

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL MISCELLANEOUS APPLICATION NO. 004 OF 2011

ANNET NAMWANGA:.....:APPLICANT

VERSUS

UGANDA:.....:RESPO

NDENT

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

Presentation:

1. Mr. Caleb Alaka
 2. Mr. Samuel Muyizi Mulindwa
 3. Mr. Francis Katabalwa
 4. Mr. Anguzu Lino (Senior State Attorney)
 5. Mr. Muwonge Emmanuel (Senior State Attorney)
- } Counsel for the Applicant

Court Clerk:

Ms. Rose Akullo Obote

RULING:

The applicant, Annet Namwanga, was on 4th February 20011, with seven others, charged with aiding and abetting terrorism contrary to section 8 of the Anti-Terrorism Act.

The particulars of offence were that:

“between the years 2005 to January 2011 in diverse places in Uganda, Kenya and Tanzania aided or abetted or rendered support to ISSA DOKKA LAAKA by acquiring grenades, motorcycles, vehicles, providing money and intelligence information to the said ISSA DOKKA LAAKA knowing or having reason to believe that the support would be applied or used for or in connection with the preparation or commission or instigation of acts of terrorism”.

The said Issa Doka Laaka was charged on the same charge sheet with terrorism.

The Applicant was remanded to Luzira Prison and now brings this application under Article 23(6)(a), 28(3) of the Constitution of the Republic of Uganda and section 14 and 15 of the Trial Indictment Act seeking to be released on bail pending trial. The grounds of her application, as submitted upon by learned counsel, Mr. Caleb Alaka, are that:-

1. The applicant has a fundamental right to apply for bail under Article 23(6)(a) of the Constitution.

2. The applicant is presumed innocent under Article 28 of the Constitution.
3. The applicant has no previous criminal record.
4. The Applicant has a fixed place of abode at the Mulago Hospital, Nurses Quarters at Mawanda Road, Kawempe Division, Kampala District within the jurisdiction of this court.
5. The applicant shall not interfere with witnesses if released on bail.
6. The applicant shall abide by any and all the bail conditions imposed upon her by this Honorable Court.
7. The Applicant has substantial sureties.

The following were introduced by Mr. Samuel Muyinza Mulindwa:-

- i) Hon. Norbert Mao – Resident Ntinda, Nakawa Division, Kampala and Gulu Municipality, Lawyer, President of the Democratic Party and former Presidential Candidate.
- ii) Hon. Erias Lukwago – Resident of Kangugube zone Central Division, Kampala District, Lawyer, Member of Parliament for Central Division and Lord Mayor elect for the City of Kampala.
- iii) Hon. Mathias Nsubuga, Resident of Rubaga Division, Kampala District and Secretary General of the Democratic Party.

- iv) Hon. Nambooze Betty – resident of Nakabago Village Mukono Town council, Member of Parliament for Mukono North, MP elect for Mukono Municipality and Member of the Democratic Party.
- v) Mr. Fred Muganga – Resident of Post Office – Sub-ward, Division A, Entebbe Municipality. A Lithographer by profession, working with FM Quick Print and Stationers Plot 16/18 Kampala Road, Entebbe Municipality and elder brother of the Applicant.
- vi) And Mr. Lutaya Henry Grace – Resident of Mutundwe, Rubaga Division and elder brother of the Applicant.

The applicant is a Nurse working with Mulago School of Nursing and stated to be a member of the Democratic Party. She hails from Kibinge Village, Bukomasimbi District. The application was supported by an affidavit deposed to by the Applicant. She therein avers that she was arrested on 15th January, 2011 from her place of work at the School of Nursing, Mulago. She was detained at the Headquarters of Rapid Response Unit (RRU) of the Uganda Police Force at Kireka for 16 days. On 3rd February 2011 the Chief Magistrate Court Nakawa ordered her unconditional release from Police Custody. Upon service of the release order on the Rapid Response Unit, she

was on 4th February 2011 produced and charged before the Buganda Road Court and remanded to Luzira Prison.

Mr. Alaka submitted that the Applicant was presumed innocent and entitled to her liberty. He cited **Hct Crim Misc. Appl No. 228 and 229 of 2005, Col (Rtd) Dr. Kiiza Besigye vs. Uganda** where Hon. Justice James Ogoola –PJ (as he then was) states:-

“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 300 years ago, one of the American independence protagonist.....summed up the situation with the following eloquent and immortal declaration - 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 been 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”.

Mr. Anguzu Lino, Senior State Attorney, opposed the application for bail.

Counsel emphasized that the overriding considerations are:-

- whether the Applicant will return to court and attend her trial if released on bail and
- whether the Applicant will interfere with the course of justice; that is interfere with the witnesses, the evidence and the investigation.

He urged court to balance the greater public interest of doing justice in the substantive case with the temporal issue of liberty of the applicant. He argued that court should give due regard to the nature of the accusation against the Applicant and the severity of the punishment in the event of conviction. He submitted that Aiding and abetting terrorism is a capital offence, one of the most serious offence in the country's statute books which carried a maximum sentence of death on conviction. He observed that terrorism, aid and abetting thereof, is equally an offence of grave concern to this country and to the entire world because it is trans-national in nature and difficult to combat.

The State filed an affidavit in reply deponed to by Patrick Wacha, a Detective Superintendent of Police attached to the Criminal Investigation Directorate Headquarters, the Officer in Charge of Anti- terrorism Unit at CID Headquarters and the investigating Officer in the case. He therein avers that his investigations established that the Applicant committed the offence in several countries including Uganda, Kenya and Tanzania. That the investigations are not yet complete and are still continuing. That five of the individuals jointly charged with the Applicant are still at large and have not been arrested.

He strongly believes that the Applicant will interfere with the investigations if released at this stage.

Mr. Mwonge Emmanuel, Senior State Attorney, submitted that the four Members of Parliament provided as sureties have no nexus or bond with the Applicant, save being members of the same Party, that is the Democratic Party. In his view these four were not substantial sureties.

Article 23(1) of the Constitution provides that no person shall be deprived of personal liberty except in any of the cases provided therein. Then in 6(a) it provides:

“(6) Where a person is arrested in suspect 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”.

Article 28 (3)(a) of the Constitution presumes every person who is charged with a criminal offence to be innocent until proved guilty or until the person has pleaded guilty.

For now the applicant is presumed innocent, thus the exercise of her Constitutional right to apply to be released on bail.

Article 23(6)(a) provides this court with the discretion to grant bail on such conditions as it may consider reasonable. The provisions of this Article have been explained by the Constitutional Court in Constitutional Reference No. 20 of 2005 – Uganda (DPP) vs. Col (Rtd) Dr, Kiiza Besigye where their Lordships stated:

“Under article 23(6)(a), the accused is entitled to apply for bail. The word “entitled” creates a “right” to apply for bail and not a right to be granted bail. The word “may” creates discretion for the court to grant or not to grant bail. The context in which the word “may” is used does not support otherwise”

The court went further to laboriously lay down the “reasonable conditions” the court should keep in mind in the exercise of its discretion to grant or refuse to grant bail.

They stated:

“While considering bail, the court would need to balance the Constitutional rights of the Applicant. The needs 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 un convicted people are remanded in custody. In this respect various factors have to be borne in mind such as the risk of absconding and interfering with the course of justice. Where there is a substantial likelihood of the applicant failing to surrender for turn up for trial, bail may 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. When 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.

Similarly, where there is a substantial likelihood of interference with witnesses, this is usually relevant when the alleged offence is comparatively serious and there is some other indications of violence

or threatening behavior by the accused, this would be a very strong ground for refusing bail.

Bail could also be refused according to the status of the offence and the stage in the proceedings. The extent to which evidence pointing to proof of guilt or innocence of the applicant would seem to be one of degree in the circumstances of a particular case. There is no rule that such evidence cannot be placed before court. An investigating officer giving evidence of arrest often be to connect the applicant sufficiently with the offence, as much as to claim that he or she may fail to surrender for trial.

While the seriousness of the offence and the possible penalty which could be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant will appear for trial and would not abscond. The applicant should not be deprived of his/her freedom merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the applicant the full benefit of his/her Constitutional rights and freedom by exercising its discretion judicially. Bail should not be refused

mechanically simply because the state wants such orders. The refusal to grant bail should not be based on mere allegations. The grounds must be substantial. Remanding a person in custody is a judicial act and as such the court should summon its judicial mind to bear on the matter before depriving the applicant of their liberty. What we have outlined above is by no means exhaustive. The court should consider all other relevant circumstances.

All in all both the High Court and the subordinate courts have wide discretionary powers to set bail conditions which they deem reasonable, though we would caution this must be done judiciously”.

I must add that court must exercise judicial power in the name of the people and in conformity with law and with the values, norms and aspirations of the people.

See: Article 126(1) of the Constitution.

The Applicant is charged with a serious offence of aiding and abetting terrorism which threatens national security. It affects the safety of the people and/or their property. There should be peace and the courts of

law, like any other organ of Government, have a duty to ensure that national and international security is preserved. However, this greater public interest must be balanced with the fundamental rights of the citizens.

The Applicant is not before this court on trial but for court to consider whether there is justification to interfere with her right to liberty pending her trial. For now she still enjoys the Constitutional presumption of innocence. The rationale of granting bail is that instead of keeping a suspect under the harsh conditions of remand who might in the end be found innocent, she should not be incarcerated if the court is satisfied that he/she will turn up to answer the charges. When granting bail the court must be satisfied that in the circumstances of the particular case, the Accused person will turn up to answer the charge at the trial and whenever he/she is required by Court. In other words that he/she is not likely to abscond. Further court must be conscious of the likelihood of the accused person to interfere with the investigations, witnesses and/or evidence.

I have carefully considered the law and the authorities cited to me and the submissions of counsel for both the Applicant and the State. I have consciously considered the gravity or seriousness of the offence the applicant is charged with and the severity of the attendant sentence on conviction. I have also considered the effects of the offence charged on national security and society. However equally importantly, I have also considered the applicant's fundamental right to liberty. I have also considered the Applicant's mitigating factors.

The Applicant is a Ugandan who hails from Kibinge Village, Bukomansimbi District. She works with the School of Nursing, Mulago with a permanent place of abode at the Mulago Hospital Nurses Quarters at Mawanda Road, Kawempe Division, Kampala District within the jurisdiction of this Honorable Court.

The Applicant has no disclosed previous criminal record. In paragraph 7 of the affidavit in reply it is averred that the Applicant is married to one of the Co-accused, one Lawrence Kiwanuka Nsereko who is stated to be still at large and resident in the United States of America. The deponent did not indicate whether his investigations had

established that the Applicant was in contact with him or any of the other co-accused persons, who are still at large, prior to her arrest. **In Panji vs R (1973) EA 282** court sounded a warning against simply acting on allegations, fears or suspicions to deny an Applicant bail.

The Applicant has presented six sureties. Four of them are Members of Parliament, two of whom are lawyers. They are all substantial persons with well known and apparent interest to national security. However I agree with Mr. Muwonge, Senior State Attorney, that they have no nexus or bond with the Applicant. A Surety must be a person capable to ensure that the Applicant turns up to stand trial as and when required by court. In my view being members of the same Political Party with the Applicant is not enough. Further with Sureties of such high Political stand it might be found difficult to enforce the bond against them.

However the Applicant also presented two of her elder brothers as sureties. I find them, and counsel for the State was in agreement, the best sureties to ensure that the applicant turns up for trial.

Considering all the above, the Applicant is granted bail on the following conditions:-

1. The Applicant is to deposit in Court a Cash bond in the sum of Shs. 5,000,000/= (shilling five million only).
2. Mr. Fred Muganga and Mr. Lutaya Henry Grace are approved as the sureties and each of them will execute a bond in the sum of shs. 10,000,000/= (shilling ten million only (not cash.)
3. The Applicant is to surrender her Passport to the Deputy Registrar, Criminal Division, High Court, until directed otherwise by this Honorable Court. In the premises the Criminal Investigations Directorate or any other Department of the Police Force which might be in the custody of the Applicant's Passport is hereby directed to handover the Passport to the said Deputy Registrar.
4. The Applicant is not to move out of the local limits of the City of Kampala without the written permission of the Deputy Registrar, Criminal Division first had and obtained.
5. The Applicant is to report to the Chief Magistrate Court, Buganda Road Court on the 18th day of April 2011 and thereafter as shall be directed by the said Court from time to time until ordered otherwise.

6. The Applicant is to report once a month, on the first Friday of every month effective from 6th May 2011 to the Criminal Investigations Directorate Headquarters until ordered otherwise by this Honorable court.

In default of any of the above conditions, the Applicant is to keep on remand.

LAMECK N. MUKASA

JUDGE

1/04/2011