

UGANDA / JUDGMENT

Opila and Others v Uganda

(Miscellaneous Application 11 of 2023)

[2023] UGHCCRD 59 (30 August 2023)

[2023] UGHCCRD 59

COURT

HC: Criminal Division (Uganda)

BEFORE

Adonyo, J

CASE / FILE NUMBER

Miscellaneous Application 11 of 2023

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The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Miscellaneous Application No. 11 of 2023

HCT-09-CR-SC-0409-2022

(Arising from Criminal Case No.: SOR-08-CR-AA-001/2022 of the Chief Magistrate's *Court of Soroti at Soroti)*

- 1. Opila Samuel
- 2. Elelu Bernard
- 3. Esenga Paul

Versus

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<pre>..... Uganda ::::::::::::::

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Before: <u>Hon. Justice Dr Henry Peter Adonyo</u>

Ruling

1. Background:

Opila Samuel, Elelu Bernard and Esenga Paul (the accused, now applicants) were charged with murder contrary to Sections 188 and 189 of the Penal Code Act, Cap 25\$ 120 as amended.

It is alleged that the accused persons and others still at large on 26th December 2021 at Abalang Centre in Kalaki district with malice aforethought unlawfully killed Oyugi Aron.

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It is alleged that the accused persons and Oyugi Aron (the deceased) were friends S who frequently met within Abalang Trading Centre in Kalaki district for social evenings.

That on 26th December 2021, while the accused persons were in the company of others in Abalang Trading Centre, they developed a misunderstanding with the deceased and his friends over one Salume, alleged to have been a girlfriend to the

deceased, whom Opila Samuel A1 was interested.

At around 1:00 p.m., the deceased, in the company of Esengu Joshua and Edutu Lazaro, were attacked by the accused and others, forcing them to run away. The accused persons followed the deceased.

Esengu Joshua hid himself in the bush and watched the accused persons, together 15 with others, assault the deceased with pieces of wood. A1 had a knife-like object that he used to cut the deceased.

Edutu Lazaro, while hiding, heard the deceased crying for help as he was being assaulted. They both did not make an alarm for fear of their lives, hence escaping to

their respective homes. 20

On the same day, the deceased was reported dead in the bush.

2. Legal basis of the Application:

This 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 (hereinafter "the Constitution"), and Sections 14 and 15(1)(b)(c) of the Trial on Indictments Act, Cap 23, SI 13-8 for orders that the applicants now on remand at Soroti Prison be released on bail pending their trial.

The application is anchored on grounds briefly stated in the application and in the supporting affidavits deposited by the applicants. That;

- a) The applicants were charged with murder contrary to sections 188 and 189 of the Penal Code Act, Cap 120.
- b) The applicants have a Constitutional right to be released on bail at this court's discretion.
- c) The applicants have permanent places of abode within the jurisdiction of this Honourable Court, and they will not abscond from attending court if released on bail.
- d) The applicants have substantial sureties to stand for them and will abide by the conditions the court may set.
- e) The applicants have no negative antecedents whatsoever, and there are no other charges pending against the applicants.
- f) It is just and equitable that the applicants be released on bail.

The respondent did not file an affidavit in reply to this application despite an affidavit of service dated 14th June 2023 indicating that the instant application was received by the Directorate of Public Prosecutions – Regional Office -Soroti on 5th May 2023, but it has not been responded to. 20

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

3. Submissions:

Since the respondent did not file any affidavit in reply, this application is apparently unopposed, meaning that there is no objection to it, and the sureties presented in 25 court or their documents or on any of the grounds relied upon by the applicants. In arguing this application, the applicants filed joint written submissions through their counsel (M/s Ewatu & Co. Advocates).

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The submissions, the application, the affidavits in its support, the attached $\$S$ documents, the relevant legal authorities and the applicable laws are considered while determining this application.

4. Decision:

The presumption of innocence is the primary principle for which a court may release an accused person on bail pending trial. This legal principle is enshrined under **Article 10 28(3)(a)** of the Constitution of the Republic of Uganda, 1995.

As has already been noted earlier, this application was brought under **Articles 23(6)(a) and 28(3)(a)** of the Constitution of the Republic of Uganda, which provide 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 Court may grant that person bail on such conditions as Court considers reasonable.

Further, Article 28 (3) (a) of the Constitution provides that, 20

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.

Section 14(1) of the Trial on Indictments Act, Cap 23 articulates the stance outlined 25 in Article 23(6)(a) of the Constitution. It entrusts the High Court with 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 $\$ \mathit{S} \$$ 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, reinforces the above legal positions by providing the general principles that this Court may take into account while considering a bail application.

These principles are: 10

- 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 justice.

a. Personal liberty: 20

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 (Criminal Miscellaneous Application No. 94 of 2019) [2020] UGHC 26)

This principle of protection of personal liberty was also articulated in the case of 25 Besigye v Uganda (Criminal Application No. 83 of 2016) [2016] UGHCCRD 7, 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])

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Accordingly, an accused person should be granted bail if they fulfil the set conditions for their release, has a fixed place of abode, has sound 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.

- Arising from all the above considerations, it is trite to conclude that whereas the 15 accused persons state that they have a constitutional right to apply for bail, this Court has the discretion under Articles 23(6)(a) and 28(3)) of the Constitution to grant or refuse to grant the bail as was also held in the case of *Uganda v Kiiza Besigye* (Constitutional Reference No. 20 of 2005) [2006] UGCA 42
- Additionally, under Section 15 of the Trial on Indictments Act, the Court may refuse to grant bail to persons charged with murder unless such accused/applicant proves, to the satisfaction of the court, exceptional circumstances such as certified grave illness, infancy or advanced age of the accused and a certificate of no objection signed by the Director of Public Prosecutions. However, proof of these 25 - circumstances is not mandatory as the courts have the discretion to grant bail even when none is proved as was held by the Constitutional Court in the case of *Foundation for Human Rights Initiatives Vs. Attorney General* (Constitutional Petition No. 20 of 2006) [2008] UGCC 1, which made reference to an excerpt in *Uganda vs Kizza Besigye* (supra), where it was held that;

"Both High Court and subordinate courts are still free to exercise their discretion judicially and to impose reasonable conditions on the applicant."

In the instant application, none of the applicants has pleaded exceptional circumstances.

The applicant did not plead nor prove any exceptional circumstance to warrant his release on bail.

The other requirements for consideration are;

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- a) That each applicant has a fixed place of abode within the jurisdiction of this court,
- b) That each applicant has presented sound and substantial sureties who undertake to have understood their roles and obligations in this position,
- c) Each applicant's undertaking to respect and abide by the terms of the grant of bail
- d) the antecedents of each applicant

- e) Possibility of intimidation or interference with the witness(es).

In reiteration, this court is equally mindful of the following; 25

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

However, in all cases, the court must have in its mind the overarching consideration $\$ \backslash \mathrm{mathsf{S}} \$$ of the gravity of the accusation levelled against the applicant, which should never be ignored.

- b. Unknown date of trial:

Each of the applicants, in their respective affidavits, state that they were charged with rape and have been in custody since 27th December 2021, when they were 10 arrested and that they were subsequently remanded to Kaberamaido Government Prison by the Chief Magistrate's Court of Kaberamaido at Kaberamaido. They were later transferred to Soroti Government Prison. Each of the applicants avers that they were committed for trial in the high court, but it is not known when their trial will 15 commence and that their stay in custody is for an uncertain period.

Upon perusal of the lower court file, I found that each of the applicants has been on remand since 18 January 2022, which is over a year and that they were committed to this Court for trial on 1 June 2022, over a year now. Indeed, the date of their trial is not known as criminal cases are fixed for hearing in sessions, which practice is

20 dependent on many things, some of which are not in the control of this Court. Nonetheless, the case must be cause listed for daily hearings, which is not yet with the case in which the applicants are charged.

As noted above, accused persons should not be kept on remand unnecessarily without a trial because of the presumption of innocence of such an accused (Article 28(3) of the Constitution. Therefore, it is the court's finding that 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:

A1 states that he has a fixed place of abode at Okaleen village, Kaberpila parish, 5 Ogwolo sub-county, Kalaki district. A2 and A3 state that they have fixed places of abode at Acida village, Kaberpila parish, Ogwolo sub-county, Kalaki district, respectively, which is within the jurisdiction of this Court.

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 10 likely to abscond once granted bail but also the failure of proving the same, 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.

A1's annexures;

- A perusal of Annexure B is a photocopy of A1's National Identity Card $\text{S}\text{CM97054101WWOL}$ which lists his village as Okaleen village, Ogwolo parish, Anyala subcounty, Kalaki county in Kaberamaido district. Annexure C is an LC1 Introductory Letter dated 20-03-2023 from Ejibu Richard, who indicates that A1 is a true-born resident of Okaleen village, Kaberpila parish, Ogwo sub-county, Kalaki district.
- Based on Annexure B2, the applicant has proved that he is a resident in the 10 jurisdiction of this court.

A2 and A3 state that their fixed places of abode are at Acida village, Kaberpila parish, Ogwolo sub-county, in Kalaki district.

Annexure B is an LC1 Introductory Letter of Elelu Benard (A2) dated 05.03.2023 from

- Alfred Epau, who states that A2 is a true resident of Acida village, Kaberpila parish, 15 Ogwolo sub-county in Kalaki district. A2 did not attach a copy of his identification document or an explanation of such failure. Based on that failure to identify himself as the one the LC1 letter talks about, over and above the LC1 introductory letter, he has not proved that he has a fixed place of abode.
- Annexure B is an LC1 Introductory Letter of Esenga Paul (A3) dated 05.03.2023 from 20 Alfred Epau, who states that A3 is a true resident of Acida village, Kaberpila parish, Ogwolo sub-county in Kalaki district. A3 did not attach a copy of his identification document or an explanation of such failure. Based on that failure to identify himself as the one the LC1 letter talks about, over and above the LC1 introductory letter, he has not proved that he has a fixed place of abode. 25

d. Substantial Sureties:

Each of the applicants, under paragraph 12 of their respective affidavits, avers that $\$S$ they have two substantial sureties. Counsel for the applicants submits that they have explained to the sureties their roles and duties and the sureties have understood them.

Furthermore, counsel submits that each of the sureties presented are closely related and linked to each of the applicants being their fathers and mothers respectively. 10 Counsel submits that because of the close relation, the sureties have control over each of the applicants and that they will ensure that the applicants comply with the bail terms and conditions.

i. A1's sureties:

Ajenyo Anna, 42 years old, mother of the applicant and Ekinu Robert, 47 years old, 15 father of the applicant, both residents of Okaleen village, Kaberpila parish, Ogwo sub-county, Kalaki district.

Upon perusal of Annexure D, Ajenyo Anna is identified by a copy of her National Identity Card of NIN CF81054103J48K, which corresponds to Annexure "E" the LC1

- Introductory Letter dated 06-02-2023 in respect of her permanent residency. 20 Upon perusal of Annexure F, Ekinu Robert is identified by a copy of his National Identity Card of NIN CM76054103J33J and the village credentials there correspond to Annexure G, the LC1 Introductory Letter dated 06-02-2023 in respect to his permanent residency.

- The LC1 chairperson in annexures G and E attests to the close relationship between 25 the sureties and A1. Since the sureties have been identified, their respective areas of residence seen, and the relationship with the accused observed, I find both sureties substantial.

- ii. $\$A2$'s sureties:

Odeng Francis, 60 years old, father of the applicant and Asimo Kevin, 56 years old, $\$S$ mother of the applicant, both residents of Acida village, Kaberpila parish, Ogwolo sub-county, Kalaki district.

Upon perusal of Annexure C, Odeng Francis is identified by a copy of his National Identity Card of NIN CM63054103JAQE, which corresponds to Annexure "D" the LC1 Introductory Letter dated 05-03-2023 in respect of his permanent residency.

Upon perusal of Annexure E, Asimo Kevin is identified by a copy of her National Identity Card of NIN CF67054100ZN3L and the village credentials there correspond to Annexure F, the LC1 Introductory Letter dated 05-03-2023 in respect to her permanent residency.

Since the sureties have been identified, their respective areas of residence seen, and 15 the relationship with the accused observed, and state did not object to them, I find both sureties substantial.

iii. $A3$'s sureties: $\frac{1}{2}$

Opila Robert, 61 years old, father of the applicant and Aeko Norah, 56 years old, mother of the applicant, both residents of Acida village, Kaberpila parish, Ogwolo 20 sub-county, Kalaki district

Upon perusal of Annexure C, Aeko Norah is identified by a copy of her National Identity Card of NIN CF670541039W1J, which corresponds to Annexure "D" the LC1 Introductory Letter dated 05-03-2023 in respect of her permanent residency.

Upon perusal of Annexure C, Opila Robert is identified by a copy of his National 25 Identity Card of NIN CM62054101XGWD and the village credentials therein correspond to Annexure D, the LC1 Introductory Letter dated 05-03-2023 in respect to his permanent residency.

Since the sureties have been identified, their respective areas of residence seen, and the relationship with the accused observed, and the state did not object to them, I find both sureties substantial.

In sum, having perused the annexures, counsel's submission regarding the closeness to the accused, the exercise of control over the accused and the sureties having understood their obligations and consequences of failure to ensure that the accused persons attend court and they all have understood, I find that each of the applicants has presented substantial sureties to ensure that the accused persons do not abscond.

The court also notes that each of the accused persons commits not to interfere with

state witnesses, that they are ready and willing to abide by the bail conditions set by the court and that they will attend their trial as and when the court commands them to do so. In the absence of contrary views of the respondent, this court is convinced that the accused persons will commit to their respective undertakings.

In the case of Foundation for Human Rights Initiative vs. Attorney General (supra), the

antecedents of the applicants are also part of the considerations that the court takes into account before granting or refusing to grant bail.

Since the antecedents of the applicants have not been brought to the attention of the court, the court shall not speculate what they are.

While perusing the lower court file and the annexures, I observed that in the charge sheet dated 11th January 2022, A2 and A3 were said to have been 18 years old. Since the offence was allegedly committed on 27 December 2021, there is a possibility that A2 and A3 were juveniles at the time they allegedly murdered Oyugi Aron. However, they did not attach National Identification Cards to identify them, but also, there is no medical examination to attest to their true ages.

In *Uganda vs. Col. Rtd Dr. Kiiza Besigye Constitutional Reference No. 20 of 2005*, it was held that the court ought to balance the applicants' constitutional rights with the need to protect society from lawlessness.

A1 has proved that he has a fixed place of abode within the court's jurisdiction, he has substantial sureties whom counsel has submitted that they understand their

- role and obligations, he has undertaken to abide by this court's terms and 10 conditions, and he has also indicated that he shall not abscond. The rest, A2 and A2, have been unable to prove that they have fixed places of abode as they did not attach their identification documents to identify them as per their LC1 Introductory Letters.
- 5. Conclusions: 15

Considering the above and because the prosecution has not objected to or countered any of the averments in the instant application, I am inclined to partly allow this application in respect of Opila Samuel A1.

As for Elelu Bernard (A2) and Esenga Paul (A3) their applications are disallowed for their failure to prove their fixed places of abode as they failed to provide 20 identification cards which would have helped them own the LC1 letters.

They will have to reapply to this Hon Court afresh for bail to be considered in accordance with the provisions of the law.

- 6. Bail Conditions:
- As for A1 who is granted bail, the following conditions apply; 25
- a. A1 to deposit a Cash bond of Shs. 2,000,000/-.
- b. Each of the sureties for A1 is bound to the State of Uganda in the sum of Shs. 5,000,000/- not cash. \$5,000,000\$ /-
- c. A1, together with his sureties, are directed to submit a copy of their national IDs and a recent passport photograph to the Registrar of this court and to the Chief State Attorney Soroti for the record.
- d. A1 to report to the Registrar of the Court once a month on the first Monday of each month with effect from 04/09/2023 until otherwise directed by court.
- I so order. 10

Hon. Justice Dr Henry Peter Adonyo

Judge

30th August 2023

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