

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT NAKAWA  
CRIMINAL APPEAL NO. 69 OF 2013

[Arising from Makindye Chief Magistrate's Court Co. 346 of 2013]

1. KABUGO STEPHEN
2. SALONGO LUBWAMA FRANCIS:::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA:::RESPONDENT

**BEFORE: HON. MR. JUSTICE WILSON MASALU MUSENE**

RULING

This was an Application by Notice of Motion under Article 23 (6) (a) of the Constitution and Sections 40 (1) and (2) of the Criminal Procedure Code. It is for bail pending Appeal by two Applicants, Kabugo Stephen and Ssalongo Lubwama Francis. The Applicants were represented by Mr. Edward Mugogo, while M/S Doreen Elima appeared for the State.

The Notice of motion is supported by two affidavits of Kabugo Stephen and Ssalongo Lubwama Francis, the Applicants herein. The grounds for this Application are set out in the Notice of Motion and briefly are:-

1. That the Applicants were jointly and severally charged with the offence of forcible entry C/S 77 of the Penal Code Act and sentenced to the maximum penalty of 2 years imprisonment under S.22 of the Penal Code Act.
2. That the Applicants have Appealed against the conviction and sentence vide High Court Criminal Appeal No. 69 of 2013.
3. That the Applicant's Appeal is not frivolous and has merits with high chances of success.

4. That the Applicants were admitted to cash bail in the Trial Court, and they duly complied with the bail terms throughout the trial and shall abide by the Bail terms as shall be imposed by this Court.
5. That the 1<sup>st</sup> Applicant, Kabugo Stephen has a long record of asthmatic aggravated by the dust and coldness and congested prisons environment which has caused mild respiratory distress and has over time deteriorated his health.
6. That the Applicants are first offenders with no previous criminal records save for the offence for which they were convicted and which did not involve personal violence.

The two affidavits in support expound on these grounds.

At the hearing, the Applicant's Counsel relied on the grounds as set out in the Notice of Motion and the supporting affidavits. He emphasized that the Applicants were jointly charged with a case of forceful entry C/S 77 of the Penal Code Act and sentenced to 2 years. He added that the Applicants were admitted on bail in the lower Court, 1<sup>st</sup> Applicant paid Shs. 5,000,000 cash, while second Applicant paid Shs. 100,000/= cash as he was financially incapacitated.

And that both Applicants diligently attended the trial without absconding. He also emphasized that both Applicants have permanent places of abode as stated in the supporting affidavits.

Four sureties were presented for the two Applicants, two for each. Mr. Ssentongo Asuman Junior, brother to the 1<sup>st</sup> Applicant and a resident of Namakoma Zone and Mukasa Lubega Jude, a cousin and a resident of Kitende LC1 Zone were for 1<sup>st</sup> Applicant.

As for 2<sup>nd</sup> Applicant were Nkugwa Ponsiano, his brother and Mr. Kaddu Samuel also a brother were presented. M/S Elima Doreen for the State did not oppose the Application for bail pending Appeal she however, prayed that the Appeal be fixed for hearing.

The Jurisdiction of this Court to grant bail pending Appeal is provided under S.132 (4) of the Trial on Indictment Act which was not quoted by Counsel for Applicants, but never the less not fatal to the Application. The other provisions are Section 40 (2) of the Criminal Procedure Code and the Judicature (Criminal Procedure) (Application) Rules. I hasten to emphasise that bail pending Appeal is not a right. It is granted at the discretion of Court.

However, this discretion must be exercised judiciously and each case must be determined on its own merits. The conditions upon which Court has to grant bail pending Appeal have been laid down in a number of cases by both the Court of Appeal and the Supreme Court. However, the most outstanding case is that of **Alvind Patel Vs Uganda, Supreme Court Criminal Appeal No. 001 of 2003**, where they were summarised as follows:-

1. The character of the Applicant.
2. Whether he/she is a first offender or not.
3. Whether the offence with which the Applicant was convicted involved personal violence.
4. The Appeal is not frivolous and has no reasonable possibility of success.
5. The possibility of substantial delay in the determination of the Appeal.
6. Whether the Applicant has complied with bail conditions granted before the Applicant's conviction and during the pendency of Appeal if any.

Needless to say, the above guidelines are not exhaustive; and they need not all be present at the same time. In my view, a combination of two or more of the guidelines are sufficient. This is because the main purpose of granting bail pending Appeal is that the Court must be satisfied that the Applicant or Applicants as the case may be shall in compliance with Bail conditions be available to attend trial or Appeal.

As far as the character of the Applicants is concerned, it would have been the duty of the State to avail to this Court with all the necessary information about the Applicants, their character, previous convictions if any or criminal records.

Bail pending Appeal is a different matter. By this time the Applicants are no longer wholly shielded by the presumption of innocence. The Applicants at this stage are convicted offenders with a right of Appeal. The Applicants at this stage have an incentive to jump bail. **A conviction: A conviction by Court at any level must be taken very seriously, the right of Appeal notwithstanding.**

For the above reasons, the Applicants in this case have to satisfy Court that they deserve to be granted bail pending Appeal and if bail is granted, they will not abscond. This evidence has to be found in the pleadings, notably the grounds stated in the Notice of Motion and supporting affidavits.

And as far as this case is concerned, the State has not come up with any allegation challenging the character of the Applicants. And what Counsel for the Applicants has submitted that they are first offenders has not been challenged. Even the Judgment of the lower Court bears it all. In fact, although at this stage Court is not to consider the merits of the Appeal, Court all the same wonders why the Applicants were sentenced to the maximum penalty of 2 years despite being first offenders. But that will be considered during the main Appeal. As for now, this Court has studied the Memorandum of Appeal attached as annexure “C” to the supporting affidavits. The said Memorandum of Appeal, which contains nine grounds of Appeal, is very detailed and elaborate in substance. For that matter, I can safely conclude that the Appeal is not frivolous. I cannot comment on the merits of the Appeal for now. The other consideration is the submission by Counsel for the Applicants is that the Applicants abided by the bail terms in the lower Court up to the end. That was not disputed by learned Counsel for State. In the premises, and in view of what I have outlined, I am satisfied that the Applicants, once granted bail will not abscond. The sureties presented have impressed this Court as substantial and were not opposed by Counsel for the State.

I accordingly do hereby grant both Applicants bail pending Appeal on the following conditions:-

1. Each Applicant to deposit in Court a sum of Shs. 1,000,000/= cash.
2. Their respective sureties are bound in the sums of Shs. 5,000,000/= not cash.
3. Applicants to report to the Deputy Registrar of this Court once every month till the Appeal is heard, starting on 3/02/2014.

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**W. MASALU MUSENE**

**JUDGE**

**3/01/2014**

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