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**THE REPUBLIC OF UGANDA**

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

**CRIMINAL APPLICATION NO.146 OF 2018**

*(Arising from Criminal Appeal No.91 of 2018)*

**APOLO SENKEETO:::APPLICANT**

10

**VERSUS**

**UGANDA:::RESPONDENT**

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

**(SINGLE JUSTICE)**

**RULING**

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This an application brought by way of Notice of Motion under Article 23(a), (b) and 137 of the 1995 Constitution, Sections 14 and 15(1) (a) and (b) of the Trial by Indictment Act, Rule 2 of the Criminal Procedure (Applications) Rules and Section 14 of the Judicature Act seeking for an order that:-

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- a) The applicant who is currently on remand at Murchison Bay Prison, Luzira, be released on bail pending the determination of Criminal Appeal No.91 of 2018 upon terms and conditions as this Honorable Court shall deem fit.*

The grounds of the Application as set out in the Notice of Motion are that;

- 5      i.    *The applicant is innocent and has a plausible defence to all the charges against him before Court.*
- ii.   *The applicant has substantial and influential sureties with the capacity to abide by the terms of bail set by Court.*
- iii.   *There is a possibility of substantial delay in determination of this appeal.*
- 10     iv.   *The charges against the applicant are bailable by this Honorable Court.*
- v.    *The applicant has a fixed place of abode at Muyenga, Tank Hill Zone, Makindye Division.*
- vi.   *The applicant is a married man of over 18 years with a family of 7 children all under the age of 14 years who depend on him for their education and*
- 15     *upkeep.*
- vii.   *The applicant has previously answered his bail in the High Court.*
- viii.   *There is no danger of the applicant interfering with the witnesses as the trial in the lower Court was concluded*
- ix.   *The applicant is pursuing his second degree in Biblical Theology at the*
- 20     *African Bible University, Lubowa, Uganda.*
- x.    *The applicant has suffered from severe back problem for over three years and requires regular specialized treatment.*
- xi.   *It is just and equitable that this application is granted.*

The application was supported by two affidavits deponed by the applicant Apolo  
25    Senkeeto dated 7<sup>th</sup> September, 2018 and Nakku Namugambe Senkeeto dated 7<sup>th</sup>  
September, 2018 respectively giving the following facts:



5 The applicant was convicted in the Anti-Corruption Court in HCT-00-ACD-0012  
for offences of theft of shs. 24,790,823,522/= the property of Government of  
Uganda, obtaining money by false pretence, uttering false documents and  
conspiracy to defraud. He was sentenced to ten years imprisonment and being  
dissatisfied with both the conviction and sentence, lodged a notice and a  
10 memorandum of appeal in this Court. He believes that his appeal has high  
chances of success but it is likely to take long to be heard which will render the  
appeal nugatory. The applicant further deponed that he is suffering from several  
ailments that include spinal and back problem and acute asthma, which are  
difficult to treat while in prison. He avers that he is of good character and has  
15 never been convicted or even accused of any other offence except this one which  
did not involve personal violence. He has two elderly parents, a wife of 15 years,  
7 children all under the age of 14 years and school going and all of whom are  
likely to drop out of school and suffer consequences of his continual stay in  
prison, him being the head of the household and main income earner. The  
20 applicant further deponed that he was granted bail in the High Court and he  
honored the bail conditions and would abide by any conditions set by this  
Honorable Court if his application is granted. He paid shs. 10,000,000/= as bail  
money which is still with the High Court. That he has substantial sureties who  
are ready to comply with the conditions of bail to be imposed by this Court and  
25 a fixed place of abode within the jurisdiction of this Honorable Court and when  
released on bail he will stay at his house at Block 2100, Plot 244 Muyenga.



5 In reply, Sarah Birungi, the Director Legal Affairs in the Inspectorate of  
Government deponed to an affidavit in which she avers that the applicant does  
not disclose or prove any exceptional circumstances envisaged by the law to  
warrant Court to exercise its discretion to grant the applicant bail pending  
10 appeal. The applicant is a convict and is no longer covered by the presumption  
of innocence thus there is a high probability that he will not come back to Court  
for trial. She deponed that the applicant's ground that there is a probability of  
delay in determining his appeal is speculative and not supported by any  
compelling evidence and the state has cross appealed in this matter with a prayer  
for the applicant to refund 24 Billion Shillings and the cross appeal has high  
15 probability of success. She further depones that the cross appeal is within the  
knowledge of the applicant who is likely to jump bail for fear of refunding the  
money.

At the hearing of the Application, Mr. Peter Mulira appeared for the applicant  
while the respondent was represented by Mr. Rogers Kinobe, a Senior  
20 Inspectorate Officer in the Inspectorate of Government.

Mr. Mulira submitted that the applicant enjoyed the presumption of innocence  
provided in **Article 28(3) of the Constitution** until Court disposes of his appeal  
and because he has never pleaded guilty, he maintains his innocence until the  
conviction is upheld by this Court.

25 Counsel contended that the applicant was a first offender and there was no  
evidence that he has ever been convicted of any other criminal offence. He was



5 not likely to abscond because he had property at plot 244 Muyenga where he stays with his family of seven children and wife. The applicant was ready to avail the title deed to the property for Court to keep.

Counsel further submitted that the applicant's appeal had a high possibility of success because the applicant was accused of having stolen 24 Billion Shillings  
10 yet the judgment showed that out of this amount shillings 12 billion was paid to a sub-contractor, 4.5 billion was sent to the American Investor and an unspecified amount was spent on buying vehicles and other equipment which are presently in the possession of Uganda National Roads Authority (UNRA). The money which the applicant is alleged to have stolen was authorized by the Chief  
15 Executive Officer of UNRA who acted on the written advice of the legal officer of UNRA and the accountant was involved in the process. Counsel further submitted that 4 of the accused persons were found to have committed offenses in respect of this money and the other 3 were found not guilty which was an indication that the appeal had chances of success. He referred Court to the  
20 decision of the Supreme Court in **David Chandi Jamwa V Uganda, Miscellaneous application No.09 of 2018** where Arach Amoko, JSC stated that in deciding whether there is a probability of success of the appeal, the Court should look at the records in the file.

Counsel submitted that the applicant was a young man of good character and  
25 currently pursuing a second degree in Theology at the Bible School in Lubowa,



5 with 7 children of school going age and their education was bound to suffer if he remained in prison.

On exceptional circumstances, he submitted that the applicant suffers from back pain and there was evidence on record from Mulago Hospital that the said problem had not been properly attended to in prison.

10 The applicant was willing to deposit his passport in Court, he had deposited 10 Million Shillings for bail in the lower Court which he had not withdrawn and was ready to deposit money in this Honorable Court as further security. He added that the hearing of this case took three years and the applicant was for all that period on bail and never absconded.

15 He presented the following four sureties whom he said he had explained to the roles required of a surety for consideration by Court:

- i. *Reverend Canon Senkeeto Albert Samuel, 73 years old and previously a diplomat in the Uganda Embassy in the United States of America. He is a holder of passport No. B189544 and a resident of Bunamweri LC1-Kakoola Ward, Mpigi Town Council.*
- 20 ii. *Retired Engineer Allan Kulumba, 66 years old and an uncle to the applicant, a resident of Nkumba Bukolwa Cell, Wakiso District and a holder of passport No.B1590774.*
- iii. *Ms. Rose Nakibirige, aged 57 years, a pastor in the Seventh day Adventist Church Bbunga, Director and tutor at Tinner International School of beauty.*
- 25



5            *She is a resident of Namirembe Bakuli, Rubaga Division and an auntie to  
the applicant.*

Mr. Kinobe for the respondent opposed the application and submitted that the  
issue of innocence was settled by this Honorable Court in ***Igamu Joanita V  
Uganda, Criminal Appeal No.107 of 2013*** where Court stated that the  
10 constitutional provisions relating to the grant of bail make no mention of bail  
pending appeal and the applicant in this application was no longer presumed  
innocent. Counsel invited Court to look at the Memorandum of Appeal marked  
as annexure "C" which he submitted was argumentative. According to counsel  
the said Memorandum of Appeal could not be relied on for Court to conclude  
15 that there was a pending appeal with a likelihood of success.

Regarding the submission that the applicant had a family which would suffer if  
he was kept in incarceration, counsel submitted that it is a ground but not  
exceptional because this Court in ***Sande Pande Ndimwibo V Uganda,  
Criminal application No.241 of 2014*** held that sympathy and discomfort to  
20 family members in itself do not constitute exceptional grounds for purposes of  
bail pending appeal.

Mr. Kinobe submitted that there was already a cross-appeal to the applicant's  
appeal which seeks for a refund of 24 Billion Shillings from the applicant and  
the same had very high chances of success because the applicant was convicted  
25 of theft which meant that he ought to have been asked to refund the amount but  
Court did not order so.



5 Counsel further submitted that there was no proof that the Government Medical facilities in prison could not take care of the applicant's health condition and prayed that this application be dismissed.

I have considered the submissions of both counsel and studied the evidence availed in support of the application. **Article 23(6)** of the Constitution grants a  
10 person arrested in respect of a criminal offence the right to apply for bail and Court may grant that person bail on such conditions as the Court considers reasonable. Sections 132(4) and 40(2) of the Trial on Indictments Act give this Court jurisdiction to hear applications for bail pending appeal.

**Rule 6(2) (a) of the Rules of this Court** provides that in any criminal  
15 proceedings, where notice of appeal has been given in accordance with rules 59 and 60 of the Rules of the Court, the Court may order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.

The Supreme Court in **Arvind Patel V Uganda SC Criminal Application NO. 1 Of 2003**  
20 set out the following guidelines to be applied while considering applications for bail pending appeal;

- i. *the character of the applicant;*
- ii. *whether he/she is a first offender or not;*
- iii. *whether the offence of which the applicant was convicted involved*  
25 *personal violence;*





- 5        iv.    *the appeal is not frivolous and has a reasonable possibility of success;*
- v.    *the possibility of substantial delay in the determination of the appeal.*
- vi.   *whether the applicant has complied with bail conditions granted after the*  
             *applicant's conviction and during the pendency of the appeal (if any).*

10        *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.*

When a person has been convicted and sentenced to jail, the onus is on him to show cause why he should be released on bail and not serve the sentence.

15        It was submitted for the applicant that although he was convicted, he still  
             enjoyed the presumption of innocence until this Court has disposed of his  
             appeal. Counsel contended that because the applicant had never pleaded guilty,  
             he maintained his innocence until otherwise proved by the appellate Court. He  
             relied on the decision in ***Kyeyune Mitala Julius V Uganda, Miscellaneous***  
             ***Application No.4 of 2017 (SC)*** for the proposition that the presumption of  
20        innocence continues as long as the case is on appeal.

***Article 28(3) of the Constitution*** provides that every person who is charged of a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.

In 2011, ***the Supreme Court in Busiku Thomas V Uganda, Criminal Appeal***  
25        ***No.33 of 2011*** held that the presumption of innocence guaranteed to a person

5 accused of a crime, ends when the accused person is found by an impartial Court guilty of the offence he or she was charged with.

In ***Igamu Joanita V Uganda, Court of Appeal Criminal Application No.107 of 2013***, the Court discussed the issue of presumption of innocence of an appellant and held that the appellant was no longer wholly shielded by the  
10 presumption of innocence because this was suspended by the conviction.

In 2004, ***the Court of Appeal in John Kashaka Muwanguzi V Uganda, Criminal Reference No.797 of 2014*** held that the presumption of innocence of an appellant keeps alive until his conviction is confirmed by the highest Court.

In a more recent decision of ***Kyeyune Mitala Julius V Uganda, Miscellaneous Application No. 4 of 2017***, the Supreme Court held that an applicant in an  
15 application for bail pending appeal enjoys the presumption of innocence as provided under Article 28(3) (a) of the Constitution. That the presumption of innocence continues as long as someone decides to exercise his right of appeal and does not stop at the trial level. The Court went further to hold that the  
20 presumption as enshrined in the Constitution is a rail guard to fair trial and premised on the notion that Courts can make errors.

In ***David Chandi Jamwa V Uganda, Miscellaneous Application No.9 of 2018*** arising out of Criminal Appeal No.2 of 2018, Justice Arach Amoko, JSC discussed this same issue and concluded at page 9 that; at this stage, the  
25 appellant is a convict and is no longer shielded by the presumption of innocence



5 and his only right is the right of appeal. If bail pending appeal is granted then the conditions must be more stringent.

As can be seen from the above decisions, there have been divergent views on the application of the provisions of Article 28(3) of the Constitution. Although the wording of Article 28(3) of the Constitution is clear that the presumption of  
10 innocence ends when a person is proved or pleads guilty, I am however, persuaded by the decision of Harris J in **Chimanbhai V Republic (No.2) (1971) 1 EA 343**, where at page 344 he states that “.....the law today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or punishment excessive, a recognition which is implicit in the  
15 legislation creating a right of appeal in criminal cases.”

Although the presumption is that the conviction and sentence of the applicant was proper and lawful, the possibility that this may not have been so is real.

Because many convictions have been reversed and the innocence of the convict restored, this lends credence to the argument that the presumption of innocence  
20 is kept alive until the last appeal which the convict has been preferred determined. I cannot be said that the innocence is completely extinguished when an appellate Court can restore it.

Counsel for applicant further submitted that the applicant was a first offender and there was no evidence that he had ever been convicted of any criminal case.  
25 Annexure “E”, the Certificate of Good Conduct indicates that the applicant had



5 never been convicted of any criminal offence. The respondent did not bring any evidence to prove otherwise.

I have looked at the documents presented by counsel for the applicant namely annexure "J", the introduction letter from LC1 Chairperson Heritage Village Urban Council confirming that the applicant is a resident of that area, a  
10 duplicate certificate of title of land comprised at Gombe, Block 275, Plot 1093 in the names of Apolo Senkeeto and Nakku Senkeeto. With this evidence, I am satisfied that the applicant has a fixed place of abode within the jurisdiction of this Honorable Court.

Counsel for the applicant submitted that there was a possibility of success of the  
15 appeal because the money which the applicant is alleged to have stolen was authorized by the Chief Executive Officer of UNRA who acted on the written advice of the Authority's legal officer and its accountant was involved in the process.

In response, it was submitted that the respondent had filed a cross-appeal which  
20 seeks a refund of the 24 billion Shillings from the applicant and the same had very high chances of success.

The possibility of success of the appeal is paramount because if the appeal is frivolous then there is no reason why bail pending appeal should be granted. A convicted person who knows that he has little chance of succeeding on appeal  
25 will try to find all ways possible on how he can avoid serving the sentence even if it is just for a while having experienced the lack of freedom while in



5 incarceration. For this reason, where the Court is inclined to exercise its discretion in his favor and grant him bail pending the hearing and determination of his appeal, the conditions imposed should be more compelling for him to appear for the hearing of his appeal rather than abscond.

10 It was submitted for the respondent that the cross appeal which seeks recovery of the stolen money had high chances of success. The sentencing Judge clarified that he had been asked to make an order for compensation to UNRA but because there was no road engineering audit to quantify the loss, it would have been guess work for him to fix a value that was not scientifically established. It is for that reason that the learned Judge made no order for compensation. The  
15 respondent did not show Court that the audit had since been done to enable Court decide whether the cross-appeal had any chance of success.

According to the decision in **Arvind Patel (supra)** the only means by which the Court can assess the possibility of success of the appeal is by perusing the relevant record of proceedings, the judgment of the Court from which the appeal  
20 has emanated and the Memorandum of Appeal in question.

From the record, I note that the applicant was not ordered to refund the 24 billion shillings which he was held to have stolen. The argument that he is likely to abscond because of fear of an order of refund which does not exist is merely speculative and not convincing.

25 In my view, the appeal raises issues with reasonable possibility of success that merit consideration by this Court and is not frivolous.



5 I have looked at annexure "G" attached to the affidavit in support of the application. It is the applicant's bail bond in the Chief Magistrates Court of Buganda Road. It indicates that the applicant had diligently reported to Court for extension his bail. With such a record, I have no reason to doubt that he will comply with the conditions set by this Court in the event that this application is  
10 granted.

In ***Singh Lamba V R (1958) E.A 337***, Court stated that an applicant for bail pending appeal bears the burden of proving that there are exceptional reasons to warrant his release on bail.

**Section 15(3) of the TIA** defines exceptional circumstances to include the  
15 following:

- a) *Grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody.*
- b) *The certificate of no objection signed by the Director of Public  
20 Prosecutions.*
- c) *The infancy or advanced age of the accused.*

Counsel for the applicant submitted that the applicant suffers from back pain and parasthesias and referred to annexure "D".

I have looked at the said annexure "D" it is a medical report from Kampala  
25 Chiropractic and Wellness Health Care Centre Ltd. It indicates that the applicant had undergone sessions of chiropractic treatment but due to the recurrence of

5 the condition, he was advised by Dr. Charles Sebwana to visit Dr. Bryan Cox based at the Spinal Clinic in Accra- Ghana. This condition cannot be managed in prison.

In deciding whether or not to grant bail pending appeal, Court should in addition to the other considerations determine whether the appellant is likely to commit 10 further offences. The applicant was convicted of the offence of theft, fraud and uttering false documents. These offences do not involve personal violence.

The applicant produced 3 sureties whom counsel stated he had explained to their roles and confirmed to Court that they had fully understood the same. I find that the sureties presented to this Court are substantial and willing to 15 ensure that the applicant will not abscond if released on bail pending the hearing of his appeal.

For the above reasons, I am satisfied that the applicant meets the conditions for the grant of bail pending appeal and grant the same on the following terms and conditions;

- 20 a) Payment of cash bail of UG shs 10,000,000/= by the Applicant into this Court. This is in addition to the shillings 10,000,000/= already deposited in the Court below.
- b) The Applicant should report to the Registrar of this Court every month at 9.00 am, beginning on 1st February 2019, for extension of his bail until 25 his appeal is heard and disposed of or until further orders of this Court.



5        **c)** The applicant is hereby directed to deposit his passport and the duplicate certificate of title of land comprised in Gombe, Block 275, Plot 1093 with the Registrar of this Court.

10        **d)** Rev. Canon Albert Samuel, Retired Engineer Allan Kulumba and Ms. Rose Nakibirige are the applicant's sureties, to secure his attendance in Court whenever he is required to do so.

**e)** The said sureties should each bind themselves by signing a bond (not cash) of shs. 20,000,000/= ( Twenty million shillings only)

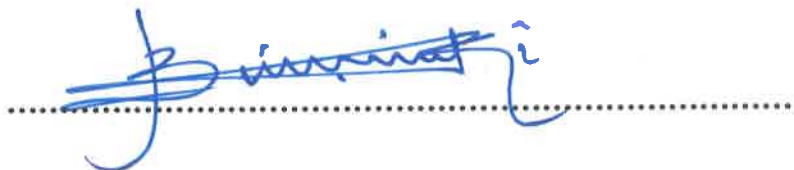
**f)** A breach of any of the above conditions shall render the bail pending appeal herein granted to the Applicant liable to an automatic cancellation.

15        The Registrar of this Court is directed to fix the appeal for hearing at the next convenient Criminal Session.

**I so order.**

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

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**HON. MR. JUSTICE BARISHAKI CHEBORION**

**JUSTICE OF APPEAL**