

UGANDA / JUDGMENT

Opiyo & Another v Uganda (Criminal
Miscellaneous Application 74 of 2023)
[2024] UGHC 91 (21 March 2024)
[2024] UGHC 91

COURT
High Court of Uganda

BEFORE
Phillip Odoki, J

CASE / FILE NUMBER
Criminal Miscellaneous Application 74 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA

HOLDEN AT GULU

CRIMINAL MISC. APPLICATION NO. 0074 OF 2023

(Arising from Criminal Session Case No. 0100 of 2023)

| 1. OPIYO SIMON PETER | |-----| | 2. OPIYO
JIMMY=====APPLICANTS | | -VERSUS | | |
UGANDA=====RESPONDENT | | | |

BEFORE HON. JUSTICE PHILLIP ODOKI RULING

Introduction:

[1] The Applicants filed this application seeking to be released on bail pending their trial before this Court, having been indicted on 3 counts of the offence of Murder Contrary to Section 188 and 189 of the Penal Code Act. The application was brought under Articles 23(6)(a) & (b) of the *Constitution of the Republic of Uganda, 1995* and Sections 14 & 15 of the *Trial on Indictment Act Cap, 23*.

Applicant's case:

[2] The grounds of the application were stated in the Notice of Motion; the affidavits of the Applicants in support of the application and in rejoinder; and the supplementary affidavit of Ocan George Wilbert and Abanya Rose. In summary, the Applicants' case is that, they have

fixed places of abode; they have substantial sureties; they do not have any other pending criminal charges against them; the offences with which they are indicted are bailable; once granted bail they will not abscond; they are willing to abide by any bail terms; they will not interfere with witnesses; the future of their children is being affected by their continued detention; and that the dismissal of their application for bail in High Court Criminal Misc. Application No. 20 of 2022 by this court does not debar them from filing this application.

The Respondent's case:

- [3] D/Cpl. Amon Vitor swore an affidavit in reply in which he deponed that this court has already considered the Applicants' bail application in High Court Criminal Misc. Application No. 20 of 2022 and dismissed it. He deponed that the factors which were considered by this Court in dismissing the Applicants' bail application are substantially similar to those in the present application. He further deponed that the offences which the Applicants have been indicted of are serious; the sureties of the Applicants are not substantial; the Applicants have failed to prove that they have a fixed place of abode within the jurisdiction of this Court; there is reasonable likelihood of the Applicants absconding; the Applicants' responsibility to their children is no basis for grant of bail; and the 1st Applicant is the Local Council 1 of Opit North Village where the offence took place and is likely to interfere with the prosecution witnesses.

Legal representation:

- [4] The Applicant was represented by Mr. Douglas Odyek of M/s Kunihiro & Co. Advocates. The Respondent was represented by M/s Jean Nareeba a State Attorney from the Office of the Director of Public Prosecutions.

Submission of counsel:

- [5] Counsel for the Applicant submitted that an applicant who has been denied bail can still apply for bail and be granted. For that proposition of the law, counsel relied on the case of **Kyagaba Charles versus Uganda High Court Criminal Misc. Application No. 067 of 2023** where the Court expressed the view that an applicant is at liberty to apply for bail as many times as possible whenever he is arraigned in court as it is within his or her right to do so. Counsel argued that in High Court Criminal Misc. Application No. 20 of 2022 the court denied the Applicants bail because no exceptional circumstances were proved and yet exceptional circumstances are not mandatory. According to counsel, the court overlooked or did not consider the decision of the Supreme Court in **Foundation for Human Rights Initiative versus Attorney General, Supreme Court Constitutional Appeal No. 03 of 2009.** Counsel further argued that the 1st Applicant will not interfere with witnesses since the Chairperson Local Council 3 has already given the powers of the 1st Applicant to his vice chairperson.

- [6] Counsel for the Respondent submitted that this application has already been considered on merit in High Court Criminal Misc. Application No. 20 of 2022. According to counsel, this application amounts to forum shopping. Counsel further submitted that the 1st Applicant is still the Chairperson Local Council 1 of the Village where the alleged offence took place. According to counsel, the Chairperson Local Council 3 has no power to remove the 1st Applicant from his position as Chairperson Local Council 1 of the Village. Counsel prayed that this application should be dismissed.

Consideration and determination of the court:

- [7] It is common ground that the Applicants applied for bail before this court vide High Court Criminal Misc. Application No. 20 of 2022. The grounds of the application were that, they are presumed to be innocent; the trial is likely to delay; they have substantial sureties; they have a good defense to the charges; they do not have any negative antecedents; and their remand is affecting their families.
- [8] On the 27th October 2022, my brother judge, George Okello, rendered his ruling on the bail application. He held, inter alia, that if the 1st Applicant was released on bail, there was a likelihood that he would interfere with evidence or witnesses. This was against the background that he is the chairperson Local Council 1 of the area where the alleged offence took place and more especially because he has already been committed to the High Court for trial and he now knows the nature of the evidence which the prosecution will be adducing against him. He further held that although the Applicants are presumed innocent, the allegations that they murdered three persons is grave. Because of the seriousness of the offence, he found that exceptional circumstances could not be ignored and ought to have been pleaded and proved by the Applicants. He accordingly dismissed the application.
- [9] Both counsel, in this application, made arguments on whether this application can be entertained given that the Applicants unsuccessfully made an application for bail before this court. I have had occasion to read the case of **Kyagaba Charles** which was cited by counsel for the Applicant. While I agree with the decision that an applicant is at liberty to apply for bail as many times as possible, I wish to add that subsequent bail applications, after the first bail application is rejected, can only be made in a limited situation where there is a material change in the circumstances that led to the rejection of the bail application. Although I was not able to come across any binding decision from the Ugandan Courts on the matter, I am fortified by the decision of the Supreme Court of India in the case of **Kalyan Chandra Sarkar versus Rajesh Rajan A. I. R. 2004 S. C.** I find the decision to be highly persuasive on the matter. In that case, the Supreme Court of India held that:

**"Before concluding, we must note though an accused has a right to make successive applications for grant of bail, the Court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications* *were rejected. In such cases, the Court also has a duty to record what are the fresh grounds which persuade it to take a view different from the one taken in the earlier applications." In the case of Jogia @ Jogendra Jena, I*

have held as follows: "Successive bail applications are maintainable but there has to be material change in the fact situation and not mere cosmetic change. Successive bail applications on the same grounds which were available to the accused at the time of consideration of the earlier bail application would not be maintainable. Neither a ground that the earlier bail application was not properly placed by the previously engaged counsel can be entertained." Thus it is the settled position of law that successive bail applications are permissible under the changed circumstances. The change of circumstances must be substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. Without the change in the circumstances, the subsequent bail application would be deemed to be seeking review of the earlier rejection order which is not permissible under criminal law. While entertaining such subsequent bail applications, the Court has a duty to consider the reasons and grounds on which the earlier bail application was rejected and what are the fresh grounds which persuade it warranting the evaluation and consideration of the bail application afresh and to take a view different from the one taken in the earlier application. There must be change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which the application for bail of an accused that has been rejected earlier can be reconsidered. If a bail application is rejected considering some grounds urged by the counsel for the accused and on the self same materials and without any change in the circumstances, the successive bail application is moved taking some other grounds and the Court is asked to reconsider the prayer of bail, it would be an endless exercise for the Court and entertaining such application would be a sheer wastage of valuable time of the Court".*

[10] I have examined the grounds in this application. They are substantially the same with those in High Court Criminal Misc. Application No. 20 of 2022. The Applicants have not proved to this court that there is a material change in the fact situation. The gravity of the offences the Applicants have been indicted with, which led this court to deny them bail, after they failed to plead and prove exceptional circumstances, still remain the same. The 1st Applicant is still the Chairperson Local Council 1 of the Village where the alleged offence took place. His likelihood of interfering with witnesses or evidence still remains the same. The argument of counsel for the Applicant that the 1st Applicant will not interfere with witnesses since the Chairperson Local Council 3 has already given his powers to the vice chairperson is not sustainable in law. Section 47 of the *Local Government Act, Cap 243* is emphatic on when the position of Chairperson Local Council 1 can become vacant. The Chairperson Local Council 3 has no power to remove the Applicant from his office.

[11] In the end, I find that this application has no merit. It is accordingly dismissed.

I so order.

Dated and delivered this 21st March 2024.

Phillip Odoki Judge.

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