

UGANDA / JUDGMENT

Rajiv Kumar v Uganda [2023]

UGSC 14 (6 April 2023)

[2023] UGSC 14

COURT

Supreme Court of Uganda

BEFORE

Tibatemwa-Ekirikubinza, JSC

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IN THE REPUBLIC OF UGANDA AT THE SUPREME COURT OF UGANDA AT KAMPALA
MISC. APPLICATION NO. 0001 OF 2023

BETWEEN

RAJIV KUMAR SABHARWAL:.....

AND

<table> UGANDA (DPP):.....

[An application for bail pending appeal arising from Criminal Appeal No.281 of 2021 which arose from the decision of the Court of Appeal at Kampala before (Bamugemereire, Madrama and Luswata, JJA) dated 14th October 2022.]

BEFORE: HON. JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA, JSC.

Summary: Bail pending appeal- The conditions to be satisfied in an application for grant of bail pending appeal are different from those required for bail pending trial.

> **Bail pending appeal-** The threshold for grant of bail pending appeal is proof of exceptional and unusual circumstances.

Representation:

At the hearing, the Applicant was represented by Mr. Allan Bario and Mr. Joel Aijuka.

The Respondent was represented by Ms. Gloria Nzikuru, Chief State Attorney in the Office of the Director of Public Prosecutions.

RULING

This application was brought by a Notice of Motion under **Articles 2, 23 (6) (a), 28(1) and (3) (a)** of the Constitution; Sections 14, 15 and 132 (4) of the Trial on Indictments Act as well as Rule 6(2) of the Supreme Court Rules wherein the applicant - Rajiv Kumar Sabharwal - prayed for orders that he be granted bail pending the hearing and determination of his appeal in Criminal Appeal No.4 of 2023.

The grounds upon which the motion is premised are that:

- That the Applicant was charged and convicted on his own \$(i)\$ plea of guilty for the offences of embezzlement, forgery and uttering false documents and sentenced to 4 years' imprisonment for the offence of embezzlement and 1-year imprisonment for the offences of forgery and uttering false documents on the 25th day of November 2021 by Her Ladyship Justice Jane Okuo Kajuga of the High Court of Anti-Corruption Division in Kampala at Kololo.
- There is an appeal filed pending disposal before this \$(ii)\$ Honourable Court.
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- The applicant is an investor and a first-time offender who had (iii) no criminal record before any Courts of Law.
- It is the applicant's constitutional right to apply for bail at \$(iv)\$ any time before the disposal of his appeal.
- The applicant is of good character and an investor. \$(v)\$
- That the applicant is the proprietor of three multimillion \$(vi)\$ dollar companies operating in Uganda to wit; Global Wire Industries(U) Ltd, Balteck Construction & Trading Co. Ltd and KingFisher Agro Products (U) Ltd.
- The offence of which the applicant is convicted and sentenced \$(vii)\$ to is not violent in nature, he is of advanced age of 60 years' old who has a large family and has a permanent place of abode in Bugolobi flats, Block 22, Room C2, Nakawa Division, KCCA which is within the jurisdiction of this Honourable Court.
- (viii) The applicant has grave illness and the prison conditions are not favorable for his health, which needs adequate health services.
- The applicant's appeal is not frivolous which has high \$(ix)\$ likelihood of success.
- There is high likelihood of delays in disposing off the appeal \$(x)\$ which will occasion miscarriage of justice to the applicant.

- The applicant will at all required times attend trial like he did \$(xi)\$ during trial when was released on bail.
- The applicant has substantive sureties who fully understand \$(xii)\$ their role as sureties who will ensure that the applicant abides by the rules of bail ordered. The said sureties are:
- (a) Mr. Kabagambe Nicholas, a friend residing in Nankulabye Zone 7-lubaga, proprietor of a farm engaged in large scale

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- farming/cereal production in Mukono and Jinja Districts and runs a milling business in Jinja industrial area.
- Nahabwe Enock Rubanzana, a friend and (b) $\mathbf{Mr.}$ $\mathbf{a}$ businessman running a transportation company, named Silver Chains EEE Ltd whose premises are located on plot 55 fountain house, Nkrumah Road Kampala.
- (xiii) The documents evidencing residences and business of the above two sureties are attached and collectively marked D- $\mathbf{D2}$.
- (xiv) The applicant had paid a cash bail of $\mathbf{\$20,000,000/}=\mathbf{\$}$, deposited his passport No. Z2171070 and Land Title of plot 609, Block 40 at Makukuba in the names Kabagambe Nicholas are still in Court.
- It is just and equitable in the interest of natural justice that $\mathbf{(xv)}$ this Honourable Court grants the applicant bail pending appeal.

Furthermore, the applicant swore a supplementary affidavit in support of the motion which largely contained grounds similar to those reproduced above. These grounds will therefore not be repeated. It is only the new ground(s) which will be reproduced below:

That I have another substantial surety to wit; Mr. Pradeep $\mathbf{(i)}$ Shambhu Nath Sethi a businessman, resident of Wabigalo Lower Village, Wabigalo Parish-Makindye Division and the documents evidencing his residence are marked B.

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- The respondent filed an affidavit in objection to grant of bail sworn by $\mathbf{S}$ Ms. Josephine Namatovu, Assistant Director of Public Prosecutions DPP/Head of Department Anti-Corruption, as follows:
- No evidence has been adduced by the Applicant to show that $\mathbf{(i)}$ King Fisher Agro products (U) Ltd ever exist as legal person in Uganda.

- The purported investments by the Applicant are heavily \$(ii)\$ encumbered with mortgages.
- The encumbered investments are not sufficient motivation to (iii) deter the Applicant from absconding once released on bail.
- The requirement for personal violence does not apply to \$(iv)\$ corruption and corruption related offences.
- The offences of Embezzlement, Forgery and Uttering False \$(v)\$ Documents, with which the Applicant was convicted are serious economic offences that involved a huge sum of money.
- No evidence has been adduced to show that the Applicant \$(vi)\$ complied with the bail terms in the High Court.
- Furthermore, that the bail terms in the High Court have \$(vii)\$ changed following the Applicant's conviction by the High Court and subsequent confirmation of that conviction by the Court of Appeal.
- (viii) No evidence has been adduced to show that the proposed sureties are substantial.

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- In reply to the Applicant's Supplementary Affidavit, the \$(ix)\$ contents of the said Affidavit are in respect of merits of the appeal.

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It is in the interest of justice that the Applicant is denied bail \$(x)\$ pending appeal and instead, the Appeal is expeditiously heard, determined and disposed of on merit.

Background of the Application

The applicant (Rajiv Kumar) together with Rajendra Kumar Thakker incorporated and duly registered a company in Uganda known as Global Wire Industries (U) Ltd, to engage in the manufacturing of 15 multipurpose binding wire for the construction industry.

It was the agreement of both Rajiv and Rajendra that since the latter was based in India, he would send machinery and raw materials from India. It was also agreed that since the applicant was in Uganda, his sole responsibility was to manage the daily operations of the company.

Upon returning to Uganda, Rajendra discovered that the Applicant had time and again forged his signature and withdrawn large sums of money from the company account. He also discovered that several company resolutions were made bearing his signature which he alleged had been forged by the applicant.

Rajendra reported the alleged forgeries to police. Through its investigations, the police established that the various cheques used by the applicant to withdraw money from the company's account bore Rajendra's forged signature. The investigations also established that the only authentic signature on the cheques was that of the applicant.

Subsequently, the applicant was charged in the High Court with offences of embezzlement contrary to Section 343 of the Penal Code Act, forgery contrary to Section 347 of the Penal Code Act and uttering of false documents contrary to Section 135 of the Penal Code Act. The applicant first pleaded not guilty to the charges. Later on, he changed

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his plea and pleaded guilty to all the offences. Based on his own plea §S of guilt, the applicant was convicted and sentenced. For the offence of embezzlement, he was sentenced to 4 years' imprisonment and for each of the offences of forgery and uttering false documents, the applicant was sentenced to a term of imprisonment. These sentences were to run concurrently. The applicant was also ordered to pay 10 Rajendra Ushs. \$556,000,000/\$ = as compensation for the embezzled money (Ushs. \$1,113,955,859/\$ =).

Dissatisfied with the decision, the Applicant appealed to the Court of Appeal against both the conviction and sentence as well as the compensation order. In respect of the conviction, the applicant faulted 15 the Trial Judge for not following the proper procedure for recording a plea of guilty. Regarding the sentence, the applicant faulted the Trial Judge for imposing an excessive sentence.

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In dismissing the appeal and upholding both the conviction and sentence as well as the compensation award, the Court of Appeal held that there was evidence on record that the procedure for recording a plea of guilty as laid down in *Adan v R*¹ was followed.

Regarding the contention of an excessive and harsh sentence, the Court of Appeal held that the sentences imposed by the trial court were within the sentencing range prescribed by law.

Still dissatisfied with the decision of the Court of Appeal, Rajiv Kumar (the applicant) lodged an appeal in this Court vide Criminal Appeal No. 4 of 2023 from which the application for the grant of bail pending appeal arises.

Parties' submissions 30

Here below I have reproduced the submissions presented by both counsel verbatim.

§1(1973) E. A 445.

Applicant's submissions $\$S$

Counsel submitted that the application discloses grounds for grant of bail pending appeal and that it is in the interest of justice that the applicant be released from prison pending the determination of the appeal.

That the Applicant is a responsible citizen of high standing in society, 10 and an investor. He is a proprietor of three multi-million-dollar companies operating in Uganda to wit; Global Wire Industries (U) Ltd, Balteck Construction & Trading Co. Ltd and King Fisher Agro Products (U) Ltd. The said companies have robust business employing Ugandans. The applicant cannot therefore afford to run away leaving 15

his afore mentioned investment behind.

The applicant is of advanced age (60 years), has a large family with a permanent place of abode in Bugolobi flats, block 22, Room C2, Nakawa Division, KCCA which is within the jurisdiction of this Honourable Court

The applicant has severe illness which is continuously worsened by prison conditions. Reference was made to a report by the medical superintendent of Luzira Prisons which was attached to the applicant's affidavit. That given the severity of the said illness, the applicant risks dying in prison before the final judgment is pronounced by Court. That this Court ought to take judicial notice of the Applicant's health and base on that to grant him bail.

In support of the above submission, counsel relied on the case of David Chandi Jamwa v Uganda², (before Arach-Amoko, JSC as a single Judge) wherein she stated that:

"In the premises, I take judicial notice of the fact that the applicant stands a high risk of suffering a cardiac arrest while in prison and may

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^²

Miscellaneous Application No. 09 of 2018.

even end up dying before having his day in court thus rendering the $\$S$ appeal nugatory."

Counsel further submitted that the appeal is not frivolous and has high a likelihood of success. That the learned Justices of Appeal erroneously upheld trial judge's decision which had been reached in utter disregard of the law governing plea taking as detailed in **Adan v R** (supra). That there is no evidence to show that he understood the charges to which he pleaded to. Thus, indicating a likelihood of success of the appeal. Counsel also cited the case of **Arvind Patel vs Uganda** (supra) for the principle that:

- "In considering an application for bail pending appeal the only means by which the Court can assess the possibility of success of the appeal is by perusing the relevant record of proceedings, the judgment of the *Court from which the appeal has emanated, and the memorandum of* the appeal in question."
- Counsel further submitted that the offences the applicant was convicted of did not involve personal violence and that he had complied with the bail terms set by the High Court by depositing a cash bail sum of 20 million as well as his passport and security of a Land title in the names of Kabagambe Nicholas in the High Court. That those documents as well as the money are still in Court custody. \$25\$
- Thus, counsel submitted that the Applicant will comply with the terms set by this Court if released on bail.

Respondent's submissions

The Respondent's counsel submitted that the Applicant has not adduced enough evidence to prove the conditions that were articulated in *Arvind Patel v Uganda* (supra) in matters of bail pending appeal. In respect of those conditions, counsel submitted as follows:

Character of the Applicant

Following the applicant's conviction by the High Court and the

subsequent confirmation of the Conviction and sentence by the S Court of Appeal, the Applicant cannot be said to be a person of good character.

To buttress the foregoing argument, counsel relied on the case of *John Muhanguzi Kashaka vs Uganda*³, where it was held that good character alone can never be enough because there is nothing exceptional or unusual in having a good character.

In respect of the investments held by the Applicant, the Respondent submitted that there is no evidence to show that the said investments will prevent him from jumping bail. That in any case, he committed

the offences for which he was convicted while the said investments were in existence.

Furthermore, the Respondent submitted that the said investments are heavily encumbered as they each have caveats on them and there is no evidence to show that he owns the listed properties.

Medical Condition of the applicant \$20\$

In response to the applicant's medical condition, the Respondent submitted that the letter from the Medical Superintendent of Luzira Prisons dated 25th November 2022 does not show that the medical facility in Luzira Prison cannot handle his medical condition while he is incarcerated. Counsel therefore prayed that this ground be disregarded.

Advanced age

The Respondent submitted that although the Applicant averred that he was 60 years of age, given the serious nature of the offences with which he was convicted, this factor does not favour him. Counsel relied on the authority of *John Muhanguzi Kashaka v Uganda* (supra) where it was held that: being of advanced age, a first time

³ Supreme Court Miscellaneous Application No.18 of 2019.

offender, and a sole bread winner, all such factors which go to the applicant's credit recede to the background when weighed with the seriousness of the offence ...

The possibility of Success of the Appeal

Counsel submitted that in the case of *Arvind Patel v Uganda* (supra), it was held that, the only means by which court can assess the possibility of success of the appeal, is by perusing the record of proceedings, the judgment of the Court from which the appeal emanated and the memorandum of the appeal in question.

Counsel argued that in the present matter, the Applicant has not attached the Judgement of the Court of Appeal. That instead, it is the Respondent which availed the said judgment and a juxtaposition of the Memorandum of Appeal filed by the applicant with the Court of Appeal judgment shows that the success of the intended appeal is minimal.

Whether the applicant has complied with bail conditions granted after \$20\$ the applicant's conviction and during the pendency of the appeal (if any)

The respondent submitted that even if the applicant complied with the bail terms in the lower court, circumstances of his compliance have since changed following his conviction by the High Court and \$25\$ the subsequent confirmation of his conviction by the Court of Appeal. That this being a final appeal, the risk and the temptation to abscond is higher than it was before in the lower courts. As such, the applicant's application for bail pending appeal should be denied.

The possibility of substantial delay in the determination of the appeal. 30

In reply to the applicant's averment that there is a possibility of substantial delay in disposing of the appeal, counsel submitted that there is no evidence adduced by the applicant to show that the schedule of the Court has affected the working of the Court. Therefore, the applicant's averment is speculative and should be dismissed.

Sureties

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Surety No. 1 Kabagambe Nicholas, a resident of Nakulabye Zone 7, Lubaga, proprietor of a firm engaged in large scale farming/cereal production in Mukono District. The Respondent's counsel submitted that this surety did not adduce evidence to show whether he is a tenant or landlord at the said residence. There is also no evidence showing that he is still a resident at the said address nor is there evidence to show that he is indeed a business man. The attached certificate of Incorporation does not relate to him in any way.

Furthermore, counsel submitted that apart from being a friend to the applicant, there is nothing to show that the said surety will exercise effective control over the applicant to compel him to attend court whenever required.

- Surety No.2 Nahabwe Enock Rubanzana who deals in 20 transportation business trading under Silver Chains Ltd whose premises are located on plot 55 Fountain House Nkrumah Road, Kampala and a resident of Nateete has not adduced evidence to show whether he is a tenant or landlord at the said residence.
- Furthermore, apart from being a friend to the applicant, there is 25 nothing to show that the surety will exercise effective control over the applicant to compel him to attend court whenever required.

Surety No. 3 - Pradeep Shambhu Nath Sethi - a resident of Wabigalo Lower Village, Wabigalo Parish-Makindye Division and brother in law of the Applicant. Counsel submitted that this person only attached a copy of his Indian passport and no documents showing his residence in Uganda or work permit were attached.

In the premises, the Respondent prayed that this Court finds that the said individuals are not substantial sureties.

Court's consideration $\$ \mathbf{S} \$$

Bail pending appeal is granted at the discretion of court which discretion must be exercised judiciously with each case being determined on its own merit.

I will first address the applicant's averments which relate to important constitutional imperatives. The applicant stated in paragraph 4 of his \$10\$ Notice of Motion as well as the affidavit in support that it is his constitutional right to apply for bail at any time before the disposal of his appeal. In support of this contention, the applicant relied on Articles 23 (6) (a) and 28 (1), (3) (a) of the Constitution.

Article 28 (1) of the Constitution provides as follows: 15

> In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

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** states that: \$25\$

- > Where a person is arrested in respect of a criminal offence-
- > (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 ...** (Emphasis of Court)
- In citing the above provisions, it is clear that counsel for the applicant $\$ \backslash \mathrm{mathsf{S}} \$$ has failed to appreciate the legal position of a person who has already been convicted by a court of law and in this instance two courts. The above cited provisions are relevant to a person applying for bail pending trial as opposed to one applying for bail pending appeal.
- Indeed, in **Henry Bamutura vs. Uganda**⁴ I held that after conviction, \$10\$ the legal status of an offender changes and the consideration for release hinges on whether there are exceptional and unusual circumstances warranting release pending appeal. This is because the applicant is no longer wholly shielded by the presumption of innocence espoused in **Article 28 (3) of the Constitution**. 15

The presumption of innocence has, in the matter before this Court, been rebutted by the fact that two lower courts have convicted the applicant. And whereas Article 132 (2) of the Constitution provides for a right of appeal to the Supreme Court, from decisions of the Court

- of Appeal (albeit in accordance to prescribed law), this right cannot be 20 said to re-clothe an already convicted person with the presumption of innocence articulated under Article 28 (3) (a). On conviction any allegations against a person graduate into factual findings by a court of law thus rendering him outside the ambit of persons envisaged in
- Article 28 (3) (a). It is for this reason that the principles which apply $\$ \backslash \mathrm{frac{1}{2}} \$$ 25 to applications for bail pending appeal are different from those applicable to applications for bail pending trial. A person applying for bail pending appeal must be subjected to a more stringent test than one who is not yet convicted.
- In the same vein, Article 23 (6) (a) of the Constitution which deals 30 with the right of a person **arrested** in respect of a criminal offence, to apply to the court for release on bail, is irrelevant to the application before us. The applicant has not merely been **arrested in respect of a criminal offence**, he has been convicted of several crimes.

⁴ Supreme Court Miscellaneous Application No.19 of 2019.

- The applicant stated in his affidavit that he is of advanced age (60) S years). He also stated that he suffers from hypertension as well as chronic gastritis diseases which are life threatening and exacerbated by the prison environment. He further stated that he has been with the said illness for over ten years.
- On record is the medical report from Murchison Bay Hospital dated 10 25th November 2022 signed by the Medical Superintendent of the said facility. The report stated that the applicant is aged 60 years and suffers from chronic gastritis with a high possibility of peptic ulcer disease, hypertensive heart disease and old age. The Applicant relied
- on the authority of *David Chandi Jamwa v Uganda* (supra) to 15 support the ground that ill health is one of those factors considered by court to grant bail. However, I note that the circumstances pertaining in the case of **David Chandi Jamwa** are distinguishable from the present matter. Whereas in the **Jamwa case** the letter from
- the Prisons' medical facility clearly indicated that Jamwa's health 20 condition could not be managed by the facility, the same cannot be said for the present applicant.

Whereas the medical report in the present case mentions various ailments suffered by the applicant, it does not state that the health facility has failed or cannot handle the applicant's health condition.

In fact, I note to the contrary, that the prisons facility has previously treated the applicant's ailments and his health improved. Paragraph 3 of the medical report on record states as follows:

"He has been treated for Chronic Clinical Gastritis with Omeprazole, Buscopan, Algol, Magnesium Trisilicate, various analgesics and 30 hypertensive heart disease with Lorsatan- H, Captopril, Lasix, Diazepam with on and off improvement."

I am alive to the fact that where a person applying for bail pending trial (and thus presumed innocent), cites ill health as a ground to be released on bail, Section 15 (3) of the Trial on Indictment Act is to

- the effect that, for grave illness to be considered as an exceptional S circumstance, it must be certified by a medical officer of the prison where the accused is detained that the facility is incapable of giving **adequate medical treatment** to the accused while in custody. (My emphasis)
- As seen in the cited provision of the Trial on Indictment Act, at the $\$10$ stage when an accused is still presumed innocent, the law requires proof that the prisons facility is incapable of handling the medical needs of an applicant, before the fact of ill-health can be cited as a reason for release on bail. It must follow that the requirement applies more strictly when considering an application of bail pending appeal 15 - and in the case before me now, a second appeal!

Arising from the above discussion, the applicant has not satisfied Court that his health condition qualifies as an exceptional circumstance upon which this Court can base a decision to grant the application.

Be that as it may, as I held in the **Bamutura case (supra)**, in applications regarding bail pending appeal, the court must - above everything else - be guided by two important factors:

(i) the gravity of the offence; and

(ii) the likelihood of success of the appeal. \$25\$

I will discuss the factor of likelihood of success of the intended appeal first.

I am alive to the fact that this Court is not clothed with the power to delve deeply into the merits of the appeal. It is sufficient at this stage

for the Court to merely ask itself whether the appeal is, *prima facie*, likely to succeed.

The applicant in the present matter attached to his application both the Notice and Memorandum of Appeal. Although he neither attached the Judgment of the Court of Appeal nor the Record of Proceedings,

the respondent availed a copy of the Judgment by attaching it to the $\$ \backslash \mathrm{mathsf{S}} \backslash \$$ affidavit in reply.

A look at the Memorandum of Appeal indicates that the first ground relates to matters of plea taking.

I note that the above ground was also the subject of appeal in the Court below. And in response to that ground, the Court of Appeal re- \$10\$ evaluated the trial proceedings alongside the guidelines set out in **Adan v R (supra)** and came to the conclusion that the procedure for recording of a plea of guilty as laid out in the said case was followed. It therefore cannot be said that on the face of the Record, the appeal has a fair chance of being successful. 15

But of course, it goes without saying that when the appeal comes up for hearing, the Court is prepared to listen to the arguments of both parties before arriving at a final decision regarding the merits of the appeal.

I now move on to discuss the second factor-the gravity of the offence. 20

The applicant stated that one of the factors to be considered is that the offence with which he was convicted of did not involve personal violence.

It is my considered view that the gravity of the offence must not and cannot be exclusively defined in terms of whether it involved violent \$25\$ behavior towards another person.

Similar to the facts in **Ddegeya Hassan vs. Uganda**⁵, the applicant before Court has been convicted of embezzlement, forgery and uttering false documents. As I noted in the **Ddegeya case**, by its very nature, the offences of embezzlement, forgery and uttering of false documents cannot by the stretch of any one's mind involve violence.

However, a man who has been convicted of committing a serious

^{lt;sup>5}</sup> Miscellaneous Application No.16 of 2021.

- financial crime does not deserve more favoured treatment than an $\$ \text{ordinarily}$ inoffensive man, who having had a mite too much drink, knocks someone's tooth out and has been convicted (of causing grievous bodily harm). What is important is that both are serious
- In the present case, the applicant was charged with embezzlement, 10 forgery and uttering false documents in relation to money entrusted to him to manage on behalf of others. The conduct of forging his business partner's signature to unduly withdraw funds in the total sum of Ushs. \$1,113,955,859/\$ = from the company's account 15
- constituted breach of trust. Such conduct cannot be considered an offence which is not grave. The gravity of the offences is also clear from the sentences prescribed by the law. In any case, the applicant was convicted of a multiplicity of offences.

Conclusion.

In conclusion, I find that the applicant has not proved existence of 20 unusual and exceptional circumstances to warrant his release pending a second appeal.

I therefore dismiss the application.

Having reached a finding that the grant of bail is declined, I find it unnecessary to make any findings regarding the sureties presented 25 before Court.

Dated at Kampala this

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HON. JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA, JUSTICE OF THE SUPREME COURT.

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