

14 and 15 of the Trial on Indictments Act, Cap 23 and Rule 2 of the Judicature (Criminal Procedure) (Applications) Rules SI 13-8), seeking for an orders that:

- a) The applicants be granted bail pending the hearing and disposal of their case; and
- b) Any other reliefs as court may deem fit.

[4] The grounds in support of the application as contained in the Notice of Motion and applicants' affidavits in support are briefly that:

1. The applicants were arrested on 10th February 2022, from the Ministry of Gender, Labour and Social Development headquarters and detained at Jinja Road Police Station at Kampala for more than 10 days;
2. The applicants applied to the Chief Magistrates Court of Nakawa to be unconditionally released having been unlawfully detained at Jinja Road Police Station in Kampala and the court ordered for their unconditional release;
3. The police disobeyed the order and after another two days of unlawful detention, produced the applicants in the Chief Magistrate's Court of Nakawa at Nakawa on 25th February 2022, charging them with the following offences:
 - a) Count 1: Aggravated Trafficking in Persons contrary to Section 3(1) (a) and 4 (i) of the Prevention of Trafficking in Persons Act, 2009;
 - b) Count 2: Aggravated Trafficking in Persons contrary to Section 3(1) (a) and 4 (j) of the Prevention of Trafficking in Persons Act, 2009; and
 - c) Count 3: Aggravated Trafficking in Persons contrary to Section 3(1) (a) and 4(c) of the Prevention of Trafficking in Persons Act, 2009.
4. The applicants pleaded not guilty to all the offences and the 1st and 4th applicants were remanded to Upper Prison Luzira, while the 2nd, 3rd and 5th applicants were remanded to the women's' wing of Luzira Government Prison;
5. The offences for which the applicants have been charged are only triable and bailable by this Honourable. Court;
6. The applicants undertake not to interfere with investigations or witnesses and there is no likelihood of the applicants interfering with investigations or witnesses as the applicants do not know the witnesses the state intends to produce since no disclosure has been made by the State to the applicants or their lawyers;

7. There are no other known pending criminal charges against the applicants and no disclosed or apparent record of any previous imprisonment of the applicants or any previous breach by the applicants of any bail conditions granted by the court;
8. The applicants are presumed innocent until proved guilty or until they plead guilty, which they have no intention of doing;
9. Save for the 3rd applicant, the applicants were duly licensed as labour exporters by the government of the Republic of Uganda under their company Nile Treasure Gate Company having satisfied the provisions of the regulations governing the recruitment and employment of Ugandan Migrant Workers abroad and did not traffic any human being as all their activities were lawful;
10. It is the applicants' fundamental constitutional right to apply for bail in this Honourable court;
11. Exceptional circumstances exist justifying the release of the 3rd applicant on bail because she suffers from a grave illness and this has been certified by a medical officer where she is detained indicating that the prison medical facility is incapable of offering adequate medical treatment to her for severe hypertensive heart disease, clinical gastricia and a high suspicion of peptic ulcer disease, which are very difficult conditions to manage while in prison, as per the medical report of the medical superintendent of Murchison Bay Hospital;
12. The applicants have fixed places of abode within the jurisdiction of this Honourable Court and undertake to appear in Court as and when required in order to clear his name of the false allegations the state has levelled against him;
13. The applicants have sound and substantial sureties within the jurisdiction of this Honourable Court who have undertaken to bind themselves and ensure that the applicants shall comply with the conditions of bail if released;
14. This Honourable Court has wide discretionary powers to release the applicants on bail at any stage of the proceedings as the offences with which the applicants are charged with are bailable by this Honourable Court;
15. The applicants shall abide by any and all the bail conditions imposed upon them by this Honourable Court;

16. It is only constitutional, fair, just and in the interests of justice that the applicant be granted bail pending their trial;

17. The applicants verily believe in their innocence on the charges preferred against them and it is their strong desire to prove it at trial whenever it commences;

18. The applicants have families and responsibilities and are the sole providers for their families; and

19. The applicants have not absconded from the jurisdiction of this court and shall not abscond if released on bail.

[5] The DPP has opposed the application through an affidavit in reply deposed by detective ASP Nambusi Lydia from the Criminal Investigations Directorate, Kibuli Headquarters.

REPRESENTATION

[6] Mr Caleb Alaka represented the applicants and Mr Joseph Kyomuhendo Chief State Attorney appeared for the DPP.

THE DPP'S PRELIMINARY OBJECTION

[7] When this application was called on 27th September 2022, Mr Kyomuhendo raised a preliminary objection to its hearing, citing Rule 54 of the Judicature (High Court International Crimes Division) Rules of 2016 (herein after referred to as the ICD Rules), which is to the effect that an accused person can only apply for bail to the trial court after confirmation of charges by this pretrial court, if that is the case and not before that.

[8] Mr Alaka prayed to file written submissions in reply to the preliminary objection which prayer was allowed. Mr Kyomuhendo was also allowed to file a written rejoinder.

Arguments for the applicants in reply to the preliminary objection

[9] Mr. Alaka submitted inter alia that the substantive laws governing bail in the High Court are the Constitution of the Republic of Uganda 1995 as amended and the Trial on Indictments Act Cap 23 (TIA). He cited the case of **Attorney General versus Tumushabe (2008) EA 26** in which the Justice Mulenga JSC (as he then was) held that Article 23(6) (a) of the Constitution allows every person charged with an offence to apply for bail, which the court may grant at its own discretion.

[10] Counsel stated that since the Constitution of the Republic of Uganda is the supreme law in Uganda, its provisions override Rule 54 (1) of the ICD Rules of this court.

[11] He also pointed out that the parent law that governs bail in the High Court of Uganda including this court is Section 14 of the TIA, which provides that the High Court may at any stage in the proceedings release the accused person on bail.

[12] He also cited Article 138(1) of the Constitution, in support of his argument that this court is presided over by a High Court Judge.

[13] He referred **to Page 1117 of Black's Law Dictionary 4th Edition**, which defines legal proceedings as all proceedings authorized or sanctioned by law, and brought or instituted in a court of justice, or legal tribunal, for the acquiring of a right or enforcement of a remedy.

[14] He maintained that in light of the above-cited provisions, this court is vested with the requisite jurisdiction to release any accused person on bail.

[15] According to Mr. Alaka, the provisions in Section 14 of the TIA are not ambiguous and should therefore be interpreted using the literal rule of statutory interpretation. To buttress his argument, he cited the following cases: **David Wesley Tusingwire vs the Attorney General Constitutional Appeal No. 4 of 2016, Mrs. Seforoza Nyamuchoncho (Administrator of the Estate of the Late Justice Polycarp Nyamuchoncho) & Anor vs Attorney General & 2 others High Court Misc. Cause No.241 of 271** and asked that this court interprets the words in Section 14 of the TIA in their natural and ordinary sense and finds that it has the jurisdiction to hear a bail application.

[16] He stated that the implication of Rule 54 of the ICD Rules is that an accused person can only apply for bail before the trial judge or panel and that is contrary to Section 14 of the TIA, which allows any person appearing in this court to apply for bail before it. He concluded that Rule 54(1) of the ICD Rules defeats the spirit of the law on bail, whose primary purpose is to ensure that an applicant for bail appears to stand trial, without being detained in custody during the trial period.

[17] He prayed that this court finds that the provisions of bail under Article 23(6)(a) of the Constitution are supreme to Rule 54(1) of the ICD Rules; that Section 14 of the TIA is the parent statute made by parliament governing bail in the High Court, pursuant to Article 97 of the Constitution and therefore supersedes Rule 54 of the ICD Rules, which is subsidiary legislation; and that any judge of the High Court is vested with the jurisdiction to hear a bail application and either grant or deny it at any stage of the proceedings.

ARGUMENTS FOR THE RESPONDENT IN REJOINDER TO THE PRELIMINARY OBJECTION

[18] Mr. Kyomuhendo submitted in rejoinder that the International Crimes Division (ICD) is a specialized division of the High Court and its procedures are similar to the procedures of the International Criminal Court (ICC).

[19] According to state counsel, Rule 54 of the ICD Rules does not contradict Section 14 of the TIA but only supplements it, in order to promote a fair and expeditious trial of the cases and its rationale is to enable the pre-trial judge concentrate on the pre-trial and conclude the proceedings expeditiously without any interruptions, rather than to entertain the delays that would arise from entertaining any bail application at this stage. He further submitted that Rule 54(1) of the ICD Rules does not contravene Article 23(6) (a) of the Constitution and disagreed with the applicants' claim that the Constitution expressly provides that bail can be applied for at any stage of the trial, as the relevant article is silent regarding the stage at which bail can be applied for.

[20] Mr. Kyomuhendo cited in support of his arguments the decisions ***in Namanya Ivan versus Uganda Misc. Cause No.2 of 2021 and Ninyesiga Onesmus Misc. Cause No.3 of 2021***, which bail applications this court dismissed for lack of jurisdiction, as the main cases were before the court for pre-trial hearing. He prayed that this court dismisses the bail application.

DETERMINATION

[21] I have taken into account the submissions of both counsel and the relevant law as well as the authorities cited for my guidance.

[22] Rule 54(1) of the ICD Rules provides:

"In accordance with section 14 of the Trial on Indictments Act, the Trial Judge or Trial Panel may, at any stage in the proceedings, release an accused person on bail, 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."

[23] Counsel for both parties rightly agree that the effect of this rule is to prevent any application for bail from being brought before a pretrial court.

[24] The crux of Mr. Alaka's submission in this matter is that Rule 54(1) of the ICD Rules is inconsistent with Article 23(6) (a) of the Constitution and Section 14 of the TIA. Article 23 (6) (a) of the Constitution provides:

“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”.

[25] The Honourable Justice Faith Mwendha JSC held in **David Wesley Tusingwire vs the Attorney General Constitutional Appeal (supra)** that where words or phrases in the Constitution are clear and unambiguous, they must be given their primary, plain or natural meaning. The language used must be construed in its natural and ordinary sense. Article 23 (6) (a) of the Constitution clearly shows that anyone arrested can apply for bail, while Section 14 of the TIA gives a judge of the High Court discretion to grant bail at any stage of the proceedings.

[26] The jurisdiction of High Court judges is properly provided for in Article 139(1) of the Constitution as follows:

The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.
(Emphasis is mine).

[27] In the same way, Section 1 of the Trial on Indictments Act vests upon the High Court unlimited jurisdiction to try any offence under any written law, after committal proceedings have been conducted.

[28] Similarly, the special jurisdiction of the judges of the ICD is well adumbrated in Direction No. 6 of the High Court (International Crimes Division) Practice Direction 2011, which establishes the ICD. It states:

Without prejudice to Article 139 of the Constitution, the Division shall try any offence relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime as may be provided for under the Penal Code Act, Cap 120, the Geneva Conventions Act, Cap 363, the International Criminal Court Act, No. II of 2010 or under any other penal enactment.

[29] The said direction read together with Article 139(1) of the Constitution leads me to the inevitable conclusion that all judges of the ICD (just like High Court Judges in Circuits or in Criminal Division of the High Court), are vested with jurisdiction to hear all the matters (including bail applications) brought before the court by the parties and it does not matter whether the particular court is sitting in a pretrial or trial capacity. This fact is cemented by Section 14(1) of the Trial on Indictment Act which provides:

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. (Underlined for emphasis).

[30] The provisions of Rule 54 (1) of the ICD Rules should thus be interpreted subject to, Article 139(1) of the Constitution, which is the supreme law of the land. The Constitution is the standard upon which other laws are judged, and any law which is consistent with the Constitution or contravenes it is null and void to the extent of the inconsistency.

[31] The said Rule should also be read together with Section 1 of the Trial on Indictments Act as well as Section 14 of the Judicature Act.

[32] The case before me was committed to the ICD for trial on 15th August 2022. It is thus properly before me for pretrial proceedings in which the court conducts a Pretrial Conference inter alia before confirming charges. Rule 6(2) of the ICD Rules summarizes the purpose of a Pre-Trial conference. It states that:

The Division shall, after an accused person has been committed for trial before the Division, hold a pre-trial conference to consider—

(a) the facts of the case;

(b) the markings for identification of the evidence of the parties;

(c) any waiver of objections to admissibility of evidence;

(d) the settlement of some or all of the issues;

(e) the status of victims and witnesses and any special needs of the witnesses, the accused person and the Defence witnesses, if any;

(f) the necessary orders and directions to ensure that the case is ready for trial, and that the trial proceeds in an orderly and efficient manner, and the obtaining of such orders;

(g) the modification of the pre-trial order if the accused admits the charge but interposes a lawful defence; and

(h) any other matters that will promote a fair and expeditious trial of the case.

[33] Under Rule 7 (1) of the ICD Rules a pre-trial Judge is expected to:

(a) consider and rule on issues relating to witness protection and any application for special measures by the parties made in accordance with rule 36 (10);

(b) consider and rule on issues relating to disclosure of evidence by both the Prosecution and the Defence;

(c) at the request of the Prosecution or on his or her own initiative, issue orders for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of the accused and the protection of national security information;

(d) confirm the case for trial by the Trial Panel; and

(e) preside over and rule on any other preliminary issue that may arise at the pre-trial stage or that may be referred to the pretrial Judge by the Trial Panel. (Emphasis is mine).

[34] These rules that make provision for the powers of the pretrial court were primarily enacted for the protection of not just the rights of accused persons, but also victims' rights, at all stages of the trial process in the ICD. It is therefore surprising that an accused's constitutional right to apply for bail at the pretrial stage was summarily taken away by Rule 54 (1) of the ICD Rules.

[35] It is important to note that had this case been sent for trial before the Criminal Division of the High Court or before a Circuit High Court Judge, (as is still the practice today with Trafficking in Persons cases countrywide, despite the provisions of Direction 6 of the High Court (International Crimes Division) Practice Directions 2011, mandating the ICD to try such cases), there would have been no contest by state counsel regarding the jurisdiction of these courts to hear bail applications in Trafficking in Persons cases.

[36] The practice of the ICD in not considering bail applications at the pretrial stage in the application of Rule 54(1) of the ICD Rules is therefore discriminatory, since accused persons appearing in the Criminal Division of the High Court or in High Court Circuits have the right to exercise their right to apply for bail immediately after their committal to the High Court.

[37] Section 39 of the Judicature Act provides that the Jurisdiction vested in the High Court by the Constitution, the Judicature Act or other enactment is to be exercised in accordance with the practice and procedure provided by the Judicature Act or any other law or by rules and orders of the Court as may be made under the Judicature Act or other Law. The Rules Committee established under Section 40 of the Judicature Act, is empowered under Section 41 of the same Act to make rules governing the practice and procedure of the High Court and other Courts in Uganda. The ICD Rules were such rules made pursuant to Section 41 (1) of the Judicature Act.

[38] The Rules Committee in providing for Rule 54(1) of the ICD Rules may have envisaged a situation in which timely and conclusive investigations are

conducted and expeditious pretrial of cases are also conducted within a short period of time, so that accused persons whose charges are confirmed, can then exercise their right to apply for bail in the trial court. The reality is far from their prediction as it has taken over five months from 25th February 2022 for the accused in this case to be committed for trial. The delay in conducting committal proceedings is in most cases attributed to delay in concluding investigations, especially in transnational crimes like this one.

[39] Whilst I entirely agree with State Counsel that the ICD is a specialized division of the High Court, established to implement the complementarity provisions of the Rome Statute, and applies special procedures in its proceedings, I do not agree with his innuendo that specialized courts cannot entertain bail applications or even release an accused on bail in deserving cases. Article 60 of the Rome Statute allows accused persons to apply for interim release at the pre-trial stage of their matters in the ICC.

[40] That notwithstanding, as I have already intimated, the effect of Rule 54 (1) of the ICD Rules is not just to take away the accused's right to bail, but also to limit the jurisdiction of the Pre-Trial Judge. It varies the provisions of Article 139 and Sections 14 of the Judicature Act and Section 1 of the Trial on Indictments Act, by taking away the unlimited jurisdiction conferred upon a High Court Judge by the Constitution, which jurisdiction is iterated in the Judicature Act and the Trial on Indictments Act.

[41] It is trite law that if an act of Parliament or Subsidiary Legislation or other act or omission has the effect of varying a provision of the Constitution, then that Act or Subsidiary Legislation or act or omission is said to have amended the affected article of the Constitution. ***See Tusingwire Vs A.G. Constitutional Petition No. 2/2013 Paul Semwogerere Vs A.G. Constitutional Petition No. 1/2002 (per Kanyeihamba) Fox Odoi - Oywelowo & Anor. Vs Attorney General Constitutional Petition No. 8/2003.***

[42] This court's implementation of Rule 54 (1) of the ICD Rules will thus result in the violation of Article 139 of the Constitution, not to mention the provisions of Section 1 of the Trial on Indictments Act and Section 14 of the Judicature Act. ***See Paul Semwogerere Vs. Attorney General Supra.***

[43] Because Article 2 of the Constitution provides that the Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda and that laws that are inconsistent with any of its provisions are void to the extent of the inconsistency, it goes without saying that Rule 54(1) of the ICD Rules, is void to the extent that it takes away the right of an accused to apply for bail before a pretrial judge of the High Court and accordingly takes away the unlimited original jurisdiction of the said court.

[44] In the result and in agreement with the submissions of Mr Alaka, I dismiss the preliminary objection and shall proceed to hear the bail application on its merits.

[45] This ruling will be delivered to the parties virtually (via email) today by the ICD Systems Administrator, as both counsel have provided the court with their email addresses.

[46] The bail application is fixed for hearing on 2nd November 2022 at 10:00 am.

I so order.

Susan Okalany

JUDGE

27/10/2022