's right to liberty as provided for in article 23 of the Constitution;
- (c) the applicant's obligation to attend trial;
- (d) the discretion of court to grant bail on such terms and conditions as the court considers reasonable; and 15
- (e) the need to balance the rights of the applicant and the interests of justice.

Having examined the applicable, the law on bail, I will now turn to the merits of this application. In doing so I will adopt the order of argument used by the Applicant's counsel in their submissions.

a. Grounds 1 and 3: Right to apply for bail and court's discretion to grant bail 20

This ground has already been addressed as above, and it is clear that the applicant has the right to apply to court to be released on bail with the court having the discretion whether to grant bail under Article 23 (6) (a) of the Constitution.

b. Ground 2: Presumption of innocence

Counsel for the applicant submitted that the presumption of innocence imposes 25 on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.

- That the applicant is presumed innocent until proven guilty or until he pleads S guilty, and the presumption still stands and can only be ended by a conviction.
- It is a presumption of law that an accused person is presumed to be innocent until proved guilty by a competent court and or until such accused pleads guilty to the charge voluntarily.
- This presumption is enshrined in Article 28(3)(a) of the Constitution which when 10 read together with Article which guarantees the right to personal liberty creates the premise that given that the applicant/accused is presumed innocent, he has a right to bail.
- This principle of presumption of innocence is a constitutional one and as noted above the Constitution (Bail Guidelines for Courts of Judicature) (Practice) 15 Directions, 2022 requires this Court to consider the principles on presumption of innocence and personal liberty. The applicant should not be deprived of his freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence.

c. Ground 4: Uncertainty as to when the substantive trial of the case would start. 20

Counsel for the applicant submitted that whereas the main case has been cause listed for hearing, the Respondent has not disclosed evidence they intend to rely on as legally required and in any case the matter cannot be heard and disposed in a single day by this Honourable court. Counsel further stated that given the practice of this court the matter may just be mentioned and adjourned to a further date to enable the parties ample time to prepare their cases.

In reply, prosecution submitted that the applicant's worry on non-disclosure of evidence is mere speculation. That when court cause lists a case for a session then all parties must prepare beforehand to have the matter heard on the day

fixed for hearing and it is the duty of the applicant and his counsel to be vigilant $\overline{5}$ and make sure before the date fixed for hearing he has got all the necessary disclosure/copies of documents he intends to rely on.

Annexure marked 1 to the respondent's affidavit in reply is a cause list for criminal session August 2023 signed by the Assistant Registrar on the 13th of June 2023.

The applicant appears as number 18 on this list with his hearing date as 10 25.08.2023.

The applicant has been cause listed for trial, certainty as to when the substantive trial will start is dependent on the preparedness of counsel and a such cannot be used as a ground for the grant of bail especially where the prosecution alleges it is ready to proceed.

d. Grounds 5&6: Fixed place of abode and substantiality of sureties.

i. Fixed place of abode:

Paragraph 13 (1) (k) of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions; Legal Notice No. 8 of 2022 details the considerations for bail by the court and includes; whether the applicant has a fixed place of abode within Uganda.

In the case of Kanyamunyu Matthew Muyogoma versus Uganda Miscellaneous Criminal Application No. 0177 of 2017, the court stated that;

"The onus is on the Applicant to satisfy that he has a permanent place of abode in a particular village, sub-county and district. This is to enable the court exercise jurisdiction over the applicant while on bail being able to trace his whereabouts whenever it is necessary".

A fixed place of abode for the applicant must be within the jurisdiction of this $\mathbb{S}$ Honourable court as it guarantees to the court that the applicant/accused person can be found in the event of absconding trial.

To underscore the importance of the provision of proof of a fixed place of abode, as it can be a ground for refusal to grant bail, it is imperative for the court to have this clear because it is a pointer to the fact as to whether the applicant is likely to

abscond once granted bail.

Section 15(4) of the Trial on Indictments Act is instructive in this respect as it provides that;

1)Notwithstanding section 14, the court may refuse to grant bail to a person accused of an offence specified in subsection (2) if he or she does not prove to the 15 satisfaction of the court—

4)In considering whether or not the accused is likely to abscond, the court may take into account the following factors—

a) whether the accused has a fixed abode within the jurisdiction of the court or is **ordinarily resident outside Uganda**;(emphasis mine)

I must state that the jurisdiction of this Honourable Court is the whole of Uganda and not only limited to Soroti High Court Circuit which is merely an administrative convenience which does not interfere with the constitutional jurisdiction of the court as it is that of the whole of the state of Uganda unlike those of a magistrate's court.

Further, in the case of Foundation for Human Rights Initiative Vs Attorney General Constitutional Petition No. 020 of 2006, it was held that the nature of the offence, antecedents of the applicants and whether the applicants have a fixed place of

abode in the Court's jurisdiction should be strongly considered by the court in an application for bail.

In respect of this application, the applicant under Paragraph 8 states that he has a fixed place of abode within the jurisdiction of this Court, that he is a known residence at Senior Quarters Cell, Western Division in Soroti City. He attached a copy of an introductory letter from the LC1 Chairperson Cell 1 Senior Quarters dated 7th May, 2023, an introductory letter from his landlord dated 5th April, 2023

plus rent receipts from April 2022 to December 2022.

Under paragraph 8 of the affidavit in rejoinder the applicant stated he is deployed in Soroti and accordingly is a resident in Soroti, however, he states that he was born and raised in Kyeitagi, Rugongi, Kenshuga in Kiruhura District where he has a permanent residence.

He attached a letter an introductory letter from the Local Council 1 of Kyeitagi dated 23rd April 2023 wherein it is stated that the applicant's father Lazaro Mushabe has lived in Kyeitagi for 58 years and the applicant for 45 years.

The applicant has also attached a letter from his father dated 27.04.2023 stating that the applicant is his son, and that when at home he resides with him at Kyeitagi.

Counsel submitted that Remmy Kasule, J in Mugenyi Steven vs Uganda Miscellaneous Application no. 0065 of 2004, held that;

"The onus is on the applicant to satisfy that he has a fixed place of abode in a particular known village, sub-county, county and district. This is to enable court exercise jurisdiction over the applicant while on bail being able to trace his whereabouts whenever it is necessary."

- Counsel further relied on the holding by Justice Kwesiga in Kanyamunyu Matthew S Vs Uganda [2017] UGHCCRD 145 where it was held that the statement that the applicant had no fixed place of abode because he lived in a landlord's property holds no sense at all for the applicant has ably shown his fixed place of abode thereby warranting the grant of bail pending his trial.
- In law, the essence of a fixed place of abode is based on the traceability of an accused in the event of abscondment.

Section 15(4) (a) of the Trial on Indictment Act provides that in considering whether an accused is likely to abscond court may take into consideration whether the applicant has a fixed place of abode within the jurisdiction of the court with this point amplified by paragraph 13(k) of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions.

While the law does not define the phrase 'fixed place of abode'; what is important is that the fixed place of abode must be within the jurisdiction of the court considering the bail application. Where the applicant fails to prove this under section 15(1) of the TIA, then the court may deny him bail.

In the instant case the applicant is ordinarily a resident of Kyeitagi, Rugongi, Kenshunga in Kiruhura District where he was born and raised as evidenced by the letters of introduction from the Lc1 of the Kyeitagi and his father.

However, because of his deployment as District Internal Security Officer in Soroti District, he is currently residing in Cell 1, Senior Quarters, Western Division Soroti 25 City per the introduction letters from the LC1 Cell 1 and his landlady.

The applicant in his affidavit states that Cell 1 Senior Quarters is his fixed place of abode, he did not adduce any evidence on payment of utilities, however, the

introductory letter from his landlady marked "C" indicates that he has stayed with $\$$ her for a period of 13 months starting April 2022.

The copies of rental receipts marked "D" indicate that he paid from April 2022 to $\backslash^*$ December 2022. This proves that the applicant resided in Senior quarters before his arrest in December 2022. Accordingly, I would find that the applicant has proved that he has a fixed place of abode within the jurisdiction of this court.

ii. Substantial sureties.

Suffice it to note that "surety" is defined by Paragraph 4 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions; Legal Notice No. 8 of 2022 to mean; A person who undertakes to ensure that the applicant will appear

in court and abide by the bail conditions and who furnishes security which may be 15 forfeited to the State if the applicant fails to appear in court. Therein lies the main duty of a surety.

What is pertinent about sureties is that there must be indication that they have been advised of their roles as sureties, they identified themselves properly and have shown and proved their authoritative relationships in respect to the 20 applicant showing that they are able exercise their authority and command appearance of the applicant in court when needed.

In regards to the instant matter, under paragraph 9 of his affidavit in support of this application, the applicant avers that he has substantial sureties who are military persons of higher ranks than him and who know their duties as sureties 25 to this honourable court and who will ensure his compliance with any bail terms imposed by this Honourable Court.

In his affidavit in rejoinder under paragraph 9 the applicant states that he holds $\$$ the rank of a private which is lower than those of his sureties who are Captain Johnson Tashobya, Lieutenant Freddie Ojuka and Lieutenant Nicholas Kajimbi.

Under paragraph 10 he further states that even in terms of deployment he is a subordinate to his sureties particularly Mr. Tashobya Johnson and Freddie Ojuka who are both Regional Internal Security Officers (RISO), whereas he is a District

Internal Security Officer.

The applicant also annexed an introductory letter dated 4th May, 2023 from the office of the Director General Internal Security Organisation which confirms that he has been a staff of Internal Security Organisation for 19 years and he also attached a copy of his employment ID to his affidavit in rejoinder.

The three sureties, to wit, Captain Johnson Tashobya, Lieutenant Freddie Ojuka and Lieutenant Nicholas Kajimbi, all have a letter of introduction from the office of the Director General ISO dated 04.05.2023 and is attached to this application. The letters indicate the ranks of these sureties and the regions they preside over as follows;

- Captain Johnson Tashobya is the RISO of Kampala Metropolitan North,
- Lieutenant Freddie Ojuka is the RISO in charge of Teso Sub region and;
- Lieutenant Nicholas Kajimbi is the DISO Kalungu District.

Copies of their ISO identity cards and National Identity cards are attached to this application.

Furthermore, for two sureties, that is, Captain Tashobya and Lieutenant Kajimbi, a letter of introduction from their LC1 is attached to this application showing that they reside at Kkungu Local Council 1 and Kalungu Town Cell LC1.

- Section 15(4)(b) of the Trial on Indictment Act and paragraph 13 (l) of the S Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, provide that in considering whether an accused is likely to abscond the court shall consider whether the accused has sound sureties within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail.
- Further, Paragraph 15 of the Constitution (Bail Guidelines for Courts of 10 Judicature) (Practice) Directions provides for determinants on the suitability of a surety thus;
 - (1) When considering the suitability of a surety, the court shall take into account the following factors—
 - (a) the age of the surety; 15
 - (b) work and residence address of the surety;
 - (c) character and antecedents of the surety;
 - (d) relationship to the accused person; and
 - (e) any other factor as the court may deem fit.

- (2) Subject to sub-paragraph (1) the proposed surety shall provide documentary 20 proof including—
- (a) a copy of his or her national identity card, passport or aliens identification card;
- (b) an introduction letter from the Local Council 1 Chairperson of the area where the surety is ordinarily resident; or
- (c) asylum seeker or refugee registration documents issued by the Office of the 25 Prime Minister.

Given the fact that the applicant is a District Internal Security Organisation (DISO) $\mathbb{S}$ holding the rank of a private it is only reasonable that his sureties should be those of a higher rank than him and who should be able to exercise authority over him. This is because once an applicant/accused is released on bail, the sureties have a duty to ensure that the applicant/accused always attends court when called upon to do so without fail and the only way they can carry out this duty is if they can exercise reasonable control over the accused.

In this respect I do find that given the fact that all the sureties presented by the applicant are of a higher rank than the applicant especially sureties; Captain Tashobya and Lieutenant Freddie Ojuka; who are additionally RISOs and who all have proper introductory letters from the office of their ultimate superior, that is the Director General ISO, I would find that the sureties presented are substantial

and can indeed ensure that the applicant attends court whenever called upon to do so.

Although, in accordance with the Bail Guidelines, there is a requirement that all the sureties attach letters of introduction from their Local Council 1 Chairperson 20 of the area where the surety is ordinarily resident, while one of the sureties called Lieutenant Freddie Ojuka did not attach the same, I am satisfied that the introductory letter addressed to this court by the Director General ISO clarifying the fact that he is indeed the Regional Internal Security Officer for Teso Subregion satisfies this court that he is indeed a substantial surety and that since he 25 is the immediate supervisor of the applicant, he is capable of compelling the applicant to attend court when required at any time, his being the RISO Teso Subregion with authority over the applicant who is the DISO Soroti. I therefore find that the sureties are substantial.

$\mathbb{S}$ However, in all cases, especially where an applicant/accused person is charged with a capital offence, the court must always have in its mind the overarching consideration of the gravity of the accusation levelled against the applicant/accused.

In this instant application, the applicant is charged with the offence of murder 10 which is contrary to sections 188 and 189 of the Penal Code Act, Cap. 120 as amended. The applicant state since his arrest he has been in detention at Soroti Government Prisons and that her has been committed for trial and this trial date is now certain.

However, the constitutional presumption of innocence as provided for by Article 15 28(3) of the Constitution means that where an applicant/ accused has proved that he has a fixed place of abode and has provided substantial sureties, then any denial of bail would be considered a punishment rather than the need to have an accuse attend his trial. This is because the active principle in granting bail is that a court while upholding the liberty of an individual must simultaneously protect the administration of justice and not use the denial of bail as a punishment as at 20

this stage the innocence or guilt of the accused is yet to be determined by court. (See: Abindi & Another v Uganda; Miscellaneous Criminal Application 20 of 2016 [2017]). (Emphasis added)

Consequently, having found that the applicant has satisfied all the relevant \$-25\$ requirements for the grant of bail such as proving that he has a fixed place of above, his antecedents are known and he has provided substantial sureties but considering that his trial is now eminent and is it is fixed for 25th August, 2023, bail granted to the applicant/ accused on the following strict conditions;

- > 1. The applicant executes a cash bond of Ug. Shs. 10,000,000 (Ten million only).
2. The applicant is not to travel outside of this country except with the permission of this Honourable Court and to ensure that this directive is carried out, he will deposit his valid passport with the Deputy Registrar of this Court not later than 7 days from the date of this order.
3. Each of the three sureties shall execute a non-cash bond of Ug. Shs. 30,000,000 (Thirty million only).
4. The applicant and each of his sureties are ordered to provide to the Deputy Registrar of this Honourable Court; and to the Chief State Attorney Soroti, one recently taken passport size photograph and a copy of valid National Identity card.
5. The Applicant shall report to the Deputy Registrar of this Court and the Chief State Attorney, Soroti, once a month on last Monday of each month beginning the 21st of August, 2023 till further orders of this court.

I so order.

\$\mathsf{S}\$

Hon. Dr. Justice Henry Peter Adonyo Judge \$2^{\text{nd}}\$ August 2023

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