

UGANDA / JUDGMENT

Osire v Uganda (Miscellaneous Criminal Application 73 of 2024)

[2024] UGHC 1054 (4 November 2024)

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COURT
High Court of Uganda

BEFORE
Boniface Wamala, J

CASE / FILE NUMBER
Miscellaneous Criminal Application 73 of 2024

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT SOROTI

MISCELLANEOUS CRIMINAL APPLICATION NO. 0073 OF 2024 (Arising from Criminal Case No. SOR-SC-0091-2019)

OSIRE MISLAM ::::::::::::::::::::::::::::::

VERSUS

UGANDA ::::::::::::::::::::::::::::::

BEFORE: HON. JUSTICE BONIFACE WAMALA RULING ON BAIL

Introduction

- [1] Osire Mislam (the applicant) was charged with the offence of Murder contrary to sections 188 & 189 [now sections 171 & 172] of the Penal Code Act (PCA), Cap 128. It was alleged that the applicant and three others, on 23rd October 2018 at Kamenya Aligoi Village, Nyero Sub-county in Kumi District, with malice aforethought unlawfully murdered Amoding Deborah.
- [2] The applicant brought this application by Notice of Motion under Articles 2(1), 23(6)(a) and 28(1) & (3) of the Constitution of the Republic of Uganda and Sections 14 & 15 [now sections 15 & 16] of the Trial on Indictments Act, Cap 25 (TIA) seeking for an order that the applicant be released on bail pending his trial by the High Court.

[3] The grounds of the application are summarized in the Notice of Motion and also set out in the affidavit in support of the application deposed by the applicant. Briefly, the grounds are that the applicant was arrested on 31st October 2018 and taken to Kumi Police Station, was subsequently charged with the offence of Murder and remanded to Kumi Government Prison. The applicant was later committed to the High Court for trial. He is yet to stand

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trial and is unsure as to when his case shall be heard. The applicant stated that he is presumed innocent until proven guilty and is likely to be acquitted given the facts and circumstances of the case. He also stated that he has a constitutional right to apply for his release on bail. He further stated that he will not interfere with state witnesses since he does not even know them. He has presented two substantial sureties who are ready and willing to stand for him. He has a permanent places of abode as indicated in the affidavit in support. He concluded that it is in the interest of justice that the application is granted.

[4] The application was opposed through an affidavit in reply deposed by Ms. Lunyoro Stella Maries, a State Attorney C/O ODDP Soroti Office, who stated that the offence of Murder with which the applicant is charged attracts a maximum penalty of death upon conviction and the applicant is most likely to abscond bail in fear of the severe sentence upon conviction. The deponent further stated that the applicant is already committed for trial by the High Court and the prosecution is ready with its witnesses to proceed if the case is scheduled by the Court for hearing. She also stated that although the applicant has a constitutional right to apply for bail, the power to grant bail remains a preserve of the Court. She averred that if released on bail, the applicant is likely to interfere with key prosecution witnesses considering the fact that the offence was committed with a lot of violence and the severity of the sentence attracted by the offence upon conviction. The deponent stated that the sureties presented were not substantial on the ground that although the sureties produced introductory letters purporting to be residents in the mentioned areas, no documentary proof such as land sale agreements, certificate of title and/or tenancy agreements were availed to prove that they have fixed places of abode within the jurisdiction of the Court. The deponent finally stated that in the event that the Court is inclined to grant bail to the applicant, the Court

should attach stringent conditions upon the applicant and his sureties. She concluded that it is in the interest of justice that the bail application is denied.

Representation and Hearing

[5] The applicant was represented by **Mr. Alfred Ewatu** from M/s Ewatu & Co. Advocates while the respondent (State) was represented by Mr. Okello Paul from the Office of the Director of Public Prosecutions (ODPP). The hearing proceeded by way of written submissions which were duly filed by both counsel and have been adopted and relied on by the Court.

- [6] The issue for determination by the Court is whether the applicant has established sufficient grounds for his release on bail.

Resolution by the Court

- [7] Let me start by pointing out that bail is an agreement between the court and an applicant consisting of a bond, with or without 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 named in the bond to attend his/her trial. See: Section 15(1) of the Trial on Indictments Act, Cap 25 and *Uganda v Lawrence Luzinda* 1986 (HCB) 33.

[8] The foundational basis upon which the court is enjoined to exercise its discretion to allow or reject an application for bail is the presumption of innocence, based in law and particularly on Article 28(3)(a) of the Constitution. 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 to be innocent until proved guilty or until that person has pleaded guilty". This legal position is also based on Article 11(1) of the Universal Declaration of Human Rights and Article 14(2) of the International Covenant on Civil and Political Rights.

- [9] Under Article 23(6)(a) of the Constitution, it is provided that where a person is arrested in respect of a criminal offence, he/she 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. As such, the core aspects to be taken into consideration by the court when dealing with an application for bail are the presumption of innocence of an accused person, the right of the accused person to apply for bail, and the discretion of the court to either grant or reject the bail application.

- [10] When exercising discretion to grant or refuse bail, the court is given further guidance through The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions 2022, which under paragraph 5 thereof sets out the following general principles to be taken into account by the court when considering a bail application, namely;

- 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 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.

[11] Under Section 16(1) of the Trial on Indictments Act, the High Court may refuse to grant bail to any person charged with any of offences stipulated under Section 16(2), Murder being one of them, 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 on bail. However, under the law, an applicant for bail is no longer required mandatorily

to plead or prove exceptional circumstances following the decision of the Constitutional Court in *Foundation for Human Rights Initiatives v Attorney General*, Constitutional Petition No. 20 of 2006 wherein it was held that it is no longer mandatory to prove exceptional circumstances given the fact that the courts have the discretion to grant bail even when none is proved. In **Uganda* \$v\$ Kizza Besigye*, Constitutional Reference No. 20 of 2005 the Court 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 an application for bail.

[12] On the case before me, the applicant's bail application has been opposed by the respondent on the following grounds;

- (i) That the applicant is likely to abscond given the gravity of the offence and the fact that the sureties presented by the applicant are not substantial;
- (ii) The State is ready with its witnesses to proceed with the hearing of the criminal case;
- (iii) The applicant is likely to interfere with key prosecution witnesses considering the fact that the offence was committed with a lot of violence and the severity of the sentence attracted by the offence upon conviction; and
- (iv) It is in the interest of justice that the bail application is denied.

[13] Regarding the possibility of abscondment by the applicant if released on bail, it is provided for under Section 16(4) of the TIA 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 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 condition of his or her bail; and
- *d) whether there are other charges pending against the accused.*

- [14] On the evidence before me, it was shown by the applicant that he has a fixed place of abode at Aligoi Village, Aligoi Parish, Ogooma Sub-county in Kumi District. The applicant produced a copy of his National Identity Card and of a letter from the area L. C 1 Chairperson. I find the above sufficient to prove that the applicant has a fixed place of abode in the area where he resided before his arrest.
- [15] Concerning the sureties, the applicant produced two sureties who were identified and observed by the Court, namely, Adekun Michael, an Uncle to the applicant and Akol Stella Rose, the mother to the applicant. The objection by the respondent to the sureties is based on the ground that although the sureties produced L. C 1 letters purporting to be residents in the mentioned areas, no documentary proof such as land sale agreements, certificate of title and/or tenancy agreements had been availed to prove that they have fixed places of abode within the jurisdiction of the Court.
- [16] I am unable to accept the argument that in order to prove possession of a fixed place of abode, a surety needs to adduce evidence of land sale agreements, certificates of title and/or tenancy agreements. In my view, the requirement to have a fixed place of abode means that the person is resident permanently or for a prolonged period of time within the stated area, preferably within the court's jurisdiction and that he/she is traceable in case the court requires their presence. To prove the above, one does not need to produce documents of ownership to land as argued by Counsel for the respondent. It is a question of fact that may be proved by any credible evidence. It may even be proved by oral evidence provided it is cogent, credible and reliable. As such, production of national identity cards and introductory letters from the area L. C. 1 Chairperson would be sufficient to prove the sureties' possession of a fixed place of abode. The objection to the sureties based on the contention raised by Counsel for the respondent is, therefore, overruled.
- [17] As such, I would find that the sureties produced by the applicant are substantial. The only reason I am not satisfied that the applicant will not abscond when released on bail is the gravity of the offence and the severity of the likely punishment in the event of being convicted. Therefore, although the applicant has satisfied the Court that he has a fixed place of abode and that the sureties presented by him could be substantial, I am not satisfied that the accused will not abscond when released on bail on account of fear of the consequences if he were to be convicted upon trial.
- [18] On the second ground of objection, it was claimed by the State that on their part, they are ready with their witnesses to proceed with the hearing of the criminal case. However, this cannot be a parameter upon which the Court could base to refuse a bail application. This is because it is a known fact that the question as to whether or not an accused person in a capital offence will stand trial and when, is a function of the capacity and readiness by the court to organize a criminal session. The court's capacity and readiness are dictated by a number of factors which include availability of funds, availability of a Judge, among other factors. As such, the singular readiness of the State and its witnesses is incapable of offering

a prediction as to when the applicant is likely to stand trial. This ground of objection is devoid of merit and is overruled.

[19] The third ground of objection by the respondent was that the applicant is likely to interfere with key prosecution witnesses considering the seriousness

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and sensitivity of the offence and the fact that the witnesses are well known to the applicant and are currently not under any protection. For the court to arrive at a conclusion as to whether or not an applicant for bail is likely to interfere with witnesses or not, the court has to look at a number of circumstances including the nature of the offence, the age of the applicant, how long the applicant has been on remand, how influential the applicant is in the community, among others. In this case, given the gravity of the offence and the age of the applicant, I find nothing to satisfy me that the applicant will not interfere with the witnesses in the matter. A potential threat to that effect therefore exists and this ground of objection by the respondent is thus made out.

[20] It was, lastly, argued by the respondent that it is in the interest of justice that the bail application is denied. Given the above findings, I find that the applicant has failed to satisfy the Court that he is entitled to be released on bail given the circumstances set out herein above. The interest of justice therefore dictates that the bail application by the applicant be denied. Accordingly, the application for bail is dismissed. The applicant shall await placing of his case on session for hearing.

It is so ordered.

Dated and signed this 4th day of November, 2024.

for and on behalf of **Boniface Wamala**

HIDGE

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Prepared on 12 October 2026 · Esheria