

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT KAMPALA

CRIMINAL MISC. APPLICATION NO. 0071 OF 2013

AGANYIRA ALBERT:.....:APPLICANT

VERSUS

UGANDA:.....:RESPONDENT

BEFORE:HON. LADY JUSTICE ALIVIDZA ELIZABETH JANE

RULING

The Applicant Aganyira Albert applied for bail. He was presented by Senior Counsel Birungi Wycliffe of Birungi & Co Advocates and the State (Respondent) was represented by Ainebyona Happiness from the Directorate of Public Prosecution.

The application is brought under the provisions as cited in the notice of the motion **Article 23 paragraph 1 and 6 sub paragraph (a) of the Constitution of Uganda and Article 28 of the Constitution of Uganda and section 14 (1) &15 of the TIA CAP 23, and section 74(4) part (a) of the Magistrates Courts Act.**

The applicant through his lawyers filed a notice of motion for orders that the applicant be released on bail pending the hearing of the case against him. The ground of the application were set out in the affidavit of the applicant and summarized during the hearing of the application by counsel of the applicants as follows;

Counsel for the applicant informed court that his client was arrested on the 22nd of May 2013 and detained at various police stations in Wakiso Kawempe, then Kira Road. He was charged on the 26th of May with the offence of aggravated robbery at the Buganda Road Chief Magistrates' Court, Kampala and thereafter remanded at Luzira prison. He argued

that the applicant is 20years of age, a student of Naalya Senior Secondary School and who has completed his senior six.

That the applicant has never involved himself in the crime and he is willing and ready to stand trial so that he can clear his name before this Honourable Court. That he has a fixed place of abode at Kasangombe village. That he lives there with his parents and one of his parents is his surety. That the applicant suffers from a disease known as Tonic convulsions and he is been attending various medical facilities for treatment but currently he is unable to access his treatment from Luzira prison. That effort to get a medical report from Luzira prison has not been successful.

He presented four sureties whose particulars are listed below;

1. Mr. Phillip Mangeni:- 65years of age; resident of Buwaate LC1, Kira Town Council. He is a retired Commissioner of the Ministry of Finance and the accused is his Nephew. That he is a Senior Citizen, married with a family and 12children.
2. Nambaziira Grace:-aged 32years; a resident of MpungaKasangombe village Wakiso District. She is employed as a Nurse at Nansana Health Center. That she is married to the applicant's brother.
3. Mrs. Winnie Kugonza:- aged 40years; a resident of MpungaKasangombe village Wakiso Town Council Wakiso District. She is a business woman and operates her business within St. Balikuddembe Market. Her stall is number D2586. She is the biological mother to the applicant.
4. Byabakama Loysious:- aged 44years; a resident of MpungaKasangombe village LC1 Wakiso Town Council. He is a businessman and operates from Wakiso Township. He deals in selling of agricultural produce and has a fixed place of abode. He is a married man with a family and six children. That the accused is his Nephew.

Counsel for the applicant assured court that he had carefully explained to all the four sureties their duties at law and all the sureties do understand their duties and are willing to stand surety on behalf of the applicant in case this court grants the applicant bail. He added

that the applicant undertakes not to interfere with the prosecution witnesses and will not abscond from the courts' jurisdiction. That his fixed place of abode is at his parent's place and he is willing to attend court and have this matter determined to clear his name.

He further submitted that the court is possessed of authority to admit the applicant on bail. He referred court to the authorities of *Vincent Nyanzi Miscellaneous application number 007 of 2001 arising out of Criminal Case number 412 of 2001 High Court of Uganda Nakawa and Turyagororwo and others Versus Uganda Miscellaneous Criminal Application number 77, 78, 79, 80 & 81 of 2012* where courts have granted bail for capital offences.

State Attorney Ainebyona Happiness opposed this application for being not well founded since it is relying on several grounds that have not been proved to court save for counsel's submissions in court which are not supported by documentary evidence.

She submitted that the accused person is 20 years of age and a student of Naalya Secondary school but there is no evidence to that effect. On the issue of the applicant's illness, the annexures submitted shown that he has been treated and that he had taken good benefit of the medicine indicating that he was ok.

Furthermore the sureties presented are not substantial, save for the first surety, who has presented authentic documents, the second surety, Nambaziira Grace, is not substantial and has no close relationship with the accused person. She is married to the brother of the accused person. That the 3rd surety, who is said to be the mother of the accused person, is also not substantial. She is said to be a business woman in Owino market but there is no evidence to that effect save for a certain ID that was presented for a certain association that operates within Owino Market. That the fourth surety is not substantial as he has no relationship with the accused person. He is simply from the same district with the accused person and the documents presented appear unreliable especially the residential identity card.

She urged that the court does not grant the bail application as it is baseless because the applicant has not shown substantial grounds for grant and the sureties are also not substantial.

In the interests of substantive justice, this court gave the applicant opportunity to adduce documents of evidential value. When court convened the next day, counsel for the applicant presented documentary evidence in form of; original medical documents, letter from LC to confirm the applicants fixed place of abode, birth certificate and baptism card of the applicant. A letter from his former school at Kinaawa High school that was different from the earlier one from Naalya S.S.S. He ended by emphasizing the fact that there was no fear that the applicant will abscond which would be worrying but the applicant has proved that he will attend court.

The position of the law governing the granting or refusal of bail is set out in the section 15 of the Trial on Indictments Act CAP 23. These provisions has been interpreted and consolidated in numerous decisions of the High Court and Court of Appeal. (*see among others; H.C CrimMis App 65/2004, MugenyiStepenVs Uganda; HCT CrimMisAppl 228, 229 of 2005, Dr BesigyeVs Uganda;Constitutional Reference N0 20/2005, Dr BesigyeVs Uganda; Constitution Petition No 20/2006, Foundation for Human Rights Initiatives Vs Attorney General; (2008) E. A. 282, Attorney General VsTumushhabe; Constitutional Petitions 45 & 46 of 2011, Kutesa& Others Vs Uganda; Criminal reference Number 179/2001,Mugisha Gregory Vs Uganda; Crim Application 47/2012, MbabaziNatukunda& other Vs Uganda and Criminal Application 0107/2013,IgamuJoanitaVs Uganda)*

However the common principles behind bail that are uncontested are;

1. That the person has an unassailable right from being deprived of personal liberty except in circumstances specifically set out in **Article 23 of the 1995 Constitution.**
2. Any person who is charged with a criminal offence is presumed to be innocent in accordance **Article 28 (3) (a) of the Constitution.**

3. Any 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 as per **Article 23 (6) (a) of the Constitution.**

Bail can be plainly defined as an agreement or recognizance between the accused (and 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 attend the trial on a certain date. The court as a contracting party usually sets down terms and conditions, which accused persons and sureties, have to comply with. (Also see **Uganda Vs Lawrence Luzinda(1986) H.C.B 33**)

The bail agreement is sealed by parties signing a Bail Form(which is usually in a set formant) and the accused person is given a date when he should appear in court without fail and have his bail status extended on his Bail Form to a given future date.

Once the accused person does not appear on the set date and his/her sureties are not in court to give a satisfactory reason to the court as to why the accused is not present as agreed, the court usually issues a warrant of arrest for the accused person and a criminal summon for the sureties.

Section 15 (1) (a) and (b) of the TID empowers the court to refuse to grant bail if the applicant fails to prove exceptional circumstances exist that justify release on bail and that he/she will not abscond when released. In my opinion, the most important question that any court should consider when determining whether to grant bail or not is; if accused is released from safe custody, he can be trusted to appear in court whenever required. Once this is answered in the affirmative, then bail should be granted. However if, the court has any slightest doubt that causes fear that the accused may abscond from the jurisdiction of the court, then this is justifiably be a ground to deny bail to an applicant.

How does the court determine whether an accused person may abscond from its jurisdiction? **Section 15 sub section 4 of the TIA** provides that “In considering whether or not the accused is likely to abscond, a court may take into account the following factors;

- a. Whether the accused has a fixed place of abode within the jurisdiction of this court or is an ordinary resident outside Uganda.
- b. Whether the accused has sound sureties within the jurisdiction to undertake that the accused shall comply with bail conditions of his or her bail
- c. Whether the accused has on previous occasions been released on bail, failed to comply with the conditions of his or her bail
- d. Whether there are other charges pending against the accused.

A judicial officer only makes fair and just decisions based on law and evidence. A judicial officer is prohibited from making judicial decision based on fanciful theories, rumors, speculations and conjuncture (referto Court of Appeal case **Mbabazi Rovence Natukunda and Loyce Kahunda Vs Uganda. (Criminal Application Number 47 of 2012)**); where this trite law was re-emphasized.

Therefore, the onus is on an applicant for bail to present evidence of high value to prove he will attend court whenever required. The role of the State is limited to casting doubt on the evidence adduced by the applicant and or bring evidence that discredits the evidence of the applicant.

What amounts to evidence of high value is a question of fact that depends on circumstances of each case. In the Court of Appeal case of **Igamu Joanita Vs Uganda Criminal Application 107/2013**, although this matter dealt with bail pending appeal, Hon Justice K. Kakurugave some guidance on what to look out for; when evaluating documentary evidence adduced by bail applicants. I found it quite useful. I will now evaluate the documentary evidence adduced by the applicant in this case to determine whether it is of high evidential value.

The first documentary piece of evidence submitted by the applicant is his affidavit in support of notice of motion dated 21st June 2013 before a Justice of Peace in Luzira Upper Prison. He stated in paragraph 7 that he has a fixed place of abode at Kasangombe Village, Wakiso District. This is supported with a letter marked as court exhibit "ID 6" headed as

“MpungaKasangombe, Ward E, Wakiso Town Council. Contact details are a telephone number of the chairman and it is stamped and signed by the chairman.

It is not clear whether this letter originates from local council I (village level), LC II (parish/ward level) or LC III (sub-county). However the only corroborating evidence is supplied by the charge sheet on the lower court record that gives the applicant’s particulars as c/o Mperema LC I chairman Wakiso town council. I would safely assume that this same person mentioned on the charge sheet is the author of letter marked in court as ID6 to wit Mperema Godfrey

Local Council officials are usually among the more important and/or respected members of the community and their evidence of a fact should be treated as very credible. However evidence of a letter from the Local Council confirming the fact that the applicant has a fixed place within this court’s jurisdiction would be of higher evidential value if it had been endorsed by at least another member of the LC that include; the vice chairman, secretary, defence, finance, information among others. This would remove the danger of court speculating that the chairperson as an individual knows every human being who resides in his area on a day to day basis. Evidence of the exact location of residence of the applicant, how long he has resided in the area, whether he is a permanent resident or he is renting premises and the names of the landlord would have added value. The fact that the applicant resides with his parents does not clarify the above issues in the mind of the court.

It would have been beneficial to the court if the LC chairman had included some basic contact details in his letter addressed to the high court. Details like registered telephone numbers, his place of work or residence and how he may be contacted in case of inquiries. This would make verification easier which in turn adds evidential value and contributes to reducing any doubt the court may have as to the correctness of the information contained in the LC’s letter confirming that the applicant has a fixed place of abode. Therefore I find that the LC letter ID6 is accepted but its evidential value is limited.

The applicant also produced sureties within the jurisdiction to undertake that he will comply with bail conditions of his bail. What makes a surety sound/ or solid/ substantial?

Blacks law dictionary defines substantial as having real worth and importance. This in my opinion may mean; value in terms of status, reputation and good standing and economically endowed. I draw an analogy to a grantor of a bank loan who undertakes to repay a loan in case a debtor fails to do so. A surety in a bail process undertakes in a written bail agreement to ensure that the applicant complies with bail condition and binds himself/herself to pay a specified sum of money or be imprisoned for a term not exceeding six months (refer to section 75 and 83 of the MCA) in case the accused absconds.

This definitely calls for documentary evidence of facts to prove capacity to meet monetary obligations in case ordered to forfeit the bond and proof of surety particulars that can be easily verified to the satisfaction of the court. The test is whether in case of breach of the bail agreement, the State has verified information that enables police to trace and arrest the surety and bring him or her before the court.

There is no hard and fast rule of the type of evidence needed but proof of ownership of property that can be attached and sold is of high evidential value. Court does not act on word of mouth by the Advocate submitting from the bar, but acts on **proven facts that show a surety has capacity to pay the bonded money.** (Section 78- 83 M.C.A has elaborate procedures to follow).

This is why it is important for the court not to give unreasonable bail terms since the sureties need to prove capacity to pay in case bonded amount has to be forfeited to the State. In case they lack capacity to pay, there should be very clear and verifiable information about their particulars to enable the police easily trace them and bring them before the court whenever needed.

Evidence of passport photographs of the sureties, national identity cards, valid passport, employment details, security of bond by way of a guarantee from a credible financial institutions , certified copies of proof of ownership of property, evidence from religious leaders and other community leaders confirming any information is also of high evidential value.

The issue for this court to determine is whether the applicant has produced evidence to prove that his sureties are sound. This is a matter of fact and proved by documentary evidence. I will consider each surety separately

Mr. Phillip Mangeni a resident of Buwaate LC1, Kira Town Council is a retired Commissioner of the Ministry of Finance. The documents include an Identity card from Ministry of planning and development that was issued on 02/01/2006 and expired on 02/01/2011. However he also produced a LC letter from Buwaate LC I Kira town council signed by one Gingo M, General Secretary that was marked as "ID1".

This letter confirms that Mr Mangeni is a resident of Buwaate village and is well behaved and law abiding. It also suffers the same defects identified in the earlier LC from MpungaKasangombe. There is no information about the exact location of the surety's residence, how long he has stayed there, whether it is a permanent or temporary residence. The LC official who signed this letter does not indicate his names in full and contact details.

Second surety Nambaziira Gracea resident of MpungaKasangombe village Wakiso District and is employed as a Nurse at Nansana Health Center. The documentary evidence is an IAA health card. This does not prove that she is a nurse. Evidence from her place of employment confirming that she is an employee would have been of high evidential value. The letter confirming place of residence is from the same source as that presented by the applicant and this court has already made a finding on this earlier on.

Mrs. Winnie Kugonza is a resident of MpungaKasangombe village Wakiso Town Council Wakiso District. She is a business woman and operates her business within St. Balikuddembe Market. Her stall is number D2586. The documents presented include a voter's card from Electoral Commission which I found to have high evidential value and of course the LC letter from the same source as the applicant and 2nd surety and I have already commented on this in detail.

The 4th Surety Byabakama Loysious is a resident of MpungaKasangombe village LC1 Wakiso Town Council. He is a businessman and operates from Wakiso Township. He produced the same letter as the applicant, 2nd and 3rd sureties. He also presented a residential identity card that provides information as to his cell, ward, residential status and that he is a landlord. This is evidence of high value and gives information which can be easily verified.

All the sureties were closely related to the accused as pointed out by counsel of the applicant but this is not enough to make any surety sound but goes more to prove motivation. Therefore I find that though the sureties may be substantial in their own right, there is insufficient evidence adduced before court to prove their real worth. I agreed with the respondent that the applicant has failed to prove that his sureties are substantial.

Therefore for those above reasons given and without having to go to the rest of the reasons which are usually considered when granting bail, I find that there is no evidence adduced that is convincing enough for court to ease the fear and doubt that the applicant would abscond if released on bail.

Therefore, despite the fact that there is no evidence that the accused has on previous occasion, when released on bail failed, to fulfill the conditions of his bail or has any other charges pending in another court, I am very reluctant to grant him bail pending trial for attempted robbery. However this does not bar the applicant from adducing evidential evidence in future and submitting a fresh notice of motion for bail before a competent court.

Therefore I hereby dismiss this application.

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ALIVIDZA ELIZABETH JANE,

JUDGE

29/08/2013