

UGANDA / JUDGMENT

Orena John Mackay vs Uganda (Criminal Miscellaneous Application No. 22 of 2022) [2023] UGHC 31 (6 January 2023)

[2023] UGHC 31

COURT

High Court of Uganda

BEFORE

Adonyo, J

CASE / FILE NUMBER

Criminal Miscellaneous Application No. 22 of 2022

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The Republic of Uganda

In The High Court of Uganda Holden at Soroti

Criminal Miscellaneous Application No. 0022 of 2022

(Arising from Criminal Case No. SOR-20-CR-AA-020/2022)

Orena John Mackay :::::::::::::::::::::::::::::: 10

Versus

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

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

This is an application brought by way of notice of motion under Articles 2(1), 23(6)(a) & 28 (1) (3) of the Constitution of Uganda 1995, Sections 14 and 15 (1)(b)(c) Trial on Indictment Act Cap. 23 and Rules 2 & 4 of the Judicature (Criminal Procedure) Applications) Rules S. I 13-8 for orders that;

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- 1. The applicant now on remand at Kumi Prison be released on bail pending his trial upon such conditions as this Honourable Court shall deem fit.
- 2. Costs of this application be provided for.

- The grounds of the application as set out in the application and further 25 expounded in the supporting affidavit briefly are that the applicant was charged with aggravated defilement, it's the applicant's constitutional right to be released on bail at the discretion of this Honourable Court, the

applicant is of advanced age of seventy-seven (77) years and is also sick $\$S$ suffering from heart failure complications. The applicant has a permanent place of abode within the jurisdiction of this court and will not abscond if released on bail. The applicant has substantial sureties who will abide by the conditions this court may set and lastly that the applicant has no antecedents whatsoever. 10

The respondents were duly served with the application as proven by the affidavit of service on record, however, no reply to the application was made.

This was in addition to Counsel for the applicant further writing to respondent requesting that a reply to the application and submissions be filed but the same was not complied with.

This application thus has proceeded ex- parte with the submissions by counsel for the applicant M/s Ewatu & Co. Advocates read and duly considered.

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

"Every person who is charged with a criminal offence shall— (a) be presumed to be innocent until proved guilty or until that person has pleaded guilty."

Article 23(6)(a) of the Constitution provides;

"Where a person is arrested in respect of a criminal offence— \$25\$

- (a) the person 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;"

Section 14(1) of the Trial on Indictment Act provides thus;

"The High Court may at any stage in the proceedings release the accused person on bail, that is to say, 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."

Section 15(1) of the Trial on Indictment Act provides thus;

"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-

- (a) that exceptional circumstances exist justifying his or her release on bail; and
- (b) that he or she will not abscond when released on bail."

Section 15(3) of the same Act provides; 20

> "In this section, "exceptional circumstances" means any of the following—

- (a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody;
- (b) a certificate of no objection signed by the Director of Public Prosecutions; or
- (c) the infancy or advanced age of the accused."

Section 15(4) of the same Act provides $\mathbf{S} \S 30$

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"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 on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and
- (d) whether there are other charges pending against the accused."

Article 23 (6) (a) of the Constitution gives accused persons the right to apply for bail, however, the act of granting of bail is discretionary power of the court.

The applicant in his affidavit states that he has been on remand since April 2022 and though he was committed for trial to the High Court he does not know when the trial will take place.

The applicant further states that he is of advanced age that is to say 77 years old having been born on 2nd may 1945 and this proven by the copy of his national Identity card attached to the application.

The applicant also states that he is sick suffering from heart failure complications and was referred by the Prisons Health Centre II to receive

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treatment from Kumi Health Centre IV. A medical report from Kumi $\mathbf{S} \S$ Health Centre IV is attached as annexure 'B' to the application and it indicates that the applicant is suffering from heart failure as well as the various tests and medication given to him.

The applicant in this regard has proved exceptional circumstances stipulated in section 15(1)(a) and 15 (3)(a) of the Trial on 10 **Indictments Act**.

The next thing to determine is whether the applicant has a fixed place of abode and sound sureties which section 15(4) of the Trial on Indictment Act deems determinants on whether the applicant is likely to abscond.

The applicant indicates in affidavit that he has a fixed place of abode at 15 Agurut village, Nyero Sub-county Kumi District and he attaches an introductory letter from the LC1 stating that he is a true resident of Agurut village. He also attached a copy of his National ID which indicates his residence as Agurut village. I therefore find that the applicant has proved fixed place of abode. 20

With regard to sureties the applicant submitted two sureties to this court. These include his niece Ilakut Jennifer aged 61 years and his nephew Orute Patrick Isaac aged 57 years both residents of Agurut Village Nyero Sub county in Kumi District as shown in the introductory letters by the Lc₁ and copies of their IDs attached to the application. Counsel for the applicant submitted that he explained to these sureties their roles and duties and they understood them. I find that with no evidence to the contrary, the sureties produced before this court are substantial and understand their duty not only to this court but the applicant as well.

While the offence of Aggravated defilement is serious and carries a $\$ \infty$ maximum sentence of death, it still remains the law that an accused is presumed innocent until proven guilty.

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

As has already been noted earlier, this Application was brought under Article 23(6) (a) of the Constitution of the Republic of Uganda which provides;

"...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 of the Republic of **Uganda** provides that,

"...every person who is charged with a criminal offence shall be presumed innocent until proved guilty or until that person has pleaded guilty..."

This position is clarified by Section 14 of the Trial on Indictment Act which states;

"...a court may at any stage of the proceedings release the accused person on bail, on taking from him or her a recognizance 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) S Practice) Directions, 2022, No. 5 reinforces the above legal positions by providing the general principles which a court may take into account while considering a bail application while being guided by relevant principles as enshrined in the Constitution of Uganda.

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 trial;
- d) The discretion of the court 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.

Arising from all the above it is trite to conclude that while an accused 20 person has the right to apply for bail by virtue of Article 23 (6) (a) and 23 (3) of the Constitution of the Republic of Uganda, the court has the singular unfettered discretionary powers to grant the same as was held in *Uganda v Kiiza Besigye*; Constitutional Reference No. 20 of 2005. 25

Additionally, and pursuant to Sections 14 and 15 of the Trial on **Indictments Act**, a person indicted of a serious offence can be stated to only be able to be released on bail if he or she proves to the satisfaction of the court that special circumstances do 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 where none is proved.

The special circumstances are no longer regarded as a required for release of an accused person charged with a capital offence to be released on bail for Section 15 (1) (a) of the Trial on Indictment Act, which provides for these special circumstances was held to be in contravention of the constitutional right to apply for bail.

See: Foundation for Human Rights Initiative vs. Attorney *General, Constitutional Petition 20/2006.*

Besides under Article 28(3) of the Constitution of the Republic of Uganda, every person is presumed innocent until proved guilty or pleads guilty.

Consequently, an accused person should not be kept on remand unnecessarily without trial and must also not be deprived of his/her freedom unnecessarily or denied bail as a punishment where he or she has not yet been proved guilty by a competent court of law.

See: Tumwirukirire Grace v Uganda; Miscellaneous Criminal *Application 94 of 20190 [2020]*

The principle of protection of personal liberty was concreted in the case of *Col (Rtd) Dr. Kiiza Besigye v Uganda Criminal Application* No.83 of 2016 wherein Masalu Musene, J held that;

"...court has to consider and balance the rights of the with individual, particularly regard personal

liberty... The active principle in granting bail is that of liberty of the individual, while upholding the simultaneously protecting the administration of justice."

Also 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 he or she fulfils 10 the set conditions for his/her 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.
- However, in all cases the court must have in its mind the overarching 15 consideration of the gravity of the accusation levelled against an applicant and that should never be ignored.

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

In respect of this application, the Applicant stands charged with the offence of aggravated defilement. Counsel for the applicant contends that there were exceptional circumstances relating to this case in that the applicant was of is not only elderly but has a sickly heart which require specialised treatment outside prison facilities as proven by the medical report from Kumi Health Centre IV attached to his affidavit.

This Honourable Court further notes that the applicant has shown that he has a fixed place of abode within the jurisdiction of this court and he is more likely than not going to abscond his trial when released on bail. This he has done so by providing an introductory letter from the local government authorities of Local Council 1 of Aguru village, Nyero sub $\$S$ county, Kumi district where he is stated to reside.

He has also presented his national identity card, which is a government document and it is attached to his affidavit which document provides for certain his identification in tangible details.

- Furthermore, this Honourable Court is also aware that though the 10 applicant has already been committed for trial in the High Court no hearing date for the offence for which he is charged with is yet to be fixed, an indication that there is a high probability of a delay to be experienced before the applicant/accused can be tried.
- In the case of **Foundation for Human Rights Initiative vs. 15 Attorney General Constitutional Petition No. 020 of 2006**, it was held that the nature of the offence, antecedents of the applicant and the fact of whether an applicant has a fixed place of abode in court's jurisdiction should be strongly considered by court in an application for bail. 20

Since there is no objection as to the sureties, the applicant has fixed place of abode nor to the antecedents of the applicant, I would conclude that all these requirements are not in dispute.

In **Uganda vs Col. RTD Dr Kiiza Besigye Constitutional* Reference No. 20 of 2005*, it was held that the court should while 25 considering a bail application balance the constitutional right of an applicant and the need to protect society from lawlessness.

The applicant has presented substantial sureties who are his niece and, nephew, respectively, who have undertaken to ensure that he attends his trial. He has also indicated that he has a fixed place of abode within the court's jurisdiction.

My assessed conclusion is that sound merit has been shown in respect to this application.

On the basis of the evidence put forward, court is satisfied that this is a case where it should exercise its discretion and grant bail to the applicant, especially given the uncertain term of remand and the applicant's frail health and age.

Bail is accordingly granted on the following conditions;

- 1. By taking from the Applicant, a recognizance consisting of Uganda Shillings One Million only (UGX1,000,000) CASH.
- 2. The Applicant to present his original national identity card together with its two certified copies, one copy of which shall be kept in this file by the Registrar of this court and the other kept by the Chief Resident State Attorney, on behalf of the respondent.
- 3. The Applicant shall also deposit on record two (2) recently taken (black and white) passport size photos (One to be attached to this file and the other kept by the Chief Resident State Attorney).
- 4. The Applicant to report to the Registrar of this Court, in person, once every month commencing on 6th February, 2023.

- 5. Each of the approved sureties shall each deposit on record two (2) recently taken (black and white) passport size photos (One to be attached to this file and the other kept by the Chief Resident State Attorney) and shall in addition sign a non-cash bond of Uganda Shillings Five Million only (UGX. \$5,000,000/\$ =).
- 6. Any failure to adhere to these conditions shall lapse the bail terms above resulting into an automatic issue of a Warrant of Arrest against the Applicant and the cancellation of his bail in addition to the sureties to both being required to pay to the state the non-cash

bond of Uganda Shillings Five Million only (UGX. 5,000,000/=) above.

I so order accordingly at the Soroti High Court Circuit, this \$6^{\text{th}}\$ day of January, 2023

Hon. Justice Dr. Henry Peter Adonyo

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Judge

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Prepared on 14 October 2026 · Esheria