

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL MISC. APPLICATION NO. 228 OF 2005

AND

CRIMINAL MISC. APPLICATION NO. 229 OF 2005

*(Arising from Buganda Road Criminal Case Nos: 794 of 2005 and 955 of 2004
respectively)*

COL. (RTD.) DR. KIIZA BESIGYE.....APPLICANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: THE HON. THE PRINCIPAL JUDGE, MR. JUSTICE JAMES

OGOOLA

RULING

The Applicant, Dr. Kiiza Besigye, has come to this Court seeking bail pursuant to the Court's discretionary authority embedded in Articles 26 and 28 of the Constitution, For the record, the Applicant has brought two distinct applications (M.A. No, 228 of 2005 and M.A. No. 229 of 2005) seeking bail in regard to the two criminal charges levelled against him - namely: treason, and rape, respectively. However, the Court and the respective counsel for both parties have agreed to assimilate the two applications into one consolidated hearing.

The Applicant's primary ground for seeking bail is that bail is a Constitutional right to be granted in the discretion of the Court, subject only to such conditions as may be imposed by the Court. The learned Assistant Director of Public Prosecutions challenged this rendering of the law. Moreover, she also raised the specter of the recent past, in which some Judges of the High Court have granted bail as an automatic right under the Constitution; while other Judges of this same High Court have granted or denied bail on the basis of the statutory provisions of the Trial on Indictments Act (Cap.23). That Act predates the present Constitution of Uganda of 1995, In this regard, the learned

Assistant Director of Public Prosecutions cited three High Court cases - namely: **Katuramu v Uganda, Case No. 1 of 2000; Byarunanga Ruggyema v Uganda, Case No. 87 of 1988; and Matove v Uganda Criminal Miscellaneous Application No. 15 of 2005.** There is thus a real and serious controversy as to what is the true state of the law, how are we to interpret and apply the relevant Articles of the Constitution? Are the bail provisions of the Trial on Indictments Act (Cap. 23) - let alone those of the Magistrates' Courts Act (Cap. 16), and of the Uganda Peoples Defence Force Act (Cap.307) constitutional or not? The situation now obtaining is contradictory and embarrassing at the High Court; and is downright confusing and perplexing as concerns the subordinate courts - whose decisions and judgments must follow the decisions and judgments of the High Court.

From a careful reading of the Constitution, the law on bail appears to be built on the following three massive pillars:

- (i) Article 23 (6) (a) of the Constitution - which gives every person arrested for a criminal offence, the right and entitlement to *apply* for bail. Upon such application, the Court /773/grant bail to the accused. In doing so, the Court has total, unlimited discretion - subject only to exercising that discretion judiciously.
- (ii) Article 23 (6) (b) and (c) of the Constitution - which gives an automatic right to bail to every person arrested for a criminal offence and remanded in custody before trial beyond the Constitutionally prescribed period of 120, 180 or, as the case may be, 360 days.

In the above two cases of Article 23 (6) (b) and (c):

- (a) the accused has a right to be released forthwith. The Court has no discretion as to whether to grant or deny bail;
- (b) When the Court grants bail, it does so upon such conditions as it may consider reasonable.
- (c) Given the above position, the bail provisions of the Trial on Indictments Act, the Magistrates' Courts Act, and the Uganda Peoples Defence Forces Act must now yield to the above Constitutional provisions if and to the extent that they conflict with those Constitutional provisions - see Article 273 of the

Constitution. That is why in the case of **Tumushable v Attorney General, Constitutional Petition No. 6 of 2004**, the Constitutional Court went out of its way to observe that:

"...the law that governs bail in Uganda is contained in Article 23 (6)

(a) , (b) and (c) of the Constitution. All other laws on bail in this country that are inconsistent with or which contravene this article are null and void to the extent of the inconsistency. The Attorney General of Uganda needs to take a closer look at sections 75 and 76 of the Magistrates' Courts Act (Cap.16) and sections 15 and 16 of the Trial on Indictments Act (Cap. 23). There may be urgent need to bring them in conformity with article 23 (6) of the Constitution"

In the Tumushabe case *{supra}*, the Constitutional Court appears to have addressed the predicament surrounding the above contradictory bail decisions of the High Court. Nonetheless, in my view, although the Constitutional Court's judgment in the Tumushabe case is quite comprehensive, the Constitutional Court was dealing with a slightly different question - namely, whether the Constitutional provisions on bail apply to a matter before a General Court Martial? In the instant application, the primary issue is more pointed: does the Constitution confer a right to bail, or only a right to apply for bail? That question needs to be answered frontally and without equivocation by the appropriate Court in this land. Equally the competent Court should definitively rule on whether the bail provisions of the Trial on Indictments Act are still good law or not. Are they constitutional or void? Have they been sanitized - in terms of Article 273 of the Constitution; and the holding of the lead judgment in the Tumushabe case?

The question then is: which is the competent Court to deal with the above issues?

Under Article 137, Clause (1) provides the answer - thus:

"(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court".

Pursuant to the above authority questions of Constitutional interpretation are to be referred to the Constitutional Court under the following Clause (5) of Article 137: *"(5) Where any question as to the interpretation of this Constitution Arises in any proceedings in a*

Court of law other than a Field Court Martial the Court -

- (a) may, if it is of the opinion that the question involves a substantial question of law; and*
- (b) shall, if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with Clause (1) of this Article".*

It is therefore quite evident that under Article 137, Clause 5(b) of the Constitution, once a party requests referral of a question of interpretation to the Constitutional Court, the Court in which that request is raised, has no. option or discretion but to make the reference to the Constitutional Court. Reference under Clause 5 (b) of Article 137 of the Constitution is *mandatory* - unlike referral under Clause 5 (a) of the same Article, which is *discretionary*.

In the instant application, the learned Assistant Director of Public Prosecutions has, by specific application and prayer, expressly raised the issue of referral of the question to the Constitutional Court for the proper and competent interpretation of Article 23, Clause (6), and its application. I am, therefore, bound by the dictates of Article 137, Clause 5 (b) of the Constitution to refer that question to the Constitutional Court. I am disposed to grant the prayer of the learned Assistant Director of Prosecutions requesting referral of the specific Constitutional question in this matter to the Constitutional Court.

All the above factors are sufficient testament to the securing of the accused's subsequent appearance before this Court when his presence will be needed - which, after all, is the basic object of bail: see **Johnson v Shaffer, 64 Ohio** App. 236, 28 N.E. 2d 765, 767.

But even more importantly, I have taken into consideration the fundamental importance of bail as the judicial instrument for ensuring the liberty of the individual. In this regard, the quest for bail is a quest for liberty. The right to the liberty of the individual is next only to the individual's right to life itself. Liberty is as crucial in a free and democratic society, as breath is to life. Liberty is so precious a commodity that during the American struggle for independence some 300 years ago, one of the American independence protagonists - I believe it was Thomas Paine - summed up the situation with the following eloquent and immortal declaration - a declaration not of suicide and despair, but of defiance and triumph: "*Give me liberty, or give me death* That sums it all up. Liberty is the very essence of freedom and democracy.

In our Constitutional matrix here in Uganda, liberty looms large. The liberty of one, is the liberty of all. The liberty of any one must never be curtailed lightly, wantonly or, even worse, arbitrarily. Article 23, Clause (6) of the Constitution grants a person who is deprived of his or her liberty, the right to apply to a competent court of law for the grant of bail. The Courts from which such a person seeks refuge and solace, should be extremely wary of sending such a person away empty handed - except of course for good cause. Ours are courts of justice. Ours is the duty and privilege to jealously and courageously guard and defend the rights of all, in spite of all.

Having regard to all the above circumstances and factors, and having judiciously and meticulously weighed one factor against the other, I am disposed to grant bail to the accused. The bail that I hereby grant is of an interim nature, in the sense that it is granted pending the hearing and completion of the reference to the Constitutional Court. At that point the matter will be revisited in accordance with the disposition of the Constitutional Court.

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From all the above, I hereby grant bail to the Applicant by way of an interim measure - subject to the following conditions:

(i) The Applicant is to enter an undertaking with the Registrar (Crime) in an amount of Shs. 10m/= (ten million) (not cash-), guaranteeing that he will return to Court to answer the charges preferred against him.

(ii) Each of the five sureties for the Applicant: Hon. John Ken Lukyamuzi (Member of Parliament for Rubaga South, and Secretary General of the Conservative Party of Uganda); Hon. Dr. Francis Epetait, (Member of Parliament for Ngora County); Hon. Capt. Charles Byaruhanga (Member of Parliament for Kibaale County); Hon. Odonga Otto (Member of Parliament for Aruu County); and Hajji Monamed Kibirige Mayanja (President of JEEMA Party of Uganda), will likewise enter an undertaking with the Registrar (Crime) in an amount of Shs.10m/= (ten million) (not cash) guaranteeing that the Applicant will return to the Court to answer the,- charges against him.

(iii) The Applicant is to surrender to the Registrar (Crime) his passport or other

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equivalent travel document(s). • / .

(iv). The Applicant, after his release on bail, must report to. the Registrar (Crime) twice every month: on every second Wednesday and on every last Wednesday of the month, until this Court concludes the hearing of these two applications or, as the case may be, the Court orders Otherwise.

Ordered accordingly.

James Ogoola

PRINCIPAL JUDGE

25/11/2005

DELIVERED IN OPEN COURT. BEFORE:

Sam K. Njuba, Esq - Lead Counsel for the Applicant

Wandera Ogalo, Esq - Counsel for the Applicant

Kiyemba Mutale, Esq - Counsel for the Applicant

Yusuf Nsibambi, Esq - Counsel for the Applicant

Ladislaus Rwakafuzi, Esq - Counsel for the Applicant

Joyce Mubiru - Counsel for the Applicant

Damalie Lwanga, Assistant Director of Public Prosecutions - Lead Counsel for the Respondent

Vincent Okwanga, Senior Principal State Attorney - Counsel for the Respondent

J.M. Egetu - Court Clerk

James Ogoola

PRINCIPAL JUDGE

25/11/2005