

UGANDA / JUDGMENT

Ojok v Uganda (Criminal Application 5 of 2023) [2024] UGSC 39 (28 June 2024)

[2024] UGSC 39

COURT

Supreme Court of Uganda

BEFORE

Mike Chibita, JSC

CASE / FILE NUMBER

Criminal Application 5 of 2023

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THE REPUBLIC OF UGANDA**IN THE SUPREME COURT OF UGANDA****AT KAMPALA****(CORAM: CHIBITA, JSC;)****CRIMINAL APPLICATION NO. 05 OF 2023**

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 $\$S$ **OJOK JOHN BOSCO OLAPAKINO:.....APPLICANT****VERSUS****UGANDA:..... \$15\$**

(An application for bail pending appeal arising from, criminal appeal No. 5 of 2023)

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RULING OF MIKE J. CHIBITA, JSC

The applicant filed this application by Notice of Motion under the provisions of Rules 2(2), 6(2)(a), 43(1) and 50(1) of the Rules of this Court seeking that the applicant be released on bail pending the hearing and determination of his Criminal Appeal No.05 of 2023

by this Court.

The grounds for the application are that;

1. The applicant was convicted of the offence of murder s/s 188 & 189 and attempted murder c/s 204 of the Penal Code Act. He was sentenced to death for murder and life imprisonment for 6 counts of attempted murder. The sentence for attempted murder was suspended.
- 2. The applicant's appeal to the Court of Appeal was partially allowed and the death sentence was reduced to 35 years' imprisonment.
- 3. The applicant being dissatisfied with the decision of the Court of Appeal filed a Notice of Appeal and Memorandum of Appeal vide Criminal Appeal No. 5 of 2023
- 4. The applicant's appeal is not frivolous and has great chances of succeeding since it raises a fundamental issue of law.
- 5. There is a likelihood of substantial delay before the applicant's appeal can be heard.
- 6. The applicant has substantial sureties who are willing and ready to stand for him.
- 7. The applicant will not abscond and will abide by the conditions set by this Court.
- 8. The discretion of Court be exercised in the applicant's favour.
- The application is supported by the affidavit of the applicant sworn on 30th November, 2023 and a supplementary affidavit sworn on 31st May, 2024 which substantially expound these grounds. The respondent opposed the application in an affidavit in reply sworn by Annette Namatovu Ddungu, Chief State Attorney. She averred, *inter alia*, that there was nothing exceptional to warrant the grant of the application and that the applicant's appeal had not possibility of success.

Background

The applicant was convicted of the offence of murder s/s 188 & s/s 189 on one count and attempted murder c/s 204 of the Penal Code Act on six counts. He was sentenced to death for the offence of murder and life imprisonment for the offence of attempted murder.

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The sentences were to run concurrently. However, since the \$\mathsf{S}\$ applicant had been sentenced to suffer death in respect to murder, the sentence of attempted murder was consequently suspended.

His appeal to the Court of Appeal was partially successful and the death sentence was reduced to 35 years' imprisonment. Dissatisfied, he has now appealed to this Court against conviction and sentence vide Criminal Appeal No.5 of 2023 hence this application pending determination of his appeal.

Representation:

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At the hearing of the application, Mr. Nsubuga Samuel represented the applicant, while Ms. Ann Kabajungu, a Chief State Attorney \$15\$ represented the respondent.

Submissions: Applicant's Submissions

The Counsel for the applicant repeated the contents of the Notice of motion and the affidavit. He submitted that the applicant had a \$20\$ fixed place of abode, the applicant had a pending appeal before this Court which has merit and a great chance of success since the learned Justices *inter alia* imposed an illegal sentence against him. Counsel further submitted that there was a likelihood of delay before the appeal was heard owing to the heavy schedule and other \$25\$ matters filed before the applicant's appeal.

Counsel also argued that the applicant had substantial sureties willing to ensure his attendance in Court. The said sureties presented were Okello Francis Phillip, Olwit Jimmy Mao, Ruma

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Abili Charles and Adupa Newton who were all close friends to the \$\mathsf{S}\$ applicant and residents from Lira District.

Lastly, Counsel relied on the Prisons Medical Report and argued that the applicant suffered from severe hypertension and chronic allergic Bronchitis (with occasional asthmatic attacks) which could not be readily managed by the Prison Authorities. He further argued that grave illness was an exceptional circumstance to warrant release. Counsel relied on the case of **Magombe Joseph Joshua v Uganda** No. 13 of 2020 (SC) to support this submission. Counsel therefore invited Court to grant this application.

Respondent's Submissions \$15\$

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Counsel strongly opposed the application. She repeated the factors outlined in *Arvind Patel V Uganda No. 1 of 2003 (SC)* and submitted that the applicant was not a first offender and was likely to abscond if he was released on bail since he was already a convict

- \$20\$ serving a hefty sentence of 35 years' imprisonment. Counsel also argued that the offence for which the applicant was convicted involved personal violence. The applicant set on fire the house in which his brother, the deceased and five other family members were sleeping.
- Counsel also argued that the applicant had no proof of a fixed place \$25\$ of abode as purported in the LC letter. She submitted that the letter did not confirm residency of the applicant. That it was a letter written by the clan chief confirming that he only knew the applicant. Furthermore, that the applicant has been in custody
- since 2017 and that he was living 80 meters from the victim's 30 home. It is therefore unlikely that he will return to the same place

if released on bail. He should be denied bail to protect the surviving \$\overline{5}\$ victims and prevent a re-traumatisation.

Regarding the success of the appeal, counsel submitted that the appeal was frivolous and without a possibility of success. Counsel submitted that the applicant's conviction was upheld by the Court

- of Appeal upon re-evaluation of evidence. She submitted that a \$10\$ look at the applicant's memorandum of appeal clearly shows that the applicant has essentially appealed on the same grounds like those at the Court of Appeal. The appeal therefore has no chance of success.
- In relation to the sureties, counsel argued that they were not \$15\$ substantial. They reside in a different district from the applicant. They are also only close friends and may not have influence over him to ensure court attendance.

Relating to the applicant's health, counsel submitted that the

- applicant does not suffer from a grave illness that cannot be \$20\$ treated in custody. Counsel further argued that his age of 61 years did not render him incapable of being in custody awaiting his appeal. The applicant has therefore not proved any exceptional circumstances to warrant the bail. Counsel relied on the case of
- *Magombe Joseph Joshua v Uganda (Supra)* to support her \$25\$ submissions. Counsel therefore invited Court to dismiss the application.

Applicant's Submissions in Rejoinder

Counsel reiterated his earlier submissions and argued that the 30 letter from the clan chief confirmed that the applicant was a resident of the same area and therefore the applicant had a fixed place of abode.

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- Counsel also argued that the applicant's age constituted an $\$S$ exceptional circumstance to warrant grant of bail pending appeal. Regarding the sureties, counsel submitted that residing in different Districts did not mean that they could not ensure the applicant's attendance in court. Furthermore, that since they were
- close friends, they had an influential position over the applicant. $\$10$

CONSIDERATION OF THE APPLICATION BY COURT

I have perused the affidavits and considered the submissions together with the authorities.

Rules $\$6(2)(a)$ of the Rules of this Court empowers this Court to $\$15$ grant bail pending appeal. It reads:

"Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence...., but the court may in any criminal proceedings, where notice of $\$20$ appeal has been given in accordance with rules 56 and 57 of these Rules, order that the appellant be released on bail *pending the determination of the appeal.*"

It is trite that bail pending appeal is discretionary and should be exercised judiciously with each case determined on its own merit. $\$25$ See; David Chandi Jamwa v Uganda No. 09 of 2018 and Magombe Joshua v Uganda No. 13 of 2020.

As established in a plethora of cases, this Court has laid down several considerations for the grant of bail as stated in **Arvind Patel v Uganda** (supra).

Namely that: $\$S$

- 1. The character of the applicant
- 2. Whether the applicant is or not a first offender;
- 3. Whether the offence of which the applicant is convicted involved personal violence:
- $\$10$
- 4. The appeal must not be frivolous and has reasonable chance of success:
- 5. The possibility of substantial delay in the determination of appeal and:
- 6. Whether the applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal.

Nevertheless, the above guidelines are not exhaustive and it is not necessary for all these conditions to be present in every case. A combination of two or more of the guidelines is sufficient."

The above notwithstanding, this Court has also firmly stated that bail pending appeal mainly hinges on whether there are exceptional and unusual circumstances to warrant release which the applicant must prove since the conditions for bail pending appeal are slightly higher than those required for bail pending trial. See; Magombe Joshua v Uganda (Supra).

This Court has emphasized that at this stage, the appellant is no longer wholly shielded by the presumption of innocence having been convicted by two courts. The applicant at this stage has an incentive to jump bail.

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Therefore, the conditions are applied more stringently. See **David S** Chandi Jamwa v Uganda (Supra), John Kashaka v Uganda No. 18 of 2019.

The issue for determination therefore is whether the applicant has satisfied court to warrant the grant of bail pending appeal.

Counsel for the applicant submitted that the applicant had a fixed \$10\$ place of abode with substantial sureties.

The position of this Court is that such factors go to the applicant's credit. However, these alone do not weigh heavy enough to attract release on bail when weighed with the seriousness of the offence

and the likelihood of success of the appeal because there is nothing \$15\$ exceptional. See; John Kashaka v Uganda (Supra) and Magombe Joshua v Uganda (Supra).

I find that the applicant is a resident of Otengoro Olong Okweryie, Odokomit East, Kotomor Sub County, Agago District. I also note

- that his four sureties who are only his close friends are residents \$20\$ of Lira District. The applicant and his sureties reside in different districts. In addition, the sureties are close friends to the applicant. None of them has a direct influence over him like a close relative would have had.
- The influence of a close friend, may not carry the same weight as \$25\$ the influence of a relative. None of them has demonstrated a strong positive influence over the accused. In my view, the risk to abscond considering the offence, is likely to be higher in such circumstances as presented in this case.

- I therefore do not find the sureties substantial. 30

Regarding the possibility of success, counsel for the applicant $\$ \text{mathsf{S}} \$$ submitted that the appeal has a great chance of success since it raises issues of law and was not frivolous. This Court has observed that the only way to ascertain the possibility of success is by perusing the entire record of appeal. In *Arvind Patel v Uganda* (supra) followed in the case of *Imere Deo v Uganda No.2* $\$10 \$$ of 2015 and *Magombe Joseph V Uganda* (Supra), this Court held

that:

"In considering an application for bail pending appeal the only means by which the Court can assess the possibility of success of the appeal is by perusing the relevant record of proceedings, the judgment of the Court from which the appeal has emanated, and the *memorandum of the appeal in question.*"

The applicant attached the Notice of Appeal, Memorandum of Appeal and the lower court judgments. No record of proceedings $\$20 \$$ was attached. In the circumstances it is not possible to determine the success of the prospected appeal. Nevertheless, a perusal of the applicant's memorandum of appeal shows that the appeal is raises issues of law that require consideration by Court. In my view $\$25 \$$ therefore, the appeal is not frivolous.

Concerning the issue of substantial delay, the applicant avers that there will be delay in hearing his appeal. I note that the Court is fully constituted and constantly operating. In my view therefore, this averment is speculative and no evidence has been adduced to prove this assertion.

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- Furthermore, in *Henry Bamutura v Uganda No. 19 of 2019 (SC)* $\$ \text{mathsf{S}} \$$ it was held that delay in disposing of the appeal should be assessed in light of whether there is a real risk that the sentence or a considerable portion of it will have been served before the appeal is heard.
- In the instant case, I note that the applicant was sentenced to 35 $\$10 \$$ years' imprisonment. These years will not have expired by the time the appeal is heard.

Relating to the issue of the applicant's health, the applicant avers that he suffers from severe hypertension and chronic allergic Bronchitis (with occasional asthmatic attacks) which cannot be readily managed by the Prison Authorities. The applicant attached the Prison's medical report (annexure F) as evidence.

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As earlier stated, the release on bail pending appeal hinges on whether there are exceptional circumstances. This Court has considered grave illness as an exceptional circumstance which

must be proved as being incapable of adequate medical treatment while in custody. See: **Magombe Joseph V Uganda**(Supra)

I note that these are chronic health conditions in an elderly male that have no cure as stated in the medical report by the Prison's Medical Superintendent. However, there is no evidence in the \$25\$ medical report to show that the applicant's health cannot be managed by the Prison's Authority. On the contrary the report shows that the applicant has been treated a number of times and has responded to the available medication that has given him relief. 30

I am therefore not persuaded that his health condition cannot be S managed by the Prison's Authority. I find that the applicant has not proved any exceptional circumstance.

For the foregoing reasons and considering the gravity of the offence of murder, which does not favour the possibility for release on bail since it involves personal violence, I decline to grant this application. It is accordingly dismissed.

Counsel is advised to get in touch with the Registrar of the Court to ensure that the appeal is fixed for hearing at the earliest opportunity.

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Dated at Kampala this 28...day of 2024.

MIKE J. CHIBITA JUSTICE OF THE SUPREME

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Prepared on 14 October 2026 · Esheria