

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA (COA) AT
KAMPALA**

CRIMINAL APPLICATION NUMBER 0107 OF 2013

IGAMU JOANITA:.....

APPLICANT

Vs.

UGANDA:.....

RESPONDENT BEFORE:

HON. MR. JUSTICE. KENNETH KAKURU, JA

Date: 5th July 2013

RULING:

This is an application for grant of bail pending appeal; the applicant was represented by Mr. Barenzi jointly with Mr. Andrew Ssebugwawo and Mrs. Jackie Mukasa. The Principal State Attorney Mr. Fred Kakooza represented the respondent. The application is by notice of motion however the motion does not state under what law it has been brought, this ought to have

the application. I may safely presume that it has been brought under Section 132 4 of the TIA and Sections 40 sub section 2 of the Criminal Procedure Act and Rule 6 sub rule 2 of the Rules of this Court.

The motion is supported by the affidavit of the applicant dated 25th June 2013 and two supplementary affidavits one supplementary affidavit also dated 4th June 2013 by the applicant and the second supplementary affidavit dated 4th June also by Mr. Paul Ssebunya advocate. The affidavit in support indicates that it was drawn by Kayondo Omonya and Company Advocates and the applicant signed the affidavit and again fixed her thumbprint thereon. This kind of practice causes confusion as one is unable to ascertain whether or not the deponent is illiterate in which case the affidavit would have to been required to be attested.

The grounds for this application are set out in the notice of motion I do not need to reproduce them all. But briefly they are:-

1. The applicant gave birth by cesarean section

2. The applicant has a baby who needs immediate attention
3. The applicant has substantial sureties and shall bind by the terms of bail set by court.
4. The applicant filed an appeal with plausible grounds which has high chances of success.
5. Judging from the busy schedule of court the appeal may not be heard without substantial delay
6. The applicant was granted bail in the lower court and complied with bail terms.
7. The offence which the applicant was convicted does not involve personal violence and
8. It is just and equitable to grant this application

The affidavit in support slightly expounds on these grounds.

At the hearing the applicant's counsel relied on the grounds as set out in the notice of motion and the supporting affidavits. Namely that the applicant had at the High Court been acquitted of the offence of embezzlement but convicted of the

offence of causing financial loss and sentenced to 30 months in prison with effect from 13th June 2013.

That she had before her conviction given birth to a baby by caesarean section that her child requires care, that her appeal has high likelihood of success because in her own affidavit she “believes” she never caused any financial loss. That she has substantial sureties and when she was granted bail at the lower court she complied with the bail terms. It was submitted for the applicant that she is a first offender who has a fixed place of abode within the jurisdiction of this Honorable Court and that it may take a long time before the appeal is heard and determined because of the busy schedule of this court.

In response the respondent opposed the application only on questions of law. Although the DPP who represents the state was duly served and an affidavit of service is on record no affidavit in rebuttal was filed. The learned Senior Principal State Attorney Mr. Fred Kakooza stated from the bar that he found no need to file a reply. Mr. Kakooza certainly must be aware of the consequences of not filing a rebuttal he did not

seem bothered. I take objection to this kind of conduct because it's not helpful to court and to the administration of justice in this country.

In his oral response Mr. Kakooza argued that the application ought to fail on the following grounds;

The character of the applicant was not proved as required under the guidelines of bail pending appeal as set out in the Alvind Patel case. He asserted that one who alleges must prove. That the applicant had failed to prove to the satisfaction of court that the grounds exist for grant of bail pending appeal. He argued that for example that the applicant should have availed a certificate of good conduct. That no proof was provided to show that the appeal is not frivolous and has great likelihood of success. This he argued is the foundation of bail pending appeal that the applicant should not continue to be held in detention only to be realized later when the appeal succeeds. He argued that no proof was provided that the applicant has a fixed place of abode within the jurisdiction of this court.

With the above not been proved he asserted that this 100
application ought to fail. However he submitted that should
this court be inclined to grant the application conditions be
imposed such that the applicant would have to answer bail. He conceded
that the sureties presented were substantial. He referred me to the case of
David Chandi Jammwa. Vs 105_ Uganda (Criminal Application Number
20 of 2011) as a
guide in setting bail conditions.

In reply Mr. Barenzi learned counsel for the applicant
contended that the facts have been proved more so because there was no
rebuttal. The facts stated remain no unchallenged, he retaliated his earlier
submissions and
prayers.

The jurisdictions of this court to grant bail pending
appeal is undisputed its derived from Section 132 4 of the Trial on
Indictment's Act Cap 23 and Section 40 sub section us 2 of the
Criminal Procedure Code Act Cap 116 and Rule

6 of the Rules of this Court. I will not reproduce them here.

The bail pending appeal is not a right. It is granted at

the discretion of court. However this discretion must be exercised judicially and each case must be determined on its own merits. Conditions must exist upon which court has to exercise its discretion. These conditions have been laid down by this court in a number of decisions some of which have been cited by counsel. All these decisions seem to follow the guidelines set out by the Supreme Court in the case of **Alvind Patel Vs. Uganda Supreme Court**

Criminal Appeal Number 001 of 2003 in which Justice Oder as he then was noted.

“ In my view conditions which should generally apply to an application for bail pending appeal as indicated by these cases above referred to may be summarized 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 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 before the applicant's conviction and during the pendency of the appeal if any"

Needless to say that these are guidelines. They are not exhaustive and they are not mandatory and they need not all be present at the same time. This court has observed before that the combination of two or more of these are sufficient. In my view the main purpose of granting bail especially bail pending appeal is that while the applicant is set free pending trial or appeal, court must be satisfied that the applicant shall in compliance with the bail conditions be available to attend trial or appeal. Court must therefore be satisfied that the applicant will not abscond.

The guidelines as set out by the Supreme Court in the **Aix/ind Patel Vs. Uganda** case supra and the bail conditions usually imposed the applicants upon grant of bail are all to ensure that the applicant answers bail.

The right to apply to bail is enshrined in the Constitution Article 23 sub article 6 as amended and it reads; 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.

The Constitutional Court on foundations of **Human Rights Initiative vs. the Attorney General: (Constitutional petition number 20 of 2009)** it was held that:- There is no automatic right to bail. The rights granted is only limited to the right to apply for bail. Court then retains the discretion to grant or not to grant bail. Still court has to be satisfied that the applicant satisfies the conditions for grant of bail. The Constitution does not mention anything about bail pending appeal. Rightly so, because in my view the right to apply for bail stems from **Article 28 (3) a of the Constitution** which is about the presumption of innocence. Since an applicant for bail is presumed innocent until proved guilty by a competent court, it follows that such a

person should have a right to bail. The two articles **Article 26** & **28** the one on right to bail and the other on the presumption of innocence must be read together.

In my view which may not necessarily be shared by all is that at the lower court the applicant for bail has less burden this is because of the presumption of innocence. All the applicant has to do is to apply for bail. The court then sets conditions to ensure that when bail is granted he or she will not abscond. However if the respondent has grounds to object to bail, then those grounds should be set out. Upon which court may determine whether or not to grant bail. It seems to me therefore that the state which is usually the respondent in bail applications must take bail applications very seriously by availing court with all necessary information about the applicant, his or her character, previous convictions if any or criminal records etc.

If need be, the State could apply for adjournment to ascertain more facts about the applicant so that court can

rights of the appellant including the presumption of
innocence are completely extinguished to a certain extent
therefore the appellant's rights to the presumption of
innocence remains until the appropriate final appellate

court in the matter has conclusively determined the appeal.”

This is why that at this stage on bail pending appeal the applicant is no longer wholly shielded by the presumption of innocence.

In my view the applicant has a greater burden of proving his or her case than previously at the lower court because at this stage the presumption of innocence is suspended. He or she has an incentive to jump bail. A conviction. A conviction by court at any level must be taken very seriously, the right of appeal notwithstanding. For the above reasons therefore the applicant in this matter has to satisfy court that she deserves to be granted bail pending appeal and if bail is granted she will not abscond. This evidence must be contained in her pleadings, as this application is by notice of motion and evidence is by affidavit. No oral evidence is expected to be adduced at this hearing; even if oral evidence was permitted it would not change the

contents of the notice of motion as it would only be adduced in support of that notice of motion.

Its trite law that evidence cannot be adduced from the bar and the submissions of counsel do not bind court in fact in my view an application of this nature could be disposed of without counsel having to submit on the matter. Court therefore has to look only at the pleadings in this case the notice motion and the supporting affidavits. Of course court would also seriously take into account the submissions of counsel, And I have so in this case.

I will now proceed to determine whether or not the applicant has satisfied the conditions for bail pending appeal following guidelines set out in the ***Alvind Patel case (Supra)***

1. The character of the applicant; I find nothing to guide court on the character of the applicant save paragraph in her affidavit that she is of sound mind. Paragraph seven of her affidavit that she complied with bail conditions in the lower court. I think a letter from her previous

employer or her CV or her Church or mosque would have been of help to court. Whether a person is a member of mother's union or a rotary club would point to her character. No effort was made in this regard, annexure C to the supporting affidavit is wanting, it's addressed "To whom it may concern". It is wanting in form and substance and I cannot rely on it.

2. Whether she is a first offender; Still other than her averments no evidence was availed in court in this regard I know as a fact that the police issues certificates of criminal record to whoever requests them to do so. No effort was made to prove this ground. Counsel for the applicant concedes he was aware that police issues certificates of criminal record.
3. Whether the offence which the applicant was convicted involved personal violence; This is easy to prove as court takes judicial notice of its own records and this condition was therefore satisfied.
4. The appeal is not frivolous and has reasonable possibility of success. No effort was made to prove this ground at

least in my view a draft Memorandum of Appeal ought to have been attached to the affidavit. Even a copy of the Judgment sought to be appealed against, see the case of **Alvind Patel (Supra)**,

5. A possibility of substantial delay in determining this appeal. The delays in handling the appeals including criminal appeals in this court is a notorious fact that this court takes a judicial notice thereof, this condition therefore exists to the satisfaction of court.

6. The applicant has complied with bail conditions granted before. Since there is no evidence from the respondent to the contrary, I am satisfied that this condition has been met by the applicant.

As I have already noted above the condition set out in **Alvind Patel case** are not exhaustive, each case must be determined on its own merits. In addition to the conditions set out in **Alvind Patel case** for granting bail pending appeal, court ought to also to take into account the provisions of **Section 151 152 153 of the TIA**

these are the sections that deal with conditions for grant

of bail at the High Court. Because of the suspension of the presumption of

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innocence, an applicant in an application such as this one for bail pending

appeal requires in my view to satisfy court that exceptional circumstances

exist see the case of **Foundation for Human Rights Initiative Vs The**

Attorney General (Supra) already quoted. I am alive to the fact that

exceptional circumstances for bail are not limited to those set out in the

Trial on Indictments Act none the less in my view exceptional circumstances

must exist at this stage when the applicant is already a convict.

In the case of **Mugisha Gregoru (Supra)**, this court observed at page 5

that: -

We hasten to add, however, that a rule of practice, bail pending appeal will

be granted only in exceptional circumstances that may include

1. The likelihood of success of the appeal
2. The likelihood to delay in hearing the appeal

3. The length of the sentence imposed or the complexity of the case

With all the greatest respect to the learned Justices of Appeal in the above case, I am of the view that exceptional circumstances are not only a rule of practice in bail pending appeal. They are a requirement of the law. The law that defines exceptional circumstances in **Section 15 sub section 3 of the TLA.**

In this section, exceptional circumstances means any of the following:-

1. 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
2. The certificate of no objection from the DPP
3. Infancy or advanced age of the accused

The reading of the whole of **Section 15 of the TLA** together with **Section 132 (4)** leaves no doubt in my mind that the

the jurisdiction of this court or is.. ..as a resident outside

Uganda. sureties within the

Whether the accuse has sound

jurisdiction to undertake that the accused shall comply

with bail conditions of his or her bail

c. Whether the accused has on previous occasions been released on bail, failed to comply with the conditions of his or her bail

d. Whether there are other charges pending against the accused.

This is a law in my view that has been modified and improved upon to suit the circumstances of bail pending appeal by **the Supreme Court in the Alvind Patel Vs Uganda case (Supra).**

I am inclined to think that the applicant was alive to the fact that she is required to prove exceptional circumstances and to satisfy court that she will not abscond when released on bail pending appeal, when she deponed in paragraph 3 & 4 of her affidavit in support as follows;

4. Before by incarceration, I had given birth to a baby by caesarean section after developing serious complications evidence shall be adduced at the trial.

5. I am married with a young child who needs my care and guidance for proper growth, evidence shall be availed at the trial.

In my view, this was an attempt to prove exceptional circumstances for grant of bail pending appeal however no evidence was adduced to support the above averments. One would have expected the applicant to produce medical records for example. Her own affidavit does not even state her own date of birth, she states in paragraph 4 that she is married but her husband is not named, she does not state the date of birth of her child in the affidavit she states in paragraph 11 that she has a fixed place of aboard but does not mention or avail proof. I do not consider a letter written to the DPP as part of the pleadings, this letter was copied to court, all she states is **that evidence shall be availed at the trial**, the hearing of this application is not a trial and as I have already stated pleadings and evidence by affidavit must be complete and on record before the hearing of the application if for no other reason but to allow the respond to reply.

Two supplementary affidavits filed on the eve of the hearing by the applicant are wanting in form and substance. Counsel for the applicant did little to satisfy court on the grounds of health of the applicant, the conditions of the infant etc which in my view clearly would have amounted to exceptional circumstances. For example the impact of the absence of a mother of a two year old child for a long time, possible mistreatment by her house helps, the rampant children's diseases, possible malnutrition, impact on the growth of the child etc would probably have helped the applicant's case. Nothing was submitted on the length of the sentence in view of the likelihood of delay to have the appeal heard.

Counsel for the applicant conceded that he was unable to file a draft memorandum of appeal or attach a lower court record or Judgment as he had failed to obtain them, this in my view he conceded that he had failed to produced evidence in court to support the applicant's contention that the appeal has likelihood of success, again see the case **of Alvind Patel Vs Uganda at page 14.**

All the annexures to the supplementary affidavits were not certified as required by the law, they were all photocopies, therefore were not admissible. However in view of **Article 126 (e) of the Constitution** and considering that this matter concerns the human rights of the applicant to 476 with:- the right to liberty, i did still look at the their evidential value. However they had little evidential value, they were all wanting in form and in substance.

In a similar application, Mbabazi Rovence Natukunda and Louce Kahunda Vs Uganda. (Criminal Application Number 47 of 2012) Hon. Justice Kavuma JA noted as follows;

“In this case, counsel for the applicants argued that the first applicant was sickly and thus should be granted bail pending the disposal of her appeal, no evidence whatsoever was adduced before court to support that argument, it is trite that courts of law act on credible evidence adduced before them and do not indulge in conjecture, speculation, attractive reasoning or fanciful theories. ” he cited the case of Kanalusasi Vs Uganda reported

in 1990 -1998 High Court bulletin at page 10, I agree with him entirely, I will not indulge in conjecture or speculation, either.

This application therefore must fail on account of failure to adduce sufficient evidence by the applicant. With all due respect to learned counsel for the applicant, had he carried out his duty with diligence, this application would not have failed. The notice of motion, the affidavits were all wanting both in form and substance.

This court therefore has no option but to dismiss this application and the application is hereby dismissed.

I do not think that the applicant is barred from bringing a fresh application in the circumstances such as these.

I think she is entitled to do so. She also has the right to appeal against this ruling by way of reference. I find that the sureties presented were substantial and I would have accepted them had this application succeeded. It is so ordered.



HON. KAKURU KENNETH

JUSTICE OF APPEAL 05TH

JULY 2013.