THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CRIMINAL MISCELLANEOUS APPLICATION NO. 23 OF 2022

(ARISING FROM CRIMINAL CASE NO. AA 51/2022, CRB 188/2022)

OKELLO RICHARD *alias* AMUNIKE.....APPLICANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

Background facts

The Applicant was arrested on 13th July, 2022 and charged with the offence of aggravated defilement on 19th July, 2022, contrary to section 129 (3) (4) (c) of the Penal Code Act (PCA) Cap. 120 (the applicant allegedly being a person in authority over the victim), and remanded to Gulu Government Prison. He was later committed to the High Court on 30th August, 2022, for trial. He applies for bail, pending trial. The Application is brought under Article 23 (6) of the Constitution of Uganda, 1995, sections 14 and 15 of the Trial on Indictments Act, Cap. 23, and section 40 of the Criminal Procedure Code Act (inapplicable to pretrial bail).

Grounds of the Application and the opposition

The grounds are contained in the Notice of motion and supported by the Applicant's affidavit, deposed on 9th August, 2022. The major grounds are that; the offence is bailable; the applicant has a fixed place of aboard and will not abscond if released on bail; the sureties are substantial; the applicant suffers from diabetes and 'pressure' (hypertension) and needs to obtain treatment and attend regular medical checks.

The Respondent opposes the application, by the affidavit of No. 35913 D/SGT Ayar Moses, dated 5th October, 2022. The brief grounds advanced in opposition are that, the offence charged is serious and attracts a maximum death sentence; the applicant is likely to abscond; the applicant has influence over the victim, he having been a school bursar at Aworanga Primary School where the victim is a pupil, that he is more likely to perform more sexual acts on the victim if released on bail. That, the applicant will interfere with the appearance of the victim in court during trial, he having power and influence over her. It is further contended that the applicant is likely to interfere with other prosecution witnesses who are teachers and pupils at the school, the former being his colleagues/friends; that the case is of public interest nature and the public interest is that the victim be protected and justice achieved for the victim; that no exceptional circumstances exist, and the medical forms attached to the applicant's affidavit are not proof that he suffers from grave medical illness incapable

of being treated while in prison custody. It is also contended that the sureties are not substantial; and that, the applicant has since been committed to the High Court for trial.

Representation

The Applicant was represented by Mr. Moses Oyet of Oyet and Co. Advocates, while the Respondent was represented by Ms. Gertrude Nyipir, a State Attorney in the Office of the Directorate of Public Prosecutions. They both filed written submissions which court has considered.

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. See: B.J Odoki: A guide to criminal procedure in Uganda (2nd Ed.) 1990., at P. 71; Francis J. Ayume, Criminal Procedure and Practice in Uganda, p. 54; Aganyira Albert Vs. Uganda, Criminal Misc. Application No 0071 of 2013 (Lady Justice Alividza, J.); 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.

The principles which guide court in considering whether or not to grant bail are well settled. I will consider the key principles in my analysis.

The applicant's learned counsel argued that the offence of aggravated defilement is bailable. The current law is that all offences in Uganda are bailable. Courts however exercise judicial discretion, whether to grant or not to grant bail, as rightly submitted. This is premised on article 23 (6) of the Constitution of Uganda, 1995, which creates the right to apply for bail, but not to be released on bail. The exception is with regard to mandatory bail, where court only sets the conditions for release See: Foundation for Human Rights Initiative Vs. Attorney General, Constitutional Appeal No. 03 of 2009 (SCU).

Because of the foregoing Constitutional provision, section 15 of the Trial on Indictments Act which prescribes the conditions to be satisfied in a bail application before the High Court, does not take away an accused person's right to apply for bail. However, in an offence of a capital nature, such as the instant one, court has to weigh one factor against the other, before exercising its discretion whether or not to grant bail. By so doing, court would not be disregarding the applicant's constitutional right to liberty

and the presumption of innocence, but should carefully weigh and consider all factors for and against grant of bail.

Learned counsel for the applicant strongly argued the premise of the need for court to protect and guarantee the fundamental rights of his client to personal liberty, the right of presumption of innocence, and the need for the due process of the law to be followed. Court accepts the arguments for the moment, but these considerations, as argued for the State, must be balanced against the interests of the society. The authority for this is Article 126 (1) of the Constitution, and the case of Foundation for Human Rights Initiative Vs. Attorney General, Constitutional Appeal No. 03 of 2009 (SCU) (per Katureebe, CJ.)

Learned counsel for the applicant submitted that the applicant has a fixed place of aboard within court's jurisdiction, at Godero village, Lalar parish, Paminyai Sub-County, Nwoya District, and that the applicant will attend his trial, if released on bail. Alternatively, he argued that the Applicant would pay a certain sum of money if fixed by court, if he were to fail to attend trial on a certain date, once out on bail. Court hopes this submission was not an advance warning to court that the applicant would jump bail, if released, after all, he would have something of value he could afford to lose to the State. I have however not taken this alternative perilous argument, against the applicant, which appears to have been a

slip by learned counsel. Court notes that the Respondent did not challenge the applicant's residence, and accordingly finds that the applicant is resident within the jurisdiction of court.

Related to the above, it was argued for the applicant that the three sureties who were presented to court are substantial. They are; Apio Evaline, a 39 year old, biological sister of the applicant, a resident of Godero village, a peasant farmer; Kakanyero Geoffrey, aged 36, a biological brother of the applicant, a resident of Godero village, a peasant farmer; and Apiyo Evelyne, a 32 year old, a cousin sister of the applicant, a resident of Godero village and a volunteer at TASO, Gulu City, for one year. The learned State Attorney disagreed that the sureties are substantial, arguing, the sureties have not shown that they have any assets that could be attached or forfeited to the State, if the applicant were to be released, only to jump bail. It was submitted that, in a serious offence like the present, sureties ought to be substantial.

I have carefully considered the issue of the substantiality of the sureties and my observation is that, whereas the sureties appear to be persons who are capable of ensuring that the applicant attends his trial, I find that they created the impression in the mind of court that they are not ordinarily resident within the area of Godero village, as they could not clearly tell court who the LC1 Chairperson of Godero village is. They stated that he is

called Miti/ Mit, saying that, that is his nickname. However, their introduction letters do not bear out the said nickname but the name Okello Francis, which the sureties failed to state when asked by court. The three letters written for the sureties are hand-written, which is fine, but the query rests with the style and hand-writing font, and yet are all written on the same day (07/08/2022) and signed allegedly by Okello Francis, the alleged LC1 Chairperson. What is equally intriguing about the letters is that whereas the one written in respect of the first surety is signed off by 'Okello Francis' the other in respect of the second surety is signed off by 'Okello Fransic.' Curiously, on the stamp impression appearing on all the three letters, is a signature written 'Emmy'.

In the circumstances, it is court's view that tracing the sureties, through the LCI Chairperson of Godero village, for the purposes of fulfilling any undertaking to court, would be very difficult if not futile. I am also in doubt whether the letter was truly written by the person named thereon as being the LC Chairperson of Godero village, and if so, whether the Chairperson indeed knows the sureties and can vouch that they are residents of his area of jurisdiction.

The sureties have also not shown that they have any assets that could be forfeited to the State, if the applicant were to be released, only to jump bail. This court notes that, although impecunious financial status is no ground

for denying someone from standing as surety, however, in serious offences, as argued for the State, a surety should be substantial. A surety is a pledge by another person guaranteeing that if the accused person does not appear before the court at the specified time and date, he will pay a certain sum of money to the court. A surety is therefore not merely there to assist a friend or a relative out of prison. A surety has a duty to court to ensure that the accused does not abscond. A surety must be at court ready to explain in the event of the accused's failure to attend. A surety can even arrest the accused if he/she has reason to believe that the accused is about to abscond. If the accused absconds, the surety will be called upon to show cause why his recognizance should not be forfeited. See: Opiyo Charles *alias* Small Vs. Uganda, Criminal Misc. Application No. 26 of 2022 (Okello, J.) Thus in Uganda Vs. Hajji Abas Mugerwa & another (1975) HCB 216, it was held that it was the duty of each surety to make sure that the accused attended the court on the date mentioned in the bond and continued to attend until otherwise directed by court. In the present case therefore, I find that the three sureties are not substantial to stand as such in a case of aggravated defilement for the applicant, which is serious.

The other consideration which I find material, is whether the applicant has proved exceptional circumstances, before court considers his prayer. Learned counsel for the applicant did not strongly argue this point. Court finds that the applicant did not adduce evidence that his medical condition

(diabetes and 'pressure' as he calls them.) are not capable of being managed while in Gulu Government prison, either by the prison medical facilities or via an arrangement with the prison medical health team. There is no medical evidence from the prison, to back up the applicant's deposition in this regard. The applicant's deposition that his continued remand is worsening his health condition has not been supported by medical evidence. The contention that he has not been able to attend regular checks (outside the prison) could well be true since he is confined to prison, but it is not shown that the prison lacks equipment for checking diabetes and high blood pressure. It is also not shown that the prison health facility has shortage of drugs for the applicant's condition, or that, an arrangement is not possible to have the requisite drugs and equipment for checking high blood pressure brought from outside by the applicant's personal doctors, if any, or other persons he can authorize, in an arrangement with the prison authority. The medical documents attached to the Motion show that the applicant's last health visit to Gulu Regional Referral Hospital was on 14th April, 2022, yet he had his full liberty till 13th July, 2022, when he was arrested and detained in Police Custody, and later charged and remanded to-date, pending trial. Court wonders whether the applicant's condition has since become that serious, yet when he was free, he is not shown to have attended health checks during the month of May and June, 2022. At any rate, it is not shown that the applicant's

medical condition have since 13th July, 2022, worsened, while in Prison custody.

Court therefore holds that the ground of grave medical illness has not been satisfied. Although this is no longer a mandatory requirement in matters of bail, court's considered view is that, in a serious offence such as aggravated defilement, which potentially inflict irreparable damage, both psychological and physical *(inter alia)* on a girl child, bail has to be granted on sterner stuff and not as a matter of course. This is not however a hard and fast rule although, on the facts, I find that this is the case here.

The other material factor which I have considered is whether the applicant is likely to interfere with the witnesses or evidence or both. It was submitted for the applicant that since the investigations have been completed, the fear of interference is unfounded. For the Respondent, it was strongly argued that the applicant will interfere with witnesses and the victim (a key prosecution witness), given his special status in the school as a bursar at the time of the alleged commission of the offence, and *ipso facto*, would influence the victim not to attend court, as well as other pupils of the school and teachers, who are potential State witnesses. It was also argued that the applicant would shower the victim with gifts, to make her refrain from testifying against the applicant. This latter submission, in Court's view, appears over exaggerated, as there was no

scintilla of evidence that the applicant used to do so or that he is now disposed to shower the victim with gifts, if granted bail.

Court however notes that the applicant did not rebut the Respondent's deposition and arguments that, he was a bursar at Aworanga Primary School where the victim is still a pupil, and that some of his colleagues could be witnesses for the prosecution, and that, he has power, authority and influence over the victim and some former colleagues who are likely to testify at the trial as State witnesses. It was argued for the applicant that, having since been committed to the High Court, awaiting trial, the fears of the State are remote. True, the investigation could be closed but the witnesses are still there and are presumed to be known to the applicant, some of whom, has been submitted, are his (former) colleagues. It is court's view that the likelihood of the former colleagues and pupils of the school being reluctant to testify against a colleague (or a former colleague, assuming the applicant has already lost his job) and a superior, is not far-fetched, especially once the applicant is released and interacts with former colleagues and pupils of the school.

In Court's view, the most important consideration here is whether the accused will turn up for his trial and will not interfere in any way with evidence. In Attorney General Vs. Joseph Tumushabe, Constitutional Appeal No. 03 of 2005, Mulenga, JSC observed "in the case of a person

accused of a criminal offence applying for release on bail pending trial, the court's principal consideration is whether such release is likely to prejudice the pending hearing." My considered view is that the pending trial would be prejudiced by the applicant, if released on bail.

Although not argued by the State, this Court may, in an appropriate case, consider the immediate interests of the accused, particularly with regard to his personal security, especially in grave offences such as aggravated defilement, among others, where there may be real danger to him from members of the public where the offence is alleged to have been committed. See: Foundation for Human Rights Initiative Vs. Attorney General (*supra*); Abindi Ronald & another Vs. Uganda, Misc. Criminal Application No. 020 of 2016.

The respondent adduced evidence, which have not been rebutted, that the District Education Officer, the Management Committee of the School where the applicant was a bursar at the time of the arrest, the parents, teachers and pupils of the school, and the general public are all interested in ensuring that the victim is protected and justice achieved for her. These deposition, in court's view, means the applicant could be exposed to danger, if released on bail, especially from the members of the community who would see that the applicant has regained his liberty, and may not understand the bail law and the dynamics. In Abindi Ronald & another Vs. Uganda (*supra*), Mubiru, J. declined to grant bail, considering the

safety of the applicants who were exposed to risk of reprisals from the community, in the form of a mob (justice, as is colloquially termed). This authority although not binding on me, as bail refusal or grant is an exercise of judicial discretion, and each case is unique, the concerns in the Abindi matter is not dissimilar to the concerns at present, although the offences do differ. The risks against the applicant from the community who, on the evidence, view him in bad light, although presumed innocent, is not remote.

Considering the matter as a whole, I exercise my discretion and disallow the application. The Application is dismissed.

Before I take leave of the matter, I note the fears of the Applicant and his counsel that the trial of the applicant could delay. However, although this concern is not a ground for granting pretrial bail, I am cognizant of the fact that under section 17 (2) (b) of the Judicature Act, Cap. 13, the High Court can, in the exercise of its inherent powers, make orders for expeditious trials. This is to curtail delays in the criminal justice system. Accordingly, I direct the Deputy Registrar of Court to make arrangements with all the relevant stakeholders, to have all cases pending trial, fast tracked for consideration during the next convenient criminal court sessions.

It is so ordered.

Delivered, dated and signed this 21st October, 2022.

21.10.2022

George Okello
JUDGE HIGH COURT

Ruling read in in the presence of;

Ms. Grace Avoka, Court clerk.

Ms. Nancy Akello Omona, counsel for the Applicant.

Ms. Gertrude Nyiro, State Attorney, DPP, for the Respondent

The Applicant in person.

JUDGE
21.10.2022