

UGANDA / JUDGMENT

**Oliborit v Uganda (Criminal
Miscellaneous Application 41 of
2023) [2024] UGHC 338 (23 April 2024)**
[2024] UGHC 338

COURT
High Court of Uganda

BEFORE
Adonyo, J

CASE / FILE NUMBER
Criminal Miscellaneous Application 41 of 2023

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The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Criminal Miscellaneous Application No. 41 of 2023

(Arising from Ngora Magistrate Grade One Court Case No. 151 of 2020)

Oliborit Albert :::::::::::::::::::::::::::::: 10 <pre>.....

Versus

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

Before: Hon. Justice Dr Henry Peter Adonyo

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Ruling

1. Background:

The applicant Oliborit Albert, Onepur Peter, Acibu Abdallah, Oluka Joseph and others still at large are charged with the offences of Murder contrary to Sections 188 and 189 of the Penal Code Act, Cap. 120 and Aggravated Robbery contrary to Sections 285 and 286 of the Penal Code Act (PCA). This application is by the applicant, Oliborit Albert only.

2. Legal basis of the Application:

The application is by a Notice of Motion under Articles 23(6)(a) and 28(1)(3)(a) of the Constitution of the Republic of Uganda, 1995, (the Constitution), and Sections 14 and 15 of the Trial on Indictments Act, Cap 23 (TIA), for orders that the applicant

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be released on bail pending determination of his trial that is now ongoing before this $\$S$ Court.

3. Grounds:

The application hinged on grounds briefly stated in the application and enriched in the supporting affidavit sworn by the applicant that;

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- a) The applicant 58 years old, with seven others, was charged with the offences of murder contrary to Sections 188 and 189 of the Penal Code Act, Cap. 120 and aggravated robbery contrary to Sections 285 and 286 of the Penal Code Act (PCA) before the Chief Magistrates Court of Soroti and is presently remanded at Soroti Government Prison since 20th February 2020.
- b) The offences for which the applicant is charged are bailable, and the applicant has a constitutional right to apply for bail.
- c) This Honourable Court has the jurisdiction to entertain this application for bail pending the applicant's trial.
- d) The applicant has a fixed place of abode and a permanent place of residence in Nacebwe village, Ogerai parish, Kobulubulu sub-county, Kaberamaido district, Uganda.
- e) The applicant is married to one (1) wife and four (4) children, all of whom are of school-going age, need his care, and whom he supported as the sole breadwinner for the family before his arrest. They shall suffer if he is not released on bail.
- f) The applicant has neither other criminal charges preferred nor a pending case against him in any other court.

- g) The applicant was committed to the High Court for trial, which indeed commenced, but for one reason or the other, has now been adjourned repeatedly to the next convenient session of the High Court before three (3) separate Judges but has never been concluded to date.
- h) The applicant will suffer grave injustice if denied bail pending the trial, now on and off for quite a while, in determining the charges the State preferred against him.

- i) The applicant has substantial sureties who know and understand their duties and responsibilities and are ready and willing to stand for him.
- 4. Affidavit in reply:
- The respondent objected to the instant application through an affidavit in reply 15 sworn by Emasu Michael (then a Senior State Attorney in the ODPP's Office – Soroti, who, but for brevity, stated that;
- a) The applicant is charged with two offences of murder and aggravated robbery, which are very serious offences with a maximum penalty of death upon conviction. Thus, the applicant is most likely to abscond bail in fear of the severe sentence upon conviction.
- b) Though the applicant has a constitutional right to apply for bail, the right to grant bail remains a preserve of this Honorable Court to which the respondent prays that bail be denied.
- c) The applicant's application does not state the name of the sureties, their relationship with the applicant, what each of them does to earn a living, or whether or not the sureties have the authority to compel the applicant to attend court if granted bail.

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- d) No documents, such as photostat copies of their National Identification Cards and introduction letters from their respective Local Chairpersons, have been attached to prove the applicant's and sureties' identity and residence.
- e) The applicant has not proved that he has a permanent residence as he has not presented any proof of introduction letter, National ID, or land title.
- f) The prosecution is ready with its witnesses to proceed at any time if this case is scheduled for hearing. The application is intended to delay the hearing of the case.
- a) It is in the interest of justice that this bail application be denied and the case be fixed for a hearing at the next convenient session.

5. Submissions:

The Deputy Registrar of this Court directed the parties to file written submissions on 29 November 2023. However, when the matter came up for compliance on 30 January 2024, only the respondent had complied with the court's directives by filing its submissions. The applicant, represented by Ms Twontoo & Co. Advocates, did not

file submissions.

I have considered the respondent's submissions, the application, the affidavits, relevant legal authorities, and applicable laws while determining this application.

4. Decision: 25

> The presumption of innocence is the primary principle for which a court may, in the exercise of its discretion, release an accused person on bail pending trial as Article 28(3)(a) of the Constitution of the Republic of Uganda, 1995) provides that.

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

Article 23(6)(a) of the Constitution of the Republic of Uganda provides that:

Where a person is arrested in respect of a Criminal Offence, he 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. 10

In his affidavit, the applicant conceded that it was at the Honourable Court's discretion to release him on bail pending his trial. Since it is his constitutional right to apply for bail, the applicant's averment is aligned with Article 23(6)(a) of the Constitution.

- 15 Capital offences such as murder and aggravated robbery in this instant application are bailable; however, whether the court is inclined to exercise the discretion to grant or not is a matter dependent on the circumstances of each case and the evidence adduced guaranteeing the applicant's return to the court to attend the trial.
- Section 14(1) of the Trial on Indictments Act, Cap 23 stipulates the stance outlined 20 in Article 23(6)(a) of the Constitution. It underpins this Court's 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.
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- The Constitution (Bail Guidelines for Courts of Judicature) Practice Directions, 2022, \$ S \$ under paragraph 5, provides the general principles in consideration of a bail application thus:
 - 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 applicant and the interest of justice.
- Having exhausted the legal provisions regarding bail, I will now turn to the merits of 15 this application.

Under Section 15(1) of the Trial on Indictments Act, the Court may refuse to grant bail to persons charged with offences such as murder unless such applicant proves, to the satisfaction of the court, that he or she will not abscond when released on bail and that exceptional circumstances exist justifying his or her release.

The applicant, in his affidavit in support of the application, did not plead and prove exceptional circumstances which though according to the case of *Foundation for Human Rights Initiatives v Attorney General* (Constitutional Petition No. 20 of 2006) [2008], proof of which is not mandatory.

This is because even if exceptional circumstances is proved or not proved the court 25 still has the discretion to grant or not to grant bail as was held in the case of **Uganda* vs Kizza Besigye* Constitutional Reference No. 20 of 2005 that;

"Both High Court and subordinate courts are still free to exercise their discretion judicially and to impose reasonable conditions on the applicant." In addition to the reasonable conditions imposed on the applicant by the court, Section 15(4) of the TIA provides that;

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.
- (b) Whether the accused has sound sureties within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;
- (c) Whether the accused has no previous occasion when released on bail failed to 15 comply with the conditions of his or her bail; and
- (d) Whether there are other charges pending against the accused.

In deciding to grant or not to grant bail to the applicant, the court is instructed to consider the accused's demonstration that he will not abscond trial by considering the above factors, which I will look at as below.

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a) Fixed place of abode:

The applicant, in his affidavit in support of his application, stated that he has a fixed place of abode and a permanent residence in Nacebwe village, Ogerai parish, Kobulubulu sub-county, Kaberamaido district, Uganda.

On the other hand, in his affidavit in reply, the respondent contended that the 25 applicant has not proved that he has a permanent residence as he has not presented any proof of introduction letter, National ID, or land title.

- The respondent in their submissions reiterated that because the applicant's S permanent place of abode is not proved, the applicant's assurance that he is not likely to abscond is mere speculation that cannot be relied on by this Honorable court and that there is a likelihood that the applicant can decide to change his residence and move to another place of his choice.
- Section 15(4) (a) of the Trial on Indictments Act strengthens the need for proof of a 10 fixed place of abode as one of the determinants as to whether the applicant is likely to abscond once granted bail with any failure to do so then can be denied.

The above provision is also 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', my interpretation is 15 that a fixed place of abode is such a place of resident ordinarily found within the jurisdiction of the court which is considering the bail application. It means that one can be traced and that because of such traceability one is not likely to abscond and is able to easily attend court whenever required.
- Apart from the averment in his application that the applicant has a fixed place of 20 abode and a permanent place of residence in Nacebwe village, Ogerai parish, Kobulubulu sub-county, Kaberamaido district, Uganda, the applicant did not attach any LC1 letter or any other documentation fortifying his averment or proving his residence within the jurisdiction of this court and as such I am unable to make a
- finding on whether he will be traceable once released on bail and as to whether he 25 will not abscond as bail is but only a temporary freedom until the case brought against such an applicant is concluded.

Therefore, the applicant has failed to satisfy court that he has a fixed place of abode S within the jurisdiction of this court. This ground fails.

b) Proposed sureties:

The applicant averred that he has substantial sureties who know and understand their duties and responsibilities and are ready and willing to stand for him.

Conversely the respondent in their affidavit in reply contended that the applicant's 10 application does not state the name of the sureties, their relationship with the applicant, what each of them does to earn a living, or whether or not the sureties have the authority to compel the applicant to attend court if granted bail. Moreover, no documents, such as photostat copies of their National Identification Cards and introduction letters from their respective Local Chairpersons, have been attached to 15 prove the applicant's and sureties' identity and residence.

In addition, the respondent submitted that since there are no sureties presented, the possibility of the applicant absconding to frustrate this trial in High court is very high.

- A "surety" is defined under Paragraph 4 of the Constitution (Bail Guidelines for 20 Courts of Judicature) Practice Directions 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 forfeited to State if the applicant fails to appear in court.
- Furthermore, Section 15 (4)(b) of the Trial on Indictment Act and paragraph 13(1) (I) 25 of the 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 $\mathbb{S}$ undertake that the accused shall comply with the conditions of his or her bail.

Paragraph 15 of the Constitution (Bail Guidelines for Courts of 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
- (a) The age of the surety;
- (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 proof, including-
- (a) A copy of his or her national identity card, passport or alien's 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 20 Prime Minister.

Whereas the applicant averred that he has substantial sureties, he has not disclosed them either in his affidavit or in the application. He also did not attach any documents such as photostat copies of their National Identification Cards and introduction letters from their respective Local Chairpersons, to prove the sureties'

identity, ages, workplace, and residence etc which would enable their identification.

Given the failure to disclose such crucial information and documentation related to $\$ \backslash \mathrm{mathsf{S}} \$$ the proposed sureties, I am unable to make any finding as to the suitability and substantiability of the non-disclosed sureties. This ground also fails.

5. Conclusion

Since the applicant neither disclosed his proposed sureties nor proved that he has a permanent place of residence which is within the jurisdiction of this court, I am 10 unable to exercise my discretion and subsequently grant him bail as the circumstances are such that were he to be released on bail, he is very likely to abscond from his trial yet he together with others are charged with very serious offences of Murder contrary to Sections 188 and 189 of the Penal Code Act, Cap.

120 and Aggravated Robbery contrary to Sections 285 and 286 of the Penal Code 15 Act (PCA), each of which carries the maximum sentence of death.

Therefore, this application would inevitably fail. The applicant is free to re-apply for consideration to be granted bail in future, where he satisfies the legal requirements which I have pointed above.

I so order. 20

Hon. Dr. Justice Henry Peter Adonyo

Judge 23rd April 2024

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Prepared on 14 October 2026 · Esheria