THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

CRIMINAL MISCELLANEOUS APPLICATIONS No. 57, 58, 59, 60, OF 2010

(Arising from Nakawa Chief Magistrate's Court Crim. Case No. 574 of 2010)

1. DR. ISMAIL KALULE

2. KHALIF ABDI MOHAMMED:::::::::::::::::::::::::: APPLICANTS

3. BATEMATYO ABUBAKARI

4. MOHAMED ADAN ABDOW

VERSUS

UGANDA ……..…….. RESPONDENT

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

RULING

Dr. Ismail Kalule, Khalif Abdi Mohammed, Batematyo Abubakari, and Mohamed Adan Abdow – hereinafter referred to, respectively, as A1, A2, A3, and A4, or collectively as the Applicants – who are prisoners remanded in Luzira Upper Prison pending trial before the High Court to which they have been committed upon being charged with various offences – each brought a separate application under the provisions of Articles 2(1), 23(6)(a) and 28(3) of Constitution of Uganda, 1995; and, as well, under sections 14 and 15(1)(b) of the Trial on Indictments Act, and also rule 2 of the Judicature (Criminal Procedure)(Applications) Rules SI 13–8; seeking to be admitted to bail pending the trial.

In view of the fact that the Applicants have all been jointly charged in the head case awaiting trial, and owing to the similarity of the several grounds on which the applications are based, Court secured the acquiescence of the Counsels on either side at the commencement of these proceedings, and heard the applications together. These grounds were also supported and elaborated upon by the respective Applicant's affidavit; and can conveniently be aggregated that:

(i) A2 and A4 were unlawfully arrested in Kenya, and irregularly transferred to Uganda where they were subjected to numerous incidents of torture and maltreatment.

(ii) The Applicants were all detained in various places before being arraigned before Court, and subsequently committed to the High Court; but since then they have not been produced for trial, and there is no indication that their trial is impending, thus violating their constitutional right to a speedy and expeditious trial.

(iii) A3's health condition is deteriorating owing to the poor condition obtaining at Luzira Prison.

(iv) Each of the Applicants will appear for trial in obedience to the Court's command, not interfere with the process of investigation or with State witnesses, present substantial sureties with fixed places of abode within the jurisdiction of this Court, and abide by the bail terms and conditions Court shall be pleased to impose; accordingly the grant of bail to each Applicant shall not defeat the cause of justice.

Francis Onyango and Duncan Ondimu, jointly argued the case for the Applicants; and pointed out that the Applicants' incarceration, inhuman interrogations, and maltreatment by both foreign and Ugandan State agencies violated their human rights. Counsels stressed that the Applicants have brought these bail applications as a matter of constitutional right to do so; and also submitted that the State's failure

to put the Applicants on trial, despite having committed them to the High Court, infringes on their constitutional right to an expeditious and fair trial; hence justification for the bail sought.

Further to this, the Counsels contended that the Applicants were ordinary men who had no capacity to interfere with the course of investigations; and in any case, committals to the High Court was clear manifestation that the State had already put together the evidence it intended to use at the trial, hence there is no investigatory process to be interfered with. For those Applicants not ordinarily resident within the jurisdiction of this Court learned Counsels assured Court that those Applicants have family members, friends, and community leaders ready and willing to accommodate them pending their trial; and indeed they presented possible sureties for Court's consideration.

State Counsel Lino Anguzu however countered the grounds presented by the Applicants for grant of bail, and their Counsels' argument in support. He contended that the gravity of the numerous charges the Applicants face, the severity of the sentence that could result upon conviction, and the fact that the State has already expeditiously committed the Applicants to the High Court for trial, are factors that make it more probable, than not, that the Applicants will jump bail. He pointed out further that for those Applicants with no fixed place of abode within the jurisdiction of this Court, it would be risky to admit them to bail as they could disappear without trace in our volatile region and thereby occasion miscarriage of justice; hence it is inadvisable for the Court to grant the bail sought.

In view of the fact that the Applicants have been committed for trial, they cannot avail themselves of the provision of Article 23 (6) (b) or (c) of the Constitution regarding mandatory grant of bail. They have correctly invoked the provisions of Article 23 (6) (a) which is a provision of wide application, and caters for situations

where either the High Court enjoys exclusive jurisdiction to try the accused person, or exercises it concurrently with a subordinate Court, but in which the bail sought is not covered by the mandatory provisions. It states as follows:

(6) Where a person is arrested in respect of a criminal offence –

(a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable; …

The other applicable laws regarding grant of bail are sections 14(1) and 15(3) (a) of the Trial on Indictments Act. Section 14 provides as follows: –

14. Release on bail.

(1) The High Court may at any stage in the proceedings release the accused person on bail, that is to say, on taking from him or her a recognisance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date and at such a time as is named in the bond.

Section 15 provides as follows: –

15. Refusal to grant bail.

(1) Notwithstanding section 14, the court may refuse to grant bail to a person accused of an offence specified in sub section (2) if he or she does not prove to the satisfaction of the court –

(a) that exceptional circumstances exist justifying his or her release on bail; and

(b) that he or she will not abscond when released on bail.

(2) An offence referred to in subsection (1) is: –

(a) an offence triable only by the High Court;

(b) an offence under the Penal Code Act relating to acts of terrorism …

……

(4) In considering whether or not the accused is likely to abscond, the court may take into account the following factors: –

(a) whether the accused has a fixed place of abode within the jurisdiction of the court or is ordinarily resident outside Uganda;

(b) whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;

(c) ……

(d) whether there are other charges pending against the accused.

Both Article 23 (6) (a), of the Constitution, and sections 14(1) and 15(3) (a) of the Trial on Indictments Act mandate Court to exercise discretion and grant bail; and to impose such terms and conditions as it considers reasonable for the grant of bail. The overriding principles for admitting a remand prisoner to bail are first, the presumption of innocence; which is that an accused person is presumed innocent, except where he or she has pleaded guilty to the charge, or the prosecution has established beyond reasonable doubt that such person perpetrated or participated in the offence charged. Second, there is need to afford an accused person adequate opportunity to prepare for his or her defence which obviously cannot be properly done when on remand. These principles are respectively enshrined in Article 28 (3) (a), and (c) of the Constitution.

In the converse, is the need for Court to determine whether in the circumstance of the case, the Applicant will turn up for trial or abscond when granted bail. There

are well established guidelines Court should adhere to, in the exercise of its discretion, in considering the issue of bail. These include the nature or gravity of the offence the accused is charged with, the severity of the sentence that could result therefrom if conviction is secured, the antecedents of the Applicant in so far as they are known, whether or not the Applicant has a fixed place of abode within the jurisdiction of the Court, the likelihood of the Applicant interfering with the prosecution witnesses, and whether the Applicant has presented substantial sureties.

Counsels cited to me the case of ***Panju v. R [1973] E.A. 282***, where the Court sounded a warning against simply acting on allegations, fears, or suspicions to deny an Applicant the bail sought. I am in full agreement with those words of caution. However, I must add here that the Court must consider each case according to its circumstance. The Court must exercise its discretion judiciously; which means it must be guided by the need to do justice, based on reasonable considerations as envisaged in Article 23 (6) (a) of the Constitution cited above.

There may well be instances where the fears, or suspicions expressed by the State are very much in the public domain; and which the Court may have to take judicial notice of. That by no means suggests that the Court looks at the Applicant with prejudice. The justice of the case requires that the accusations brought against such a person, and not the temporal issue of bail, should be attended to so that either conviction or acquittal may result; thereby bringing closure to the matter. This means the accused may then have to be inconvenienced with curtailment of his or her liberty for the greater good.

In the instant case before me, except for A4 who has been charged in one count only, namely the lesser offence of being an accessory to the offence of terrorism after the facts, the Applicants and others have all been charged in multiple counts with various offences; to wit, 76 of murder, 10 of attempted murder, and 3 of

terrorism. They have all been committed to the High Court for trial; and this was effected in a timely manner, before the expiry of the restricted period provided for in Article 23(6) (b) and (c) of the 1995 Constitution of Uganda which envisages completion of investigations by then, and otherwise would entitle a remand prisoner to mandatory admission to bail.

By any account, the allegations of murder of 76 persons in the manner alleged in the indictments amounts to mass homicide. They are certainly very grave allegations. These are further aggravated by the allegations of multiple acts of terrorism. Both offences attract the severe possible death sentence. The Court must certainly never lose sight of the constitutional provision of presumption of innocence whatever the nature of the offence charged. Nonetheless, the gravity of these offences and the severity of the sentence that may result from any conviction make it incumbent on the Applicants to present correspondingly strong grounds and justification for seeking to be admitted to bail. That is the essence of the provision of section 15 (1) (b) of the Trial on Indictments Act reproduced above; which makes it incumbent on the Applicant to satisfy Court that he will not abscond.

A2 and A4 are non citizens of this country, and are not ordinarily resident within the jurisdiction of this Court; and A3, while a citizen, is not ordinarily resident within the jurisdiction of this Court. This, per se, does not disqualify any of them from admission to bail as the law demands equality of treatment of all persons. However, they all challenged the legality of their arrest, and relocation to Uganda where they were arraigned before Court. A2 in fact contends that he was a refugee arrested in Kenya, deported to Somalia, rearrested therefrom and then brought to Uganda.

Surely the temptation for such persons to flee the jurisdiction of this Court at the first opportunity is naturally high. While the charge against A4 is far lighter than

the others its linkage with the grave charge of terrorism places it on an otherwise higher scale. I must also state here that the very volatile nature of the Eastern African region with its porous borders would present any Court with additional difficulty in the exercise of its discretion; and this is so in the absence of cogent and persuasive assurance that the Applicant will actually appear and face trial. The sureties presented in Court on behalf of A2 and A4 generally have very thin nexus or bond with the Applicants. The Chairperson of the Somali community who has gracefully offered to house A4 is only known to him through the family of the Applicant. I am not satisfied that he enjoys sufficient influence on the Applicant to ensure compliance with Court's order.

For A1 and A3 the gravity of the offences weighs heavily and tilts the Court's discretion against grant of bail despite the substantial sureties presented. A1's case is further aggravated by the other charge of terrorism pending in the Magistrate's Court. In like vein, the plea of malady by A3, brought as an exceptional circumstance, was just his word of mouth. The Applicant's interest would have been served better if he had availed this Court with medical forms in proof of such condition. The case of ***Foundation for Human Rights Initiative v. Attorney General; Constitutional Petition No. 20 of 2006***, clarified that section 15(1) (a) of the Trial on Indictments Act, on exceptional circumstance is merely regulatory, and bail can be granted regardless of it.

Nonetheless, providing documented evidence of ill health would add weight to that ground in an application for grant of bail; and this becomes more pertinent when there are adverse factors against grant of bail. I possess no skill to clinically determine that a person is as sick as he or she claims to be; or even at all. Here, the application for bail is brought after committal to the High Court; hence grant of bail is not mandatory. Proof of the exceptional circumstance of malady would very

much help to incline the Court favourably in its exercise of discretion to grant bail; which is stipulated in section 15 of the Trial on Indictments Act.

I must however make it categorically clear that the reported practice in Luzira Prison, where the accused persons are allowed about four hours only outside, must stop. Whatever security considerations that have dictated this, the accused persons are entitled to the human rights safeguards entrenched in the Constitution requiring humane treatment of all persons. In any case, the accused persons enjoy the presumption of innocence equally enshrined in the Constitution. Even if they were convicts, condemned to suffer death, they would still be entitled to this protection up to the moment of the execution ritual. The Prisons authorities must therefore make other security arrangements that do not unduly infringe on the rights of the accused persons to receive humane treatment.

The Applicants have been committed to the High Court in record time; suggesting that investigations are complete. Therefore interference by the Applicants with investigations ought to be minimal; if any. On the other hand, this indication of readiness to prosecute may in fact have the opposite effect on the accused; as it may create fear in their minds and strengthen the temptation to abscond. Added to this is the public anger the blasts, which claimed several lives and wounded others, and for which the Applicants have been indicted, evoked; inclusive of persons to whom the victims were not known at all. I must hasten to reiterate here that I fully maintain the constitutional presumption of innocence of the Applicants; and the State will certainly have to prove the allegations against each of them in accordance with the law.

Nevertheless I have to take judicial notice of the fact that terrorism has become a global phenomenon that has caused much public anxiety and resentment; the more so because the perpetrators' victims are soft targets who are usually people with

whom they have no quarrel at all. In the circumstance, the need for a full trial while the liberty of the accused persons is curtailed is imperative. Once the accused persons undergo trial and the prosecution fails to prove the case against any or all of them in accordance with the premium set by the law, such person or persons shall not doubt be acquitted and discharged. Justice will have been done; and there would be public knowledge that the due process took its course, and the accused person's plea of innocence was vindicated.

I find support for this view in the well thought out advice of the Constitutional Court in the case of ***Uganda v. Col (rtd) Dr. Kiiza Besigye; Constitutional Reference No. 20 of 2005***, in which the Court expressed itself on how a Court exercising discretion regarding grant of bail must indulge in the balancing act. It stated as follows:

> *"The need of society to be protected from lawlessness and the considerations which flow from people being remanded in prison custody which adversely affects their welfare and that of their families, and not least the effect on prison remand conditions if large numbers of unconvicted people are remanded in custody. In this respect, various factors have to be born in mind such as the risk of absconding and interference with the course of justice. Where there is a substantial likelihood of the applicant failing to turn up for trial, bail may only be granted for less serious offences. The court must weigh the gravity of the offence and all the other factors of the case against the likelihood of the applicant absconding. Where facts come to light and it appears that there is substantial likelihood of the applicant offending while on bail, it would be inadvisable to grant bail to such a person."*

In the result, and for the reasons I have set out herein above, I find myself unable to admit any of the Applicants to bail. I must also take this opportunity to observe

here that there is evidently need to revisit the law or practice, currently in place, which leaves the Director of Public Prosecution (DPP), after committing an accused to the High Court for trial, to helplessly wait for the Court to determine the commencement of the trial; yet, up till the trial begins, the case is still very much the property of the DPP who, from the evidence in his or her possession, is best placed to determine which case deserves priority attention in the face of competing demands for resources.

The Director of Public Prosecution ought to fully take charge of mobilisation of the requisite resources for trials; or at the very least have a major role in doing so, and in determining the listing of cases; something akin to the practice obtaining in the civil procedure. It is not gainsaid that the Applicants have been indicted for incidents which have occasioned much public anxiety; hence the charges must be accorded commensurate importance and dealt with in a fair, just, and timely manner, to ensure that justice is done both to the accused persons, and the public at large.

Without doubt, timely commencement of trials would greatly reduce the need to have recourse to bail; which may only be an ephemeral remedy. By copy of this ruling, I take the liberty to draw the attention of both the Chief Registrar of the Courts of Judicature, and the Director of Public Prosecution, to have serious consideration for this aspect of our criminal case management.

Alfonse Chigamoy Owiny – Dollo

JUDGE

27 – 01 – 2011