THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CRIMINAL APPLICATION NO. 114 OF 2015

(Arising out of Court of Appeal Criminal Appeal No. 711 of 2014 and High Court Criminal Session case No. 41 of 2012)

1. Frank Mugerwa
2. Mrs. Winnie Mugerwa } :::::::::::::::::::::::::::::: Applicants

VERSUS

Uganda :: Respondent

Coram: Hon. Justice Remmy Kasule, JA sitting as a single Justice

RULING

The applicants were tried and convicted on 19.06.2014 by the High Court at Kampala in **Criminal Session Case No. 41/2012, (Alividza,J)** of the offence of being accessory after the fact to murder c/s 206 of the Penal Code Act. Each applicant was sentenced to a period of 26 months imprisonment.

On 30th June 2014 both applicants, through their then Counsel, Ayigihugu & Co. Advocates, lodged a Notice of Appeal intending to appeal against both conviction and sentence.

The applicants then proceeded to apply for bail pending appeal through this application lodged in this Court on 20.03.2015. Each

applicant deponed to an affidavit in support of the application. Learned Senior State Attorney Sherifah Nalwanga affirmed to an affidavit in reply opposing the application.

At the hearing, learned Counsel Sam Sserwanga of Ms. Katende Ssempebwa & Co. Advocates, appeared for the applicants, while Lilian Nandawula, a Senior State Attorney from the Directorate of Public Prosecutions was for the State.

The background facts to the application are that both applicants and their biological son, one Ssali Anthony, resided, at the material time, at Kiburi "B" village, Makindye Ssaabagabo, Wakiso District. The said Ssali Anthony, murdered an eight (8) year old child, one Ssozi Edirisa, by cutting him on the neck, stabbing him on the left eye, causing a wound on the left ear and then stuffing the body into a yellow nylon sack and depositing it into a garden neighbouring the applicants' home. The body was discovered on 16.10.2011 after loud speaker announcements about the missing of the said deceased boy had been made all over the village.

In a charge and caution statement, the said Anthony Ssali admitted killing the deceased child. Evidence at trial, accepted as truthful by the trial Court, established that the killing of the deceased had been done inside the applicants' residential house, leaving the walls of the said house stained with blood. There were also blood stained rags in the house and a very offensive ordour from the bathroom where the deceased had been killed.

The evidence also established that both applicants became aware of the murder, but inspite of that, not only did they not report the suspected murder to the police, but they also tried to prevent their son, Anthony Ssali, from talking to the police.

The trial Judge found that the prosecution had proved beyond reasonable doubt that the applicants were guilty of accessory after the fact to murder c/s 206 of the Penal Code Act. Both applicants

were accordingly convicted and each applicant was sentenced to 26 months imprisonment. Their son, Anthony Ssali, was, on his part, convicted of murder and sentenced to fifty (50) years imprisonment.

In support of their application to be released on bail, Counsel for the applicants submitted that the appeal of the applicants stood a high chance of success as no evidence had been adduced that the applicants had assisted their son, Anthony Ssali, to remove or hide the body of the deceased. The evidence adduced was to the effect that both applicants were away from home at the time the murder took place.

There was also likelihood of the appeal not being resolved quickly and it is likely that by the time the appeal will be resolved, the applicants will have served the greater part of their sentence period.

Further, the applicants were of good character, first offenders and the offence of which they were convicted is bailable. Both applicants have a fixed place of abode, both availed to Court substantial sureties in the persons of Hon. Dr. Lulume Mayiga, Member of Parliament, Buikwe South, brother to second applicant, Winnie Mugerwa, and also in the person of Mr. Kanyike Fred Sserunjogi, a businessman of Nsambya West Zone, a close friend of both applicants. The applicants were also elderly, the first applicant being aged 64 years while the second was also in her late fifties. Both applicants had fulfilled their bail conditions at the trial stage.

Counsel for the State objected to Court granting bail to the applicants. The objection was based on the submissions that there was no likelihood that the appeal would succeed given the evidence that was adduced at the trial. Further, the applicants had not taken vigorous steps to prosecute the appeal, as even as of now, almost a year since judgment was delivered and Court proceedings availed to the applicants' Counsel, no memorandum, let alone record of appeal had been filed in Court or even a copy attached to this application. The applicants were now convicts and so the

likelihood of avoiding serving sentence is higher than it was before they were convicted. The applicants had also not produced any title to property by way of security to Court.

In resolving this application by this Court, it has to be appreciated that an applicant for bail pending appeal bears the burden to prove that exceptional and unusual circumstances exist that warrant that such applicant be released on bail: See: **Raghbir Singh Lamba v R [1958] EA 337.** Therefore, it logically follows that, in an application for bail pending appeal, the applicant ought to first prove exceptional circumstances, before calling upon Court to consider the other normal considerations for bail, such as those laid down in the case of ARVIND PATEL V UGANDA: Criminal Application No. 1 of 2003 (SC).

This Court also takes it, as an essential requirement, that before an applicant for bail pending appeal can succeed in his/her application, that applicant ought to show to Court that he or she has been diligent and vigorous in prosecuting his or her appeal in the appeal Court that is to entertain the appeal, and that it is due to factors beyond his or her control that it has not been possible of him or her to have the appeal prosecuted at the earliest possible. A non vigorous applicant, one who is indolent and does not take steps to prosecute the appeal does not deserve and ought not to be granted bail by that appellate Court to which the appeal ought to be lodged.

This is so, because in the considered view of this Court, the criminal justice system, through operations of the Courts of law, must not only act, but must also be seen to act firmly and strongly against convicts of crime whom trial Courts of law have declared, because of the injury they have caused to society, that they no longer enjoy the presumption of innocence. **Article 28(3) (a)** states:

"(3) Every person who is charged with a criminal offence shall

.....

(a) Be presumed to be innocent *until proved guilty* or until that person had pleaded guilty;".

A convict ceases to enjoy the presumption of innocence from the moment a Court of law, through the due process of law, finds him or her guilty.

If such a convict contends that his or her being found guilty is on the basis of some mistake, whether of law or fact or mixed law and fact on the part of the convicting trial Court, then the burden is on that applicant to prosecute his or her appeal with all vigour and diligence so that the appellate Court considers his or her appeal on merit.

For such an applicant to just fold his or her hands and be lukewarm when it comes to prosecuting the appeal but be very vigorous in pursuing the application for bail, as unfortunately is becoming the trend these days with a number of applicants, is to water down the strength of the Criminal Justice System and to make Courts of law, particularly the trial Courts, appear as if they are acting in vain when they convict and sentence those they try. Such applicants/convicts, by so conducting themselves make the Criminal Justice system appear to be such a one where the convicts just walk through the Courts, one after the other, without ever serving the sentences imposed upon them by the Courts of law for the wrongs they have inflicted upon society.

In the case of this application, the Court convicted and sentenced the applicants on 19.06.2014. The Notice of Appeal was lodged by the applicants on 02.07.2014. It is now, (17.06.2015) almost getting a whole year since the applicants were convicted and sentenced. For all this period, no record and or Memorandum of Appeal have been filed in this Court. Only this application for bail pending appeal has been pursued. There is no explanation at all in the supporting affidavits of the applicants as to why this has not been done. From the Bar, Counsel for the applicants admitted that

the Court proceedings had been availed to Counsel for the applicants, but that the same needed some corrections. He provided no explanation at all as to what steps had been taken for and on behalf of the applicants to have these corrections in the Court proceedings carried out, and if any steps had been taken, why the corrections were not carried out.

This Court has therefore come to the conclusion that the applicants have not been vigorous in prosecuting their intended appeal to this Court. All that they seek is to be released on bail and then leave the appeal in abeyance. Then the trial Court that tried, convicted and sentenced them will be made to appear in the eyes of the public to have acted in vain. This Court must put a stop to that state of affairs.

The observation of Lady Justice Solomy Balungi Bossa in **Criminal Application No. 187 of 2014. John Kashaka Muhanguzi versus Uganda** that:

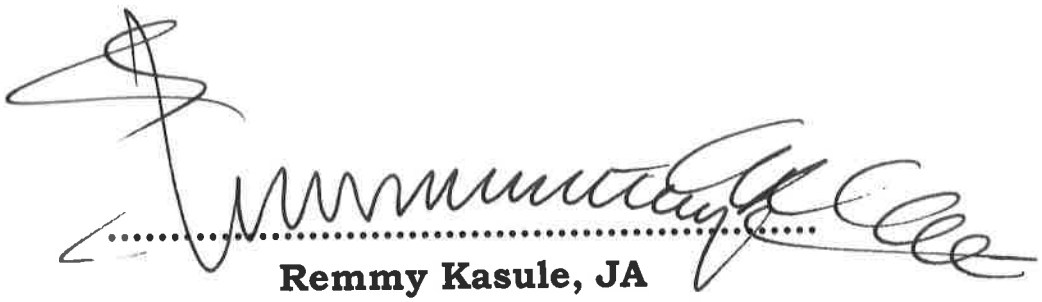
".....releasing the applicant on bail pending appeal requires a delicate balance between the rights of the applicant/convict and the interests of the wider public and Justice.", is a very pertinent one to the facts of this application. The rights of the applicants must be considered vis a vis the interests of the wider public and justice as a whole.

While in this case the applicants are first offenders, have produced substantial sureties and have a fixed place of abode and may be of advanced age, (though there was no independent proof of this), which are factors in their favour, this Court finds that the applicants have been indolent, and not caring to prosecute their appeal with the necessary vigour and due diligence. As such, they do not deserve to be released on bail, pending appeal, as from their stated conduct, they are not likely to pursue the said appeal with the necessary vigour and due diligence once released on bail. The possibility that both applicants, once released on bail, will use

whatever means available to them to frustrate the pursuit of the intended appeal is very great. This conduct undermines the strength of the Criminal Justice System and the cause of justice as a whole.

Accordingly this application fails and the same stands dismissed. It is ordered that each of the applicants continues to serve his/her sentence to completion, subject to the outcome of their intended appeal, or until ordered otherwise by a competent Court of law.

Dated at Kampala this **17th** day of **June,** 2015.



Remmy Kasule, JA