

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL MISCELLANEOUS APPLICATION NO. 47 OF 2019
(Arising from Criminal Appeal No. 50 of 2017)

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(Arising from High Court Criminal Session Case No. 02 OF 2017 of the Anti-Corruption Division at Kololo before L. Gidudu, J)

KAMUGISHA BERNARDAPPLICANT

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VERSUS

UGANDA.....RESPONDENT

RULING OF EZEKIEL MUHANGUZI, JA.

(Single Justice)

15 This application by Notice of Motion seeks release of the applicant on bail pending the hearing and final disposal of his Criminal Appeal No. 50 of 2019 now in this court.

The application was brought under Article 23 (6) (a) of the 1995 Constitution of Uganda, Section 132 (4) of the Trial on Indictments Act, 20 Cap. 23, Section 40 (2) of the Criminal Procedure Code Act Cap.116 and Rule 6 (2) of the Judicature (Court of Appeal) Rules, SI 13 – 10.

The application was based on seven (7) grounds which were set out and contained in the body of the motion as follow:-

25 “1. *That the applicant has filed an appeal against his conviction vide Criminal Appeal No. 50 of 2019.*

2. *That the applicant was previously granted bail during the trial which is the subject of appeal which he fully honoured.*
3. *That the applicant has a fixed place of abode within the jurisdiction of this honourable Court.*
- 30 4. *That the offences for which the applicant was convicted do not carry the death sentence.*
5. *The Appellant has substantial sureties who also reside within the jurisdiction of this Honourable court;*
- 35 6. *That the applicant is a first time offender and has never previously been of a criminal offence.*
7. *That it is fair and just that the applicant be released on bail”.*

Annexed and filed together with the motion is the fifteen (15) paragraphs affidavit of Kamugisha Bernard, the applicant, sworn at Kampala on 19/3/2019, stating as follows:-

- 40 *“1. THAT I am a male adult Ugandan of sound mind.*
2. *THAT I am the applicant in this matter, fully conversant with the relevant factual matters relating to this application the same having been explained to me by my above mentioned lawyers and now swear this affidavit in that capacity.*
- 45 3. *THAT I was convicted and sentenced by the Ant-Corruption Court of Uganda at Kololo on the 10th December 2017 to seven (7) years. (A copy of the judgement and Record of Proceedings is hereto attached A).*
4. *THAT I was dissatisfied with the decision of the trial court and thus lodged an appeal. (A copy of the Notice of Appeal and Memorandum of Appeal are hereto attached and marked B & C respectively).*
- 50 5. *THAT I am a law abiding citizen with no criminal record.*
6. *THAT I was convicted of embezzlement which does not involve any personal violence.*

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7. *THAT I shall abide by all bail conditions imposed upon me by this Honourable Court.*

8. *THAT due to heavy schedule of work in this court, the hearing of my appeal might delay.*

9. *THAT when I was released on bail by the High Court, I complied with the bail conditions and never absconded my bail.*

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10. *THAT I am aged 62 which is advanced age with different ailments which include HIV and backache all requiring adequate medical attention which may not be appropriate provided for by the prison medical services.*

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11. *THAT I am a widower with three children to wit: Joyce Twesigomwe aged 2 years, David Twinamatsiko aged 13 years and Daniel Ayebare aged 20 years who are all school going and I am the sole bread winner for my entire family which necessitates staying with my family to provide the basic necessities of life.*

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12. *THAT I have a fixed a place of abode at Kawala – Kasubi within the jurisdiction of this Honourable Court and I will not abscond when granted bail.*

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13. *THAT I have Three (3) substantial sureties who are ready and willing to stand for me in this application. (Photocopies of the LC I letters introducing my sureties are hereto annexed and marked “KS2, KS3, & KS4” respectively.*

14. *THAT I have been advised by my above mentioned lawyer which advise I verily believe to be true that my appeal is not frivolous and has reasonable possibility of success:*

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15. *THAT whatever is stated herein above is true and correct to the best of my knowledge and belief, save for the information which was disclosed to me by the source disclosed herein”.*

In opposition to this application, Josephine Namatovu, an Assistant Director of Public Prosecutions, swore a seventeen (17) paragraphs affidavit in reply, at Kampala on the 23/04/2019, stating as follows:-

- 85 ***“1. That I am a female adult Ugandan of sound mind and I am an Assistant Director of Public Prosecution in the Office of the Director of Public Prosecutions, the respondent in this case.***
- 2. That I handled the prosecution of Ant-Corruption Court Criminal Session Case No. 2 of 2017, from which this application arises and I am possessed with capacity to swear this affidavit.***
- 90 ***3. That our office was served with the applicant’s application for bail pending appeal and his affidavit in support thereof on the 18th of April 2019.***
- 4. That I have thoroughly read the application for bail, the affidavit in support thereof and the attached documents.***
- 95 ***5. That paragraphs 1 to 4 of the applicant’s affidavit in support are noted.***
- 6. That paragraph 5 of the applicant’s affidavit in support is not correct since the applicant was convicted by the Anti-Corruption Court on charges of embezzlement of shs.4.9 billion/= as shown by the attached copy of the judgement marked ‘Annexure A’***
- 100 ***7. That in response to paragraph 6 of the applicant’s affidavit in support, the offence with which the applicant was convicted is a serious offence that had grave consequences on the former ISO employees, whose terminal benefits he embezzled.***
- 105 ***8. That in further response to paragraph 6 of the applicant’s affidavit in support, the offence with which the applicant was convicted involved breach of trust and he used his position as the Treasurer of Uganda Veterans Internal Security Organization (UVETISO) Association Limited to steal their terminal benefits.***
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9. That paragraph 8 of the applicant's affidavit in support is speculative and no evidence has been attached to support the averments under the said paragraph.

115 10. That in response to paragraphs 7, 9 and 12 of the applicant's affidavit in support, the circumstances under which the Applicant complied with the bail terms before the High Court have since changed since he is now a convict sentenced to 7 years' imprisonment in addition to jointly compensate the former ISO employee in the sum of shs.2.5 billion/= as shown by the judgement marked Annexure A.

120 11. The no evidence has been adduced to support the contents of paragraph 10, 11 and 12 of the applicant's affidavit.

125 12. That in further response to paragraph 10 of the applicant's affidavit in support, no medical evidence has been adduced by the applicant to show that his medical condition cannot be handled by the medical facilities at Luzira Prison.

130 13. That it is not true as averred under paragraph 13 of the affidavit in support that the proposed sureties are substantial with capacity to stand surety for the applicant/convict who has been ordered to refund shs.2.5 billion/= to the victims of his crime.

135 14. That in reply to paragraph 4 of the applicant's affidavit in support, I handled the prosecution of Ant-Corruption Court Session No. 02 of 2017 and I verily believe that his appeal is frivolous and stands no chance of success as he never had an explanation for his action right from the investigation stage up to his prosecution by the Ant-Corruption Court. The judgment marked Annexure A refers.

15. That it is interest of justice that the application for bail pending appeal be denied.

140 16. That I wear the affidavit in support of the objection to grant of applicant's bail pending the disposal of his appeal.

17. That whatever is stated herein above is true and correct to the best of my knowledge and belief".

145 When the application was called on for hearing on 23/04/2019 Mr. Vincent Mugisha, learned counsel appeared for the applicant while Ms Abgail Agaba, learned Senior State Attorney appeared for respondent. The applicant was present.

Applicant's Submissions

150 Mr. Mugisha for the applicant submitted that the applicant was relying on the ground of exceptional circumstances, namely:- old age as required by section 15 of the Trial on indictments Act. That the applicant was aged 62 years as per paragraph 10 of the applicant's affidavit, though the applicant's National ID shows the applicant is aged 59 years. Further Mr. Mugisha submitted that the applicant suffers from HIV and has a fixed place of abode at Kawala, Kasubi.

155 He then introduced sureties, namely:

- 1) Mutesigensi, brother to the applicant and provided a work ID from MoFPED, a copy of a land title and National ID.
- 2) Turyamureeba Godfrey, clearing agent who provided his ID and copy of land title.
- 160 3) Byaruhanga William, provided a National ID, Kikuubo Businessman.

165 Finally, Mr. Mugisha insisted that the applicant is a first offender, that he complied with bail terms in the lower court, that he is of excellent character and that the applicant's pending appeal has high chances of success.

Respondent's Reply

170 Ms Agaba, for the respondent was not ready to reply because counsel
for the applicant without notice produced and relied on eight (8)
documents in his submissions which had neither been earlier annexed
to the pleadings nor served on to her prior to the hearing. She
therefore applied for and was granted an adjournment to receive
copies of those documents and verify them. Court, for that reason,
175 directed both parties to file and serve reply and rejoinder submissions
in a specific time frame.

In her written submissions, in reply dated and filed on record on
02/05/2019, counsel for the respondent opposed the application
vehemently and cited the following authorities in support of her
submissions:-

- 180 1. **Emere Deo V. Uganda**, SCCA No. 2 of 2015.
2. **Kyeyune Mitala Julius V. Uganda**, SCC Criminal Application No. 9
of 2016.
3. Section 15(3) of the Trial Indictments Act, cap.23.
4. Patrick Sentongo V. Uganda, CA Crim. Application No. 17 of 2017.

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Applicant's Rejoinder

Learned counsel for the applicant filed written submissions dated
08/05/2019 in rejoinder to the submissions of the respondent citing the
following authorities in support of the application:-

- 190 1. **Arvind Patel V. Uganda**, SCC. Application No. 1/2003.
2. Section 15 (1) and (3) of the Trial on Indictments Act, cap. 23.

Consideration by Court

195 I have carefully perused the seven (7) grounds on which the application is based as set out in the Notice of Motion and the fifteen paragraphs of the applicant's affidavit in support and substantiation of those grounds. I have equally perused the Seventeen (17) paragraphs affidavit in reply sworn by Josephine Namatovu dated 23/04/2019.

200 I have also carefully considered the submissions of counsel for both parties and the authorities cited and relied upon in support of these submissions.

All bail applications, whether pending trial or pending appeal, are not as of right. Bail is dependent on court's discretion which court is enjoined to exercise judiciously.

205 Regarding the seven grounds on which this application was based, my considered view is as below:-

Ground No. 1: It is not disputed that the applicant filed Civil Appeal No. 50 of 2019 which is still pending disposal in this court.

Ground No. 2: It is also not in dispute that the applicant was previously granted bail pending trial whose terms he fully honored.

210 **Ground No. 3:** That the applicant has a fixed place of abode within the jurisdiction of this court and will not abscond if released on bail, in my view, is neither here nor there. He is said to own kibanja on which he has a house at Kawaala Zone II, LC 1 where he resides with his family. No more evidence of ownership of or fixed nature of abode was
215 advanced in support of this ground.

Ground No. 4: That the offences for which he was convicted do not carry the death sentence is granted, but, in my considered view, does not weigh heavily in support of this application.

220 **Ground No. 5:** That the applicant has substantial sureties who also reside in the jurisdiction of this court is a ground I have considered after examining the sureties in relation to their ability to enforce the judgments orders against the applicant, namely: compensating the victims of fraud committed by the applicant to the tune of UGX2.5 billion. I find the substantiality of the sureties very much doubtful.

225 **Ground N. 6:** That the applicant is a first time offender who has never previously been convicted of a criminal offence, in my view, carries very little weight to justify grant of bail pending appeal, where the applicant is already a convict even if he is an appellant.

230 **Ground No 7:** That it is fair and just that the applicant be released on bail, is a ground which, in my view, has not been substantiated.

Over all, I have perused the judgment of the Lower Court (Annexure 'A' to Josephine Namatovu's affidavit in reply) as well as the entire record of proceedings attached as 'A' to the applicant's own affidavit in support of the application and noted as follows:

- 235 1. Though the offence the applicant was convicted of does not attract death sentence, it is nonetheless one involving serious breach of trust and theft of colossal sums of money amounting to UGX4.9 billion.
- 240 2. Upon perusal of the record of the Lower Court as well as the Memorandum and Notice of Appeal (Attachments 'B' and 'C' to the applicant's affidavit in support of the application) the applicant appeared not to raise any serious explanations or defence at the trial. I therefore formed the impression that his appeal is frivolous and does not disclose good chances of success,
- 245 which effectively does not favour grant of bail pending appeal. After all the appeal was fixed in March this year which is very

recent and as such cannot be a basis for imputing delay is disposal of the appeal.

- 250 3. Though this application was not based on grounds of exceptional circumstances, the applicant in paragraph 10 of his affidavit in support of his application speculatively stated that his medical needs may not be “appropriately provided by the prisons medical facilities.” No evidence to substantiate such assertion was produced as required by the law.
- 255 4. The ground of advanced age of 62 years of the applicant which was alluded to in paragraph 10 of the applicant’s affidavit in support and 59 years from the applicant’s National ID, alone is not, in my considered opinion, a sufficient basis for grant of bail pending appeal.

260 On the whole, I find that it is not fair and just and I am not persuaded to grant this application.

Consequently I hereby dismiss this application.

Dated at Kampala this date 18th of NOV 2019.

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EZEKIEL MUHANGUZI

JUSTICE OF APPEAL/CONSTITUTIONAL COURT