

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
MISCELLANEOUS APPLICATION No. 240 of 2013
(Arising out of Criminal Case No. KBG-CO-176 of 2013)

1. SEKABIRA LAWRENCE

2. SEBAGALA HERBERT

3. MAYIRA NTEZA

APPLICANTS

VERSUS

UGANDA

RESPONDENT

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHANYA

RULING

The Applicants, Sekabira Lawrence, Sebagala Herbert and Mayira Nteza are indicted of the offence of murder contrary to Section 188 and 189 of the Penal Code Act Cap 120. They were committed to the High Court for trial on 24 July 2013. They are now seeking to be released on bail while awaiting their trial. It is in respect of that application this ruling is issued. On their behalf a Notice of Motion was filed by their Advocate, Mr. Abdulla Kiwanuka of M/S Lukwago & Co. Advocates, pursuant to Article 23(6), Article 28(3)(a) of the Constitution of the Republic of Uganda, 1995, S. 14(1) (a) , S. 15(1)(a) (b) and 15(3) of the Trial On Indictment Act(T.I.A.) and Rule 2 of the Judicature (Criminal Procedure)(Applications) Rules S.I. 13-8).

The applicants are represented by Mr. Abdulla Kiwanuka and the State was represented by Ms. Kwezi Asimwe Fiona, a State Attorney.

The Notice of Motion sets out seven grounds for this application, inter alia, the fact that each of the Applicants have a fixed place of abode and are all residents of Kateera, Degeya, Kiboga District which within the jurisdiction of this Court and that they are willing to abide by any bail conditions that may be imposed upon them by the Court and that they shall not abscond; they have no pending charges against them in any other Court; the Applicants are not sure of when their case shall commence; each of the Applicants has a family comprising of a wife and two children; Each of them is a sole bread winner; that it would be in the interest of substantive justice if they are granted bail and lastly, that they have substantial sureties resident within the jurisdictions of the Court.

They have been on remand for about nine months. At the hearing of the application, the Applicants relied on the Notice of Motion and each Accused person's Affidavit in support.

Their Counsel therefore prayed that they should be released on bail pending their trial.

Counsel Abdulla Kiwanuka highlighted the relevant facts from each Accused person's Affidavit accompanying the Application. In respect of Sekabira, Mr. Kiwanuka relied on paragraphs 5 and 8 to the effect that since his committal on 24/07/13, no hearing has been scheduled; that as a married man with a family, he will not abscond. Counsel relied upon similar paragraphs for Sebagala Herbert and Mayira Nteza. In fact, their Affidavits were word for word in similarity.

Counsel presented Sureties for each Accused. For Sebagala Herbert (A2), he presented Mr. Mulema Eddie Kizito, 38 years, resident of Kateera, Degeya as his Surety. Mr. Mulema stated that he has resided at that location since he was born and is a farmer. He presented an LC. 1 Letter of Kateera Degeya dated 21/05/14, an ID of Kiboga District Local Government, No. KDLG/03/081 issued on 1/7/11 and expiring on 31/6/16. It's a pity that a Government body

would issue a card with mistakes in it. The month of June has only 30 days not 31 days. Mr. Mulema told Court that although he had no blood relationship with the Accused, they are village mates and as an LC3 official, he knew him very well. He put a few things on record that he knew Sebagala about such as the fact that he is farmer, has never committed any offence, he is an approachable person who has good relations with people. Mr. Mulema told Court that he has not visited Sebagala in prison due to financial constraints.

Another Surety for A2 was Surety No. 3(Semambya Patrick), 26 years old, resident of Kajjere Parish, Kiboga District since birth, he is a famer and business man dealing in coffee. According to Surety No. 3, he is an uncle to the Applicant and that A2 was indicted for killing his half-brother Mpanga with whom they shared a mother. I rejected this Surety because he had insufficient information about Herbert. The Surety did not know the Applicant's family neither did he know the names of A2's wife nor their children despite being an uncle. My argument is that if he has no knowledge about simple facts relating to A2, where will he get the moral authority to be so concerned about the Applicant so as to ensure that he attends Court.

Another Surety (Surety No. 5), Mr. Joseph Walusimbi, 48 yrs old, resident at Kateera, Degeya, Kiboga District was presented. He is a farmer dealing in coffee, matooke and has plantation of juice making bananas. Mr. Walusimbi is the second born in the family from which Sebagala originates. Sebagala is the eighth child of their parents. He presented identification documents which were: an LC 1 letter from the LC1 Kateera, Degeya and a Resident ID. No. 5283 issued on 1/1/13 expiring on an unknown date. Mr. Walusimbi did not know Sebagala's wife's name nor his children's names although he states that he had visited him 6 times. He assured Court that he will ensure that Sebagala attends Court.

The Sureties presented for Sekabira Lawrence (A1) included Mr. Willy Ssengendo, 49yrs old, male, farmer and a resident of Degeya. He told Court that he is a brother to A1 although he did not know A1's age. He knew that A1 had a fixed place of abode in Degeya and owns his own home where he grows coffee and has a banana plantation. He presented an LC letter from Kateera Degeya dated 21 and a Citizen Card No. 6728 obtained on 20/5/15, two days before the hearing of the Application. His ID was not signed and had no stamp. In answer to Court's probing relating to what he knows about A1, this Surety stated that the Applicant was suspected of having burnt people, namely Matia Mpanga and Kaweesa who were his relatives. He also stated that he had never visited the Accused given the distance between the prison where the Accused is incarcerated and where the Surety lives in Kiboga. He told Court that he did not know much about A1's conditions in prison. He stated that he has been looking after the Applicant's wife and two children. He lives with A1's children aged 11 and 5 years.

The third Accused, Mr. Mayira Peter Nteza had Ms. Scovia Nabaka, presented as his Surety. She is 40 yrs old, resident of Kiboga T/ Council, a house wife for 20 years and runs a shop selling groceries, sugar and other foodstuffs. She relied upon an LC1 letter from Buzzibwera LC 1B dated 15/5/14; her Resident ID. No. 0250 issued on 01/05/11. She told Court that she came to represent all three Applicants, particularly Nteza(A2). She has known Muiyira since birth, has visited him in Kiboga, Kigo but this was months ago. She informed Court that Muiyira's complaint is that his family is left alone without help as there is no money for their sustenance. That although A3 was a boda boda rider, the boda boda he used to operate was sold by this Surety. The motor cycle belonged to her and she had only allowed A3 to utilize it or operate it on her behalf. She was aware of her role as a Surety.

Muyira Peter had another Surety called Mr. Godfrey Kisitu (Surety No. 6) of Kateera, Degeya , Kiboga District; farmer and elder brother to A3 and he told

Court that Muyira is about 20 years old and had known him since 1980. He presented an LC letter dated 21/5/14; a Citizen's ID card No. 1803 which she obtained recently so that she could stand Surety for her brother(A3). Surety No. 6 could not recall A3's children's names although he knew that A3 had a 3 year old child. He was hesitant to talk about A3's wife which created an impression that he did not perhaps know A3 so well notwithstanding their blood relationship otherwise how could he stay with A3 his brother without knowing simple facts about him?

Mr. Kiwanuka implored Court to grant his client bail. The Prosecutor opposed the Application. She brought to Court's notice the fact that S. 14(1) (a) of the TIA is non-existent and that the Applicant's Counsel relied on S. 15(1) (a) & (b) pertaining to 'exceptional circumstances. Each Applicant mentions sickness in their respective Affidavits in support. The common thread amongst all 3 Affidavits are paragraphs 6 & 7 where each Applicant states that sickness has rendered them unfit physically to endure the prison conditions. Further that each of them has been made abnormal, weak and frail. The wording is exactly the same for all 3 Applicants. According to the State Attorney, the Applicants have not proved "exceptional circumstances" by following the definition of 'exceptional circumstances'. Neither have they produced a letter from the Prison authorities stating that their conditions are grave and the Prison authorities are unable to manage their conditions. She further submitted that it's a usual practice for Court to require two Sureties. Additionally, the gravity of their offence is another factor that would affect the possibility of granting them bail. She also noted that the Accused persons had no letters of introduction from their respective LC1 s. She challenged their respective places of abode and stated that the three have been in prison for just 9 months, which is a short time. Moreover, their case can easily be accommodated in any of the Sessions at Nakawa

In rejoinder, Mr. Kiwanuka submitted that S. 14(1) (a) of the TIA is non-existent and that to cite a wrong law is not at all fatal as per jurisprudence emanating from the Supreme Court. In any case, the State can only rebut evidence using an affidavit which they failed to do hence whatever they have stated is evidence from the Bar. He contends that absence of a medical certificate is not fatal. The most crucial factor in the grant of bail, is the assurance that the Accused shall return to Court. Counsel Kiwanuka further contended that there is no need for sureties or even a requirement that they should be at least 2. Additionally, according to Council for the Applicant, the Constitution of the Republic of Uganda provides for expeditious trial and there is no need to present letters of identification from the Applicant's villages. Regarding the fixed places of abode, Counsel Kiwanuka contended that the charge sheet prepared by the State itself has their place of abode.

Concerning the authorities applicable to their application, Mr. Kiwanuka cited **Constitutional Reference No. 20 of 2005 Rtd Col. Dr. Kiiza Besigye vs. Uganda** which enunciated some of the principles to be considered in granting bail. It was stated therein that bail should not be refused mechanically just because the State wants it. He also cited the **Alice Kaboyo matter-Miscellaneous Application 98/ 07** where Ms. Kaboyo was granted bail. He, therefore invited Court to exercise its wide discretion to release the Accused persons on bail.

RESOLUTION

I have considered the submissions of Parties in this matter. I am cognizant of Article 28 (1) of the Constitution conferring the right to a speedy trial. Article 23(6) of the Constitution confers discretion to the Court to grant bail to an applicant on conditions it deems reasonable.

In exercising the discretion, Court must act judiciously and on either legal basis or rational basis. In the case of **Osborn V. Bank of the United**

States, 22 U. S. 738 (1824), Chief Justice John Marshall wrote the following on this subject:

“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.”

Additionally, a full court in the Supreme Court of Nigeria in the case of **United Bank for Africa V. Gmbh (supra) where Oputa, J.S.C.** made a Volte-face by holding at **p.409** as follows -

“-----in the exercise of its discretion...the court will have regard to all the particular facts and circumstances of the particular case before it. Discretion is thus not an indulgence of judicial whim, but the exercise of judicial judgment based on facts and guided by the law or the equitable decision... to exercise his discretion properly the Judge was bound to look at the facts and surrounding circumstances. If this is not a ground of fact or at least of mixed law and fact, then I do not know what it is.”

In other words, a Judge exercising his discretion must have a basis for it. The Trial on Indictment Act was meant to give further direction on what factors Court may consider. The provisions of S. 14 and 15 of the T.I.A may not be mandatory but they guide the Judge in the adjudication of such matters. If these sections of the TIA are considered, they are directive. More so, where the Applicant has relied on them. I agree with the Prosecutor that the Applicant needed to put on record that they had been examined by the prison authorities and their conditions are not manageable by the Prisons

authorities. The Applicants did not do so. Suppose that these various legal provisions would not be applicable then to what would one resort to? The Applicants can use the Constitution to seek the remedy that they need. This is what I have considered but as I pointed out above its inevitable for a Judge not to use an existing law on the subject matter or case law. In my considered opinion, the mischief behind **S. 15** of the **TIA** was to ensure that Court does not arbitrary grant or deny bail to Accused persons. Court is also enjoined to consider the gravity of the offence. In many jurisdictions this factor is an over-riding consideration in granting bail as well as the circumstances in which the offence was committed.

This is a case of alleged Murder through arson which involves over 3 Accused persons. The trio has not been long on remand having been committed only since last year. The time spent on remand before trial is not excessive in my opinion. The State should be accorded an opportunity to investigate the matter further. In any event, it would not be prudent to have all three accused persons on the same case admitted to bail yet there are others indicted of the same offence who are still at large.

Since the Applicants in this matter have relied upon sickness as a ground for being released on bail, it would not be unfair to hold them under the very provisions upon which they have based their application, since the Applicant have failed to prove any grounds upon which they are relying to the satisfaction of Court. In the circumstances, I hereby decline to exercise my discretion to admit all of them to Bail at this stage. I implore the Prosecutor Assistant Registrar to look into scheduling the matter.

Signed:.....
Hon Lady Justice Elizabeth Ibanda Nahamya
Judge
23rd May 2014