THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CRIMINAL MISCELLANEOUS APPLICATION NO. 20 OF 2022

(ARISING FROM CRIMINAL CASE NO. 0102/2021, OMORO CRB AMURU CRB 564/2021)

1. OPIYO SIMON PETER
2. OPIYO JIMMY.....APPLICANTS

VERSUS

UGANDA.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

The Applicants jointly lodged the application in court on 26th July, 2022, seeking to be released on bail pending trial. They are indicted on three counts of murder, contrary to sections 188 and 189 of the Penal Code Act, Cap. 120. They were committed to the High Court for trial on 13th May, 2022. The application is made under Article 28 (3) (a) of the Constitution of Uganda, 1995, sections 14 (1) and 15 (3) of the Trial on Indictments Act Cap. 23 and Rules 2 and 4 of the Judicature (Criminal Procedure) (Application) Rules, S.I 13-8.

The main grounds of the Application are; the presumption of innocence; likelihood of substantial delay in trial; the sureties are substantial; the

applicants have good defenses to the charges and they are likely to succeed; there are no negative antecedents; the prison remand is adversely affecting the families of the applicants; and it is in the interest of justice that the application is allowed. These grounds are supported by affidavit of each applicant. They also deposed on the details of their sureties, and attach the photocopies of their national identity cards and introduction letters from the Local Council 1 Chairperson of their area.

The Respondent opposes the application, although there is no affidavit in reply. The Respondent relies on the Summary of the case and a copy of the Indictment adduced by the Applicants, to found its opposition. Since there is no affidavit, I will consider the arguments in opposition, in my analysis of the application.

Representation

During the hearing, Mr. Doughlas Odyek represented the Applicants, while Ms. Gertrude Nyipir, a State Attorney in the Office of the Directorate of Public Prosecutions, appeared for the Respondent. Both counsel were granted leave to file and rely on their written submissions, which court has duly considered and will only refer to relevant parts.

Analysis and determination

I wish to state at the onset that the application is omnibus in nature, yet bail application should be made by each accused person, even when they are jointly charged. This is the legal position settled in the case of Katebarirwe Alfred & Komunda Ephraim Vs. Uganda, Criminal Application No. 165 of 2019 (Court of Appeal) where Kakuru, JA held that each Applicant for bail ought to file separate application, stating reasons peculiar to him/her. In this case, I decided to save the application from a strike out order, by calling into aid Article 126 (2) (e) of the Constitution of Uganda, 1995, by disregarding the omnibus nature of the application, as a technicality. See Utex Industries Ltd Vs. AG, SCCA No. 52/1995 which support this view. However legal practitioners ought to take heed and act accordingly going forward.

I also noted that the affidavits in support are not dated. I have ignored this defect, given that the Justice of Peace affixed a stamp bearing a date, although omitting to fill the usual parts bearing the date, expected to be filled by Commissioner for Oath, before a deponent signs/ appends a thumbprint. Justices of Peace ought to avoid such omission in future. I therefore decided to consider the application on merit.

On its part, the Respondent, as noted, did not file an opposing affidavit. In her submission, the learned State Attorney relied on some pieces of

evidence adduced by the Applicants. I find that she is entitled to do so. Therefore, the objection by the Applicants' learned counsel that the Respondent has no locus, having lodged no opposing affidavit is, with respect, without merit. Even if the State filed no opposing affidavit, the application still has to be inherently assailable on its own. Objection was also taken in respect of alleged late service of the Respondent's submission. I have not been shown proof of late service, as by law required. Even if the allegation were true, I would have overlooked it, in the interest of justice, as there is no prejudice occasioned by the alleged late service. At any rate, submission of counsel, although may be of assistance to court, does not bind court, whether ignored or not. The objections by Mr. Odyek therefore does not go to the root of the matter. I overrule it.

Turning to the merit of the matter, bail has been stated to be 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. See: Opiyo Charles *alias* Small Vs. Uganda, Criminal Misc. Application No. 26 of 2022 (Okello, J.) 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.

Courts have laid down principles which guide court in considering whether or not to grant bail. In this matter, I will only consider the key principles. The main consideration for bail is whether the applicant will attend his trial if released on bail, and whether or not he will interfere with witnesses or evidence, if released: See Opiyo Charles alias Small Vs. Uganda (*supra*);

In the present matter, it was submitted for the Applicants that they will attend their trial once released on bail, as they have known places of abode and that their sureties are substantial. Reliance was placed on the introduction letters written by the LC1 Chairperson of Opit North **Cell**, Parwech Ward, Omoro Town Council, Omoro District. The LC I Chairperson of the area is a one Acaye John Bosco. He confirms that both applicants are residents of his area of jurisdiction. The Respondent did not rebut this evidence. As stated however, even where there is no opposing affidavit, court still must subject the application to scrutiny. Having scrutinized the material before court, I find that the applicants have a fixed place of abode within court's jurisdiction. They reside in the same area stated by the LC 1 Chairperson.

Each Applicant relied on two sureties whose identities are on court record. For the 1st Applicant, the sureties are Okello Simon, an uncle, and Ocan George Wilbert, a brother. Mr. Ocan is stated to be a laboratory technician at Opit Secondary School, while the first surety's nature of work is not

stated. The LC 1 Chairperson confirms that both sureties own property. For the 2nd Applicant, Akello Juliet, a sister of the 2nd Applicant a local hotelier within Parwech Ward, Omoro Town Council, was introduced by the same LC 1 Chairperson. The second surety was Okwera Silvestor, a teacher at Lalogi Primary School, and a brother to the 2nd Applicant. The two sureties were shown to be gainfully employed and the LC I Chairperson confirmed that, they too have property. Court therefore finds that both applicants presented sureties who are substantial and who are residents of the area where the applicants ordinarily reside.

The next consideration is whether the applicants are likely to interfere with evidence. The learned State Attorney contended that being the LC1 Chairperson of Opit North **Sub-ward**, the 1st Applicant is likely to interfere with witnesses for the prosecution, given that, the witnesses reside within the area where the offence was committed, which falls under the jurisdiction of the 1st Applicant. The learned State Attorney apparently is relying on the 1st Applicant's own affidavit, where he introduces himself as the LC 1 Chairperson of Opit North **Sub-Ward**. It was then argued, the 1st Applicant wields power in the area. No similar arguments were however made by the State counsel in respect of the 2nd Applicant. I find that, the likelihood of the 1st Applicant interfering with evidence or witnesses is very strong. The 1st Applicant has not denied that, as the LC1 Chairperson of the area where the alleged offence was committed, he wields no power. As

regards the 2nd Applicant, it is not shown that he wields any power or has influence. I therefore find that, the 1st Applicant, on his own evidence, being the LC 1 Chairperson of Opit North Sub-Ward, is more likely to interfere with witnesses, now that he has been committed to trial by the High Court and is assumed to know the substance of the evidence to be adduced against him, as he has a copy of the indictment and the summary of the Prosecution case. However, on the material available, there is no similar evidence of a likelihood of interference by the 2nd Applicant, as he is not shown to wield some power and influence over the people of his community, some of whom are likely State witnesses.

Court will therefore consider other relevant factors. The Respondent argued that the offence involved a lot of violence. Relying on the summary of the case (adduced by the applicants) and the Indictment, it was argued, the victims of murder were three who were killed in a very violent manner, and that, if released on bail, the applicants are likely to commit other offences. I am not persuaded by these arguments. There is no past history of violence adduced by the Respondent, to show that, that is the disposition of the applicants.

The other consideration is the stage of the proceedings, the gravity of the offence and exceptional circumstances. I have carefully weighed these factors against the others. The applicants have been committed to trial.

They applied for bail two months after committal. It is intriguing that they did not think about applying for bail before, although the timing of a bail application before committal is not a legal matter, I find that, in this case, the fact that the application was lodged two months after the committal proceedings is telling. The fact that they have since been committed, the applicants know the substance of the allegations against them and the nature of the evidence to be adduced by the State. Although presumed innocent, yet the allegations that they murdered three persons, are grave. In a serious offence such as the instant, exceptional circumstances cannot be ignored. Here, none has been pointed out and relied on. I am of the view that, given the magnitude of the accusations, the applicants ought to adduce at least evidence of an exceptional circumstance, before court can consider whether or not to grant them bail. Whereas they have substantial sureties, who could meet the bail terms, the public interest is more in seeing that criminal justice is served. It is not about Government being able to make a profit, if that be appropriate description, out of those who jump bail, as the sum of money constituting the bond is forfeited to the State. In the circumstances, given the gravity of the allegations, an exceptional circumstance ought to have been pleaded and proved by the applicants. They did not do so. This factor works against the applicants.

The Applicants are alleged to have been part of a mob that killed three persons, who were wrongfully alleged to be cattle thieves. In such a case,

it cannot simply be rubbished, as the applicants' counsel suggested, that the relatives of the victims are not aggrieved and may not revenge. Thus, there is need to protect society from lawlessness by temporarily keeping the applicants away for their own safety. This was the wisdom espoused in Abindi Ronald & another Vs. Uganda Misc. Criminal Application No. 020 of 2016. (Mubiru, J.)

This matter cannot be concluded without considering the wisdom of Katureebe, CJ espoused in the case of Foundation for Human Rights Initiative Vs. Attorney General, Constitutional Appeal No. 03 of 2009 (SCU) when he considered Article 126 (1) of the Constitution of Uganda (which provides for how judicial powers is derived and how it should be exercised). As regards to 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."*

In my considered view therefore, people's values, norms and aspirations matter, when considering bail application. I therefore find that releasing the applicants on bail, moreover where they have not proved any exceptional circumstances in an alleged case of triple murder, would not

accord with the values and aspirations of our people, under article 126 (1) of the Constitution, 1995.

Last but not the least, all the Applicants demonstrated their huge family responsibilities and contended that they ought to released so as to care for their big families. In Henry Bamutura Vs. Uganda, Misc. Application No. 19 of 2019 (SCU), Hon Lady Justice Prof. Tibatemwa- Ekirikubinza, JSC, held that hardship, if any, facing an applicant's family, are no exceptional (and unusual) factors for consideration in bail application. Court cited with approval Dominia Karanja Vs. Republic (1986) KLR 612. I therefore find that hardship facing the applicants' respective families, although attract sympathy, is nevertheless no ground for grant of bail by this court.

Furthermore, the Applicants' plea about the probability of success of their defenses and the same not being frivolous, are no consideration for bail in this court.

All in all, having considered several factors, one against the other, coupled with the applicants' constitutional rights, I exercise my discretion to refuse bail. The Application is accordingly dismissed. Court however guarantees the applicants all their rights, as by the Constitution prescribed, including a speedy trial, during the next convenient sessions of court.

Delivered, dated and signed this 27th October, 2022.

27-10-2022

George Okello
JUDGE HIGH COURT

Ruling read in in the presence of;

Attendance

Ms. Grace Avola, Court Clerk

Ms. Akello Nancy Onono, holding brief for Counsel Douglas Odyek, for the Applicants.

The Applicants are in Court

Ms. Nyipir Gertrude, State Attorney, ODDP for the State.

Ms. Akello: The matter is coming for Ruling. We are ready to receive.

Ms. Nyipir: We are ready to receive the Ruling.

Court: Ruling read in Chambers.

27-10-2022

George Okello
JUDGE HIGH COURT