

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT GULU**

**CRIMINAL MISC. APPLICATION NO. 68 OF 2023
(Arising from Criminal Session Case No. 0095 of 2023)**

OBITA CHARLES=====APPLICANT

-VERSUS-

UGANDA=====RESPONDENT

BEFORE HON. JUSTICE PHILLIP ODOKI

RULING

Introduction:

[1] The Applicant filed this application seeking to be released on bail, pending his trial before this Court, having been indicted, on 8 counts, of the offence of Aggravated Robbery Contrary to Section 285 and 286(2) of the Penal Code Act and 7 counts of counts of the offence of malicious damage to property Contrary to Section 335 (1) of the Penal Code Act. The application was brought under Articles 23(6) and 28 of the *Constitution of the Republic of Uganda, 1995*, Sections 14(1) and 15(1) (a) and (c) of the *Trial on Indictment Act Cap, 23* and rules 6,7,11,12 and 13 of *The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022*.

Applicant's case:

[2] The grounds of the application were stated in the Notice of Motion, supported by the affidavit of the Applicant. In summary, the Applicant's case is that he is of advanced age (62 years) and has a fixed place of abode at Dika Village, Onyona Parish, Ongako Subcounty, Omoro District. He stated that, he does not have any other pending charges against him; he has substantial sureties; he has never been released on bail and failed to comply with the bail terms; he will not interfere with witnesses when released on bail.

The Respondent's case:

[3] The Respondent did not file any affidavit in reply opposing the bail application, despite having been given the opportunity to do so.

Representation:

[4] The Applicant was represented by Mr. Samuel Openy of M/s Awino Openy Nyafono Advocates and Legal Consultants. The Respondent was not represented at the hearing despite being aware of the hearing date of the application since on the 26th of February 2024, when the application first appeared in court, Ms Sarah Amony, a Chief State Attorney from the Office of the Director of Public Prosecution requested that she be given an opportunity to file an affidavit in reply. The matter was therefore adjourned to the 1st of April 2024 at 9.00am at her instance. However, when the matter was called for hearing, she was not in court nor was there any representative from the office of the Director of Public Prosecution to hold her brief. The matter therefore proceeded in their absence.

Submission of counsel:

[5] Counsel for the Applicant submitted the applicant is currently 62 years old, therefore there exist exceptional circumstances. Counsel further submitted that, the Applicant has a fixed place of abode; substantial sureties; has never failed to comply with bail conditions before; he does not have any other pending charges against him; and that his trial is likely to delay.

Consideration and determination of the court:

[6] A decision whether to grant or not to grant bail has a far-reaching consequence on the right to liberty and fair trial of the accused person, which rights are recognized in all major international and regional human rights instruments that Uganda is party to, such as; the **Universal Declaration of Human Rights**, the **International Covenant on Civil and Political Rights** and the **African Charter on Human and Peoples' Rights**.

Article 23 (1) of **The Constitution of the Republic of Uganda, 1995** specifically provides that no person shall be deprived of personal liberty except in limited situations which are provided for in the Constitution. Where a person is arrested in respect of a criminal offence, that 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. See: Article 23(6)(a) of the Constitution. In addition to the right to liberty, an accused person charged with a criminal offence has the right to fair trial, which includes the right to be presumed innocent until proved guilty or until he or she pleads guilty. See: Article 28(3) (a) of the Constitution. Accordingly, an accused person charged of a criminal offence should not be kept on remand unnecessarily before trial.

In well deserving cases, they should be granted bail if they fulfill the conditions the court considers reasonable.

[7] According to the Bail Guidelines (supra) “bail” means the temporary release of an accused person after providing security for future appearance in court on such conditions as the court considers reasonable. I should add that “bail” is an agreement between the accused (and sureties, if any) on the one part and the Court on the other part. The accused agrees to pay a certain sum of money, fixed by the court, if he/she fail to attend the trial on a specified date. The court as a contracting party sets down terms and conditions, which accused persons and sureties, have to comply with. Once the parties have signed agreement, it can only be cancelled upon satisfaction of the court that granted it that there has been a breach of the conditions set by it or by the law. See Uganda Vs Lawrence Luzinda (1986) H.C.B 33). The purpose of bail is, therefore, to permit an accused person to temporarily gain his liberty, by leaving prison and attending his trial while coming from home or any other place of their choice, subject to conditions set by court. On the other hand, the purpose of setting bail conditions is to ensure that once released, the accused person will return to the court to attend trial.

[8] The decision whether or not to grant bail is at the discretion of the court. See Uganda versus Kiiza Besigye; Constitutional Reference No. 20 of 2005). This discretion however must be exercised judicially. In so doing, the court has to balance the rights of the accused person and the needs and interests of society to prevent and punish crimes. In Foundation for Human Rights Initiative versus Attorney General, Supreme Court Constitutional Appeal No. 03 of 2009, the Supreme Court held that;

“Article 23 (6) (a) vests in Courts power to grant or decline a bail application made before it. The same Article requires that a grant of bail should be on such terms as the Court considers reasonable. Although Article 23(6)(a) of the Constitution does not give guidance on how Courts are to determine this reasonableness, it is my view that embedded in the reasonableness test is the need for the Court to weigh all relevant factors before granting bail to an accused person.

Furthermore, under Article 126 of the Constitution, judicial power is derived from the people and must be exercised by the Courts established under the Constitution in the name of the people and in conformity with the law, and with the values, norms and

aspirations of the people. This Article establishes the supreme importance of the people who are the major beneficiaries of our justice system.

With respect to bail matters, it therefore follows that whereas Court is supposed to bear in mind the rights of an accused person when considering his or her bail application, Court should not lose sight of the needs and interests of society to prevent and punish crimes committed within its midst. This Article imposes on Courts the duty to ensure that they do not only consider the rights of an accused person applying for bail. Rather the Court should also consider the interests of society at large. This in turn calls for the need to balance the competing interests of the accused person on the one hand and society on the other hand. To ensure this balance, Courts must at all times when dealing with a bail application bear in mind this fundamental aspect under Article 126 of the Constitution with regard to exercise of this judicial power.”

[9] Section 15(1) of the **Trial on Indictment Act**, gives guidance on the exercise of the discretion of the court to grant bail. It provides that the court may refuse to grant bail, in respect to some specified offences, if the accused person fails to prove to the satisfaction of the court that exceptional circumstances exist justifying their release on bail. Exceptional circumstances is defined under section 15(3) of the **Trial on Indictment Act** to mean, grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody; a certificate of no objection signed by the Director of Public Prosecutions; or the infancy or advanced age of the accused. I must emphasis here that proof of exceptional circumstances is not mandatory since the court has the discretion to grant bail even where none is proved.

[10] The court may also refuse to grant bail to the accused person under Section 15(1) of the **Trial on Indictment Act** if the accused person fails to prove to the satisfaction of the court that they will not abscond when released on bail. In considering whether the accused person is likely to abscond, the court may take into account, whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda; whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail; whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and whether there are other charges pending against the accused.

[11] Further guidance on the exercise of the discretion to grant bail is provided for in the **Bail Guidelines** cited above. Guideline 4 provides that when the court is determining whether it is reasonable to grant bail, it must consider;

- “(a) the gravity of the offence;*
 - (b) the nature of the offence;*
 - (c) the antecedents of the applicant so far as they are known;*
 - (d) the possibility of a substantial delay of the trial;*
 - (e) the applicant’s age, physical and mental condition;*
 - (f) the likelihood of the applicant to attend court;*
 - (g) the stage of the proceedings;*
 - (h) the likelihood of the applicant to commit an offence while on bail;*
 - (i) the likelihood of the applicant interfering with witnesses;*
 - (j) the safety of the applicant, the community and complainants;*
 - (k) whether the applicant has a fixed place of abode within Uganda or whether he or she is ordinarily resident outside Uganda;*
 - (l) whether the applicant has sufficient sureties within Uganda to undertake that the applicant shall comply with the conditions of his or her bail;*
 - (m) whether the applicant has, on a previous occasion when released on bail, failed to comply with his or her bail terms;*
 - (n) whether there are any other charges pending against the applicant; or*
 - (o) whether the offence for which the applicant is charged involved violence.”*
- Underlined for emphasis.

[12] The role of a surety in a bail process is to ensure that the accused person attends trial, failure of which the surety may be ordered, by the court, to pay the bond the surety executed to ensure that the accused attends court. If the surety fails to pay the bond amount, his or her movable property may be sold to recover the amount. If there is no movable property of the surety capable of being sold to recover the amount, the surety may be imprisoned for a period not exceeding 6 months (see Section 21 of the **Trial on Indictment Act**).

[13] A determination of whether a surety is substantial must therefore take into account the capability of the surety to prevail over the accused person to ensure that the accused person attends trial. In addition, under Practice Directive 15 of the **Bail Guidelines** (supra), when considering the suitability of a surety, the court has to take into account, the age of the surety; work and residence address of the surety; character and antecedents of the surety; relationship to the accused person; and any other factor as the court may deem fit. The proposed surety has to provide documentary proof including, a copy of his or her national identity card, passport or alien's identification card; an introduction letter from the Local Council 1 Chairperson of the area where the surety is ordinarily resident; or asylum seeker or refugee registration documents issued by the Office of the Prime Minister. I must emphasize however that each case will be determined according to its peculiar facts and circumstances.

[14] In the instant case, the Applicant deponed that he is 61 years old, having been born on the 8th January 1962. In support of his averment, he attached his National Identity Card which confirms his age. The Respondent did not rebut this averment. Guideline 4 of the **Bail Guidelines** cited above defines advanced age to mean 60 years and above. I am therefore convinced that the Applicant is a person of advanced age.

[15] In addition, the Applicant deponed that he has a fixed place of abode at Dika Village, Onyona Parish, Ongako Sub – county, Tochi County, Omoro District. He attached to his affidavit in support of the application his National Identity Card and a letter from the Chairperson Local Council 1 of his village confirming his residence. No contrary evidence was adduced by the Respondent to disprove the averment of the Applicant. I therefore have no reason to doubt his averment.

[18] On whether the sureties of the Applicant are substantial, the Applicant presented two sureties. The 1st surety is Aboga Martin Kiiza, 74 years old, a resident of Ayita Konya Ki Ting North Cell, Patuda Abuga Ward, Bar Dege Layibi Division, Gulu City, a retired businessman and an uncle of the Applicant. He produced a copy of his National Identity Card and a letter from the Chairperson Local Council 1 of his village confirming his residence. The 2nd surety is Oloya Joseph, aged 64, a resident of Wii Layibi Cell, Techo Ward, Bar Dege Layibi Division, Gulu City, a peasant farmer and an uncle of the Applicant. He also produced a copy of his National Identity Card and a letter from the Chairperson Local Council 1 of his village confirming his residence. There was no evidence adduced by the Respondent to the contrary

to prove that the above sureties are not substantial. I therefore find that the sureties are substantial.

[20] The Applicant further deponed that, he has never failed to comply with bail conditions before; he does not have any other pending charges against him; and that his trial is likely to delay. Again, no evidence was adduced by the Respondent to rebut those averments.

[21] I have taken note of the nature of the offences with which the accused person has been charged. Although each charge attracts a maximum penalty of death if the Applicant is found guilty, at this point the Applicant is still presumed innocent until proven guilty. Any risk of the Applicant interfering with police investigations was not proved by the Respondent. In addition, there was no evidence adduced to show that the safety of the victim and the community would be prejudiced by granting the Applicant bail.

[22] In the end, this application succeeds. The Applicant is hereby granted bail on the following conditions:

1. The Applicant to enter an undertaking with the Registrar of this court in the amount UGX 20,000,000/= (Twenty Million Shillings only) (Not cash) guaranteeing that he shall appear before the registrar of this court once every month for the mention of his case pending his trial.
2. Each surety of the Applicant shall enter an undertaking of UGX 50,000,000 (Fifty Million Shillings only) (Not cash) guaranteeing that the Applicant shall appear before the Registrar of this court once every month for the mention of his case pending his trial.

Dated this 1st day of March 2024



Phillip Odoki
Judge.