

UGANDA / JUDGMENT

Okullo v Uganda (Criminal Miscellaneous Application 12 of 2022) [2023] UGHCCRD 49 (18 August 2023) [2023] UGHCCRD 49

COURT

HC: Criminal Division (Uganda)

BEFORE

Adonyo, J

CASE / FILE NUMBER

Criminal Miscellaneous Application 12 of 2022

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The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Criminal Miscellaneous Application No. 12 of 2022

(*Arising from HCT-09-CR-SC-0364-2022*)

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..... Applicant Okullo Charles

Versus

<pre>..... Uganda

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Before: Hon. Justice Dr Henry Peter Adonyo**Ruling****1. Background:**

The applicant/accused, together with Omiat Patrick and others still at large, was charged and later indicted with two counts; (1) murder contrary to Sections 188 and 189 and (2) Arson contrary to Section 327 (a) of the Penal Code Act, Cap 120 as amended.

Count I: The accused (now applicant), together with Omiat Patrick and others still at large on 4th January 2022, at Ongoratok village in Soroti district, with malice aforethought, unlawfully caused the death of Ejemai Norbert.

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Count II: The accused (now applicant), together with Omiat Patrick and others still at large on 4th January 2022, at Ongoratok village in Soroti district, willfully and unlawfully set fire to three grass-thatched huts, the property of Ejemai Norbert.

The prosecution case is that Omiat Patrick (A2) is the biological son of Okullo Charles \$ \mathsf{S}\$ (A1). The deceased, Ejemai Norbert, was the chairperson of the Lulai Clan, where A1 and A2 both belonged.

In June 2019, A1 offered to sell his land to Auruku Andrew in order to settle outstanding loans and fees. A1 sold the land to Auruku, who agreed to pay in instalments. After an outstanding amount had been received in instalments on different occasions, Auruku asked for an agreement from A1. A1 denied having had any transactions with Auruku.

Auruku referred the matter to the Chairman of the Clan, Ejemai Norbert, who summoned the clan members, A1, A2, the chairperson LC1 and Auruku and others,

for a meeting to settle the matter. A1 did not attend but instead sent A2 to go and monitor what was taking place.

The moment the meeting resolved to write a sales agreement to Auruku Andrew, A2 went and informed his father, A1, of what was transpiring. A1 came and started fighting Ejemai (deceased), who was chairing the meeting. A1 then shortly ran home, picked a panga and came intending to kill Ejemai and other members who attended

the meeting.

In fear, everyone ran for their lives. A1 and A2 uttered threats and stated that they were going to kill Ejemai over that land. On several occasions, A1 and A2 had issued threats to kill Ejemai.

The deceased reported the matter to Nakatunya Police Station, the case of assault 25 and threatening violence vide SD/11/12/2021; however, the Ejemai chose to forgive A1, and he was discharged.

The threats by A1 and A2 to kill Ejemai, however, continued.

On the night of 4th January 2022 at about 10 pm-1200am, Akao Rose, the wife of \$ \mathsf{S}\$ Orapeda Joseph, who is a brother to the deceased (Ejemai) and a neighbour, went out to ease herself only to see three huts at the home of the deceased (Ejemai) on fire.

Akao Rose and Orada Joseph made an alarm that attracted other people, only to discover that Ejemai was burnt in the house.

A case of murder and arson was reported to the police. A canine dog was brought to the scene of the crime, and it led the police to the home of A1, who was arrested and charged.

Omiat Patrick (A2), who was still at large, continued to make serious threats to the sons of the deceased, neighbours, and any witnesses who made statements in 15 regard to the arrest of A1.

He was also eventually arrested in regard to his conduct before, during and after and jointly charged with A1.

The body of Ejemai was taken for postmortem, and it was revealed that he was burnt to ashes and the cause of death was asphyxia caused by smoke secondary to the burnt house.

2. Legal basis of the Application:

The applicant brought this application by a Notice of Motion under Articles 23(6)(a) and 28(3) of the Constitution of the Republic of Uganda, 1995 (hereinafter "the Constitution") for orders that the applicant be released on bail pending committal and eventual hearing of the criminal case.

3. Grounds of the application:

The application is premised on grounds briefly stated in the application and amplified in the affidavit in support deposed by the applicant. That;

- a) The accused was arrested and remanded to Soroti Government Prison without being committed and has been waiting for his trial but has since not been cause listed.
- b) The applicant shall not abscond trial if released on bail.
- c) The accused/applicant is presumed innocent until proven guilty or until he pleads guilty to the charges of murder and arson.
- d) The applicant has a constitutional right to be released on bail on such terms and conditions that shall be set by the Court.
- e) The applicant has spent close to five months on remand at Soroti Government Prison following his arrest, which is a violation of his Constitutional rights without being committed to the High Court, and he is not sure when the trial will commence.
- f) The offences with which the accused is charged are bailable on such terms and conditions that this Honourable Court shall set.
- g) The applicant has two substantial sureties who understand their obligations towards this Honourable Court and undertake to present themselves to this Court for examination and approval.
- h) The applicant is a first-time offender since he has never been granted bail and failed to comply with the terms and conditions.

- i) The applicant shall abide by the terms and conditions which this Honourable Court shall set.

The respondent neither filed an affidavit in reply to this application nor submission in respect to the instant application in spite of an affidavit of service dated 23rd June 2023 which indicates that the submissions in this instant application filed in court on 23rd May 2023 were served onto and received by the Directorate of Public

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Prosecutions - Regional Office - Soroti on 23rd May 2023, but it has not been $\$S$ responded to.

Accordingly, this Court will consider the merits of the applicant's application while determining the application.

4. Submissions: 10

Since the respondent did not file any affidavit in reply, this application is apparently unopposed, meaning that there is no objection to it and to the sureties presented in court or their documents or on any of the grounds relied upon by the applicant. In arguing this application, the applicant, through his counsel (M/s Ogire and

Company Advocates), filed written submissions. The submissions along with the 15 application, the affidavit in its support, the attached documents, the relevant legal authorities and the laws applicable are taken into account while determining this application.

4. Decision:

- In the case of Lawrence Luzinda vs Uganda [1986] HCB 33, bail was defined as an 20 agreement between the court and the applicant consisting of a bond with or without a surety for a reasonable amount as the circumstances of the case permit conditioned upon the applicant appearing before such a court on a date and time as the name in the bond to start his trial.
- The presumption of innocence enshrined under Article 28(3)(a) of the Constitution 25 of the Republic of Uganda, 1995, is the primary principle upon which a court may release an accused person on bail pending trial.

This application was brought under Article 23(6)(a) of the Constitution, which entitles a person arrested in a Criminal Offence to apply to the Court to be released on bail,

and the court is enjoined with discretion to grant or not to grant that person bail on $\$S$ such conditions as Court considers reasonable.

Section 14(1) of the Trial on Indictments Act, Cap 23 (TIA) articulates the stance outlined in Article 23(6)(a) of the Constitution. It entrusts the High Court with the discretion to release an accused person, at any stage of the proceedings, 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. The Constitution (Bail Guidelines for Courts of Judicature) Practice Directions, 2022, No. 5, reinforce the above legal positions by providing the general principles which

- this Court has considered in determining the instant application. These principles 15 are:
- a) The right of an applicant to be presumed innocent as provided for in Article 28(3) 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 the trial;
- d) The discretion of the court to grant bail on such terms and conditions as the court considers reasonable; and
- e) The need to balance the rights of the applicants and the interest of

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justice.

Additionally, and pursuant to Sections 14 and 15 of the Trial on Indictments Act, a person indicted of a serious offence is stated only to be able to be released on bail if he or she proves to the satisfaction of the court that special circumstances exist to warrant his or her being released on bail. These circumstances which are regarded

"special" include; grave sickness, infancy or old age, the fact that the applicant has $\$S$ 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.

Proof of these circumstances, nonetheless, is not mandatory as the courts have the

- discretion to grant bail even when none is proved. This position was observed in the 10 case of Foundation for Human Rights Initiative Vs Attorney General, Constitutional Petition 20/2006, where the court held that exceptional circumstances are no longer a requirement for release on bail, as the court found S.15 (1) (a) of the Trial on Indictment Act (TIA) to be in contravention of the Constitution. The court observed

- that the provisions thereof are not mandatory but provide guidance and not 15 directions. However, in relation to the instant application where the applicant is charged with the offence of murder, which is of a capital nature, exceptional circumstances shall render guidance in consideration of whether to grant or refuse to grant bail to the applicant.
- Arising from all the above considerations, it is trite to conclude that while an accused 20 person has the right to apply for bail by virtue of Articles 23(6)(a) and 28(3)) of the Constitution, this Court has the discretionary to grant or refuse to grant the bail as was held in the case of Uganda v. Kiiza Besigye, Constitutional Reference No. 20 of 2005.
- 25 a. Exceptional circumstances

The applicant stands charged with the offences of murder and arson. For the offence of murder, upon conviction, an accused person can be liable to suffering death as a maximum sentence whereas a person convicted of arson is liable to life imprisonment. This demonstrates how grave the accusations against the accused

are and which necessitate that exceptional circumstances have to be proved for the $\mathbb{S}$ court to consider whether to grant or not grant bail.

The applicant did not plead nor prove any exceptional circumstances to warrant his release on bail. The court is cognizant of the decision in the Foundation for Human Rights Initiative Vs A. G Constitutional Petition No 20 of 2006, but as has already been

noted, the exceptional circumstances of an accused in a case such as murder cannot be ignored by this Court.

Accordingly, and considering that the offences with which the applicant is charged are of a grave nature for which the maximum punishment upon conviction is to suffer death and life imprisonment respectively, therefore, proof of exceptional circumstances in addition to other requirements is, in my view, required for consideration of the instant application.

Moreover, the facts disclose that prior to the commission of the offences, it is alleged that A1 and A2 had issued death threats to Ejemai Norbert, the deceased, who reported the matter to Nakatunya Police Station vide SD/11/12/2021 only to

meet his death after. It is further alleged that A2 - the son of the applicant, 20 continued making serious threats to the sons of the deceased until his arrest.

It is, therefore, my finding that this court cannot take lightly such allegations even with the presumption of innocence, hence the requirement for the applicant to prove any exceptional circumstance for this court to grant or not grant this application.

I need not go into other requirements, but for completeness' sake, I shall.

The other requirements for consideration would now be;

- a) the applicant's fixed place of abode within the jurisdiction of this court,

- b) the soundness and substantiality of the sureties presented and their undertaking to have understood their roles and obligations in this position,
- c) the applicant's undertaking to respect and abide by the terms of the grant of bail and whether he shall not intimidate or interfere with the investigations or witnesses thereof.
- d) the antecedents of the applicant a
- e) Possibility of interference with the witness(es).

The court is equally cognizant of the following:

- The right of the accused to apply for bail, $\overline{a}$
- this court's jurisdiction to hear and determine an application such as b this one.
- and the court's discretion in such applications. c

In *Uganda v Col (Rtd) Dr Kiiza Besigye* Constitutional Reference No.20 of 2005, the Court laid out some general observations on the reasonable conditions the court should keep in mind when deciding to grant or to refuse to grant bail. It held:

"While considering bail, the court would need to balance the constitutional rights of the applicant, the needs of society to be protected from lawlessness and the considerations which flow from people being remanded in prison custody which adversely affects their welfare and that of their families and not least the effect on prison conditions if large numbers of unconvicted people are remanded in custody. In this respect, various factors have to be borne in mind, such as the risk of absconding and interference with the course of justice, while the seriousness of the offence and the possible penalty which could be meted out are

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considerations to be taken into account in deciding whether or not to grant bail, the applicants must be presumed innocent until proven guilty or until that person has pleaded guilty.

The court has to be satisfied that the applicant will appear for trial and would not abscond. The applicant should not be denied of his/her freedom unreasonably, and bail should not be refused merely as a punishment, as this would conflict with the presumption of innocence.

The court must consider and give the applicant the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially. Bail should not be refused mechanically simply because the state wants such orders.

The refusal to grant bail should not be based on mere allegations. The grounds must be substantiated. Remanding a person in custody is a judicial act, and as such, the court should summon its judicial mind to bear on the matter before depriving the applicant of their liberty."

However, in all cases, the court must have in its mind the overarching consideration 20 of the gravity of the accusation levelled against the applicant, and that should never be ignored.

b. <u>Unknown date of trial:</u>

The applicant states that he was charged with the offences of murder and arson and remanded by the Chief Magistrate's Court of Soroti at Soroti on 13th January 2022. Further still, he was committed for trial in this Court on 14th June 2022 and has since been on remand at Soroti Government Prison for more than a year pending the hearing of his case.

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Therefore, the averments in his affidavit in support that he has not yet been $\overline{\$5}$ committed are not correct, as he was committed for trial.

It is not known when his hearing will start as criminal cases are fixed for hearing in sessions, as is the practice of the judiciary, and fixing a session is dependent on many things, many of which are not in the control of this Court.

- The accused person should not be kept on remand unnecessarily without a trial 10 because of the presumption of innocence of such an accused (Article 28(3) of the Constitution. It is, therefore, the finding of this court that, indeed, one year without trial is a long time, yet the right to a fair hearing guarantees a speedy trial, and the Constitution enacts that justice should not be delayed in Article 126 (2) (b).
- c. Fixed place of abode 15

The applicant states in paragraph 10 of his affidavit in support that prior to his arrest and detention, he was a permanent resident of Cell B, Moruapesur ward, East division, Soroti City, within the jurisdiction of this Court. He undertook not to abscond from the court's jurisdiction if released on bail under paragraph 11 of his affidavit. On the other hand, his lawyers, in their submission, stated that the applicant has a fixed place of abode at Odocai village, Alengo parish, Atiira subcounty, Serere district, which is within the jurisdiction of this Honourable Court as per Annexure "A" which is an introductory letter of the area LC1.

Section 15(4) of the Trial on Indictments Act underscores the importance of proof of a fixed place of abode as not only a determinant as to whether the applicant is likely to abscond once granted bail but also the failure of proving the same, that bail can be denied.

Section 15(4) of the TIA 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 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 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 Court in an application for bail.

Firstly, upon careful perusal of the application and attachments thereto, there is no Annexure "A", but also the applicant's averments on his fixed place of abode are evidently in contrast with his lawyer's submissions on his fixed place of abode even though both are within the jurisdiction of this court.

This court is left to speculate which is the exact fixed place of abode, and since there is no annexure to support the averment, this court cannot speculate any further. It is my finding that the applicant has failed to prove that he indeed has a fixed place of abode and the location of the same.

I now find no need to proceed to other requirements.

Considering that in *Uganda vs Col. Rtd Dr Kiiza Besigye (supra)*, it was held that the court ought to balance the constitutional right of the applicants with the need to protect society from lawlessness, I am inclined, as I now do, to reject the applicants' application for bail for failure to provide exceptional circumstances to warrant a

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release on bail pending hearing and also that the fixed place of abode has not been $\$ \mathbf{S}$ proved. $\mathbf{R}$ The application thus has no merit and it is accordingly disallowed.

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Hon. Dr. Justice Henry Peter Adonyo

Judge

18th August 2023

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