

UGANDA / JUDGMENT

Umutoni v Uganda (Criminal Appeal No.0341 of 2014) [2015] UGCA 11 (13 March 2015)

[2015] UGCA 11

COURT

Court of Appeal of Uganda

BEFORE

Mwangushya, JA

CASE / FILE NUMBER

Criminal Appeal No.0341 of 2014

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL UGANDA AT KAMPALA CRIMINAL APPLICATION NO. 0341 OF 2014

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UMUTONI ANNET

APPLICANT

VERSUS

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UGANDA

Coram: Hon. Mr. Justice Eldad Mwangusya, JA

RULING

This is an application brought under Article 23 (6) (a) of a Constitution of the Republic of Uganda, Section 40 of the Criminal Procedure Act Cap 116, Section 132 (4) of the Trial on Indictments Act Cap 23 and Rules 6 (2), 43 and 44 of the Judicature (Court of Appeal) Rules S1 13 - 10 seeking orders that the Applicant be granted bail pending Appeal at the discretion of this Honourable Court, that if this Honourable Court is pleased the earlier terms earlier set in the High Court be adopted and any other Order as this Court may deem fit.

The application is supported by the affidavit of the applicant on grounds stated in the motion as follows:-

- 1. That it is the Applicant's Constitutional right to be released on bail pending appeal within the discretion of this Honourable Court.
- 2. That the Applicant shall not abscond from the bail terms as shall be imposed by this Honourable Court.
- 3. That the Applicant has already lodged a notice of appeal in this Honourable Court which appeal is not frivolous and has a high likelihood of success.

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- 4. That the Applicant is a first offender save for the conviction which she is challenging before this Honourable Court giving rise to this application and the offence she was convicted of did not involve personal violence.
- 5. That the Applicant was previously released on bail in the High Court and the Chief Magistrate Court before committal and she never ever absconded from the said terms as were set by Court and also promise to abide by the terms of bail as shall be set by this Honourable Court.
- 6. That is in the in the interest of justice that the Orders sought herein be granted by this Honourable Court

The background to this application as can be ascertained from the affidavit of the Applicant is that she was indicted before the High Court of Uganda for the offences of Child Trafficking C/s 3 (a), 4 (a) and 5 (a) of the Prevention of Trafficking in Persons Act. She was convicted on the 16th October 2014 on two Counts and sentenced on 3.11.2014 to eight (8) years imprisonment on the first count and five (5) years imprisonment on the second count and both sentences to run concurrently. According to the Notice of Appeal filed in this Court on 5th November 2014 she appeal against both her conviction and sentence and arising out of the appeal she applies to the Court to be released on bail pending the hearing and disposal of her appeal.

At the hearing of this application the Applicant was represented by Mr. Louis Tumwesigye while the Respondent was represented by Ms Sharifa Nalwanga a Senior State Attorney.

In his submissions Mr. Tumwesigye referred this Court to the case of ARVID PATEL Vs UGANDA Supreme Court Criminal Application No. 1 of 2003 which laid down guidelines to be followed by an Appellate Court faced by an application of this nature.

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The guidelines were arrived at after reviewing a number of Court decisions on the matter. These guidelines as enumerated in the ruling are as follows:-

- 1. The character of the Applicant;
- 2. Whether he or she is a first offender or not;

- 3. Whether the offence of which the Applicant was convicted involved personal violence.
- 4. The appeal is not frivolous and has a reasonable possibility of success.
- 5. The possibility of substantial delay in the determination of the appeal.
- 6. Whether the Applicant has complied with bail conditions granted after the Applicants conviction and during the pendency of the appeal (if any)

In the view of the Supreme Court it is not necessary that all these conditions should be present in every case. A combination of two or more criteria may be sufficient and each case must be considered on its own fact and circumstances. So the first task is to establish which conditions are present in this case and then determine whether those conditions are sufficient for this court to grant the Applicant bail pending the hearing of the appeal. Some of these conditions are easy to establish while others are not.

Those easy to establish are that the Applicant is a first offender and that there is a possibility of substantial delay in the determination of the appeal. This is because according to Counsel for the Applicant up to the time of hearing this application the trial Court has not availed the recording proceedings to enable the Appellant file her memorandum of appeal. The not availability of the record four months after the judgment is an indicator that the hearing of the appeal is likely to suffer substantial delay. Those conditions difficult to establish include the character of the Applicant who is now facing an eight year sentence for a conviction for an offence related to child trafficking.

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As already stated the Supreme Court in the case of Arvid Patel Vs Uganda (supra) reviewed a number of previous decisions on bail pending appeal. During the review of the cases one issue that stands out is that different conditions should apply in applications for bail before conviction and those that apply after conviction and one of the considerations is that an Applicant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely presumption of innocence. In one of the cases reviewed **GIRDHAL DHANJI MASRAN Vs R** [1960] E. A 320 the Applicant was denied bail on the consideration that he had received a sentence of 18 months imprisonment and if he were granted bail pending appeal he might be 'solely tempted to abscond at any cost'. The Supreme Court observed that the Law 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 the right of appeal in criminal cases'. This is why one of the consideration for granting bail pending appeal is that the appeal is not frivolous and has a possibility of success. On this consideration this Court is handicapped by the fact that neither the grounds of appeal nor the record of appeal were availed by the appellant. The explanation from the bar was that although the applicant applied for the same from the High Court the proceedings are not ready because they are still being typed. While it is the strong view of this Court that proceedings should not take as long as four months to prepare their absence makes it

impossible for this Court to determine as to whether or not the applicants appeal has a reasonable possibility of success. This, coupled with the length of the sentence on the Appellant outweigh the other considerations for grant of bail pending appeal because like in the case of GIRDHAR DHANJI MARRANI Vs R (supra) where the Court declined to grant bail on the consideration that the Applicant who had received a sentence of 18 months would be tempted to abscond the applicant facing a sentence of eight (8) years would also be tempted to

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abscond. So until this Court is availed with the proceedings and judgment of the trial Court I would not be inclined to grant bail pending appeal because I am not in position to determine that given the gravity of the offence with which to applicant was convicted she would not be tempted to abscond.

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Lastly, a comment on the last condition that throughout her trial the applicant had been granted bail whose conditions she religiously observed. The consideration set down in the case of **Arvid Patel (Supra)** is that the Applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any). Unlike Arvid Patel who had been granted bail after conviction the applicant in this case has not. So the condition is not applicable to her. I have already explained that after conviction the character of the Applicant before conviction becomes irrelevant because of the different considerations for bail pending appeal from those of a bail application pending trial.

The Applicant had presented three sureties whom Counsel for the Respondent opposed because they were not substantial. Her reason was that their specific occupations were not given. They were described as business persons. My observation is that, that alone would not disqualify any of the sureties because all Court would have to do is establish their specific business if it felt that their particulars needed more clarification.

In conclusion I am not satisfied that in the absence of the Court record of proceedings and the judgment this Court is sufficiently equipped to determine this application in favour of the applicant and for reasons already advanced in the ruling her application is dismissed.

Dated at Kampala this 13th day of March, 2015.

Hon. Mr. Justice Mwangusya Eldad, JA COURT OF APPEAL

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