

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPLICATION NO.0047 OF 2017
(ARISING FROM CRIMINAL APPEAL NO.174 OF 2017)

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KALUNGI ABUBAKER ALIAS MANIRAK.....APPLICANT

VERSUS

UGANDA.....RESPONDENT

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CORAM:

HON. MR. JUSTICE S.B.K. KAVUMA, DCJ ✓

RULING OF THE COURT

15 This Application is brought under **Article 23(6)** of the
Constitution, Section 40(2) of the Criminal Procedure Code Act,
Section 132(4) of the Trial on Indictments Act, and R.6(2)(a) of the
Judicature (Court of Appeal Rules) Directions S.113-10. The
Application seeks orders granting the applicant bail pending the
20 hearing and determination of his Appeal No.174 of 2017, now
before this Court.

Background

The background of the Application is that the applicant was a businessman managing Ideal Media Company Ltd. dealing in investment, real estates and money lending in East Africa. He was arrested on 30th April, 2015 and charged with four counts of the offences of Money Laundering and Conspiracy to Commit a Felony. He was sentenced to 12 years and 5 years imprisonment respectively, to run concurrently, in addition to refunding USD 500.000. He has filed an Appeal against both the conviction and sentence, out of which this Application arose.

Representation

At the hearing, Mr. Macdusman Kabega (counsel for the applicant) represented the applicant while Mr. Mugisha Peter, a State Attorney from the Chambers of the Director of Public Prosecutions (counsel for the respondent) appeared for the respondent.

Grounds

The grounds of the Application are:

- 1. That the applicant has filed an Appeal in this Court being Criminal Appeal No.174 of 2017 against the conviction and sentence, which is pending determination before this Court.**
- 2. That the applicant was on remand for two years and was denied bail throughout the trial.**
- 3. That the applicant has no previous criminal record and the offences for which he was convicted did not involve any form of personal violence.**

4. That the applicant has substantial sureties who are willing and ready to stand for him.

5. That the applicant's Appeal has very high chances of success.

5 6. That the Appeal is likely to take some time to be heard as the Court has heavy backlog of cases. (Sic)

The case for the applicant

10 Relying on the Affidavit in Support of the Application, counsel for the applicant submitted that the applicant is a resident of Bunga, Kalungu, Makindye East Constituency, Kampala District. He contended that the applicant is a single father with two school going children.

15 That when the applicant was arrested, he was kept in safe houses in Kololo and later Nalufenya for a remand period of 2 years.

He submitted that the Court is faced with a setback of case backlog which will delay the hearing and determination of the applicant's Appeal.

20 Counsel cited **Arvind Patel V Uganda Criminal Appeal No.1 of 2003**, where the Supreme Court laid down some of the principles to be followed by courts in granting or denying bail.

He also relied on the decision of this Court in **Serunkuuma Edrisa V Uganda M.A No.152 of 2015** to further support his submission.

He presented three sureties, namely:

25 1. Mr. Kalule Mohammad, 37 years of age. He is an employee of Safaris Center Uganda Limited and a resident of Baggala Cell,

Seeta Ward, Goma Division, Mukono Municipality. He is the holder of a National Identity Card No.004684955.

2. Ms. Mubiru Mary, Chairperson LC1 Nsubuga Godionzi, Kakungu-Ggaba Ward, Makindye Division.

5 3. Mr. Sabimbona Ezechiel, 26 years of age. He is the Managing Director of Little Hearts Creche and Pre-School and a resident of Kalungi Ggaba Ward, Makindye Division. He is the holder of a National Identity Card No.018326939.

10 Counsel submitted that the sureties are well aware of their roles having been briefed by him.

Counsel further submitted that the applicant is ready and willing to deposit his land title deed for the land comprised in Mengo Block 446, Plot273 measuring app.1.1 acres.

He prayed that this Court be pleased to grant this Application.

15 **The case for the respondent**

Counsel for the respondent opposed the Application. He relied on the affidavit, deponed by Erizoba Maixm in reply to the Application to argue that the applicant has not proved exceptional circumstances warranting him to be granted bail pending appeal.

20 With regard to the applicant's contention that he was detained and tortured in various safe houses, counsel argued that those were mere allegations without evidence to prove the same. He argued that the Medical Report presented by the applicant does not indicate that his ailments are as a result of the alleged torture.

25 He further argued that the applicant's Appeal has no chance of success basing on the evidence adduced in the lower court.

He invited Court to look at the considerations for bail as set out in the case of **Arvind Patel** (supra) and find that none of them has been satisfied in the instant case.

5 He argued that this Court is fully constituted and has a good record of disposing of Appeals and therefore the contention of a likelihood of delay is not justified.

Counsel further argued that the question of whether or not the applicant's sureties are substantial does not fall under the exceptional circumstances that warrant a grant of bail pending appeal. He invited Court to look at the findings of this Court in **Criminal Application No.17 of 2017 Patrick Sentongo V Uganda**

In reply

15 Counsel for the applicant referred Court to pg.342 of the Record where one of the investigating officers of the case, while under cross examination, said that the convict did not sign but thumb printed the statement because he was tortured. He further referred Court to Pg.301 of the Record where A4 said: "**To some extent we violated the constitutional rights of the accused.**" He highlighted the above as evidence of torture against the applicant.

Court's consideration

25 The power to grant bail pending appeal is discretionary but must be exercised judiciously (**See Walubiri Godfrey V Uganda Court of Appeal Criminal Application No.44 of 2012**).

The right to bail is enshrined in **Article 23(6)** of the Constitution.
It provides:

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

- 5 **(a) The person is entitled to apply for bail, and the court may grant that person bail on such conditions as the court considers reasonable.”**

10 The law relating to bail pending appeal is found in Section 132(4) of the Trial on Indictments Act, Cap 23 of the Laws of Uganda which provides:

Section 132(4)

15 **“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.”**

Similarly Section 40(2) of the Criminal Procedure Code Act, Cap 116 of the Laws of Uganda provides:

Section 40(2):

20 **“The appellate Court may, if it sees fit, admit an appellant to bail pending the determination of his appeal, but when a magistrate’s court refuses to release a person on bail, that person may apply for bail to the appellate court.”**

The case of **Arvind Patel V Uganda** (Supra) set out some of the conditions to be considered as special circumstances in granting or refusing to grant bail pending appeal to an applicant as follows:

“(a) The character of the applicant

- 5 ***(a) Whether he or she is a first offender or not.***
- (b) Whether the crime of which the applicant was convicted involved personal violence.***
- (c) Whether the appeal is not frivolous and has a reasonable possibility of success.***
- 10 ***(d) The substantial delay in the determination of the appeal.***
- (e) Whether the applicant has complied with bail conditions granted after the applicant’s conviction and during the dependency of appeal (if any).”***

15 Justice Oder (JSC) (RIP) observed in that case that:

“In my view, it is not necessary that all these conditions should be present in every case. A combination of two or more criteria may be sufficient. Each case must be considered on its own facts and circumstances.”

20 According to the evidence on the record, the applicant herein is a first time offender. The offences he was convicted of did not involve personal violence.

The sureties presented in Court are in my view, substantial. I have no cause to doubt their ability to ensure that the applicant shall
25 attend Court whenever required to.

I have considered the fact that during the applicant's detention at Nalufenya and Kireka, he was subjected to torture, a deplorable practice that is prohibited by the laws of this Country.

5 The adverse effects on the welfare of the two school going children of the applicant, to whom he is a single parent, is a matter Court cannot simply gross over. **See Uganda (DPP) V Col. (Rtd) Dr. Kiiza Besigye Constitutional Reference No.20 of 2005.**

10 Due to the challenges experienced by Court resulting from several constraints, including the high levels of backlog, a matter I take judicial notice of, it is not farfetched to expect that the hearing of the applicant's Appeal may not be concluded any time soon.

15 Court is aware that the amount of money involved in the offences the applicant was convicted of are colossal, but, this *per se*, should not, in a deserving case, deter Court from granting the temporary relief of bail pending appeal. The applicant is, in any case, challenging his conviction over those offences. Court further notes that unlike in a case where an offender is sentenced to death, the Legislature has not called for a restrictive approach to the consideration of whether to or not to grant bail pending appeal
20 basing on the colossal amount of money involved in the offences in issue, like in this Application. Court cannot proceed on the assumption that it was an oversight on the part of the Legislature not to so provide because of the strong presumption that the Legislature makes no mistakes when legislating.

25 In the result, after carefully considering all the circumstances pertaining to this Application, I am persuaded that it should be and is hereby granted on the following terms:

1. The applicant shall deposit a cash bail of Shs.10,000,000/= in this Court.
2. He shall deposit his passport with the Registrar of this Court.
- 5 3. He shall deposit the Certificate of title for his land comprised in Mengo Block 446 Plot273 situate at Nkumba, with the Registrar of this Court.
4. The three persons presented to Court as sureties are hereby approved as such for the applicant and they shall, each execute a bond of Shs.40,000,000/=(not cash), and deposit the same with the Registrar of this Court.
- 10 5. A breach of any of the above terms shall render the bail pending Appeal herein granted to the applicant liable for cancellation.

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I so order

Dated at Kampala this ³¹.....day of ^{September}.....2017

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S.B.K. Kavuma

DEPUTY CHIEF JUSTICE,

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