

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

**HCT-04-CR-CM-0008-2013
(Arising from HCT-04-CR-CN-0038-2012)**

**NAMAISI MUDDU.....APPLICANT
VERSUS
UGANDA.....RESPONDENT**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

This is an application for bail.

Through his counsel, **Musambwa**, the applicant/accused moved court by Notice of Motion supported by affidavit. The applicant deponed that he was charged of theft and sentenced to 2 years imprisonment, and to pay 42 millions to the complainant.

The applicant appealed in Criminal Appeal 0038/2012 which is pending before court. He is serving sentence in Mbale Prison Maluku.

He stated that he suffered from High blood pressure, diabetes and is also of advanced age of 65 years. He relied on prison form 19 supplied by prison alleging that they have no capacity to manage his complications. He presented 2 sureties and prayed for bail pending the hearing of his appeal.

He referred court to section 40 (1) (2) of the CPCA.

Jane Chekwech for the State opposed this application. She distinguished bail pending appeal from bail under the TIA and faulted counsel's submission for falling short of this technical truth. She further referred court to decided cases of

Eliafazi Tebenkana v. Patrick Tenya, and ***Daigi v. Masirani*** and concluded that the conditions required for bail pending appeal are different from those in other bail applications under the TIA.

The motion is brought under S.40 (1) (2) of the CPCA which provides that the court can release an appellant on bail pending his appeal.

In the case of ***IGAMU JOANITA VS UGANDA COA- CANO 107 of 2013***, **Hon. Z Kakuru** clarified on the principles governing bail pending appeal. The Judge discusses the fact that while before conviction an accused is protected by the presumption of innocence, after conviction, that presumption is greatly shifted and he/she is a convict. The essence of bail pending appeal is therefore not to enable the innocent accused attend his trial but rather to enable the convicted accused pursue his appeal. This places a greater burden on the accused seeking bail pending appeal to prove himself that he deserves the grant. The principles which courts consider in these applications were again discussed at length by **Hon. Z. Kakuru** in ***Igama v. Uganda***. They include;

1. The character of the applicant.
2. Whether he/she is a first offender.
3. Whether the offence for which he/she was convicted involved personal violence.
4. Whether the appeal is not frivolous and has reasonable possibility of success.
5. The possibility of substantial delay in the determination of the appeal.
6. Whether applicant has complied with bail conditions granted before conviction or during the pendency of the appeal if any.

(See ***Alivind Patel v. Uganda SCCA 001/2003***).

The above are a guide however the court can be guided by the pleadings filed whether the applicant has fulfilled a good majority of them so as to be granted bail. I will review them one by one.

On whether applicant has good character, apart from the applicant's affidavit, there is no mention of his character. No document was filed to help court assess this. The record is silent, and court cannot merely assume that because sureties presented claim to know him therefore he is of good character. It must have been pleaded and shown.

2. Whether he is a first offender. No effort is on record to prove to court this fact. No mention of accused's record is found anywhere on the application. I have nothing to guide me on his past criminal record.

3. Whether the offence he was convicted of involved personal violence. The record shows that he was convicted of theft and the offence never involved personal violence.

4. Whether the appeal is not frivolous and has a high possibility of success.

The proof of this is the responsibility of the applicant. The appellate court cannot sit in a bail pending appeal and start reviewing the record on its own motion to "ascertain if appeal is likely to succeed." The appellant/applicant must in the pleadings attach evidence of this. (See *Arvind case* supra). In this case no effort to show that the appeal isn't frivolous was done.

5. There is a possibility of delay in determining the appeal. This is a fact ascertainable. However since the appeal was filed in December 2012. No step has ever been taken to fix it. It's now over 11 months. However the delay is obvious and is noted, however this court is now proactively handling the appeals, and if it is fixed, no delay is envisaged.

6. That he has complied with previous bail conditions. This was never challenged by respondent, and court takes it that no previous bad record exists.

According to the Supreme Court case of *ARVIND PATEL V. UGANDA* the above considerations are the most important considerations in bail pending appeal matters.

The burden is upon applicant to prove them sufficiently before court. In this application there was laxity in the application, no information is available to enable me reach a different conclusion on all issues listed save what I have so far discussed. The application therefore as it is does not satisfy court, by reason of insufficient information.

I find that the requirements for an application for bail pending appeal are not satisfied. The application is accordingly dismissed.

Henry I. Kawesa

JUDGE

03.10.2013