

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA
MISCELLANEOUS APPL NO. 26 OF 2013
(ARISING FROM NAKASEKE CRB 135/2013)

MUBIRU HUSSEIN:.....APPLICANT/ACCUSED
VERSUS
UGANDA:.....RESPONDENT/PROSECUTOR

BEFORE: HON. JUSTICE LAMECK N. MUKASA

RULING:

The Applicants, Mubiru Hussein and Kawesi Frank jointly with one Kasumba Kenneth, were on 14th February 2013 charged with Aggravated Robbery in the Chief Magistrate's Court, Luwero holden at Kiwoko and remanded.

The particulars of the offence are that the Accused persons at Katale Zone, Semuto Nakaseke District robbed cash shs. 20,000,000/=, MTN, AIRTEL and WARID Airtime cards worth Ushs. 90,000,000/= the property of Baku Distribution Ltd. and at the time of the said robbery threatened to use a knife and a pick axe on Nyesiga Eunice and Ayesigonume Dorothy.

The Applicants now applied to be released on bail pending their trial. Mubiru Hussein is the Applicant in HCT-00-CR-CN-0026-2013. Both applications were handled together. Their respective applications are made under Article 23(6) and 28(3)(a) of the Constitution and sections 14 and 15 of the Trial on Indictment Act. The relevant provisions of the Articles provide:

“23(1) No person shall be deprived liberty except in any of the following case-----

(6) Where a person is arrested in respect of a criminal offence-----

(a) the 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”

28(3) Every person who is charged with a Criminal offence shall –

(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty”

The grant of bail is the judicial instrument for the preservation and ensuring the personal fundamental right to liberty and the protection of the presumption of innocence enshrined in Articles 3 and 26 respectively. **See HCT Crim. Appl No. 228 and 229 of 2005 Col. (Rtd.) Kiiza Besigye vs Uganda, Constitutional Petition No. 46 of 2011, Hon. Sam Kuteesa & others vs A/G& Uganda.** The **right** to apply for bail is available to every criminal offence irrespective of the graveness or seriousness of the offence charged. **See Attorney General vs Tumushabe Deo (2008)2 EA 26.** The application can be at any stage of the proceedings. See Section 14(1) Trial on Indictments Act.

However Section 15(1) of the Trial on Indictment Act provides that court may refuse to grant bail to a person accused of an offence specified on subsection (2) thereof, if he or she does not prove to the satisfaction of the Court-

“(a) that exceptional circumstances exist justifying his or her release on bail, and

(b) that he or she will not abscond when released on bail”

subsection (3) spells out the exceptional circumstances and subsection (4) provides:-

“In considering whether or not the accused is likely to abscond, the court may take into account the following factors

(a) Whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda;

(b) Whether the accused has sound sureties within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail.

(c) Whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and

(d) Whether there are other charges pending against the accused.”

The onus is upon the Applicant to satisfy such that he satisfies the above factors. In his affidavit in support of his Application Hussein Mubiru states that he has a fixed place of abode at Busunju in Mityana district. He attached an LCI letter from Kibubula Local Council I, Busunju Parish, Ssekanyonyi Sub-county Mityana district which stated that he is a time registered resident of Kibubula LCI Zone.

To prove that he has a fixed place of abode he, at the hearing, produced a Sale Agreement as evidence that he on 9th December 2011 bought a piece of land (Kibanja) located at Kibubula. This evidence shows that Hussein Mubiru has a fixed place of abode at Kibubula LCI, which is within Busunju Parish, Mityana district as averred in paragraph 7 of his affidavit in support.

Kaweesi Frank also stated in his affidavit in support that he has a fixed place of abode at Busunju in Mityana district. He also attached a letter from Kibubula LCI, Busunju Parish Ssekanyonyi Sub-county Mityana district which also stated that he is a true registered resident of Kibubula LCI Zone. At the hearing, he produced an Agreement of Sale which shows that in 2008 he bought a piece of land (plot) at Busunju LCI, Ssekanyonyi Sub-county. The above evidence shows that he resides at Kibubula LCI but owns a piece of land at Busunju LCI. I agree with Ms. Masinde that with such evidence it is doubtful whether Kaweesi has a fixed abode at Busunju as averred in paragraph 7 of his affidavit in support.

Both applicants have not based their respective applications on any of the exceptional circumstances spelt out in Section 15(3) of the Trial on Indictments Act. However Mubiru Hussein avers in his supplementary Affidavit that he has none working wife, with three children aged seven, four and two years respectively. That he is the sole bread winner for his family. Also Kaweesi Frank avers in his Supplementary Affidavit that he has a none working wife with two children aged seven and four years respectively. That he is the sole bread winner for his family. The children's welfare is paramount and children are entitled to live with their parents and

where a competent authority determines that it is in the best interests of the child to separate him or her from his or her parents or parents, the best substitute care available shall be provided for the child. But both applicants do not indicate that prior to their arrests they had respectively been living with their children. This would have been an exceptional circumstances remains not proved. However in Constitutional Reference No. 20 of 2005 (Supra) the constitutional Court held that the exceptional circumstances under section 15 are only regulatory.

In **Mugenyi Stephen vs Uganda HC Criminal Misc. Appl No. 65 of 2004, Justice Remy Kasule** held that under Article 23(b)(a) of the constitution Court may exercise its discretion to grant bail to an accused person even where the special circumstances set out in Sections 14 and 15 of the Trial on Indictments Act do not exist.

In the exercise of its discretion whether to grant or not 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. So the need to be conscious of the likelihood to abscond and/or 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. Court must also weigh the mitigating factors for the applicants release on bail and the factors justifying interference with the Applicants right to liberty pending his/her trial.

The applicants are charged with aggravated robbery where the maximum sentence on conviction is death. The more serious the offence the higher the possibility to observe when an accused is released on bail. D/AIP Okiria

James Francis who was part of the team which carried the arrest of the team which carried the arrest of the Applicants, his Affidavits avers that the offence was committed in the night of 25th January, 2013. That following the commission of the offence Mubiru Hussein disappeared from his home until the 13h February 2013 when he was arrested. That on his arrest he run away but was pursued and subdued. Also Kaweesa Frank disappeared from his home and was found hiding in a traditional shrine deep in the village. This is evidence that the Applicants tried to avoid arrests which shows a likelihood to abscond if released on bail.

D/AIP James Francis further avers in affidavits that on arrest part of the stolen airtime was recovered in Mubiru Hussein's residence below the carpet hidden. That also part of the airtime and money was recovered hidden in the roof of the house of Kaweesa Frank. Not all the stolen airtime has been recovered and in his supplementary affidavits D/AP Okiria stted that the Applicants were arrested by tracing for the stolen airtime by its serial numbers and contends that the Applicants' release would jeopardize the investigations as it would enable them dispose off the rest of the stolen airtime. The Applicants conduct to hide airtime below the carpet and in the roof of the house shows the Applicants efforts to conceal evidence.

In his submission Mr. Luwum for the Applicant sought to rely on the provisions of Article 23(b0910) of the constitution and argued that the Applicants had a right to bail. The Applicants are charged with Aggravated robbery contrary to sections 285 and 286 920 of the Penal Code Act, which is not an offence triable by the High Court as well as well as by a subordinate court, it is an offence triable only by the High Court . therefore the Applicants cannot benefit from the provisions of Article 23(6)(b) above.

They cannot even benefit from the provisions of Article 23(b)(c) since they were charged for the offence on 14th February 2013. Therefore they have been on remand for less than one hundred and eighty days.

Mubiru Hussein put forward two sureties, namely Yustoh Nkubi, a friend who has known him for about two years and Nakayila Yowanina, also a friend who has known him for about three years. They have no relationship with the Applicant and have no control over him. I find their ability to ensure that he answers bail doubtful.

Kaweesa Frank also put forward two sureties, namely Kyambadde John Bosco, his maternal uncle, a resident of Sembule Zone LCI, Kabowa parish, Rubaga Division, Kampala and Kasanya Pauline his maternal aunt, a resident of Kabowa Zone LCI, Mutundwe parish, Rubaga Division, Kampala. None of the two resides where the applicant resides.

I also find their ability to ensure that the Applicant answers bail doubtful.

Considering all the above, I am unable to exercise this courts discretion in favour of the Applicants. I accordingly decline to grant them bail and their respective applications are hereby dismissed.

LAMECK N. MUKASA

JUDGE

9/5/2013