

**Sipapa and Another v Uganda (Criminal
Miscellaneous Application 53 of 2023)
[2023] UGHCCRD 67 (17 July 2023)**
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The Applicants, Olimu Charles Sipapa and Nakiyemba Shamira Rukia, seek orders that:

- 1. They be released on bail pending their trial; and
- 2. Consequential directions be issued to regulate their bail.

The grounds on which the application is based are set out in the Notice of Motion and particularized in the attached affidavits of both Applicants.

It is stated that the Applicants were charged with 5 counts of the offence of Aggravated Robbery c/s to Sections 285 and 286 (2) of The Penal Code Act; and 7 counts of Money Laundering c/s to Sections 116 (a) and 136 (1) (a) of The Anti-Money laundering Act 2013.

The 1st Applicant states that he reported to Kabalagala Police Station on his own to record a statement in regard to charges against him and was immediately arrested. The Applicants add that they have both pleaded 'not guilty' to the offences.

That they are presumed innocent until proven guilty and have a fixed place of abode at Buwate LC1 which is within the jurisdiction of this Court.

That they will not abscond once released on bail and have produced substantial sureties prepared to guarantee return for trial.

That the Applicants do not have a history of absconding once released on bail and nor does any of them have a previous criminal.

That they are parents to a one year old child, E. C. O, who is sickly and who they were caring for at the time of arrest. A2 is the primary care giver of this child. That they have information that the infant child has been in and out of hospital since their arrest but there are now financial constraints affecting his care.

That the 1st Applicant is the founding director of Sipapa Entertainment Limited, a nonprofit foundation which reaches out to under privileged children to enhance their welfare. If he stays in detention the objective futile. He has a number of dependents, mostly orphans, who were supported by him for school fees, feeding and livelihood. Unless he is released their future is at stake.

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That the 1st Applicant has now spent more than 360 days, and the 2nd Applicant 194 days on remand, at the time of filing this application, and as a result they are both entitled to automatic release on bail. That in event of acquittal, they will never be compensated for the suffering they have gone through while in detention. It is therefore fair and in the interest of justice that they be granted bail

The state opposes this application.

Muhumuza Edward, a Chief State Attorney in the Office of the Director of Public Prosecutions, deposed the affidavit in reply and stated that the Applicants have not proved exceptional circumstances to warrant release on bail.

That according to a finger print report from the Directorate of Forensic Services, based on the fingerprint identification system [AFIS] database, A1 was placed at 15 scenes of crime of reported robberies within the Kampala metropolitan area.

That the Applicants who deposed that they are parents to infant, E. C. O, have not shown that their child cannot be treated in their absence. That there is evidence from the very same applicants indicating that their son is receiving treatment while they are in prison.

That the 1st Applicant averred that he has dependents but did not produce evidence in proof. That together, the applicants have also not established that they have a fixed place of abode, as the rental agreement they have relied on has since expired, and there is no evidence to show that the Applicants still occupy the same premises. It was stated that they were in rental arrears at time of their arrest.

That the sureties presented by both Applicants are not substantial. Additionally, the charges they face are serious attracting a maximum sentence of death. Because there is overwhelming evidence to sustain the charges, the Applicants are likely to abscond in order to escape the severe sentences.

Lastly, that the Applicants were committed to the High Court for trial on the 27th of February 2023 and are therefore not entitled to automatic bail.

The Applicants filed affidavits in rejoinder. They affirm that their application is premised on the right to a fair hearing and both enjoy the presumption of innocence until proven guilty. That right is non-derogable.

That the prosecution's allegations that the 1st Applicant is likely to jump bail in order to escape the severe sentences are unjustified speculations which should be ignored by this Court. In addition, his passport and National ID were confiscated by the Police.

That the 2nd Applicant averred that she is the primary care giver of her one year old sick child. In his condition, the incarceration of both his parents exposes the him to adverse psychological effects.

That annexure "c" attached to the affidavit in reply to the Application, which is a police statement of the Applicant's landlord acknowledged that the 2nd Applicant is her tenant, and that her sister has assured the landlord that the rent issues are going to be sorted out.

Submissions

The parties filed written submissions which are on record and will not be reproduced here. Nevertheless, I have studied them and will refer to them in determination of this application.

Determination

The applicants have a right to apply for bail which is exercised pursuant to Article 23 (6) (a) of **The Constitution** which stipulates, \$23\$

Where a person is arrested in respect of a criminal offence, 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;

The above provision stems from the presumption of innocence. That any person charged with any criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty. In certain circumstances therefore, the accused shall not be detained in custody before determination of culpability.

In respect of offences only triable and for which bail may only be granted by the High Court, such as the ones the applicants are indicted for, Article 23 (6) (a) is operationalised by Section 14 (1) of the Trial Indictment Act (TIA) which states,

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.

As can be seen from the two provisions above, the right to apply for bail is subject to the discretion of Court. Ordinarily judicial discretion is exercised within given parameters. It was observed in the English case of *R vs Board of Education* [1990] 2 KB 165 that,

Judicial Discretion is a matter for Court to consider all that is before it and reach a decision without taking into account a reason which is not a legal one. The Court acts within the rules of reason, justice and the law especially the objects and limits intended by the particular legislation.

Essentially bail is a temporary release of an accused person provided that the individual will be available or will attend the trial albeit from the comfort of his home. To ensure presence the release may be conditional.

Indeed Sections 14 and 15 of the TIA state what conditions need be proved for bail, with Section 15 requiring specific proof of exceptional circumstances before consideration can be made for a release on bail.

In light of the wording of both Article 23 (6) of the Constitution and Section 15 of the TIA the requirement for proof of exceptional circumstances is directory and not mandatory. The legislature would not have otherwise worded the sections in the liberal manner it did. While this Court will not ignore them out rightly, it is not compelled to be bound them. The evaluation of this application will be considered on its unique circumstances with the Court applying the law to the specific conditions in this matter.

Secondly in exercising discretion this Court must balance various factors. The needs of society to fight lawlessness, the consideration that the accused has been committed to the High Court for trial, the nature of the offence that this is a very serious offence attracting a maximum sentence of death, and the fact that the applicant protests his innocence (*Obua Otima vs Uganda H. C. Cr. M. A. No. \$18/2005\$*).

Section 15 (1) of the TIA stipulates that 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.

Exceptional circumstances are defined in Section 15 (3) of the Trial On **Indictments Act** as 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.

There are several other factors that the Court may consider as laid out in The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022.

The Applicants were charged with five counts of Aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act and seven counts of Money Laundering C/s 116 (a) and 136 (1) (a) of The Anti-Money Laundering Act. The offence of aggravated robbery is one for which bail can only be granted by the High Court.

The applicants aver that they have not pleaded guilty to the offences and they are still presumed innocent. I agree.

It was stated that they are both entitled to a mandatory release bail owing to the period spent on remand. However, as stated by the respondent, considering that both have been committed to the High Court for trial, the right to a mandatory release has lapsed.

It also true that no exceptional circumstances have been proved in this case. Nevertheless, and as noted above, this court takes the view that failure to prove exceptional circumstances should not automatically debar an applicant from bail. Ultimately the court retains the discretion to decide whether to grant bail.

The Applicants aver that they will not abscond once released on bail. Section 15 (4) of the TIA sets out the considerations the court takes into account to determine whether or not the Applicants will abscond. It all goes to emphasise that overriding factor is a determination whether, if released on bail, the applicant will attend his trial. Any conditions the court may set are aimed at either ensuring or compelling the applicant's presence throughout trial.

Section 15 (4) alluded to above provides:

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 securities 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.

The Applicants aver that they have a fixed place of abode at Buwate Local Council 1 where they reside. This Court has seen an annexure to the affidavit in reply, which is a police statement of Mrs Akello Judith Franca, the Applicants landlady. She states that the 1st Applicant has been her tenant since November 2019 but his rent expired in November 2022. Further still, that she is not sure whether the 1st Applicant is still occupying the said premises although the 2nd Applicant's sister had informed her that they would be sorting out the rent issues.

Whether an applicant has a fixed place of abode is a question fact proved by evidence. The provision on fixed place of abode envisages that proof of a fixed or permanent place of residence is mandatory. The evidence should indicate that there is a permanent address to which the applicant can be traced if required.

As it stands the applicants are in arrears of rent and their landlady clearly states that she is not sure whether they are still her tenants. Consequently, the status of their place of residence is uncertain. That fact on its own clearly shows that the evidence falls far short of proof of an exact place of abode or residence to which the applicants can, without doubt, be traced if required.

In these circumstances the letter of the LCs indicating that the applicants are residents in the area cannot alter the uncertain status revealed by the landlady.

Next each of the applicants has produced 3 sureties. Both under Section 15 (4) (b) of the TIA and Regulation 16 (1) of The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022 the duty and obligations of sureties include an undertaking to ensure the attendance of the accused person before court, whenever required. The court may determine

this by looking at the relationship between the applicant and the surety. In the case of the 1st applicant, it is only stated that each surety is a friend. In my view these sureties are not proved to be substantial in these circumstances.

In all, a surety is not limited to producing identification and residence letters. This court is alive to the presumption of innocence, but that said, where the applicants are charged with capital offences attracting a death sentence, as in this case, the surety must show the manner or mechanism by which they can compel the applicant to attend court.

I have also taken the interests of the infant into account. There is no indication that his medical support has been cut off or compromised in any way. He continues to access medical attention as indicated in the detailed medical report presented. In

addition, there is no proof that Sipapa Entertainment Limited, is a nonprofit foundation or that it is aimed at helping the underprivileged or disadvantaged. Its name alone may give a glimpse of its business mission as an entertainment enterprise.

This court has carefully and anxiously balanced the lack of a fixed place of abode and the question of whether the applicant's sureties are substantial against the fair trial rights of the applicants. I have also taken into account the gravity and multiplicity of the charges here. It is also pertinent consideration in these circumstances that the applicants have both been committed for trial.

While bail should not be granted or denied mechanically, I have balanced and made an all-round examination of the factors here, in addition to the rights of both the applicants and the victims plus the public interest at large.

In view of all the above, this court is not satisfied that the applicants have proved that they should be admitted to a release on bail. The application is therefore dismissed.

Michael Elubu

Judge

17.7.23

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Prepared on 12 October 2026 · Esheria