

UGANDA / JUDGMENT

Sentongo Vs Uganda (Criminal Appeal No.0040 of 2017) [2017] UGCA 55 (31 October 2017)

[2017] UGCA 55

COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

Criminal Appeal No.0040 of 2017

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPLICATION NO.0040 OF 2017

PATRICK SENTONGO \$\mathsf{S}\$

VERSUS

UGANDA.....

CORAM:

\$10\$

HON. MR. JUSTICE S. B. K. KAVUMA, DCJ

RULING OF COURT

This is an Application brought under Section 132(4) of the Trial on Indictments Act, Section 40(2) of the Criminal Procedure Code Act \$15\$ and R.6 \$(2)(a)\$ of the Judicature (Court of Appeal Rules) Directions S. I 13-10 seeking the release of the applicant on bail, pending the hearing and determination of his Criminal Appeal No.37 of 2017 before this Court.

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Background

The background to the Application is that the applicant was charged with and convicted of the offences of Enbezzle

counts) c/S 19(b)(i) of the Anti-Corruption Act, 2009, Electronic Fraud c/S 19 of the Computer Misuse Act 2011 and Conspiracy to defraud c/S 309 of the Penal Code Act by the Anti-Corruption Division of the High Court and sentenced to 10 years imprisonment on 14th February, 2017. The applicant filed an Appeal against the conviction and sentence vide Criminal Appeal No.37 of 2017. He then made this Application for bail pending the disposal of his Appeal.

Representation \$10\$

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At the hearing, the applicant was represented by Mr. Ochieng Evans (counsel for the applicant) while the State was represented by Mr. Mugisha Peter (counsel for the respondent).

Grounds

- The grounds of this Application were stated in the Notice of Motion \$15\$ and in the applicant's Affidavit in Support of his Application. They are briefly that:
- 1. The applicant's appeal is not frivolous and has high chances of success.
- 2. The hearing of this appeal is likely to delay due to the heavy \$20\$ business schedule of this Court.
- 3. The offences with which the applicant was charged and convicted do not involve any personal violence.
- 4. This court has powers and discretion to release the applicant on bail pending the hearing and determination of his appeal.

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- 5. The applicant has got a fixed place of abode and has sound and substantial sureties.
- 6. The applicant suffers from several ailments.
- 7. The applicant will suffer injustices and irreparable damages if his application is not granted. (Sic)

The case for the applicant

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Counsel for the applicant referred to paragraph 1 of the applicant's Affidavit in Support of the Motion. He submitted that the applicant

is a Ugandan national, holder of a national Identity card \$10\$ No. CM76031105ZZ0J.

He submitted that the applicant's Appeal is not frivolous and asked Court to refer to the substantive grounds revealed in the Draft Memorandum of Appeal and the Record of Appeal.

It was further submitted that the applicant has no previous 15 criminal record and would not in any way pose a threat to the community if released. Arvind Patel V Uganda Supreme Court Criminal Appeal No.1 of 2003 was relied on.

He argued that the applicant has exercised his right of appeal and as such, his presumption of innocence is not extinguished \$20\$ completely. Mugisha Gregory V Uganda Criminal Reference No.179 of 2011.

It was submitted that the applicant suffers from brown Asthma, hypertensive heart disease, acute on chronic gastritis and renal parenchymal disease which may be fatal in prison. He stated that these ailments were confirmed by the Medical Report of Kakoraki Alex, a Medical Officer at Murchison Bay Hospital.

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Counsel further submitted that applicant was on bail in the lower court for four years but did not abscond at any one time.

It was also submitted that the applicant deposited his land title, a S land sale agreement and his Motor vehicle registration card with the lower court as security. He intends to use the same security in this Court.

He argued that the applicant is a family man with five children of school going age and has a fixed place of abode in Bukasa, \$10\$ Kyadondo Kampala District.

Counsel presented the applicant's three sureties as Mr. Kato Fredrick, a 47 year old Accountant at FCK Associates and Certified Public Accountants, a resident of Mugalu Village, Bukasa Ward, Makindye, Kampala District and the holder of National

\$15\$ Identification Card No. CM70023106V49G;

Kato William Kawuki, a 46 year old Operations Manager at Crown Holdings Property Limited, a resident of Urban Village, Kabalagala Central, Makindye Division, Kampala District and the holder of a

National Identity card No. CM70023108W0VD; \$20\$

Mr. Ddunga Shem, a 37 year old employee of Bank of Africa, resident of Massajja B Cell, Makindye, Wakiso District, the holder of National Identification Card No. CM7905210EWL9D and a Passport No. B0815670.

applicant He prayed that the Court be pleased to release \$25\$ pending the determination of his Appeal.

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Case for the respondent

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- Counsel for the respondent opposed the Application. He argued that the exceptional circumstances that warrant a grant of bail pending appeal have not been satisfied.
- He relied on the Affidavit in Reply of Maxim Erizooba, a Senior S State Attorney attached to the Anti-Corruption Division of the High Court.

He submitted that the applicant's argument that the Appeal has high chances of success cannot be sustained. He argued that the Draft Memorandum of Appeal filed by the applicant and the grounds there in did not hold any water and as such, there is no Appeal in this Court. He cited Nalukenge V Uganda Criminal Appeal No.27 of 2014 "where the learned Justices observed that in regard to rule 66 of the Court of Appeal Rules as well as rule 67 which provides for memorandum of appeal, there is nothing like a draft memorandum of appeal surface existence of an appeal." (Sic)

He cited Patrick Sentongo V Uganda Criminal Application No. 17 of 2017 to support his submission that the applicant ought to have presented a certificate of his criminal record as evidence of no previous criminal record.

Counsel argued that although the offences of which the applicant was convicted did not involve personal violence, they are economic offences which involve a colossal sum of Shs.5 billion and should be treated more seriously than murder cases in as fact they make the lives of a majority of people economically weak and miserable.

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He cited an Indian case of Prema Kuma Pama V State 1989, which he argued is not binding but persuasive on this Court to take economic crimes as serious offences.

Regarding the applicant's medical report, counsel argued that the report did not indicate that the mentioned illnesses could not be treated in prison. He submitted that the period the applicant has spent in prison suggests that his condition can be managed.

He argued that the applicant, unlike at the trial, is now a convict and can be tempted to abscond to avoid serving the 10 year sentence given by the lower court.

With regard to the applicant having a fixed place of abode, counsel submitted that the applicant did not present a land title in respect of land comprised in Bukasa, Kyadondo. That attaching a mere sale agreement and NWSC bills which are not in his names is not

evidence enough. 15

Counsel relied on *Kyeyune Mitala V Uganda S. C. CA No.9 of 2016* to argue that the fact that the applicant has a house is not an exceptional circumstances for grant of bail pending appeal.

He argued that the sureties are not substantial in as far as there was no evidence presented to prove that they have the financial \$20\$ standing to pay up in the event that the applicant absconds. *Patrick Sentongo V Uganda Criminal Application, No. 17 of 2017*.

Counsel then prayed that the Application be dismissed.

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Reply

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Counsel for the applicant cited R. \$6(2)(a)\$ of the Rules of this Court and argued that once a Notice of Appeal is lodged then the Appeal is proper before Court. He argued that the applicant exercised vigilance by applying for the Record of Appeal, and filed a Draft Memorandum of Appeal all by himself. He stated that after being given instructions, counsel reduced the Grounds of Appeal and filed a substantive Record of Appeal.

He distinguished this Application from *Nalukenge V Uganda (supra)* basing on the argument that they had demonstrated that there is a Record of Appeal in the instant case.

In reply to the respondent's argument that the applicant did not bring a certificate of good record, counsel argued that that was not a legal requirement and secondly, that the respondent did not bring any other record to contradict the applicant's affidavit.

Counsel downplayed the Indian case cited by the respondent arguing that it is not binding on Court and that it is not good law.

He asked Court to seriously consider the dangerous nature of the applicant's ailments as stated in the Medical Report on record.

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Court's considerations

The right to apply for bail is enshrined in Article 23(6) of the Constitution. It provides:

"(6) Where a person is arrested in respect of a criminal offence-

(a) The person is entitled to apply for bail, and the court may grant that person bail on such conditions as the court considers reasonable."

The law relating to bail pending appeal is found in Section 132(4) of the Trial on Indictments Act, Cap 23 of the Laws of Uganda which provides:

Section \$132(4)\$

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"Except in a case where the appellant has been sentenced to death, a judge of the High Court or the Court of Appeal may,

in his or her or its discretion, In any case in which an appeal \$10\$ to the Court of Appeal is lodged under this section, grant bail, pending the hearing and determination of the appeal."

Similarly Section 40(2) of the Criminal Procedure Code Act, Cap 116 of the Laws of Uganda provides:

Section \$40(2)\$: 15

> "The appellate Court may, if it sees fit, admit an appellant to bail pending the determination of his appeal, but when a magistrate's court refuses to release a person on bail, that person may apply for bail to the appellate court."

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The power to grant bail pending appeal is discretionary but must be exercised judiciously (See Walubiri Godfrey) \$nda\$ Criminal Application No.44 of 2012 Court of Appeal)

Some of the guideline followed by courts in applications of this nature are set out in Arvind Patel V Uganda (supra) as special circumstances to be considered in granting or refusing to grant bail pending appeal to an applicant. These are:

- "(a) The character of the applicant \$\mathsf{S}\$
- (b) Whether he or she is a first offender or not.
- (c) Whether the crime of which the applicant was convicted involved personal violence.

- (d) Whether the appeal is not frivolous and has a reasonable possibility of success.
- (e) The substantial delay in the determination of the appeal.
- the applicant has complied with bail (f) Whether conditions granted after the applicant's conviction and during the dependency of appeal (if any)."

Justice Oder (JSC) (RIP) observed in that case that:

"In my view, it is not necessary that all these conditions should be present in every case. A combination of two or more criteria may be sufficient. Each case must be considered on its own facts and circumstances."

In the instant Application, the applicant submitted that his Appeal has high chances of success while the respondent argued that there is no Appeal before Court at all.

The applicant was convicted of the offences he was and was given the sentences outlined herein above.

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He filed a Notice of Appeal on 15th February, 2017. The legal effect of this was to bring into existence his Appeal before this Court. He requested for certified copies of the proceedings, from the Anti-Corruption Division of the High Court, on the same day.

R.6(2)(a) of the Rules of this Court provides: S

R. 6(2)(a)

"Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may in any criminal proceedings, \$10\$ where notice of appeal has been given in accordance with rule 59 or 60 of these Rules, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal."

R.60(2) of the same Rules provides: \$15\$

\$R.60(2)\$

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(2)"The notice of appeal shall -

- (a) state shortly the nature of the conviction and findings against which it is desired to appeal; and

- (b) contain the address at which the documents connected with the appeal may be served on the appellant or appellants and shall be in six copies."

The applicant followed the proper procedure as stated in the of this Court. There is indeed a proper Appeal pending before Court.

The Medical Report on the applicant indicates that he suffers from Renal Chronic Gastritis, Acute Asthma, **Bronchial** Parenchymal, and Hypertensive Heart disease. The said Report concludes that: "The above health conditions are of a chronic nature and they may be fatal especially in the prison

conditions."

In my view, the applicant is suffering from grave illness serious enough to move court to afford him an opportunity to access better facilities than those at the prison he is incarcerated in.

- Considering that this Court is still handling Election Petition Appeals, it may not hear and determine the applicant's Appeal soon, hence the understandable fear of a likely delay in the disposal of the same which may result into injustice to the applicant.
- Further the very high levels of congestion of prisoners at the facility 15 where the applicant is kept, a fact I take judicial notice of, may aggravate his medical condition.

The offences of which the applicant was convicted involve a colossal sum of money. Counsel for the respondent argued that the applicant's sureties have not exhibited the ability to fully pay up in the event that the applicant absconds. I take the view that since two of the applicant's sureties who stood surety for him at the High Court were able to ensure that he attended the hearing of the case without absconding, they in addition to the surety may be considered substantial enough to ensure that the applicant attends the trial of his Appeal.

Further, the applicant's third surety, Mr. Ddungu Shem is ready and willing to deposit a title deed, which he holds by virtue of Powers of Attorney with the consent of the registered proprietor (Kakumba Francis), as additional security in this Court.

Further still, the applicant has chosen to exercise his right to appeal and as such, his presumption of innocence is not completely extinguished. This reasoning was adopted by this Court in Gregory Mugisha (supra) where Constitutional Reference No.2 of 2005 Uganda (DPP) V Col (Rtd) Dr. Kiiza Besigye was cited.

The Constitutional Court, in the above cited Reference further made the following observation:

"Bail should not be refused mechanically simply because the State wants such orders."

In respect to the argument put across by counsel for the respondent that economic crimes should be considered more serious than murder cases, I note that the Legislature did not prohibit a grant of bail in economic offences as it did in respect of offences for which an offender is sentenced to death under **Section 20** 132(4) of the Trial on Indictments Act, Cap 23 of the Laws of Uganda (supra). Had the Legislature wanted to make such provisions for the offences of which the applicant was convicted, it would have clearly stipulated so. I can safely presume has Indeed hereby do, that, in this regard, when legislating the Legislative did 25\$ not make a mistake.

In the result, I am persuaded that this Court should grant the applicant bail pending the disposal of his Appeal, as indeed I hereby do, on the following terms:

- **1.** The Shs. 10,000,000/= in this Court.
- **2.** He will deposit his passport with this Court.
- **3.** The applicant's land title deed, his land sale agreement Motor vehicle registration Book will be his and transferred from the trial court to this Court for custody of the same till the disposal of the Appeal.
- **4.** The three persons presented to Court as sureties are hereby approved as such for the applicant and they will, each execute a bond of Shs.30,000,000/=(, (not cash), to be deposited with the Registrar of this Court.
- **5.** Mr. Ddungu Shem, the applicant's third surety will deposit the land title deed for the land registered in the names of Kakumba Francis together with a duly executed Powers of Attorney with the Registrar of this Court-
- **6.** A breach of any of the above terms shall render the bail 20\$ pending appeal herein granted to the applicant lia cancellation.

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I so order!

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Dated at Kampala this

S. B. K. Kavuma S\$

DEPUTY CHIEF JUSTICE

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Prepared on 13 October 2026 · Esheria