THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CRIMINAL MISCELLANEOUS APPLICATION NO. 019 OF 2022

(ARISING FROM CRIMINAL CASE NO. AA 19/2022 KTG CO. 330/2022, CRB 191/2022)

ODOKONYERO SAMUEL.....APPLICANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

The applicant applies to be released on bail, pending trial on two counts of aggravated robbery, contrary to section 285 and 286 of the Penal Code Act, Cap. 120. The Application is brought under article 23 (6) (a) of the Constitution of Uganda, 1995, sections 14 (1), (3) and (4) of the Trial on Indictments Act, Cap.23 and Rule 2 of the Judicature (Criminal Procedure) (Application) Rules, S.1 13-8. The grounds of the application in brief are; the applicant's good antecedents, having not committed any offence before; the applicant's assurance of not absconding if released on bail, as he has a fixed place of abode within the jurisdiction of court, and the fact of having sureties who are substantial; and the interest of justice. These grounds are amplified in the applicant's affidavit in support, dated 19th July, 2022.

Although not pleaded in the Motion, the Applicant introduces in the affidavit, ground of ill-health, contending that he suffers from kidney (problem). The Applicant also swore a supplementary affidavit dated 9th August, 2022, where he deposed that he had in his earlier affidavit omitted to the state that he suffers from serious illness which requires a specialist attention. In the supplementary affidavit, he deposed that he suffers from *'Nephelic'* Syndrome with frequent and bilatrary hernia and has to undergo CT scan and prepare for operation in August, 2022. He deposed that the said illness is grave and cannot be treated in Prison, as recommended by the Prison Medical Personnel.

The application was opposed by the Respondent, by an affidavit of a one No. 041936 D/CPL Okene Silver Christ, on the grounds that the offence the applicant is charged with is serious and the likelihood of absconding is therefore very high; that the Applicant and his colleague who is now deceased were arrested by the Community of Namukora Sub County, Kitgum District where the offence was allegedly committed and his colleague was killed by mob, so the applicant will not be safe if released; that ever since the Applicant's arrest and remand to prison custody, peace has resumed in the area and incidents of robbery have reduced, and that, if released, robbery will resume; that the Applicant has not proved that he is suffering from grave illness that is not capable of being treated while in Prison custody; that the charges of aggravated robbery involved a lot of

violence, as the Applicant and his colleague were armed with iron bars, pangas and a gun which they even fired at the robbery scene, so the Applicant is likely to interfere with the victims or the course of justice if released on bail; that the sureties are not financially capable of meeting terms of the bond; that the Court ought to protect society from lawlessness, when considering the constitutional rights of the Applicant to liberty and presumption of innocence; and finally, that the Applicant has already been committed to the High Court for trial and the Prosecution is ready to lead evidence against him.

Representation and submission

Learned Counsel Doughlas Odyek appeared for the Applicant, who was present in court. Counsel filed written submissions and made brief oral highlights, after presenting three sureties. He prayed that the application be granted. Ms. Nyipir Gertrude, a State Attorney with the Office of the Directorate of Public Prosecutions represented the Respondent. She also filed written submissions and made brief oral highlights and prayed that bail be denied. Court has considered both submission by learned counsel and is grateful.

Analysis and determination

Bail is an agreement or recognizance between the accused (and his sureties, if any), and the court, that the accused will pay a certain sum of

money fixed by the court should he/she fail to appear to attend his/her trial on a certain date. The object of bail is to ensure that the accused person appears to answer the charge against him/her, without being detained in prison on remand pending trial. The effect of bail therefore is to temporarily release the accused person from custody. See: Opiyo Charles *alias* Small Vs. Uganda, Criminal Misc. Application No. 26 of 2022 (Okello, J.)

The principles which guide court in considering whether or not to grant bail are well settled. Only key principles have been considered for the purposes of this ruling.

It is not disputed that the applicant is accused of two counts of aggravated robbery, which is a capital offence. It is alleged by the Respondent, in the Indictment and Summary of the case that, on 8th March, 2022, at Onyala Central village, Namukora North Sub County, Kitgum District, the Applicant and others still at large robbed two persons of a total of seven bags of simsim, and at or immediately before or immediately after the robbery, used a gun, a deadly weapon. It is further alleged that the Applicant and others had travelled from Gulu (City) to Kitgum District by a motorvehicle Registration No. UBA 444 U. That, the residents laid a road block, impounded the car and recovered the bags of simsim. That the

Applicant escaped but lost his way in the area, during which he was arrested by the Community and handed over to Police.

Given the gravity of the allegations, Court needs an assurance that the Applicant will turn up for his trial, if granted bail, as the temptation to abscond is high. Court will thus consider the matters raised by both sides of the prosecution divide.

Although at the hearing of the application, the State took issue with the Applicant's lack of a National Identity Card, arguing that he would be untraceable if granted bail, when Court granted leave to the Applicant to produce proof of his registration with National Information Registration Authority (NIRA), a letter dated 21st October, 2022, from NIRA was filed in Court on 26th October, 2022, confirming the Applicant has a National ID No. CM97005109N12E appearing in the National Identification Register (NIR). The above evidence therefore resolves the point taken by the State.

What however remains to be scrutinized is the Applicant's residence. The Applicant pleaded in paragraph 4 of the Notice of Motion, and deposed in paragraph 2 of his affidavit in support, that he is a resident of Patiko village, Omote Sub County, Kal Parish, Gulu District. However, in the letter authored by the LC 1 Chairperson of Layibi Center A/B, **Tegwana Ward**, Laroo-Pece Division, dated 21st October, 2022, it is indicated that

the Applicant is a resident of "*the above* ***Sub- Ward***." Whereas the said **'Sub-Ward'** is not stated, the Ward is said to be Tegwana. The letter by the LC 1 Chairperson casts doubt on the Applicant's exact residence, given that the letter it is at variance with what the Applicant pleaded and deposed as being his area of residence (Patiko village, Omote Sub County, Kal Parish). This factor weighs against the Applicant's request to be considered for release on bail, as he may not be easily traced, should he be released and fails to honour his bail terms.

However, Court will still consider other factors. Proceeding with the sureties, Court notes that the parents of the Applicant, namely Okullu Chirstopher Kagwa, and Lanyero Florence, who told Court that they are business persons, dealing in timber, and second hand clothes, respectively, are in right standing to offer themselves as sureties for their son. They told court they own a permanent home where they live, within Layibi Centre A and B. whereas they stated that the Applicant lived with them before the arrest, that evidence appears inconsistent with the Applicant's own pleading and deposition that he was a resident of Patiko village, Omote Sub- County. No one attempted to explain away the above material contradiction regarding the Applicant's residence. The third surety was Olanya Gerald, an uncle to the Applicant. He was introduced as a technician specialized in bicycle repairs around Layibi Centre A and B. I find him too, to be in good standing as surety for his Nephew (the

Applicant). Whereas the sureties stated that they are capable of meeting any bail terms, Court remains doubtful as to whether they can influence the applicant to attend court, because, on the evidence available, they do not live in the same area as the Applicant. Being a relatively young adult of the apparent age of 25, the residence of the sureties and the Applicant, matters to Court, as the level of influence over him is critical, for the purposes of ensuring his Court attendance, if released on bail. The evidence given by the State is that, the Applicant was arrested from Kitgum District by the community of the area where the offence of aggravated robbery was allegedly committed, and that, this was after his colleague in the alleged robbery was killed by a mob. On his part, the Applicant informed court that he had gone to do electrical wiring in Kitgum and that before travelling to Kitgum, he did not alert his parents, but that they learnt about his being away, after the arrest. The question that comes to mind is whether the parents of the applicant really had control and influence over him, before the time of the arrest. If he could go to another District where he ended up being arrested by the community as he affirmed to Court, yet the impression the parents created to Court is that the Applicant was under their care and parental custody, before the time of the alleged incident, then it seems to court that, although they are his parents, the 1st two sureties had neither control nor influence over the Applicant. I am therefore not satisfied that the Applicant would listen to his parents and honor the bail terms, if released.

This court has held before that the mere fact that sureties are in a financial position to be able to forfeit something of value, usually bond money to the State, is not in the best interest of the criminal justice, once an accused has jumped bail and cannot face the due process of the law. The interest of the State is not to make a profit or money out of bail money that sometimes get forfeited to the State. The paramount interest is to ensure an accused attends his trial, while out on bail, and that criminal justice is served. The mere fact that on occasions accused persons jump bail and their sureties readily pay the bail money, leaves a permanent scar in the hearts and minds of the victims of crime (if alive) and their relatives, and the public in general. Therefore, forfeiting bail money serves no justice. See: Opiyo Simon Peter & Opiyo Jimmy Vs. Uganda, Criminal Misc. Application No. 20 of 2022 (Okello, J.)

I am therefore of the considered view that, whereas the sureties are persons of relative substance and can stand surety for their son and Nephew, respectively, the sureties have not demonstrated that they were able to have influence over the Applicant, before his arrest and now that he has been charged with a very serious offence, the applicant will be obedient to them. On the contrary, the Applicant's propensity to disregard the sureties are more apparent than not. The Applicant was presented to court as an obedient young man, a student, well under the care of his

parents before the time of his arrest, and therefore would not let down his parents, once granted bail. I am not satisfied, on the evidence, that he was so.

I have also found some material contradictions in the Applicant's narrative to court, when asked about his education. He told court that he is still a student of Northern Youth Development Centre, yet his Student ID shows that he ceased being a student on 25th August, 2021. Despite this fact, he maintained that he is still a student. His parents also described him as a student, ready to go for further studies, in pursuit of a Diploma in Electrical Engineering, having completed a certificate in the same discipline before. This Court is not satisfied that the Applicant will turn up for trial, if released on bail. On the contrary, there is evidence that the Applicant could resume studies, which is fine, but the likelihood of completely ignoring to attend Court and thus neglecting to fulfill his undertaking to court all -together, is very high, if released on bail.

Court will next consider the ground of ill-health advanced by the Applicant. The Applicant at first deposed in his affidavit of 19th July, 2022 that he suffers from **kidney** disease. He attached no proof. However, in his supplementary affidavit of 9th August, 2022, his narrative was that he suffers from 'Nephelic' Syndrome, with frequent bilatrary hernia, and has to undergo CT scan and prepare for operation in August, 2022. This court

has looked at the two pieces of medical documents attached to the supplementary affidavit. The first one is dated 15th July, 2022. It bears the Ministry of Health Logo as well as the name of the Applicant. It however does not show which medical facility issued the document. As at 15th July, 2022 when the document was issued, the Applicant was already in Prison custody. It is apparent from the Indictment that the Applicant was arrested on 8th March, 2022 (although he states 8th February, 2022). The Applicant confirms that he was medically examined on 15th July, 2022, although it is not clear whether the examination was done at a Prison Medical facility or outside it, as there is no affidavit evidence or report from Prison Medical facility either. The place where the Applicant was examined from matters to Court. On the back of the Medical document under 'plan for the applicant', it is written *"consider abdominal CT Scan... R/O Gall Stew; Prepare for operation in August 2022, after CT Scan."*. Court's view is that it would have been weightier and corroborative if the circumstances of issuance of the document was clarified to court. Court is thus unable to tell whether it is the Prison medical facility or an outside medical facility which made the recommendation appearing on the medical document. If it is the Prison Medical facility which made the recommendation, then the Applicant ought to present a report from the facility clarifying whether or not the Applicant's condition cannot be managed while in Prison custody. Court was also not able to appreciate what "*Nephilic*" syndrome, appearing on the document means, as an online search did not show that the term

exists in clinical medicine. In his affidavit, the Applicant terms it "*Nephelic*" syndrome. Both terms do not exist. The closest term is "Nephrotic" Syndrome, which is a kidney disorder, caused by damage to small blood vessels. This has to be contrasted with 'bilateral inguinal hernia" appearing on the same medical document. This is also termed as groin hernia which according to court, is a condition in which a soft tissue bulges through a weak point in the abdominal muscles; the soft tissue often being part of the intestine, and it is easy to see and feel the bulge, although not all are visible, especially when the patient is obese. This condition is treatable.

The other medical document I have considered is that shown to have been issued from Gulu Regional Referral Hospital and dated 5/10/2021 (before the Applicant's arrest and remand) showing diagnosis of "*Nephrilic...*" It shows bilateral inguinal hernia as being the Applicant's condition. This document predating the earlier document, shades some light about the Applicant's condition. Under treatment notes, the author of the document makes recommendations, thus, "*surgical...*; and *'avoid strenuous activities, digging, carrying heavy things, running long distances."*

What is thus missing from the Applicant's evidence is proof that the Prison medical facility is not capable of executing the actionable medical recommendations made in the treatment notes of the document, either

independently or through an arrangement with an outside medical facility. Given the gravity of the accusation levelled against the Applicant, this exceptional circumstance of grave illness not capable of being treated or managed within the Prison Medical facility is critical and ought to be proved, before court can exercise its discretion whether or not to grant bail. See: Komakech Geoffrey Vs. Uganda, Criminal Misc. Application No. 29 of 2022 (Okello, J.)

I will now consider the arguments that the offence with which the Applicant is charged is serious, involving violence and that the Applicant has already been committed for trial by court, hence if released, he may interfere with evidence, and public peace and security. The Evidence by the Detective Corporal, Okene Silver Christ, in the above respects, have not been rebutted by the Applicant. Therefore, given the nature of the accusation and the circumstances under which the Applicant was arrested by the community in Namukora, Kitgum District, bail application has to be considered on sterner stuff. Although the possibility of the Applicant being harmed if released, is remote, as it is not shown that he will go back to Namukora, Kitgum District any time soon, it is court's view that the interest of the society as a whole has to be taken into account, before granting bail in this case. Although I have also not found that the Applicant is capable of interfering with evidence or the victims or the course of justice, as he is less likely to go back to Namukora, Kitgum District, where

his colleague was killed, I am of the considered view that the concerns of the State that society needs to be protected from the accused, (although no proof of guilt) ought to be taken into account and balanced against the Applicant's right to liberty and presumption of innocence. In this matter, my view is that, having not proved the exceptional ground of illness incapable of being treated or managed by the Prison Medical facility, the Applicant should temporarily be deprived of personal liberty, which right is not absolute. See: Article 23 (1) (a) of the Constitution of Uganda, 1995; Foundation for Human Rights Initiative Vs. Attorney General, Constitutional Appeal No. 03 of 2009 (SCU).

Before I take leave of this matter, I wish to pay deference to the wisdom of Katureebe, CJ espoused in the case of Foundation for Human Rights Initiative Vs. Attorney General, Constitutional Appeal No. 03 of 2009 (*supra*) where the Learned CJ considered Article 126 (1) of the Constitution of Uganda (which provides for how judicial powers is derived and how it should be exercised by courts). As regards bail consideration, the Learned CJ posed the question, thus,

"What are the values, norms and aspirations of the people as far as bail is concerned? Court answered *"often, court releases a person on bail and this is followed by strong disapproval from members of society, particularly in*

serious offences like murder. In deed in some jurisdictions, such offences are not bailable at all."

It is therefore my considered view that the people's values, norms and aspirations matter, when considering bail application, depending on the circumstances of each case. On the facts of this matter, I find that releasing the applicant on bail, moreover where the Applicant has not proved the pleaded exceptional circumstance, on the balance of probability, would not augur well with the values and aspirations of our people, under article 126 (1) of the Constitution, 1995. Accordingly, bail is denied and the application dismissed. If he had proved an exceptional circumstance pleaded, perhaps my conclusion might have been different. Accordingly, bail is rejected.

Delivered, dated and signed this 31st October, 2022.

31.10.2022

George Okello
JUDGE HIGH COURT

Ruling read in in the presence of;

Attendance

Ms. Grace Avola, Court Clerk.

Ms. Gertrude Nyipir, State Attorney, ODPP, for the Respondent.

Mr. Odyek Douglas, Counsel for the Applicant is absent.

The Applicant is in Court.

Ms. Nyipir: The case is coming up for Ruling on bail application. I am ready to receive the Ruling.

The Applicant: I am ready to receive the Ruling.

Court: Ruling read in Chamber.

31.10.2022

George Okello

JUDGE HIGH COURT