

UGANDA / JUDGMENT

Semanda Vs Uganda (Miscellaneous Application No. 05 of 2018) [2019] UGCA 31 (9 April 2019)

[2019] UGCA 31

COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 05 of 2018

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO.05 OF 2018

SEMANDA GEOFFREY MWESIGE::::::::::::::::::::::::::::::::

VERSUS

\$10\$ UGANDA::::::::::::::::::::::::::::::::

HON. MR. JUSTICE BARISHAKI CHEBORION, JA CORAM:

(SINGLE JUSTICE)

RULING

\$15\$

The applicant was convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 10 years.

He now seeks to be released on bail pending appeal because his health is deteriorating each day and needs to seek treatment out of prison. He says his appeal has great chances of succeeding and he has a fixed place of abode in Bukabi village, Kyeyindaula parish, Kakooge Sub County, Nakasongola District

\$20\$ which is within the jurisdiction of this Honorable Court. He adds that he has substantial sureties willing to undertake that once granted bail, he will comply with the terms and conditions of bail to be set by Court.

\$1\$ | Page

To support his application, he filed an affidavit sworn on 31st January, 2018 and \$5\$ a supplementary affidavit sworn on 10th January, 2019. In the two affidavits, he avers that he was convicted of the offence of murder contrary to section 188 and 189 of the Penal Code Act by the High Court of Uganda at Luweero and remanded. Being dissatisfied with the said judgment, he lodged an appeal in this Court on 10th July 2017. To him, the appeal is not frivolous and has a high \$10\$ likelihood of success. He deponed that he is a person of good character with no previous criminal record. He reiterates that if granted bail, he will comply with the bail terms. He has a fixed place of abode within the jurisdiction of this Court and substantial sureties within the jurisdiction of this Court. He adds that his appeal is likely to suffer substantial delay before being determined. That he \$15\$

The application was opposed by way of an affidavit deponed by Olongot Pamella, a State Attorney in the Director of Public Prosecutions. She averred that the offence which the applicant was convicted of involved personal violence, his \$20\$ medical condition can be handled in prison with available facilities. That the applicant had not presented any exceptional circumstance to warrant his release on bail pending appeal. According to the deponent, it was the practice of Court to hear appeals expeditiously so the claim that the hearing will delay was uncalled for. That the sentence of 10 years given to the applicant was an \$25\$ incentive for him to jump bail.

suffers from grave illness which condition cannot be handled in prison.

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At the hearing of the application, the applicant was represented by Ms. \$S\$ Natukunda Lillian while Ms. Namatovu Sarah Ddungu, Senior State Attorney in the Directorate of Public Prosecutions represented the respondent.

Counsel for the applicant submitted that the applicant was a first offender basing on the Judgment of the lower Court where the trial Judge therein noted at page

23 that the convict was a first offender $\frac{1}{2}$ \$10\$

> Counsel conceded that the offence for which the applicant was charged of involved personal violence but added that the applicant had deponed under paragraph 5 of his supplementary affidavit that he was of good character and attached evidence of a letter from the office of the District Chairperson, Nakasongola.

> As to whether the appeal had reasonable possibility of success, counsel submitted that the applicant had attached a draft Memorandum of Appeal which laid down the grounds of appeal and the judgment of the lower Court where the trial Judge indicated that there were minor contradictions yet in counsel's view the said contradictions were major.

> Counsel further submitted that the applicant complied with all the bail conditions in the lower Court and never absconded and that he further intends to comply with the bail conditions set by this Court.

\$20\$

\$\mathsf{S}\$ As to whether exceptional circumstances existed to warrant the grant of bail pending appeal, counsel referred Court to a medical report attached to the affidavit in support of the application.

He further submitted that the applicant had no other pending charges against him in any other Court within or outside the jurisdiction of this Honorable Court.

- \$10\$ Ms. Natukunda argued that there would be substantial delay in determining the applicant's appeal because the Memorandum of Appeal was filed on 10th July, 2017 but to date the appeal has never been fixed for hearing. She invited Court to look at the authority of **Igamu Joanita V Uganda**, **Court of Appeal Criminal* Application No.0107 of 2013* where according to her. Court noted that the
- \$15\$ above grounds were neither exhaustive nor mandatory and they need not all be present at the same time.

Counsel added that the presumption of innocence continued as long as the applicant exercised his right of appeal and relied on the decision in *Kyeyune Mitala V Uganda*, Supreme Court Miscellaneous Application No.4 of 2017 to support her argument.

He presented the following sureties for consideration by Court;

1. **Ms. Nakachwa Sauda Nalongo*, a 54 year old Business Woman and a step mother to the applicant. She is a resident of Hajji Yasi Zone, Kakooge Town* Council, **Nakasongola District* and holder of National* \$I\!D\$ \$No.\$ CF65044101P1RJ.

\$4\$ | Page

\$25\$

\$20\$

2. **Ms. Namanda Olivia*, a 43 year old resident of Kakooge T/C, Katale Zone, Nakasongola District.* She is a sister to the applicant and a holder of National ID No. CF730441036ECL.

- 3. Mr. Kyambadde Framanuel Kawonawo, a 37 year old resident of *Wabinyonyi Village, East Ward-Nakasongola T/C, Nakasongola District. He* \$i\$ s \$\overline{a}\$ \$ *teacher by profession* \$and\$ \$\overline{a}\$ \$ holder \$of\$ \$ *National* \$I\!D\$ No. CM80044101H99E.
- 4. Mr. Kamoga Benard Baliddawa, a 35 year old Diistrict Councillor *Nakasongola a friend to the applicant. He is a resident of Nakaseeta Village, East Ward Nakasongola* \$T/C\$ \$ *in Nakasongola District and a holder of* National ID No/CM8304410234MG.

Counsel for the respondent opposed the application and submitted that the applicant was convicted of a serious offence which involved personal violence and had not proved any exceptional circumstances. She added that the applicant averred that she suffers from a grave illness but attached a medical report which did not indicate that the said condition could not be managed by the prison

\$20\$ authorities.

\$25\$

\$\mathsf{S}\$

\$10\$

\$15\$

sentence is one of the considerations for Court to take into account while assessing the likelihood of abscondment. To her, the sentence of 10 years imprisonment was long enough to pose a likelihood of abscondment. She relied on Kairu Arajab and anor V Uganda, Court of Appeal Miscellaneous

On the possibility of absconding, counsel submitted that the length of the

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\$\mathsf{S}\$ **Application No.34 of 2014** in support of her submission and prayed that the application be dismissed.

In rejoinder, counsel for the applicant submitted that the allegations for abscondment made by the respondent were merely speculative as no evidence had been adduced to that effect. She added that the applicant paid a cash bail of 3 Million in the lower Court and deposited his passport both of which have

never been withdrawn.

Regarding the medical report, she submitted that asthma is a chronic health condition with negative health consequences which necessitated treatment outside prison.

15 I have listened to the submissions of both counsel and perused the Court record.

The guidelines to be applied while considering applications of this nature were set out by the Supreme Court in **Arvind Patel V Uganda SC Criminal Application NO. 1 of 2003** where Justice Oder, JSC observed that it was not necessary prove all the conditions as a combination of two or more criteria may be sufficient and each case must be considered on its own facts and circumstances. Before making the observation, he had listed the following guidelines which Courts generally applied when considering applications of such a nature.

- i. the character of the applicant;
- 25 ii. whether he/she is a first offender or not;

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- iii. whether the offence of which the applicant was convicted involved personal violence;
- the appeal is not frivolous and has a reasonable possibility of success;
- the possibility of substantial delay in the determination of the appeal.
- whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any).

Ms. Natukunda submitted that the applicant was of good character and attached evidence of a letter from the office of the District Chairperson, Nakasongola District. The letter is dated 17th December, 2018 and signed by Retired Lieutenant Kigula Sam. It says Semanda Mwesige Geoffrey was a gentleman of his character and a law abiding citizen. That by the time of his arrest, Semanda was working as a District Councilor, Kakooge Sub-County, Nakasongola District. It requests that he should be released so that he goes back to serve his Sub-County.

I find the request strange because ordinarily the District leadership would be hesitant to take back a convict more so of murder. The applicant having been convicted of murder, it would have been more meaningful for him to obtain a letter from the prison authorities certifying his good conduct from the time he was confined or a letter from the LC1 confirming his good character before he was imprisoned.

It was submitted for the applicant that he was a first offender, I have looked at the Judgment of the lower Court where the trial Judge therein noted at page 23

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\$10\$

that the convict was a first offender and I have no reason to believe otherwise. $\$ \backslash \mathrm{mathsf{S}} \$$ The fear is that if the applicant is a serial offender, he is likely to repeat the offence. For that reason, he should be kept away from the public until his appeal succeeds or until he serves his sentence. When the District Chairperson writes that he is "a man of his character", it creates doubt in my mind whether this is not the type of person who does what he wills regardless of other people's well-being. I do not give him the benefit of doubt that he is a person of good character.

Counsel for the applicant conceded that the offence for which the applicant was convicted of involved personal violence but was quick to add that the applicant had deposed under paragraph 5 of his supplementary affidavit that he was of good character and used the same letter from the office of the District 15 Chairperson, Nakasongola to demonstrate it. I have already found above that the evidence adduced by the applicant to prove his good character was insufficient. Further the applicant was convicted of murder and sentenced to 10 years imprisonment. Murder is the most violent of offences. I find that the offence for which the applicant was convicted involved personal violence and the public $\$ 20 \$$ should be shielded as much as possible from such people.

Counsel submitted that the appeal had high chances of success and attached a draft Memorandum of Appeal which laid down the grounds of appeal and the judgment of the lower Court where the trial Judge indicated that there were minor contradictions yet in counsel's view the said contradictions were major.

In order to assess the possibility of success of the appeal, one must peruse the $\$ \backslash \overline{5} \$$ relevant record of proceedings, the judgment of the Court from which the appeal has emanated, and the memorandum of the appeal in question. I have had the benefit of perusing the judgment of the High Court of Uganda at Luweero and the Memorandum of Appeal. I am of the considered view that the appeal is not frivolous and has a possibility of success. $\$ 10 \$$

Counsel further submitted that the applicant complied with all the bail conditions in the lower Court and never absconded and that he further intends to comply with the bail conditions set by this Court. I have had the benefit of perusing the Applicant's bail bond in the High Court of Uganda at Luweero which shows that the applicant complied with the bail conditions Court had set for him.

This however on its own cannot justify the grant of bail.

Counsel for the applicant submitted that there would be a substantial delay in determining the applicant's appeal because the Memorandum of Appeal was filed on 10th July, 2017 but to date the appeal has never been fixed for hearing. I find

this reason to be mere speculation as this Court will be handling a Criminal $\$ 20 \$$ Session soon and therefore, the appeal will be fixed and heard as soon as possible.

In **Singh Lamba V R (1958) E. A 337**, it was held that an applicant for bail pending appeal bears the burden of proving that there are exceptional and unusual reasons which warrant the grant of bail pending appeal.

\$25\$

Section 15 (3) of the TIA lists the following as constituting exceptional S circumstances.

- 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) The certificate of no objection signed by the Director of Public Prosecutions. \$10\$ c) The infancy or advanced age of the accused.

The exceptional circumstance advanced by the Applicant is that of ill health. Counsel for the Applicant submitted that the Applicant suffers from a grave illness and invited Court to look at the applicant's medical report. I have looked

- at the said Medical Report which indicates that the applicant aged 41 years 15 suffers from Allergic Bronchitis with Asthmatic complaints and Hypertensive Heart disease. In his findings, the doctor noted that Asthma is a chronic health condition that has negative health consequences especially in stuffy prison conditions. The said medical report does not explicitly state that the applicant's condition cannot be handled in prison. If an applicant for bail pending appeal \$20\$
- were to be granted bail because of suffering from a chronic disease, then he would never serve any prison sentence all his life. I therefore do not find any merit in this argument as advanced by counsel for the applicant. It is misconceived and I reject it.

After taking into consideration all the arguments above, I decline to grant this S application and the same is dismissed. The Registrar of this Court is directed to fix the applicant's appeal and ensure that it is heard at the earliest opportunity.

$\mathcal{L} = \mathcal{L}$ I so order. $\frac{1}{2019}$ Dated this .day of.

HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

\$15\$

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