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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMAPALA**

**[INTERNATIONAL CRIMES DIVISION]**

**CRIMINAL MISC APPLICATION NO.009 OF 2023**

**[ARISING FROM CRIMINAL CASE NO. 0010 – 2023]**

**1. CHELIMO JULIUSMOSES**

**2. KIPLIM FELIX**

**3. KWEMOI JOSHUA:..... APPLICANTS/ACCUSED**

**VERSUS**

20  
**UGANDA :..... RESPONDENT/ PROSECUTOR**

**BEFORE: HON MR. JUSTICE BASHAIJA K. ANDREW.**

**RULING.**

Chelimo Julius Moses, Kiplimo Felix and Kwemio Joshua (*hereinafter referred to as 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Applicant, respectively*) brought this application under Article 23(6)(a) and 139(1) of the Constitution of the Republic of Uganda, Section 14 and 15 of the Trial On Indictments Act Cap 23, Rules 5,6, 9, 10, 11,12, and 15 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022, and other enabling Laws, to be released on bail pending trial. The application is supported by the respective affidavits of the Applicants. The application was opposed by the Respondent. The grounds of the application are that: -

- 30
1. *The 1<sup>st</sup> Applicant was arrested around the 30<sup>th</sup> day of October 2022, from their home in Bukwo District and taken to Kiira Police Station and was later charged with Aggravated Trafficking in Children C/s. 3(a) and 5(a) of the Prevention of Trafficking in Persons Act, 2009, and two other counts*

10 of Aggravated Defilement **C/s 129(3) and (4) (c) of the Penal Code Act, Cap 120**. For the 2<sup>nd</sup> Applicant, that he was arrested on 2<sup>nd</sup> November 2022, and charged with the offence of Promoting Trafficking in Children **C/s 7(a) of the Prevention of Trafficking in Persons Act, 2009**. For the 3<sup>rd</sup> Applicant, he too was arrested on 2<sup>nd</sup> November, 2022, and charged with Aggravated Trafficking in Children **C/s 3(a) and 5(a) of the Prevention of Trafficking in Persons Act, 2009**.

20 2. The Applicants were arraigned before the Chief Magistrate of Kiira Chief Magistrate's Court on the 2<sup>nd</sup> day of November 2022 and subsequently remanded to Luzira Upper Prison before committal to the High Court on 15<sup>th</sup> March 2023.

3. It is the Applicants' fundamental Constitutional right to apply for bail before this Honourable Court.

4. The Applicants are presumed innocent and intend to prove their innocence as they strongly believe that the charges levelled against them are false fabricated and intended to embarrass them.

5. The 1<sup>st</sup> Applicant is the Chairman LCV for Bukwo District, and has a fixed place of abode at Kabulwo village, Amanang subcounty, Bukwo District, and he is willing to abide by the bail conditions that may be imposed by this Honourable Court.

30 6. The Applicants will not, and undertake not to interfere with the investigations or witnesses if released on bail and are aware that such actions may lead to cancellation of bail.

7. There are no other known pending criminal charges whatsoever against the Applicants in any other court.

8. The Applicants have substantial sureties, all resident within the jurisdiction of this Honourable Court who are ready to undertake to ensure that the Applicants shall comply the conditions of bail if released.





10 9. *The Court has wide discretionary powers to release the Applicants on bail as the offences with which the Applicants are charged are bailable by this Honourable Court.*

10. *The Applicants shall abide by all the conditions imposed upon them by this Honourable Court and shall not abscond from attending court if released on bail.*

11. *It is only fair, just and in the interest of justice that this Honourable Court exercises its discretion in favour of the Applicants.*

20 At the hearing, the Applicants were jointly represented by Mr. Ochieng Evans of M/s. Ochieng Associated Advocates & Solicitors. The Respondent was represented by Senior State Attorney Ms. Marion Benbella. Both counsel made oral submissions to argue the application and provided court with authorities. Court is thankful to them.

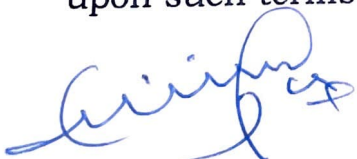
***The Law.***

30 The law which underpins bail is enshrined in the Constitution and Acts of Parliament as cited in the Notice of Motion herein. It is also in decided cases which interprets and gives effect to the law regarding the applicable position. Counsel for the parties in the present case have correctly cited the applicable law in their respective submissions. It is a settled position that bail is a constitutional right that flows from the presumption of innocence of an accused person, under *Article 28 (3) (a)* of the Constitution. The relevant portion in *Clause (3)(a)* thereof, provides as follows;

***“(3) Every person who is charged with a criminal offence shall—***

***(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;”***

Whereas a person charged with a criminal offence has a right to apply for bail, *Article 23(6)* of the Constitution gives courts the discretion to grant the bail upon such terms and conditions as court may consider reasonable.



Clause (6)(a) thereof, provides as follows;

***“(6) Where a person is arrested in respect of a criminal offence—***

***(a) 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 use of the word “may” in Article 23(6)(a) connotes discretion on part of the court. Thus, the constitutional right available to the applicant is only the right to apply for bail, and there is no automatic right to bail. Similar position was confirmed by the Supreme Court in the case of ***Uganda vs. Col. (Rtd) Dr. Kiiza Besigye Constitutional Ref. No.20 of 2005.***

20 Bail is also provided for under the ***Trial on Indictments Act Cap 23.***

Section 14(1) thereof provides as follows;

***“14. Release on bail.***

***(1) 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.”***

30 Section 15 (supra) also sets the standard and criteria to be taken into account by a court when considering the grant of bail, as follows;

***“15. Refusal to grant bail.***

***(1) 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.”**

In addition, *Legal Notice Supplement No. 7 of 2022*, the **Constitutional (Bail Guidelines for Courts of Judicature) (Practice) (Directions, 2021)**, guides and streamlines issues pertaining to bail. This court will be guided by these laws and others in determining the matter at hand.

### **The Indictment.**

In **Criminal Case HTC – 00 – ICD – SC – 0010 – 2023**, the Applicants are each charged with separate offences in the four counts of the indictment. The 1<sup>st</sup> Applicant, Chelimo Julius Moses, is charged in Count 1, with **Aggravated Trafficking in Children C/s 3(1)(a) and 5 (a) of the Prevention of Trafficking in Persons Act, 2009**. The particulars of the offence are that on 21<sup>st</sup> October, 2022, at Cairo village Chepkwasta subcounty in Bukwo District, the 1<sup>st</sup> Applicant recruited or received Chelimo Zipporah, a girl child aged 16 years, by means of deception or abuse of position of vulnerability, for the purpose of sexual exploitation. The 1<sup>st</sup> Applicant is also charged in Count 3 of the same indictment, with **Aggravated Defilement C/s 129(3) and 4 (c) of the Penal Code Act, Cap 120**. The particulars of the offence state that on 21<sup>st</sup> March, 2022 at Cairo village Chepkwasta subcounty in Bukwo District, the 1<sup>st</sup> Applicant being a person in a position of authority over Chelimo Zipporah, performed a sexual act on the said Chelimo Zipporah, a girl aged 16 years.

The 2<sup>nd</sup> Applicant, Kiplimo Felix, is separately charged in Count 4 of the same indictment, with **Promoting Trafficking in Persons C/s. 7(a) of the Prevention of Trafficking in Persons Act, 2009**. The particulars of the offence are that the 2<sup>nd</sup> Applicant on 21<sup>st</sup> October, 2022, at Cairo village Chepkwasta sub county in Bukwo District, knowingly leased or sublet, used or allowed his house, building or establishment, to be used for the purpose of sexual exploitation.

10 The 3<sup>rd</sup> Applicant, Kwemoi Joshua, is also separately charged in the same indictment in Count 2, with *Aggravated Trafficking in Children C/s. 3(1)(a) and 5 (a) of the Prevention of Trafficking in Persons Act, 2009*. The particulars of the offence are that the 3<sup>rd</sup> Applicant on 21<sup>st</sup> October, 2022, at Cairo village, Chepkwasta subcounty in Bukwo District recruited or transferred Chelimo Zipporah a girl aged 16 years by means of deception or abuse of power or position of vulnerability, for the purpose of sexual exploitation.

Under *Criminal Miscellaneous Application No.008 of 2023 (Arising from Criminal Case No HTC-00 -ICD - SC - 0005 - 2023)* whose hearing court handled simultaneously with the instant application, the Applicant therein,  
20 Chelimo Julius Moses, is singularly charged in three counts. Count 1 is *Aggravated Trafficking in Children C/s. 3(1)(a) and 5 (a) of the Prevention of Trafficking in Persons Act, 2009*. The particulars of the offence are that the Applicant between the month of October 2021 and May 2022, in the Districts of Bukwo, Mable and Kampala, recruited, transported or harboured Chebet Emelda, a girl child aged 16 years, by means of deception or abuse of power or position of vulnerability, for the purpose of sexual exploitation.

In Count 2, the Applicant is charged with *Aggravated Defilement C/s 129(3) and (4) of the Penal Code Act, Cap 120*. The particulars of the offence are that the Applicant on the 28<sup>th</sup> November, 2021, at Kashiwa village, Kapsurur subcounty  
0 in Bukwo District being a person in authority over Chebet Emelda, performed a sexual act on the said Chebet Emelda, a girl child aged 16 years.

In Count 3, the Applicant is charged with *Aggravated Defilement C/s 129(3) and (4) of the Penal Code Act Cap 120*. The particulars of the offence are that the Applicant on the 18<sup>th</sup> May, 2022, at Kitui village, Kabei subcounty in Bukwo District, being a person in authority over Chebet Emelda, performed a sexual act on the said Chebet Emelda, a girl aged 16 years. The indictments were read to the accused persons at the Chief Magistrate's court, and they understood them.





## **Consideration.**

Section 15 of the Trial on Indictments Act provides the criteria for court to consider in an application for bail. It is important for court to determine from the circumstances surrounding the case whether the accused person will attend court when required and not to abscond. The factors for court to consider are in subsection (4) thereof, which provides as follows;

***“(4) 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 starting factor is the substantiality of sureties. In the case of **Masaba Godfrey vs. Uganda Criminal Miscellaneous Application No.30 of 2016**, court held that the requirement and duties of sureties cannot be underestimated for they are seen by court and public as persons who will police the attendance of the accused. They should be people of integrity, mature and have possible proximity to the accused.

In the instant application, each of the Applicants presented their respective sureties who were duly examined and interviewed by court. Although counsel for

10 the Respondent disputed the substantiality of all of them, court found the basis of her objections not meritorious. After examining all the sureties, they were found to meet the basic requirements. They had proper and clear identifications. They also possessed letters of introduction from their respective employers and Local Council authorities of their respective places of work and residences. The said identification documents, which included passports and national identity cards, were issued by competent government authorities. The documents showed who the sureties are and what they do for a living. The sureties were also found to be in gainful employment either in government service or self-employed within their local places where they ordinarily reside. They are all in one way or  
20 the other connected to the Applicants as close friends or relatives staying within the same locality as the Applicants. They proved that they have fixed places of abode within the jurisdiction of this court given their letters of introduction from their local authorities. They appeared to be persons of sound financial means, and there was no evidence to suggest that they are impecunious as not to meet the bail if the terms involve depositing a cash bond. Most importantly, they all appeared to understand their duties to court as sureties. In effect, court did not find anything substantial to prevent them from standing as sureties for the respective Applicants, if bail is granted. In court's view, the sureties presented duly have met the criteria set under *Direction 15* of the **Constitutional (Bail**  
30 **Guidelines for Courts of Judicature) (Practice) Directions, 2022**, and Section 15(4) of the **Trial on Indictments Act, Cap 23**.

It was also argued by counsel for the Respondent against the grant of bail, that the Applicants did not demonstrate exceptional circumstances to warrant their release on bail. The law relating to exceptional circumstances has been cited above. Section 15 (1)(a) of the **Trial On Indictments Act** provides that court may refuse to grant bail if the applicant does not prove to the satisfaction of the court that exceptional circumstances exist justifying his or her release on bail. Subsection (3) thereof defines "exceptional circumstances" to mean any of the following—





10 (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.**

However, the applicability of exceptional circumstances in the consideration of bail has been settled. Supreme Court in **Foundation for Human Rights Initiative vs. Attorney General, Constitutional Appeal mNo.03 of 2009**,  
20 held to the effect, inter alia, that provisions as to exceptional circumstances are not mandatory and do not fetter court's discretion to grant bail to a person accused of a capital offence. This court has also held in the case of **Namuddu Lydia vs. Uganda Criminal Misc. Application No.131 of 2022 (Arising from Crim Case No.20 of 2021)** that the requirement to prove exceptional circumstances would be a relevant consideration and would properly apply in such instances as where the accused had not spent the mandatory period on remand before applying for bail. But where the accused had spent more than the required mandatory period on remand, the need to demonstrate exceptional circumstances prior to his or her release on bail would be an unnecessary  
30 requirement. Based on the above facts and position of the law, the Respondent's contention in that the Applicants herein have not proved exceptional circumstances would not be sustainable.

The other important consideration by court whether or not to grant bail is the gravity and nature of the offence(s) charged. This too is a major consideration as guided under *Direction 13 (1)(a) and (b)* of the **Constitutional (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022.**



10 The gravity of any offence can be inferred from a number of circumstances and factors. The most important is the sentence prescribed for a given offence. The more severe or greater the sentence, the more grave the offence would be. In the present applications, the offence of *Aggravated Trafficking in Children C/s 3(1)(a) and 5 (a) of the Prevention of Trafficking in Persons Act*, is such that upon conviction the person is liable to suffer a sentence of death. A death penalty is invariably the highest and most severe sentence that a court of law vested with the jurisdiction can pass against a person. Where an offence attracts such a severe sentence, courts are usually, though not always, reluctant to grant bail to the accused. The reasons are not far to seek. Where a death penalty is a possible outcome, the flight risk by the accused becomes very high given that the stakes are also high. The accused would naturally be circumspect because after all, he has nothing more than his life to lose. Absconding and or escape becomes the natural way of avoidance. This court thus takes seriously the gravity of the offence charged into account.

20 The nature of the offence also plays a crucial role in the consideration of bail in this matter. From the indictment and *Summary of Evidence*, it is observed that the offences were allegedly committed against vulnerable girl children both aged 16 years, who hail from socio –economically vulnerable backgrounds and families. On the other hand, the Applicants, particularly the 1<sup>st</sup> Applicant, who is the LCV Chairperson of Bukwo District, wields a lot of power and authority over many people in the District. Given that unequal power-play relations involved in this case between the Applicants, the victims and their parents and other potential witnesses, it calls for court to exercise extreme restraint and caution in granting bail to the Applicants. There exists a high likelihood that the victims and their potential witnesses would be intimidated by the presence in the same village of the Applicants when released on bail. It is also understood that the victims are under police protection scheme which factor underscores the nature of the risk of intimidation to the victims and potential witnesses of the prosecution from the Applicants who reside in the same locality and District.





10 There is also a high possibility of compromising the parents of the victims and the potential witnesses of the prosecution, which would ultimately render the whole trial rather futile. On that account alone, bail for the Applicants would not be considered.

It is further noted that the 2<sup>nd</sup> Applicant, Chelimo Felix, is charged with *Promotion of Trafficking in Persons C/s 7(a) of the Prevention of Trafficking in Persons Act, 2009*. The offence attracts a maximum sentence of a fine of one hundred and twenty currency points or imprisonment for five years, or both. Ordinarily, this would not be considered a grave offence. However, in this particular case, the nature of the offence and manner of the alleged commission manifests a more sinister intention of the 2<sup>nd</sup> Applicant's involvement in a concerted action. It is alleged that he knowingly leased or sublet, used or allowed his house, building or establishment to be used for the purpose of sexual exploitation. That gives the nature of the offence and it would be amiss of the court not to take that into account as the inimical behaviour of the 2<sup>nd</sup> Applicant of willingly and freely permitting the use of his premises in the commission of a grave offence. Similarly, it is not lost on court that coming from the same community as the victims renders the 2<sup>nd</sup> Applicant a potential risk of interfering with the victims' relatives and other would - be witnesses for the prosecution. Being part of, or lending a hand to what appears to be a grand scheme to commit a felony renders the 2<sup>nd</sup> Applicant unfit for release on bail.

It is also observed that the 1<sup>st</sup> Applicant, Chelimo Julius Moses, is charged with several offences of a similar grave nature allegedly against different victims who were minors. Much as he avers, in ground 7 of the application, that there are no other known pending criminal charges whatsoever against him in any other court, the fact that he is already indicted on two different cases has a strong bearing against his release on bail. He is indicted in two different cases to wit; **HTC -00 - ICD - SC - 0010 - 2023**; and **HTC - 00 - ICD - SC - 0005 - 2023**. The charges against him in the two cases entail allegations of a grave nature, and they involve different victims and different modes of commission of the

10 offences on different dates and places. For instance, regarding the victim, Emelda Chebet, it is alleged that the 1<sup>st</sup> Applicant repeatedly defiled her in different places on diverse dates. These are serious allegations which cannot be taken lightly, and they involve the co-accused who provided a dwelling place for the commission of the offence and transporting and harbouring of the victim. The allegations strongly suggest that the 1<sup>st</sup> Applicant is likely a repeat offender even when such allegations are yet to be proved beyond reasonable doubt at the trial.

20 Court has also taken into account the stage of the proceedings and the possibility of substantial delay of the trial as envisaged under *Direction 13 (1)(d) and (g) of the Constitutional (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022*. As applicable to the instant case, it was shown by the Respondent that investigations have been completed and prosecution is now ready to commence the pre-trial. The disclosures are also ready and the trial would have commenced in earnest except that court was indisposed. Given this position and the fact that court has resumed to work, it would be proper that the hearing commences in earnest without further delay or interruptions that would be occasioned by the accused persons' absence and failure to attend court for one reason or the other, when released on bail.

30 After carefully balancing the rights of the Applicants in respect of the two cases and the interests of justice, court is reluctant to grant bail to the Applicants. The respective applications for bail are accordingly dismissed. This finding applies to; and disposes of **Criminal Miscellaneous Application No.008 of 2023 (Arising from Criminal Case No HTC-00 -ICD - SC - 0005 - 2023)**. To avoid further delay, both case files are re-allocated to another pre-trial Judge.

  
**BASHAIJA K. ANDREW**

**JUDGE**

**08/12/2023.**