

UGANDA / JUDGMENT

Wanyenze v Uganda (High Court Miscellaneous Application 130 of 2021) [2021] UGHCCRD 114 (16 September 2021) [2021] UGHCCRD 114

COURT

HC: Criminal Division (Uganda)

BEFORE

Gadenya, J

CASE / FILE NUMBER

High Court Miscellaneous Application 130 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

CRIMINAL DIVISION

HCMA 130 of 2021

ARISING FROM ENTEBBE COURT CO NO.19 OF 2021

WANYENZE LILIAN SUSAN APPLICANT

VS

UGANDA RESPONDENT

RULING BY JUSTICE GADENYA PAUL WOLIMBWA

Introduction

This application is brought under the provisions of article 50(1) 23(6)(a), section 75(4)(a) of the Magistrates Courts Act, section (15) (1), (3), (4) of the Human Rights Enforcement Act and rules 5(a) and 9(1) of the Judicature (fundamental and Other Rights and Freedoms (Enforcement Procedure Rules, 2019).

The application seeks the following prayers:

1. A declaration that the applicant is being unreasonably detained;
2. An Order that the applicant be released on bail on her recognisance and,
3. An order that the Respondent pays the costs of this application.

The grounds of the application are, among other things:

1. The applicant is charged with being in possession of narcotics, which is an offence triable by subordinate court;
2. That the applicant has been on remand in Kigo Prison since 19th of January 2021, without trial, which is beyond the 120 days categorised as unreasonable detention under section 15(4) (b) of the Human Rights Enforcement Act;
3. That after being on remand for over 100 days without trial, the Chief Magistrate of Entebbe granted the applicant a 3 million shillings bail contrary to section 76(b) of the Magistrates Courts Act which provides for release of an accused in such circumstances on bail on her recognizance.
4. That the case bail of three million shillings has perpetuated the unreasonable detention of the applicant as she does not have the means to raise the amount of money or any money at all, especially since she has been in prison for so long and was not working. All the money she had was confiscated by the Police at the time of the arrest.
5. That the applicant has been denied access to a lawyer and, therefore, is unable to make her defence;
6. That the continued detention of the applicant amounts to a miscarriage of justice; and,
7. That the applicant has substantial sureties.

The Application is supported by the affidavit of Albert Madoolo, a brother to the applicant, who deposed to the above matters and circumstances leading to the applicant's arrest. He also deposed to the difficulty of accessing her in the prisons due to restrictions imposed to control the spread of COVID-19 in the country. The Respondent did not file an affidavit in opposition because the Applicant did not serve the Office of the Directorate of Public Prosecutions with the supporting affidavit to the application.

Background to the Application

According to the lower court file, the Applicant, who was escorting Ritah Owobosobozi on a medical visa to India on 8th January 2021, was arrested at Entebbe International Airport with allegations of drug trafficking. They were detained at Entebbe Police Station from 8th to 18th January 2021.

The Applicant was charged with the offence of unlawful possession of narcotic drugs c/s 4(1) and (2)(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act and in count two, the Applicant and others still at large, was charged with the offence of trafficking in narcotic drugs c/s 5 of the Narcotic Drugs and Psychotropic Substances (Control) Act, at the Chief Magistrate Court, Entebbe. The Applicant pleaded not guilty to the charges and was remanded at Kigo Government Women's Prison.

On 12th April 2021, the Applicant applied for bail under Article 28(3)(a) and 5(a) of the Constitution. On 21st April 2021, the Chief Magistrate granted the Applicant bail on condition that the applicant pays cash bail of three million shillings and produces two sureties, each to be bonded a sum of ten million shillings, not cash. However, due to poverty, the Applicant was not able to meet the bail conditions and remains in Prison to this day.

Meanwhile, Albert Madoodo, a brother to the Applicant, being concerned about the alleged violation of the Applicant's rights due to her incarceration without her case being heard, filed this application for her unconditional release on the ground that the bail conditions imposed on the Applicant were harsh and in essence disguised as a sentence meant to keep her in prison and yet she is presumed to be innocent.

Representation

The Applicant was represented by M/s Odeke and Co. Advocates, while Ms Njuki Mariam, a State Attorney in the Office of the Directorate of Public Prosecutions, represented the Respondent.

Submissions of the Applicant

Counsel for the Applicant submitted that the Chief Magistrate contravened the law when she granted the Applicant cash bail of three million shillings. Yet, she had spent more than sixty days on remand, which would have entitled her to be released on her recognisance as directed by **article 23(6)(b) of the Constitution and sections 76(2) and 75 of the Magistrate Courts Act**.

He submitted that the Applicant does not have the means to raise the cash bail as the Police Authorities confiscated all her resources at the time of her arrest.

Furthermore, counsel submitted that the continued detention of the applicant without trial for more than 120 days constitutes unreasonable detention and that, accordingly, the Applicant is entitled to unconditional release by the High Court in accordance with **section 15(1) of the Human Rights (Enforcement) Act**.

Counsel also submitted that the Respondent, I guess she meant the Prisons Authorities, have denied the Applicant access to counsel in contravention of article 28 of the Constitution, which guarantees the right to a fair hearing. As a result of the Respondent's actions, the Applicant cannot prepare her defence against the charges that are levelled against her.

He submitted that the High Court is vested with powers under **section 75(4)(a) of the Magistrates Courts Act** when read together with **section 76(2) of the Magistrates Courts Act** to release the Applicant on her recognisance since she has been on remand for more sixty days without trial and that in any case, the Applicant has substantial sureties, who the Chief Magistrate approved. Lastly, the Applicant prayed for the costs of the Application.

Submissions of the Respondent

The Respondent opposed the application on the following grounds, namely that:

* The applicant is charged with a serious offence, and chances are high that she will abscond if released on her recognisance.

* That the applicant cannot be released on her recognisance because section 14 of the Trial on Indictment Act does not provide for the release of inmates who are released on bail but fail to meet the conditions for their release.

* That the court has discretion when granting bail to impose conditions including payment of cash, so that the applicant does not abscond.

* That the Applicant presented only one surety, whom the court cannot trust or rely on to pay the bond sum if the Applicant absconds.

* That since the Applicant has already been granted on conditions which are reasonable, the court should maintain those conditions and release her bail.

In conclusion, counsel for the Respondent invited the court to disregard the Applicant's prayers as none of her constitutional rights were violated by the court.

Submissions of the Applicant in rejoinder

Counsel for the Applicant submitted that the Respondent never filed an affidavit in reply and that the court should take it that the Respondent accepted all the contents of the Applicant's affidavit. He relied on the case of Prof. Joe Onyango Oloka and 9 Others vs. The Attorney General, Constitutional Petition No. 18 of 2014, where the court observed that where facts are sworn in an affidavit, the burden to deny them is on the other party. Failure to do that they are presumed to have been accepted.

Secondly, counsel submitted that **section 14 of the Trial on Indictment Act** does not apply to this case because this case is triable by the Magistrates Courts. He submitted that the applicable law in this matter is **section 75(4)(a) of the Magistrate Courts Act**, which provides that:

The High Court may, in any case, where an accused person is appearing before a magistrate's court where the case is not one mentioned in subsection (2), direct that a person to whom bail has been refused by a magistrate court be released on bail or that the amount required for any bail bond be reduced.

Thirdly, the submission of the Respondent did not allude to the violation of the Applicant's rights and yet her to be released on mandatory bond in accordance with **article 23(6)(b) of the Constitution** was violated by the lower court when it directed the Applicant to execute a cash bond as opposed to a none cash bond. The Applicant has been on remand for more than 270 days without being tried in contravention of **section 15(4) (b) of the Human Rights Enforcement Act**.

Fourthly, according to section 8 of the Human Rights Enforcement Act, fundamental rights take precedence over any matter, and, as such, the applicant's fundamental rights that have been breached should be inquired into before other matters are dealt with.

Lastly, they should release the Applicant on her recognisance...with her two sureties, which the Chief Magistrate had already approved.

Issues for consideration

1. Whether the Chief Magistrate erred in granting cash bond to the Applicant who had qualified for mandatory bail in accordance with article 23(6)(b) of the Constitution
2. Whether the Applicant's continued incarceration at Kigo Prison constitutes illegal detention.
3. What remedies are available to the parties, if any?

Whether the Chief Magistrate erred in granting cash bond to the Applicant who had qualified for mandatory bail in accordance with article 23(6)(b) of the Constitution

The case for the Applicant was that when article 23(6)(b) of the Constitution is read together with **sections 76(2) and 75 of the Magistrate Act**, an accused person who is charged with an offence triable by a magistrate court and has been spent more than 60 days on remand, without trial is entitled to be released on his recognisance without a cash bond. On the other hand, the Respondent submitted that the court has discretion under article 23(b)(b) of the Constitution to either release the accused on their recognisance or impose conditions on the bail.

Article 23(6)(b) of the Constitution, which is the applicable law to this case, provides that:

Where a person is arrested in the respect of a criminal offence-

(b) in the case of an offence which is triable by the High Court as well as by a subordinate court, if that person has been remanded in custody in respect of the offence for sixty days before trial, that person shall be released on bail on such conditions as the court considers reasonable.

Unlike **Article 23(6)(a) of the Constitution**, which guarantees an accused person the right to apply for bail, **Article 23(6)(b) of the Constitution** grants an accused person the right to be released on bail if they have been on remand for more than sixty days without trial, in a case triable by a Magistrates Court. However, the same article directs the court to release the accused person on bail '**on such conditions as the court may consider reasonable**'.

According to **Article 23(6)(a) of the Constitution**, whether to release an accused person on mandatory bail, with or without conditions, is at the court's discretion. This clawback provision in this article was explicitly inserted in the Constitution as a mechanism for ensuring that accused persons released on bail under this provision are not given a blank check to decide whether to come back to court for their trial. It is for this reason, therefore, that the court is authorised to impose such conditions as it considers reasonable to guarantee or ensure that the accused person does not abscond. What is reasonable depends on the circumstances of each case, but what is critical is that the conditions imposed shall not grant the right and, at the same time, take it away through the imposition of stiff conditions that negate the very reasons why mandatory bail was provided in the Constitution. For guidance, Magistrates, when dealing with mandatory bail, should be alive of the economic realities of the accused persons, who, in most

cases, are too poor to get out on cash bail and have to stay in prison hoping to benefit from mandatory bail, which, is generally granted on less onerous cash conditions unlike ordinary bail, which is granted in the immediate aftermath of the accused's arrest on more stringent conditions to among other things inspire public confidence in the administration of justice and sieve out suspects, who may be a flight risk.

In conclusion, the Chief Magistrate did not contravene the law when she imposed a cash bail on the Applicant.

Whether the Applicant is unreasonably detained at Kigo Prison?

The case made on behalf of the Applicant is that her continued incarceration at the Kigo Women's' Prison for more than 120 days without trial constitutes unreasonable detention under section 15 of the Human Rights (Enforcement) Act. On the other hand, the Respondent submitted that the Applicant was granted bail, which she failed to meet and cannot claim to be unreasonably detained.

There is no doubt that the Applicant has been in Kigo Prison since 18th January 2021, which to date marks close to 252 days. She was granted bail but failed to raise three million shillings, which the court set as her bond. As of today, the 16th of September 2021, the case against the Applicant remains unheard, and it is not certain when the court will be able to hear the case.

Whereas in the past, inmates whose cases had not been heard could indefinitely remain on remand if they failed to meet bail conditions, today, the situation is different following the enactment of the **Human Rights (Enforcement) Act**.

Section 15 (1), thereof, provides that:

A person who has reason to believe that another person is being unreasonably detained in the circumstances prescribed in subsection (4) may petition the High Court for the unconditional release of such a person.

Section 15(3), provides that:

The High Court shall on being satisfied that a person is unreasonably detained –

(a) order for the production of such a person before court;

(b) Impose obligations on the person in charge of a detention center in which such a person is detained as the High Court considers appropriate; or

(c) order for the release of such a person from detention on any terms and conditions as the High Court determines.

Section 15(4)(b) provides that:

In this section, a person shall be taken to be unreasonably detained where-

(b) he or she being charged with an offense triable by a subordinate court, is remanded in custody before trial for a period exceeding one hundred and twenty days.

A person who is triable by a Magistrates Court is deemed unreasonably detained if he or she, has been on remand for more than 120 days without trial. In the case under consideration, the Applicant was arrested and remanded by the court on 18th January 2021. She has been on remand for about 252 days, which is more than the 120-day limit set by **Section 15 of the Human Rights (Enforcement) Act**. However, the State Attorney argued that the Applicant is not unreasonably held because she was granted bail but failed to meet the conditions. This cannot be true!

Section 15 of the Human Rights (Enforcement) Act, as I understand, is meant to give effect to the right to a fair hearing in **Article 28 of the Constitution** and curtail excesses, in this case, by the Prosecution, where suspects are charged with offences and left unattended to in the Prisons, without any attempt being made to bring their cases for trial, first within 60 days as set out in **Article 23(6)(b) of the Constitution** and then, within 120 days as provided for in the Human Rights (Enforcement) Act. The inability to meet bail conditions is irrelevant under **Section 15 of the Human Rights (Enforcement) Act**. Section 15 is triggered when the judicial system fails to try an accused person who has been on remand for 120 days and above, which is the mischief that the section is meant to cure. The Applicant has, therefore, met the threshold of being unreasonably detained within the meaning of **section 15 of the Human Rights (Enforcement) Act**.

What remedies are available to the parties?

According to section 15(3) (c) of the Human Rights (Enforcement) Act, -

The High Court shall on being satisfied that a person is unreasonably detained –

(c) order for the release of such a person from detention on any terms and conditions as the High Court determines.

The Applicant has asked me to release her on her recognisance, while the Respondent proposed that the Applicant be released on the same bail conditions set by the Chief Magistrate, Entebbe. In determining the appropriate bail conditions, the court is aware that the Applicant remains in Prison because she does not have the means to pay the three million shillings imposed by the Chief Magistrate. Therefore, within Article 23(6)(b) of the Constitution, it would be unreasonable to set the same bail condition the Applicant failed to meet. Equally, the imposition of harsher bail conditions would defeat the purpose of this particular kind of bail and the spirit of the **Human Rights (Enforcement) Act**.

The Applicant's case, therefore, calls upon the court to impose conditions that will ensure that she continues to attend court from her home until her trial is completed. In the circumstances, I consider a non-cash bond of ten million shillings appropriate for the Applicant. In addition to the no cash bond, the Applicant will present two sureties, each of which will be bonded a sum of five million shillings, not cash. The Deputy Registrar of the Criminal Division is directed to approve

the sureties before the Applicant is released on bail. The Applicant will report to the Chief Magistrates Court, Entebbe, on 24th September 2021 for further management of her bail and the case.

As regards the issue of costs, each party shall meet their costs, as the court granted the Applicant bail but, on her own volition, failed to comply with the conditions.

Decision

I allow the Application with the following orders:

1. The Applicant is granted a none cash bail of five million shillings;
2. The Applicant will present two sureties, each of which will be bonded five million shillings, not cash.
3. The Deputy Registrar of the Criminal Division will approve the sureties before the applicant is released on bail and
4. Each party will meet their costs.

It is so ordered.

Gadenya Paul Wolimbwa

JUDGE

16th September 2021.

I request the Deputy Registrar to read this ruling to the parties on 22nd September 2021 at 9.00 am.

Gadenya Paul Wolimbwa

JUDGE

16th September 2021.

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