

UGANDA / JUDGMENT

Ssemugooma Vs Uganda (Criminal Applications No. 145 of 2018)

[2019] UGCA 2085 (9 April 2019)

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COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

Criminal Applications No. 145 of 2018

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THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA****CRIMINAL APPLICATION NUMBER 145 OF 2018**

JOE SSEMUGOOMA::::

VS

\$10\$ UGANDA::::

CORAM: HON. MR. JUSTICE BARISHAKI CHEBORION, JA

(SINGLE JUSTICE)**RULING**

This application was brought under the provisions of Article 23 (6) (a) of the 15 Constitution, section 40 of the Criminal Procedure Code Act, Section 132 (4) of the Trial on Indictments Act and Rules 6, 43 and 44 of the Rules of this Court. It is for an order that the applicant be released on bail pending the hearing and determination of his appeal.

The background to the application is that the applicant was on the 29th day of \$20\$ August 2018, convicted of abuse of office contrary to section 11 and corruption contrary to section \$2(1)\$ of the Anti-Corruption Act and sentenced to 5 years imprisonment on each count. Both sentences were to run concurrently. Being dissatisfied with the said decision, the applicant appealed to this Court against

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both conviction and sentence. He subsequently filed this application for bail $\$ \text{mathsf{S}} \text{\$}$ pending appeal.

The grounds upon which the application is premised are contained in the Notice of Motion and the applicant's affidavit dated 7th September, 2018. Briefly they are that:

- 10 1. the applicant lodged a Notice of Appeal in the High Court together with a request for the record of proceedings.
- *2. the applicant will turn 58 years of age in a few months and has a wife with* several children residing at his permanent place of abode at Munyonyo *within the jurisdiction of this honourable Court.*
- \$15\$ 3. during the investigations, the applicant was granted a Police Bond by the Special Investigations Unit of the Police and was also placed on bond by the inspectorate of Government. At all times he complied with the bond terms and reported to the respective offices without the need of being looked for. *threatened with arrest or coercion.*
- \$20\$ 4. the applicant was granted bail pending the trial in the High Court and for the duration of the trial he remained on bail and abided by the bail conditions strictly. He undertakes to do the same if this Honourable Court *grants him bail pending disposal of the appeal.*
- 5. there are no other charges pending against him save for the matters the subject of the appeal herein stated.
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- 6. *the applicant has never been involved in and or accused of any matter of* violence.
- *7. the applicant's appeal has very high chances of success.*

The applicant, Joe Ssemugooma further filed a supplementary affidavit in support of the application dated 18th January, 2019 wherein he briefly stated \$10\$ that;

- $\$ \dot{\text{I}} \text{\$}$. after his affidavit sworn in support of his application, the applicant's *medical condition in Prison continued to deteriorate.*
- *the medical practitioners conducted examinations and issued a report.* ii.
- iii. the applicant is under constant fear for his life considering his medical \$15\$ condition and prays that this Honourable Court grants him bail pending the disposal of his appeal to enable him have easier and better access to appropriate medical services.

The respondent opposed the application and filed an affidavit in reply sworn by Brenda Kimbugwe, the head of Prosecutions from the Inspectorate of \$20\$ Government dated 17th January, 2019, stating that:

- a. unlike at trial where the applicant was presumed innocent and thus granted both police bond and bail as alleged, in the instant case, the applicant is already a convict with high chances of absconding when released on bail.
- *b. whereas the applicant has alleged that his appeal has high chances of* success, the allegation is speculative since there is no memorandum of

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- appeal filed and attached to enable this Honourable Court arrive at the same conclusion.
- *c. this application does not disclose or prove any exceptional circumstances as* envisaged by the law to warrant the grant of bail pending disposal of the appeal.
- \$10\$ *d. the applicant's ground that there is a probability of delay in determining his* appeal is speculative and not supported by any compelling evidence from Court.
- *e. the state has cross appealed in this matter with a prayer for the applicant* to refund 24 billion shillings and the cross appeal has high probability of success.
- *f. the certificate of title attached to the applicant's application as annexure* \$B2\$ is equally encumbered vide mortgage registered on the 24th January, 2011. *Hence there is a third party interest on the same.*
- *g. the cross appeal is within the knowledge of the applicant who shall most* likely jump bail for fear of refunding the money.

At the hearing of this application, the applicant was represented by Mr. William Were while Senior Inspectorate Officer, Mr. Rogers Kinobe appeared for the respondent.

Counsel for the applicant submitted that the applicant suffers from Chronic allergic bronchitis with asthmatic components, Hypertensive heart disease and \$25\$ chronic osteoarthritis accompanied with old age since he is 58 years old. He

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invited Court to look at the medical report attached to the applicant's \$\mathsf{S}\$ supplementary affidavit.

Counsel further submitted that the applicant still enjoyed the presumption of innocence since he had exercised his right of appeal. He invited Court to look at the case of **Kyeyune Mitala Julius V Uganda, Supreme Court Miscellaneous**

Application No.4 of 2017 which is to the effect that an applicant in an \$10\$ application for bail pending appeal enjoys the presumption of innocence as provided under Article 28(3) (a) of the Constitution.

Counsel contended that the applicant complied with the bail conditions in the lower Court and he is willing to do the same in the event this Court grants him bail pending appeal.

Counsel further submitted that the applicant had the following sound sureties who were ready and willing to stand for him;

- 1. Mr. Katimbo Mugwanya Edward, a 70 year old resident of Jambula-Bugolobi, Nakawa Division in Kampala District. He is a retired banker and holder of passport No. B1332473. He was said to be a cousin to the applicant.
- 2. Mr. Ssebitosi John, a 61 year old resident of Ben Kiwanuka Village LC1, Rubaga Parish in Rubaga Division. He is a retired Banker and a holder of Passport No. B1625713. He was said to be a father in law to the applicant.*

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- 3. Mrs. Claire Nabayego Ssemugooma, a resident of upper Mawanga Zone, Buziga Parish in Makindye Division. She is Credit Controller in Liquid Telecom and was said to be the wife to the applicant.*
- 4. Mr. Kakande Andrew, a resident of Bbunga Trading Centre urban Council 1, Ggaba Parish, Makindye Division in Kampala District. He is a holder of National ID No. CM60052109KATF. He was said to be a friend to the applicant.

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Counsel further submitted that the applicant had furnished a copy of his national ID as proof of his age and place of residence. He informed Court that the applicant's passport and the cash bail of 10 Million had not yet been collected

15 from the lower Court. He prayed that this Court be pleased to grant the applicant bail pending the hearing and determination of the substantive appeal before this Court.

Mr. Kinobe, opposed the application and submitted that since the applicant is now a convict, the presumption of innocence as provided for under Article 28(3) (a) of the Constitution had ceased.

He further submitted that the applicant's appeal had no chances of success because the applicant did not attach the judgment of the lower Court for this Court to determine whether his appeal has any likelihood of success.

According to counsel Kinobe, the applicant had not proved any exceptional circumstance to warrant his release on bail. He argued that the applicant had \$25\$ only stated that he was 58 years old without adducing any evidence of a birth 6 | Page

certificate to prove his age and further that the medical form did not state that \$\mathsf{S}\$ the applicant's illness could not be managed by prison authorities.

Regarding the applicant's place of abode, counsel submitted that the duplicate certificate of title marked as annexure "B2" adduced by the applicant was encumbered by way of a mortgage registered on 24th January, 2011 and therefore the same could not be relied on because it could be repossessed by the mortgager

\$10\$ anytime.

Counsel further submitted that the respondent had filed a cross appeal against the applicant's acquittal on some other counts which cross appeal in counsel's view had high chances of success.

\$15\$ Regarding the applicant's averment under paragraphs 5, 6 and 10 of his affidavit that he has a young family which he needs to look after, counsel invited Court to look at the decision of Remmy Kasule, JA in **Sande Pande Ndimwibo V Uganda**, Court of Appeal Miscellaneous Application No.241 of 2014 where the learned Justice of Appeal held that sympathy and discomfort to family \$20\$ members cannot constitute exceptional grounds for purposes of a bail application. Counsel prayed that the application be dismissed.

In rejoinder, counsel for the applicant submitted that he had never been served with a notice of a cross appeal. He added that reason why the applicant annexed his National ID was to ascertain his true age and the duplicate certificate of title was to show that the applicant has a permanent place of abode.

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I have listened to the submissions of both counsel for and against the \$\overline{5}\$ application. I have also considered the pleadings as well as the law relied upon by both parties.

The jurisdiction of this Court to grant bail pending appeal is derived from Section 132 (4) of the Trial on Indictments Act and Section 40(2) of the **Criminal Procedure Code**. The said sections state thus:

"*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 to the Court of Appeal is lodged under this section, grant bail, pending the hearing and determination of the appeal".

\$15\$ Section 40(2) of the Criminal Procedure Code reads:

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

Further Rule 6(2) (a) of the Rules of this Court provide thus: \$20\$

- (2) 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— (a) in any criminal proceedings, where notice of appeal has been given in accordance with rules 59 and 60 of these Rules, order that the appellant be

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released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal:

The burden is on the applicant to convince Court that special circumstances exist which warrant him to be released on bail pending appeal. See *Igamu Joanita V Uganda*, Criminal Application No.107 of 2013. However proof of exceptional circumstances is not mandatory. **See Foundation for Human Rights Initiative V Attorney General**, Constitutional Petition No.020 of \$2006.\$

Section 15 (3) of the TIA defines exceptional circumstances to mean:

- a) Grave illness certified by a medical officer of the prison or other institution or

\$15\$ 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.

- c) The infancy or advanced age of the accused.

These exceptional circumstances should be read together with the guidelines set out by the Supreme Court in *Arvind Patel V Uganda*, Supreme Court Criminal \$20\$ **Application No. 1 of 2003** which to include the following:

- \$i\$. *the character of the applicant;*
- ii. *whether he/she is a first offender or not;*
- iii. whether the offence of which the applicant was convicted involved *personal violence;*

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- \$iv.\$ *the appeal is not frivolous and has a reasonable possibility of success;*

- the possibility of substantial delay in the determination of the appeal. v .
- *whether the applicant has complied with bail conditions granted after the* vi. applicant's conviction and during the pendency of the appeal (if any).

Order, JSC who decided Arvind Patel case (supra) further noted that it was not necessary to prove all the above conditions as a combination of two or more criteria may be sufficient and each case must be considered on its own facts and circumstances.

Counsel for the applicant submitted that the applicant suffers from Chronic allergic bronchitis with asthmatic components, Hypertensive heart disease and chronic osteoarthritis accompanied with old age since he is 58 years old. He invited Court to look at the medical report attached to the applicant's supplementary affidavit.

I have looked at the medical report attached to the applicant's affidavit in rejoinder and find that the Medical Superintendent stated that the applicant suffers from Chronic allergic bronchitis with asthmatic components, Hypertensive heart disease and chronic osteoarthritis. The doctor added that the said health conditions are of chronic nature and unfavourable in Prison conditions particularly asthma and hypertension which are fatal. I am satisfied that the applicant has proved that he is suffering from grave illness.

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Regarding the applicant's age, the medical report indicates that the applicant is 5 58 years old. This is confirmed by the applicant's National ID which shows that the applicant was born on 25th December, 1960 making him 59 years old. In Uganda, a person of 50 years and above is by law considered to be of advanced age. See Walubi Godfrey V Uganda, Court of Appeal Criminal Application No.44 of 2012.

Counsel for the applicant submitted that the applicant still enjoyed the presumption of innocence having exercised his right of appeal. He invited Court to look at the Supreme Court decision in **Kyeyune Mitala Julius V Uganda**, Miscellaneous Application No.4 of 2017.

Article 28(3) of the Constitution provides that every person who is charged of a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.

Justice Eldad Mwangusya in **Kyeyune Mitala Julius V Uganda Supreme Court Criminal Application No.9 of 2016** held that;

"*The case of Arvid Patel V Uganda SCCA NO.1 of 2003 which is frequently cited for guidelines as to the considerations for grant of bail pending appeal sets down the followingthe above considerations were listed after the Court had observed that an appellant seeking bail pending appeal lacks one of the strongest elements normally available to an accused person *seeking bail before trial, namely the presumption of innocence.*"

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This Court has in numerous decisions found that an applicant for bail pending appeal no longer enjoys the presumption of innocence provided in Article 28(3) of the Constitution. See *Igamu Joanita V Uganda*, Court of Appeal Criminal Application No.0107 of 2013, *Sande Pande Ndimwibo V Uganda*, Court of Appeal Miscellaneous Application No.241 of 2014, *WDR Ekusia Joseph V Uganda*, Court of Appeal Criminal Application No.69 of 2016* among others. \$10\$

In a later application; *Kyeyune Mitala Julius V Uganda Supreme Court Miscellaneous Application No.4 of 2017, Opio-Aweri, JSC stated that;*

"It must also be noted that an applicant in an application for bail pending appeal enjoys the presumption of innocence as provided under Article 28(3) *(a) of the Constitution.*

The presumption of innocence continues as long as someone decides to exercise his or her right of appeal. The presumption of innocence does not stop at the trial level. The presumption of innocence as enshrined in the *Constitution is one of the rail guards to the protection of personal liberty and* the right to a fair trial. The presumption of innocence is also predicated on *the motion that Courts can make errors because they are manned by human* beings."

I am persuaded by the reasoning of Harris J in *Chimambhai V Republic (NO.2)* (1971) 1 EA 343 at page 344 where while recognizing that a convicted person

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no longer enjoyed the presumption of innocence, went ahead to justify the grant $\overline{5}$ of bail pending appeal. He said;

> "It is manifest that the case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, that of the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation *creating a right of appeal in criminal cases.*"

Counsel for the applicant contended that the applicant complied with the bail 15 conditions in the lower Court and was willing to do the same in the event that this Court granted him bail pending appeal. In paragraph 7 of the affidavit in support of the application, the applicant avers that during the investigations, he was granted a Police bond by the police. He was also placed on bond by the Inspectorate of Government, he was granted bail during the trial of the case and at all times he complied with the bond and bail terms. Because the averments \$20\$ were not disputed by the respondent, I have no reason but to believe them as a credit of good conduct to the applicant.

The offence of abuse of office and corruption for which the applicant was convicted did not involve personal violence. It is not easy for him to repeat the same and therefore, he cannot be said to be a risk to society if released on bail pending the determination of his appeal.

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As to whether the applicant's appeal has any possibility of success, Court can $\mathsf{\$}$ assess the possibility of success of the appeal 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. The applicant availed Court with only a Memorandum of Appeal and in the absence of the Record of Proceedings of the lower Court and the judgment, I am unable to assess whether $\$10$ the applicant's appeal has any possibility of success.

The applicant attached a duplicate certificate of title for Plot No.470, Block 255 land at Munyonyo to his application to confirm that he has a fixed place of abode within the jurisdiction of this Honourable Court and was therefore not likely to

flee. I note that the said duplicate certificate of title is encumbered by way of a 15 mortgage registered on 24th January, 2011. The mortgage does not take away proof that the applicant has a fixed place of abode within the jurisdiction of this Court.

Counsel submitted that the applicant has a young family which he needs to look after. Sympathy and discomfort to family members cannot constitute exceptional $\$20$ grounds for purposes of a bail application. See decision of Remmy Kasule, JA in Sande Pande Ndimwibo V Uganda, Court of Appeal Miscellaneous Application No.241 of 2014.

The applicant presented 4 sureties whose particulars I have taken into consideration and find them to be substantial. I am satisfied that they will ensure 25 the applicant's presence in Court as and when required to do so.

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- For the above reasons, I am satisfied that the applicant meets the conditions for $\overline{\$5}$ the grant of bail pending appeal and I am inclined to the grant the same on the following terms and conditions;
- a) Payment of cash bail of UG shs $\$10,000,000$ = by the Applicant into this Court. This is in addition to the shillings $\$10,000,000$ = already deposited in the Court below.
- b) The Applicant should report to the Registrar of this Court every month at 9.00 am, beginning on 22nd March, 2019, for extension of his bail until his appeal is heard and disposed of or until further orders of this Court.
- c) Mr. Katimbo Mugwanya Edward, Mr. Ssebitosi John, Mrs. Claire Nabayego Ssemugooma and Mr. Kakande Andrew should be the applicant's sureties, to secure his attendance in Court whenever he is required to do so.

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- d) The said sureties should each bind themselves by signing a bond (not cash) of shs. \$20,000,000/= (Twenty million shillings only)
- e) A breach of any of the above conditions shall render the bail pending appeal herein granted to the Applicant liable to an automatic cancellation.

The Registrar of this Court is directed to fix the appeal for hearing at the next convenient Criminal Session. \$10\$

I so order.

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\bigcup_{\text{day of.}}\$ Dated this.....

HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

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