

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
CORAM: OWINY - DOLLO DCJ, MUSOKE AND CHEBORION JJA.  
**CRIMINAL REFERENCE NO. 95 OF 2019**

*(Arising from Ruling of Justice Ezekiel Muhanguzi Criminal Miscellaneous Application No.219 of 2019 Arising from Criminal Appeal No. 183 of 2018)*

**BOB KASANGO** ..... **APPELLANT**

**VERSUS**

**UGANDA** ..... **RESPONDENT**

**JUDGMENT OF COURT**

**Background**

The Applicant was charged with, and tried for, the offences of theft, forgery of a judicial document, conspiracy to defraud, and conspiracy to commit a felony. He was convicted by the High Court (Tibulya J) of all the charges above, and sentenced to a custodial prison term of sixteen years. He was further ordered to refund the sum of UGX, 5,000,000,000 (Five billion shillings) to the Republic of Uganda. Being aggrieved by the decision of the High Court, he has appealed to this Court against both the conviction and sentence. He then applied to be admitted to bail pending appeal which was heard by an appellate Court sitting as a single Justice who declined to grant him the order he had sought; hence this reference against that decision.

**Representation**

At the hearing of the Appeal, the Applicant represented himself; while the Respondent was represented by Counsel Caroline Tabaro (State Attorney).

**Grounds of Reference**

The grounds of the reference, as formulated by the Applicant are that:

1. The learned Justice of this Court erred in law when he made a finding that the Applicant is not entitled to the presumption of innocence under Article 28(3) of the constitution.
2. The learned Justice erred in law and fact when he found that the application has not satisfied the requirements spelt out as guidelines in the case of Arvind Patel.
3. The learned Justice erred in law and fact when he found and held that the Applicant was required to, and has not proved any exceptional circumstances to warrant granting him bail.
4. The learned Justice erred in fact when he found and held that the Applicant has not proved that he has a fixed place of abode within the jurisdiction of this Court.

### **Applicant's case:**

#### **Ground 1**

The Applicant argued that the learned Single Justice applied the provisions of Article 28 (3) (a) in isolation of other relevant provisions of the constitution. The Applicant submitted that interpreting constitutional provisions with the most liberal and purposive interpretation ought to be applied especially so when interpreting provisions relating to guaranteed fundamental non derogable rights such as the right to apply for and be released on bail. He cited the case of *Okello Okello John Livingstone and 6 Others vs Attorney General - Constitutional Petition No.01 Of 2005*, as being instructive in this regard. In it, the Court had this to say:

*“A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive, liberal, and flexible interpretation keeping in view the ideals of people, their social economic and political, cultural values so as to extend the benefit of the same to the maximum possible.”*

The Applicant contended that the learned Justice of Appeal should not only have considered Article 28 (3) (a) but also Articles 131(1), 134(2), 132(2), and 28(9) of the Constitution. He contended that the learned Justice of Appeal ought to have taken cognizance of the fact that an appeal opens up a second trial based on the same facts. This, according to him imports further application of the benefit of the presumption of innocence.

### **Grounds 2, 3 and 4:**

The Applicant submitted that the concession to the guidelines set out in *Arvind Patel vs. Uganda Supreme Court Criminal Application No. 1 of 2003* was made in the spirit and to the extent that the doctrine of *stare decisis*, by which precedents are authoritative and binding, must be followed. The Applicant argued that the guidelines set out in *Arvind Patel vs. Uganda (supra)* did apply in the circumstances; and that he had satisfied all that was laid down in the guidelines.

### **Case for the Respondent:**

#### **Ground 1**

Counsel for the Respondent argued that the Applicant was convicted by the Anti-Corruption Court of theft of Shs. 15.4 billion/=, forgery of judicial document, conspiracy to defraud, and conspiracy to commit a felony. Consequently, the presumption of innocence that was accorded the Applicant lapsed when he was found guilty of theft, forgery and conspiracy to defraud; and was accordingly convicted of those charges.

Counsel further contends that the decision of a single Justice of the Supreme Court can overturn a decision of a full bench of the Court of Appeal, which justifies the decision of Muhanguzi J.A. in which he followed the decisions in *Kyeyune Mitala vs Uganda (S.C) Criminal Application No. 7 of 2017* and *David Chandi Jamwa Vs Uganda (S.C) Criminal Application No. 9 of 2018* to reach the decision that the Applicant was not entitled to the presumption of innocence provide for in the Constitution.

## **Ground 2, 3 and 4**

Counsel for the Respondent argued that the guidelines set out in *Arvind Patel vs. Uganda Supreme Court Criminal Application No. 1 of 2003* are factual matters, which leave this honorable Court with the discretion to examine the facts of the Application; and in the circumstances of the case, make its own finding as to whether it is suitable to grant bail pending appeal or not to the Applicant.

Counsel for the Respondent argued that the circumstance of this case are that the Applicant was convicted of very grave and rampant economic crimes resulting into custodial sentence of 16 years and ordered to pay a refund of 5,000,000,000/= (Five billion shillings) to the Republic of Uganda. Counsel submitted further that the Applicant should prove exceptional circumstances, as was held *Mugisha Gregory vs. Uganda, Criminal Reference No. 179 of 2011*, when this Court found that “*as a rule of practice, bail pending appeal will be granted only in exceptional circumstances.*” Court stipulated that exceptional circumstances mean any of the following:

1. 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.
2. The certification of no objection from the Department of Public Prosecution.
3. Infancy or advanced age of the accused

### **Court’s Consideration:**

We have carefully considered the grounds of the reference, the submissions of the Applicant, and of Counsel for the Respondent; as well as the authorities cited by either of the parties, and the law applicable to this matter. We appreciate that this reference arises from a decision of a single Justice of this Court in the course of determining an application for bail pending appeal. It is again said that there are settled principles for the grant of such applications and that it is within the discretionary powers of the Judge.

Further, the principles for interference with the exercise of discretion by a Justice are settled as well. Whenever a decision is based on the exercise of discretion of any Court, Justice, such decision will not be reversed merely because the appellate Court would have exercised the discretion differently if it had handled the matter in the Court below. On the other hand, where the appellate Court finds that the trial Court has failed to exercise any discretion at all or has exercised it in a way that no reasonable Court would have done, or erred in principle or in law, or took into account irrelevant factors; or has omitted to consider factors which are material to the decision, the appellate Court can reverse such a decision. *See: Mbogo vs Shah [1968] 1 EA 93*. Section 12(2) of the Judicature Act which provides for references provides that:

*"(2) Any person dissatisfied with the decision of a single justice in the exercise of a power under subsection (1) is entitled to have the matter determined by a bench of three justices of the Court of Appeal which may confirm, vary or reverse the decision."*

In essence, a reference operates like an appeal from the decision of a single Justice to a panel of three Justices. So the above principles are applicable to the instant case.

From the grounds set out above and the submissions of the Applicant, and counsel, the main complaint in the reference is the finding of the learned single Justice that the Applicant is not entitled to a presumption of innocence under Article 28 (3) (a) of the Constitution because the Applicant had been charged, tried and convicted by the trial Court. The record shows that the Applicant was convicted by the Anti-Corruption Court of theft of Shs. 15.4 billion/=, forgery of judiciary document, conspiracy to defraud and conspiracy to commit a felony.

Article 28 (3) (a) of the Constitution provides;

*Every person who is charged with a criminal offence shall-*

*(a) Be presumed innocent until proven or until that person has pleaded guilty”*

A person applying for bail pending appeal lacks one of the most important elements normally available to a person seeking bail before trial; which is the presumption of innocence (See Harris J in *Chimambhai v Republic (No. 2) [1971] 1 EA 343* . This is because he or she has been proven guilty, and convicted, by a competent Court hearing jurisdiction in the matter.

It cannot be over emphasized that bail pending appeal is not a right but it is granted at the discretion of Court which should be exercised judiciously; and each case must be determined on its own merit and circumstances. See; *Arvind Patel v Uganda (SC) Criminal Application No. 1 of 2003*, *Basiku Thomas v Uganda, (CA) Criminal Application No. 33 of 2011*, *Busulwa Bulasio v Uganda (SC) Criminal Application No. 06 of 2015* and *Kato Kajubi v Uganda CA (Criminal Application) No. 2 of 2016*. These cases further state that at this stage, the Appellant is a convict in at least two Courts. He is no longer wholly shielded by the presumption of innocence. His only right is the right of appeal. *Arvind Patel v Uganda (supra)* clearly sets out the principles as guidelines in considering applications for bail pending Appeal, however it's important to note that grant or refusal of the application for bail pending Appeal rests within the discretion of the Justice handling the matter; and such can only be challenged where it is not exercised judiciously.

We have perused the record before this Court and it is clear that the learned Justice of Appeal considered the requirements in *Arvind Patel v Uganda (supra)* and exceptional circumstances as follows;

### *1. Character of the Applicant*

The learned Justice stated that the Applicant has been convicted on several charges preceding the Applicant's latest convictions and in the circumstances we agree that the Applicant's character can best be described as that of a convict in multiple cases.

2. *Whether the offence the Applicant was convicted of involved personal violence.*

The learned trial Justice defined "personal violence" to include the perpetrator depriving the victim of substantial property, in this case colossal sums of money such as Ugx 5,000,000,000/=, which the Applicant deprived the state of.

We agree with the learned Justice that economic crimes do not involve physical force, but can be described as not only violent, but cruel, outrageous, and inhuman; because they deprive the victims of the crime, of resources to life. In this regard economic crimes can be categorized as behavior of personal violence.

3. *Whether the Appeal is frivolous or not or has reasonable possibility of success.*

In this case the learned Justice was justified in ruling that there was no record of Appeal and Memorandum of Appeal and in the circumstances the Applicant did not prove this aspect in this application.

4. *Possibility of substantial delay in the determination of the appeal.*

We have perused the record before this Court; and in the attachment to the affidavit in reply we have noted that the name of the Applicant in Appeal No.183 of 2018 appears as No. 4 on the Cause List; and is scheduled for hearing on 15<sup>th</sup> of July 2019. before a panel of three justices. This implies this appeal is yet to be heard by this Court; and in circumstances this requirement fails.

5. *Whether the Applicant had complied with the bail terms during the pendency of the Appeal.*

We agree with the learned Justice of Appeal that the Applicant has not prior to this application applied for or been granted bail pending the trial by the lower Court; hence it would be difficult to assess the Applicant's compliance with the bail terms.

6. *The Applicant's medical/ health.*

We agree with the learned Justice of Appeal that though the Applicant did attach a medical report he did not state that he could not receive treatment in Uganda neither did he attach a medical report from the prison stating that they could not manage his health condition.

7. *Fixed Place of abode*

The Applicant stated that he has been a resident at Plot 9, Butabika, Kirombe - B Nakawa Division in Kampala for the last three years with his family but he did not avail a letter of introduction to Court from the local authorities to prove that he still has a fixed place of abode there or anywhere within the jurisdiction of this Court. We agree with the learned Justice of Appeal.

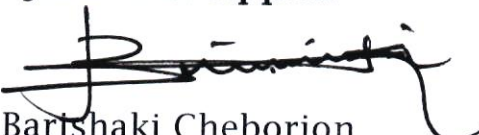
It is our well considered view that in the instant case, the Applicant has not demonstrated that the single Justice of this Court did not act judiciously in the exercise of his discretion in determining the application. We find that the learned single Justice understood the facts of the application; and rightly directed his mind to the law on bail pending Appeal. In light of all this, we find no merit in this reference; and we accordingly dismiss it.

Dated at Kampala this .....<sup>5<sup>th</sup></sup>.....day of .....<sup>March</sup>.....2020

  
Alfonse C. Owiny - Dollo

**Deputy Chief Justice**

  
Elizabeth Musoke  
**Justice of Appeal**

  
Barishaki Cheborion  
**Justice of Appeal**