

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 34 OF 2014
ARISING FROM CRIMINAL APPEAL NO. 225 OF 2014

KAIRU ARAJAB

KANGE PATRICK.....APPLICANTS

VERSUS

UGANDA.....RESPONDENT

Coram: HON. MR. JUSTICE KENNETH KAKURU, JA
(Single Justice)

RULING OF THE COURT

The applicants were each convicted of the offence of murder contrary to Section 188 and 189 of the Penal Code Act by the High Court at Iganga on 30th April 2014

They were each sentenced to 15 years imprisonment.

They now seek to be released on bail pending appeal, on the following grounds.

- a. That the Applicants were jointly charged and convicted. of murder 188 & 189 of the Penal Code Act and sentenced to 15 years imprisonment by the High Court of Jinja sitting at Iganga.***

- b. That the Applicants were aggrieved by the decision of the Lower Court conviction and sentence and have already filed a Notice of Appeal.***

- c. That the Applicants have a fixed place of abode at Nambale, Iganga, within the jurisdiction of this Honourable Court and have always complied with bail conditions during the trial.*
- d. That the Appeal is not frivolous and has high chances of success.*
- e. That the Applicants are 1st offenders with no other previous convictions and their character has never been in issue.*
- f. That the applicants were granted bail by the trial court and complied with the terms and conditions.*
- g. That there is a possibility of substantial delay in the determination of the appeal.*

Further grounds in support of their application are set in two supporting affidavits, one deponed by Nabirye Fatina who is stated to be a wife of the 1st applicant and the other by one Nakagolo Mega who is stated to be a wife of the respondent.

Both affidavits are brief and stat that:-

- 1) The applicants have filed a notice of appeal in this court, against both conviction and sentence.*
- 2) That when they were both granted bail at the High Court they duly compiled to the terms.*
- 3) That the appeal is likely to delay*
- 4) That the appeal is not frivolous and has reasonable chance of success.*
- 5) That both applicants do not have any criminal record which is a subject of this appeal.*

6) *That they each have substantial sureties.*

The respondent filed a brief 5 paragraph affidavit in reply opposing the application. At the hearing of this application both applicants were present in court. They were represented by **Mr. Albert Mooli** learned counsel. The respondent was represented by **Ms. Sherifa Nalwanga** Senior State Attorney with the Directorate of Public Prosecution.

Both parties did not file authorities.

Mr. Mooli generally repeated what was set out in the affidavits in support of the motion after which he presented 3 sureties for the 1st applicant and 2 sureties for the second applicant.

Ms. Nalwanga opposed the application on ground that the applicant had failed to show by evidence that the appeal had likelihood of success as no Judgment and no memorandum of appeal were attached to the pleadings. She also submitted that the sureties were not substantial. She asked court not to allow this application.

I have listened carefully to the submissions of both counsel, I have also carefully perused the court record. A glance at the notice of motion will clearly indicate that this one is application brought jointly by two persons.

It is trite law that criminal reasonability is individual responsibility. Even if two or more persons are charged jointly each of them still remain personally responsible and answerable for the offence.

Each of the applicants ought to have filed a separate bail application as grounds relating to one do not necessarily relate to the other.

Secondly the affidavit deponed to by Nakagolo Mega in support of the notice of motion which contains facts relating to the second applicant was deponed to by an illiterate person without complying with Protection Of Illiterate Act. I would strike it out on that account.

Both affidavits in support of the application lack documents in support of the averments. There is no draft memorandum of appeal. There is no copy of the Judgment of the High Court. There is no copy or evidence of proof of residence of the applicants, such as local council letter the High Court bail release form in respect of the 2nd applicant w also not availed.

The identity documents and introduction letter of the sureties were not attached.

Generally the application reveal laxity on part of counsel and the casual manner in which he treated an application of this nature that concerns liberty of individuals and their other rights.

Be that as it may, the grounds upon which this court may grant an application of this nature have been discussed by this court in a number of authorities. I have discussed them extensively before in the case of ***Igamu Joanita vs Uganda Criminal Application No. 0107 of 2013***. I will not repeat them here.

Briefly the law as I understand it to be that bail is a constitutional right, that stems from the right to be presumed innocent until proved guilty. See Articles 23(6) and 28 (3) of the Constitution.

This right however, is extinguished upon conviction. Before conviction an applicant charged with a serious offence is for required to prove exceptional circumstances as set out in Section 15 of the Trial on Indictments Act. It cannot be the law that upon conviction the same person has no duty to prove those exceptional circumstances.

I am of the considered opinion that the authority of ***Arvid Patel vs Uganda Supreme Court Criminal Appeal No. 01 of 2003*** (unreported) has been wrongly applied. That authority did not

take into account the provisions of Section 15 of the Trial on Indictment and to that extent it was made *per incuriam*.

Secondly that authority did not set any hard and fast rule. It simply sets out guidelines. These guidelines are not exhaustive and can only be applied within the law.

Again Section 132(4) of the Trial on Indictments stipulates as follows:-

- (4) ***Except in a case where the appellant has been sentenced to death, a judge of the High Court or the Court of Appeal may, in his or her or its discretion, in any case in which an appeal to the Court of Appeal is lodged under this section, grant bail, pending the hearing and determination of the appeal.***

The Trial on Indictments is a 1971 statute, until the Supreme Court decision in the case of ***Susan Kigula vs Attorney General*** death penalty was mandatory upon a conviction of murder. It appears to me that a person convicted of such serious offence and would not ordinarily be granted bail pending appeal. The reason is rather obvious, that there is a great likelihood of such person absconding, taking into account the severity of both the offence and the sentence.

In the case of ***Arvid Patel*** (Supra) one of the guiding principles before grant of bail pending appeal is whether or not the offence for which the applicant was convicted involved personal violence.

In this particular case both applicants were convicted of murder and sentenced to 15 years imprisonment. Murder is the most violent of offences.

As already stated they have not provided any evidence to prove that their appeal is not frivolous and has a likelihood of success.

They have not provided prove of their permanent residence.

Needless to say, they have not shown to the satisfaction of court that special circumstances exist as to require the court to release them on bail pending appeal.

Those exceptional circumstances are:-

1. Grave illness
2. A certificate of no objection from the DPP
3. Advanced age or infancy.

This list is not exhaustive *See:- Foundation for Human Rights Initiative vs Attorney General Constitution Petition No. 20 of 2009*. But in this case no attempt was made at all to prove any of the exceptional circumstances above or any other.

I am not satisfied that this is a case in which this court to exercise its discretion to grant bail pending appeal.

I accordingly decline to grant this application.

Had I been inclined to grant the application I would have rejected all the sureties save for Mr. Luswiga Mohamed.

This application stands dismissed.

Dated at Kampala this 18th day of March 2015.

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HON. MR. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL