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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**MISCELLANEOUS APPLICATION NO.135 OF 2018**

*(Arising from Criminal Appeal No.011 of 2011)*

**KWEGIRA ANNET ALIAS MUSOGA:::APPLICANT**

10

**VERSUS**

**UGANDA:::RESPONDENT**

**CORAM: HON. MR. JUSTICE BARISHAKI CHEBORION, JA**

**(SINGLE JUSTICE)**

**RULING**

15 This application was brought by Notice of Motion under Rule 6(2) of the Rules of this Court, Section 132(4) of the Trial on Indictment Act and Section 40(2) of the Criminal Procedure Code Act seeking that the applicant be released on bail pending the hearing and determination of her appeal which is lying before this Court.

20 In 2007 the applicant was tried for embezzlement contrary to section 268(1) of the penal Code Act and she was acquitted by the Chief Magistrates Court of Mbarara. The state appealed and the High Court set aside the acquittal and orders of the trial Court and convicted her. She was sentenced to two years

5 imprisonment and ordered to refund the money she had embezzled. She filed an appeal in this Court which she says has high chances of success. In her affidavit in support of the application, she averred that owing to the busy schedule of this Court, her appeal ~~will delay before~~ it is heard. She further avers that the offence for which she was convicted of was not violent.

10 The respondent objected to the application and filed an affidavit in reply sworn by Orogot Pamela who inter alia averred that the applicant had not presented any exceptional or unusual reasons to warrant grant of bail pending appeal. That this Court has a constitutional duty to dispose of the appeal expeditiously so there was no merit in the applicant's averment that the hearing of the appeal  
15 would delay. That because copies of the memorandum and the record of appeal were not attached to the application there was no evidence to show that the appeal had any merit.

At the hearing of the appeal, Mr. Waiswa Rhamadhan appeared for the applicant while the respondent was represented by Ms. Annet Namatovu Ddungu, Senior  
20 State Attorney from the office of the Director of Public Prosecutions.

Counsel for the Applicant largely reiterated the contents of the Applicant's Notice of Motion and the affidavit in support and submitted that the applicant was convicted of the offence embezzlement and sentenced to 2 years and has so far served a period of 7 months and left with 1 year and 5 months to complete her  
25 sentence.



5 He argued that in applications of this nature, proof of exceptional circumstances is not mandatory and relied on the decision in ***Kabaza Jackson V Uganda, Miscellaneous Application No.97 of 2016*** to support this proposition.

Ms. Namatovu opposed the application and submitted that Court could not assess the possibility of success of the applicant's appeal because neither a  
10 Memorandum of appeal nor the Record of proceedings was availed to Court. She relied on ***Arvind Patel V Uganda, Supreme Court Criminal Application No.1 of 2003*** where it was held that the only means by which Court can assess the possibility of success of the appeal is by perusing the relevant record of proceedings.

15 The conditions upon which this Court may grant an application for bail pending appeal have been discussed in a number of cases. See ***Arvind Patel V Uganda, Supreme Court Criminal Application No.1 of 2003 and David Chandi Jamwa vs Uganda Criminal Appeal No. 20 of 2011.***

In ***Igamu Joanita Vs Uganda CACA No 107 of 2013***, the main purpose of  
20 granting bail especially bail pending appeal is to enable the applicant pursue her appeal and court must be satisfied that the applicant shall be available to attend the hearing of the appeal. Court must therefore be satisfied that the applicant will not abscond.

It was submitted that the applicant has a fixed place of abode in Kaceka,  
25 Rwebukono, Kamukuzi Division in Mbarara Municipality within the jurisdiction of this Court. I note however that the applicant did not attempt to prove this

5 assertion for example there was no letter from the area LC1 to confirm that she  
is indeed a resident of Kaceka. It was not shown whether she was living in her  
own house or she was renting. Counsel merely made statements from the bar.  
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  
10 theories. **See Mbabazi Lovence & Anor V Uganda, Court of Appeal Criminal  
Application No.47 of 2012.**

Counsel stated that the applicant had appealed against both conviction and  
sentence and in his view, the appeal has high chances of success. In order to  
assess the possibility of success of the appeal, one must peruse the relevant  
15 record of proceedings, the judgment of the Court from which the appeal has  
emanated, and the memorandum of the appeal in question. **See Arvind Patel V  
Uganda, Supreme Court Criminal Application No.1 of 2003.**

I have looked at the Record and find that the applicant has neither attached a  
Memorandum of Appeal nor the Judgment of the lower Court. The applicant has  
20 also not attached a record of proceedings. In the absence of the said documents,  
I am unable to assess whether or not the intended appeal has a likelihood of  
success.

I am satisfied from the affidavit and Court record that offence of embezzlement  
that the applicant was convicted of does not involve personal violence.

25 On the possibility of substantial delay in determining the appeal, counsel  
contended that there is a likelihood of delay in hearing the appeal. I note from  
the applicant's affidavit that she was convicted on 12<sup>th</sup> June, 2018 for a custodial

5 sentence of 2 years. The applicant has since served a period of 7 months. I cannot determine when the applicant filed her appeal because neither a notice of appeal nor a memorandum of appeal was availed to Court. Therefore the question of inordinate delay ~~does~~ not arise.

The applicant presented the following sureties;

- 10 i. *Mr. Kwegira Speke aged 46 years. He is a husband to the applicant and a resident of Rwebikoona Cell, Kamukuzi Division in Mbarara District. He is a holder of National ID No.CM720621015P4L and a businessman.*
- ii. *Mr. Muhumuza Gibril aged 32 years. He is a family friend to the applicant and a resident of Rwebikoona Cell, Kamukuzi Division in Mbarara District.*
- 15 *He is a holder of National ID No.CM86046101YFLA and a traditional herbalist.*
- iii. *Mr. Mukundane Richard aged 26 years and a resident of Kiwatule Parish, Nakawa Division in Kampala. He is a holder of National ID No.CM920271086CQG and a pharmacist.*

20 Mr. Mukundane Richard's relationship with the applicant was not stated and secondly he is only 26 years old and a resident of Kiwatule Parish, Nakawa Division in Kampala who might not be able to ensure that the applicant is in Court as when required to do so. Mr. Muhumuza Gibril aged 32 years, a family friend to the applicant and a resident of Rwebikoona Cell, Kamukuzi Division in

25 Mbarara District is a traditional herbalist who appeared not to understand the responsibilities of a surety. The information provided regarding the said sureties



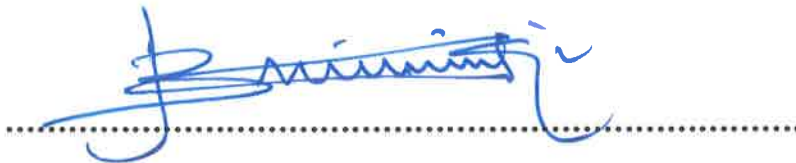
5 is insufficient and I have all reason to doubt their ability to ensure that the applicant complies with the bail conditions if she was to be granted bail.

Counsel submitted that the applicant is a mother with children of school going ages who largely depend on her. This Court has held that sympathy and discomfort to family members in itself does not constitute exceptional ground for  
10 the purposes of bail pending appeal. **See Sande Pande Ndimwibo V Uganda, Court of Appeal Criminal application No.241 of 2014.**

For the aforesaid reasons, I decline to grant this application and the same is dismissed.

**I so order.**

15 Dated this 9<sup>th</sup> day of April, 2019



**HON. MR. JUSTICE BARISHAKI CHEBORION**

**JUSTICE OF APPEAL**

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