

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

MISC. APPLICATIONS NO. 01, 02 AND 03 OF 2013

ARISING FROM CITY HALL CRIMINAL CASE NO. 33 OF 2012

- 1. KANANURA ANDREW KAGONYERA**
- 2. MUZOLERWA SAMUEL**
- 3. MAGANDA CYRUS**
- 4. ONYANGO JACOB:.....:APPLICANTS**

VERSUS

UGANDA:.....:RESPONDENT

BEFORE: HON. JUSTICE LAMECK N. MUKASA

REPRESENTATION:

Mr. Geoffrey Nangumya of counsel for Applicants in Misc. Application No.s 1 and 3 of 2013.

Mr. Alex Tumuhimbise of counsel for Applicant in Misc. Application No. 2 of 2013.

Mr. Fred Kakoza PSA for the Respondent

Mr. Kutosi Charles – court clerk

Mr. Kawali Muzafalu – Proceedings Recorder

RULING:

These three applications for bail arose from City Hall Criminal Case No. 1458 of 2012. Kananura Andrew Kagonyera is the Applicant in Misc. Appl. No. 1 of 2013. Muzolerwa Samuel is the Applicant in Misc. Appl. No. 2 of 2013. While Mazanda Cyrus and Onyango Jacob are the Applicants in Misc. Appl. No. 3 of 2013. The respective Applicants were, jointly charged with Kananura Raymond, before the Chief Magistrate Court Buganda Road at City Hall with murder contrary to sections 188 and 189 of the Penal Code Act.

The particulars of the offence are that the above named, with others still at large, on the 30th day of September 2012 at Panamera Bar and Lounge Naguru Go down in the Kampala District with malice aforethought unlawfully killed Katerega Badru. Kananura Raymond was vide Misc. Appl. No. 118 of 2012, granted bail on grounds of grave illness.

Kananura Andrew Kagonyera, the Applicant in Misc. Appl. No. 1 of 2013, was not personally in court when charges were preferred against them. A Warrant of Arrest was issued against him. On information communicated to the City Hall Court about his health condition and that he was attending Medical facilities in the United Kingdom, the Court issued Criminal summons instead to appear on 20th December, 2012. It was extended to 21st January, 2013.

On 8th January, 2013 this application was filed under Article 28(3)(a) of the Constitution Sections 33 and 39(1) & (2) of the Judicature Act, section 14(1) of the Trial on Indictment Act, Section 75(4)(b) of the Magistrate Court Act and Rules 1,2, and 3 of the Judicature (Criminal Procedure)(Applications) Rules.

The application was seeking orders that:

“ This Honorable Court be pleased to direct the Buganda Road Chief Magistrates Court sitting at City Hall to admit and or to release the Applicant on bail pending the disposal of the criminal case for charges preferred against him by the Prosecution/Respondent on such conditions that this Honorable Court deems fit.”

The grounds for the application were, inter alia, that:

- The applicant has substantial sureties to undertake that the applicant shall comply with conditions of this bail.
- The Applicant has a fixed place of abode being Katali Rise Naguru within the jurisdiction of this Honorable Court.
- The Applicant is suffering from grave illness.
- It is in the interest of justice that this application is allowed.

These applications came before me for hearing on 11th January, 2013 in the absence of the applicant, Kananura Andrew Kagonyera.

Miscellaneous Application No. 1 of 2013 is supported by two affidavits, one deponed to by Stella Kananura, the mother of the Applicant's and the second by George Mondo Kagonyera, the Applicants paternal uncle. On the 10th of January, 2012, two Supplementary Affidavits and a Statutory Declaration indicated deponed to by Andrew Kansime Kananura Kagonyera and sworn in the United Kingdom before a one Frank Okello Abe were filed in Court. This Court is unable to rely on Andrew Kansime Kananura Kagonyera's affidavits and/or statutory declarations, since there was no stamp or seal

affixed to show whether Frank Okello Abe before whom they had been purportedly deponed to was a Commissioner for Oaths or a Notary Public.

However, Stella Kananura in paragraph 3 and 4 avers;-

‘(3) THAT the Applicant was admitted in a London hospital at North Middlesex University Hospital in the United Kingdom on 31/10/2012 for a medical condition and was attending medical personnel at the said hospital and he is living at the place where I was resident in the United Kingdom

(4) THAT the Applicant had intensive medical care at the said Middlesex University Hospital and was resuscitated having lost over 20 kilograms off his body weight and I was personally attending to the Applicant in hospital and I personally received all the medical correspondences of the applicant that he was diagnosed with diabetes Type 2 meritus (Refer to annexures “B1”, “B2”, “B3”, “B4”, “B5”, “B6” and “B7” attached hereto”.

Article 28(3)(a) of the Constitution presumes every person charged with a Criminal offence innocent until proved or pleads guilty. Under Article 23(1) of the Constitution every person has a fundamental right to liberty which can only be deprived in the exceptional circumstances provided therein. To preserve this presumption of innocence and the fundamental right to liberty, article 23(6)(a) of the Constitution grants Court the discretion to grant or deny bail to any person charged with a criminal offence. This discretion can be exercised irrespective of the gravity or seriousness of the offence charged

with. However first and foremost, the issue before me is whether this Honorable Court has the discretion to grant bail before the person is arrested or appears before Court for charges to be read out to him. My search has not brought me to any case where such an application like this one was handled in Uganda. This could be the first application.

Mr. Nangumya, counsel for the Applicant, cited three Kenyan cases for guidance of this Court.

In Samuel Muciri W’Njuguna vs Republic High Court of Kenya – Misc. Criminal Case No. 701 of 2002 (Nairobi) the issue under this Constitutional Reference was whether the High Court can grant the remedy of anticipatory bail a remedy not specifically provided for under Kenya laws. The High Court in that case decreed that it could. The Court took a liberal interpretation of Article 84(1) and (2) of the Constitution and stated that despite anticipatory bail not being specifically provided for under Kenyan law, the High Court can grant it and by doing so would be exercising its supervisory powers to ensure enforcement of fundamental rights and freedoms.

In Chacha Mwita and 4 others vs Commissioner Police and Attorney General – High Court Misc. App No. 110 of 2006 (Nairobi) three of the Applicants had been arrested and the other two were threatened with arrest. The application was for court to grant bail to the three pending arraignment in court and the two pending arrest or anticipatory bail. By the time of the ruling the three applicants had been granted bail by the subordinate court, accordingly no orders were made. Anticipatory bail was granted to the other two applicants. It was held that the three applicants had demonstrated to the

satisfaction of the court that their freedom and liberty, as provided under the Constitution had been severely compromised and breached and that the other two will be equally severed and curtailed once they give themselves to the Respondents.

In Celeste Ajwang Juma vs Republic of Kenya – High Court Misc. Appl. No. 2 of 2009 (Kitale) the application was for orders, inter alia, that the Applicant be admitted on bail pending filing of charges in court. The application was intended to stop the violation of her Constitutional rights. CID officers had visited the applicant's place of work and intimated that they wanted to arrest and question her over the theft at her husband's place of work. Court found that in law a spouse cannot be liable for criminal acts of her husband unless it is established there was some conspiracy. She was granted anticipatory bail.

Mr. Nangumya argued that the Applicant had been given criminal summons to initiate the process of arrest and detention. That if the Applicant was to appear before the Magistrates Court in answer to the summons the court had no jurisdiction to grant him bail but only to detain him. He cited Article 51 of the Constitution which provides:

“Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation”.

The Kenyan authorities cited above are founded on a similar provision. That is that where a break of fundamental rights and freedoms is anticipated, the High Court should be able to grant orders to prevent or forestall the occurrence of the said event. Article 50 above vests a competent Court with jurisdiction to make a grant or an order in enforcement of the fundamental rights and freedoms.

Under Article 139(1) of the Constitution, the High Court has unlimited original jurisdiction in all matters. It therefore has jurisdiction under Article 50 above to hear claims of infringement of fundamental rights and freedoms guaranteed under the Constitution. Among such is the right to personal liberty under Article 23.

In his submission, Mr. Kakooza, for the Respondent, distinguished the Kenyan cases cited by Mr. Nangumya. He argued that therein the respective applicants' fundamental rights and freedoms had been violated or under threat of violation. In Muciri W'Njuguna case the Applicant had undergone through several attacks, assaults and threats to his life and police had raided his home arrested him, charged him but prosecution failed. Fearing further harassment from the police and fearing for the safety of his life he brought a Constitutional Reference to determine whether the remedy of bail pending arrest would be available to him. Court held that the Applicants' fundamental rights and freedoms under Articles 70, 72, and 76 of the Kenyan Constitution had been contravened by the Respondent. It was held that the remedy or grant and relief of anticipatory bail or bail pending arrest was Constitutionally provided for and lawfully available to persons under the Constitution. In the Chacha Mwitwa case three of the Applicants had been

arrested and detained for more than 48 hours contrary to the law and their other two colleagues had been threatened with arrest and detention. In Ajwang Juma case the Applicant was threatened with arrest for an offence allegedly committed by her husband.

Clearly in the cited Kenyan cases the Applicants' fundamental rights or freedoms had been infringed or threatened by the state organs. The Applicant's case, in Misc. Application No. 1 of 2013 is among the exceptions provided for under Article 23 of the Constitution. It provides:

“(1) No person shall be deprived of personal liberty except in any of the following cases-

(c) for the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the Laws of Uganda”

It is undisputed that the Applicant stand charged with murder before a court of law. It is further undisputed that the court issued Criminal Summons requiring him to appear before it on 21st January 2013. Therefore, as I pointed out at the hearing, when Article 50 and 52 of the Constitution are considered together there is no infringement or threatened infringement to the Applicant's fundamental right to liberty or freedom of movement. In the premises the Applicant cannot be considered for anticipatory bail or bail pending arraignment in court.

In the alternative, Mr. Nangumya sought to rely on the provisions of section 75(4)(b) of the Magistrate Courts Act and section 14(1) of the Trial on Indictments Act. Section 75(4)(b) MCA provides:

“(4) The High Court may in any case where an accused person is appearing before a magistrate’s court –

(b) where the case is one mentioned in subsection (2), direct that the accused person be released on bail.’

While section 14(1) of T.I.A provides;

“(1) The High Court may at any stage in the proceedings release the accused person on bail;-----.”

Counsel submitted that the High Court is empowered to grant the Applicant bail pending his trial on any terms that are reasonable in the circumstances and direct the lower court to release the Applicant when he appears before it in answer to the Criminal Summons. He further submitted that the Applicant was appearing before the lower court by his lawyer. He relied on Article 28(3)(d) of the Constitution. It states;

*“(3) Every person who is charged with a criminal offence shall –
(d) be permitted to appear before the Court in person or at that persons own expense, by a lawyer of his or her choice.”*

Counsel argued that the Applicant was appearing before Court by his advocates.

With due respect to learned counsel, my considered view is that appearance in section 75(4)(b) MCA refers to personal attendance in Court and appearance in Article 28(3)(d) of the Constitution refers to the accused person's right to represent himself or to representation by counsel in the conduct of his defence. Article 2 of the Constitution provides that the Constitution is the supreme law of Uganda. All other laws apply subject to the provisions thereof. Article 23 of the Constitution grants a right to a person arrested in respect of a criminal offence to apply to the court to be released on bail. For the provisions of section 75(4)(b) MCA and section 14(1) TIA to come into play there must be an arrested person who is arraigned before court. The Applicant in Miscellaneous Application No, 1 of 2013 has never been arrested and has never appeared before court. In my considered view this application is intended to forestall the Applicant's appearance before the Magistrate's Court in answer to the Criminal Summons issued. This Honorable Court cannot allow to appear being used to defeat the ends of justice. In the circumstances I find that the application for an order by the High Court to direct the applicant to be released on bail under the provisions of section 75(4)(b) of the MCA was filed prematurely and the same fails.

The Applicant will be free to exercise his right under Article 23(6)(a) of the Constitution and section 14 of the Trial on Indictment Act when he commences to appear before the lower court. In the circumstances I will not at this stage consider whether or not he merits release on bail pending his trial.

The Applicants in Miscellaneous Application No. 2 and 3 of 2013 stand charged with murder. In exercise of its discretion whether to grant or not to grant bail 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 is required by Court. Therefore the need to be conscious of the likelihood to abscond and/or to interfere with the investigations, witnesses and/or evidence. Court has to weigh the gravity of the offence charged and the severity of the attendant sentence for the charge. The more serious the offence, the higher the temptation for the accused to abscond when released on bail. Murder is a serious offence whose maximum sentence is death on conviction. In such serious offences court is guided by the provisions of section 15 of the Trial on indictment Act. Court has to consider the existence of exceptional circumstances and factors set out in the section.

Section 15 of the Trial on indictment Act provides that Court may refuse to grant bail to a person accused of an offence specified in subsection (2) of the section, if the Applicant does not prove to the satisfaction of Court that-

- (a) exceptional circumstances exist justifying his or her release on bail, and
- (b) he or she will not abscond when released on bail.

The section defines “*exceptional circumstances*” to mean any of the following;

- (a) 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,

- (b) a certificate of no objection signed by the Director of Public Prosecution or
- (c) the infancy or advanced age of the accused.

I have carefully studied the respective grounds of application in Misc. Appl. No. 2 and 3 of 2013. None was premised on any of the above exceptional circumstances as a ground. I have also studied the respective affidavits of Muzolewa Samuel, the Applicant in Misc App. No.2; and Maganda Cyrus and Onyango Jacob; the applicants in Misc. App. No.3. None of the above applicants avers to any exceptional circumstances. There was no evidence of illness adduced. Mr. Kakoza counsel from the DPP strongly objected to the respective bail applications. There was no evidence of infancy or advanced age adduced in respect of any of the Applicants.

Considering the above, the seriousness of the offence charged and the fact that the Applicants were recently charged in November, 2012 I am unable to exercise this Court's discretion in favour of any of the Applicants. Their respective applications for bail are rejected and dismissed.

LAMECK N MUKASA

JUDGE

21/01/2013