

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA-NAKAWA CENTRAL CIRCUIT
MISCELLANEOUS APPLICATION NO. 28 OF 2014
(Arising from Criminal Case No. NAK-AA-06 of 2013)

D/AIP WABWIRE IBIN ABDU::::::::::::::::::::::::::::::::: APPLICANT/ACCUSED
VERSUS

UGANDA::
RESPONDENT/PROSECUTION

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

R U L I N G

This application was brought under Articles 2(1) & (2), 23(6) (a), 28(3) of the 1995 Constitution of the Republic of Uganda, Sections 14 & 15(1) (b) (c) of the Trial on Indictments Act (Cap 23), and Rule 2 of the Criminal Procedure Application Rules SI 11-1). It is for orders that the applicant be released on bail pending the hearing of the charges against him.

The Applicant is charged with the offence of Murder C/S 188 &189 of the Penal Code Act. The Applicant was committed for trial and he has been on remand for a period of 16 months.

The grounds in support of the application are that:-

- a) The Applicant has a Constitutional right to apply for bail and this honourable Court has the discretion to grant bail to the applicant
- b) The Applicant suffers from Acute (end stage Glumerulonephritis (kidney disease) in advanced stage and this constitutes an exceptional circumstance;
- c) The Applicant has substantial sureties who are all resident within the jurisdiction of this Honourable Court. ; and it is in the interest of substantive justice and observation of constitutional rights for the applicant to be granted bail.

The Application was supported by the Affidavit of D/AIP Wabwire Ibin Abdu (Applicant) which enunciates the grounds in the Notice of Motion.

Counsel Mooli Albert of Waluku, Mooli & Co. Advocates represented the Applicant whilst the Respondent was represented by Ms Elima Doreen

Mr. Albert Mooli, Counsel for the Applicant submitted that there are exceptional circumstances justifying the release of the Applicant on bail pending hearing of the criminal charges against him. Counsel delved into the health history of the Applicant. He referred to paragraph 3 of the Affidavit which states that before his arrest, the Applicant was on 1st September 2012 diagnosed by the Police Surgeon. It was established that he was suffering from Kidney Failure resulting into reduced urea and **cretutive** Clearances. (See Annexure "A"). Furthermore, another examination was conducted on the Applicant by Dr..... in Murchison Bay Hospital. The results disclosed that the Applicant is still suffering from Acute end stage *Glumerulonephritis (kidney disease)* in advanced stag. The Report also indicates that his life has continuously deteriorated due to lack of appropriate medical and other facilities in Luzira Prison. (See Annexure "B" dated 21st August 2013).

It should be observed that at the hearing of this Application, Counsel for the Applicant produced a copy of a Medical Report dated 21st August 2013. However, I accorded him an opportunity to present a recent copy of the Medical Report. In his Oral submissions, Counsel for the Applicant stated that the basis of the Application is grave illness. Counsel referred Court to the Medical Report made by Dr. Kakorali Alex dated 2/5/2014. Counsel notified Court that the Applicant's condition requires for special attention which can only be done if the Applicant is out of prison.

Additionally, Counsel Mooli for the Applicant, submitted that the fact that the two Medical Reports exist should not be fatal to the Application since both Reports are similar and rather reveal that the Applicant suffers from a kidney problem. Relating to the issue of irregularity in the report for

failing to state whether the Applicant's condition cannot be handled in Prison, Counsel Mooli stated that it was unfortunate that the Report did not reveal that fact. However, it is a fact that the Applicant's condition cannot be monitored in Prison. Additionally, the Applicant needs to be out of Prison in order to solicit for funds. Counsel referred Court to **paragraph 6** of the Applicant's Affidavit which states that that Applicant has 3 (three) children and a wife plus 3 dependants and that he is the sole bread winner in the family stands to suffer during his absence. Further, in **paragraph 8**, the Applicant is ready not to interfere with Prosecution witnesses. In paragraph 10 the Applicant has a permanent place of abode. Counsel for Applicant cited **Nansamba Hamiyat vs. Uganda High Court Miscellaneous Application No. 105 of 2009** where His Lordship Benjamin Kabiito, J. Observed that the presumption of innocence is the cardinal criminal justice principle and if the Applicant would fulfil the conditions of bail it would be unfair to deny him bail simply because it is feared that the gravity of the offence may tempt an Accused to abscond. Court prayed Court to exercise its discretion to grant the Applicant bail.

He also cited **Ringe Steven vs. Uganda Miscellaneous Application 65 of 2009** where it was held that no exceptional circumstances, the Applicant adduced sound sureties who would guarantee the attendance of the Accused and bail was granted.

In that regard, Counsel prayed that the Applicant be released on bail in the event that the Applicant provides substantial sureties. He cited **Kiiza Besigye vs. Uganda Miscellaneous Application No. 228 of 2005** where it was held that notwithstanding the gravity of the offence, Bail should not be denied mechanically but Court should consider social circumstances surrounding the parties to the case and the fact that the Applicant will not abscond and has substantial sureties. Counsel Mooli submitted that he had 3 Sureties. **Surety No. 1 Yowana Wafula** aged 54 years, a business man dealing in Hardware in Kira through Supreme Investments and a resident of Makerere II Zone C testified that the Applicant is his nephew. That he was instrumental in getting the Applicant

a job as the Police Officer in 2003. He adduced an LC. 1 Letter from Makerere II Zone C, Kawempe Division dated 2/05/2014. He also adduced a business card in the names of Supreme Investments Ltd and Surety as the Executive Director for 3 years. The surety stated that he had visited the Applicant over 6 time's imprisonment. I have noticed that the Surety is aware of the details of the Applicant. Like the fact that he is charged with murder. Surety No. 1 was aware of his duty as surety. He told Court that as Surety he must ensure that the Applicant reports to Court and on failure of the Applicant to show up, he would be penalized.

*Surety No. 2 **Nelson Okello*** aged 39 and nephew to the Accused. He stated that he is a kitchen Aide under Dean of Students Department and he has been under the employment of Makerere University Business School and he resides at the Staff headquarters. He adduced an LC. 1 Letter from Nakawa Institutions Parish dated 14/4/2014 and an Employer's ID No. 88991054, a passport issued on 06/09/2007. He stated that the Applicant was a residing at Jinja Road Police Station and a Detective AIP and has a wife and three children. The Surety was also aware of her role as surety that is he will ensure that the Applicant attends Court.

*Surety No. 3 **Migisha Moses*** aged 30 years, a resident of Lweza Zone "A", Entebbe. He stated that he is a friend to the Applicant. He adduced an LC.1 Letter dated 14th April 2014 from Lweza Zone "A" Mutungo Parish, a Driving Permit, and a Work I.D. He was well conversant with the particulars pertaining to the Applicant and he knew his duty as the surety.

In reaction to Counsel Mooli's submissions, the State Attorney submitted that the Medical Report does not state that the prison authorities would not manage the Applicant's medical condition. Further, that the Applicant chose to rely on exceptional circumstances and therefore he can no longer exempt himself from proof of exceptional circumstances. State Attorney Doreen Elima submitted that at first the Applicant produced a Medical Report dated 21/August/2013. That on 9/5/2014 the Applicant presented another Medical Report dated 2/05/2014. The State Attorney

observed that the Medical Report shows that a different Doctor examined the Applicant yet he made similar conclusions with the previous Report made about 10 months ago. That in any case this reveals that the Applicant's Health condition can be handled in, the Accused could not have survived the prison ordeal to date. The State Attorney told Court that the 2nd medical Report does not state whether the prison authorities are unable to manage the Applicant's condition

Additionally, the State Attorney submitted that the Applicant failed to plead the exact location of his fixed place of bode. She stated that there is no introductory letter to confirm the Applicant's residence and whether it is within the Court's Jurisdiction. On the issue of Sureties, the State Attorney stated that Surety No. 1 does not know when the Applicant committed the offence and the circumstances within which it occurred. And the surety also stated that the Applicant has 2 dependants whereas the Applicant in paragraph 6 of the Affidavit in support of the Application stated that he has 3 dependants. Surety No. 1 failed to mention the Applicant's illness yet he is an uncle to the Applicant. He also does not know his role as Surety and he does not seem authoritative over the Applicant so as to be able to compel him to come to Court. Surety No. 3 did not know the Applicant's sickness and presented a Work ID which is not stamped. The Sureties' Introductory Letter is not addressed to Nakawa High Court, it is open ended. She in conclusion asked Court to find the sureties not substantial and dismiss the bail Application. Further, that since the Applicant has been committed to High Court, the matter be Cause listed at the next session. But if in any case the Court is inclined to grant bail, it should impose strict Bail Conditions by making an Order that the Sureties deposit their passports and cash bail be payable.

That Further, the Surety stated that his LC 1 Chairman is Mr Robert Nanda whereas the letter shows that Mr Nanda is the Vice Chairman

In Rejoinder by Counsel Mooli he reinstated his position and stated that according to the previous authorities cited, the main emphasis is that Court can grant bail even upon failure to prove exceptional circumstances. He stated furthermore that the Applicant had proved exceptional circumstances. And that the omission in the Medical Report to state that the Applicant's condition cannot be handled in prison is not fatal. Section 15 (3) of the TIA on proof of exceptional circumstances is not mandatory and in any case Court can invoke its discretionary powers to grant bail. On the issue of Surety No. 1 stating the Vice Chairman's name instead of the Chairman, Counsel Mooli submitted that the omission is not fatal on the basis that the V/ Chairman is a member of the Committee. On the issue of dependant's that the surety endeavoured to show that he knows the Applicant. That even if Surety No. 2 did not mention the Applicant's illness but he nevertheless answered the questions that were put to him. Additionally, that the criminal sessions are dependent on the availability of funds, the Applicant has been in detention for 16 months (1 year and four months), he has not been earning therefore Court can grant bail on lenient terms.

Therefore from the above the issue for determination is whether the Applicant be released on bail pending the determination of the criminal charges against him.

I have carefully perused the grounds of this Application, the affidavit in support, the provisions of the law and submissions of both Counsel Mooli for the Applicant and Ms. Elima Doreen State Attorney. I observe that among others that the Application was brought under **Article 23 (6) (a) of the Constitution of the Republic of Uganda**. It provides; *where a person is arrested in respect of a criminal Offence, he is entitled to apply to the Court to be released on bail and Court may grant that person bail on such conditions as Court considers reasonable*. Additionally, Section 14 of the T.I.A provides Court with the discretion to release an Accused

person on bail upon such conditions. Section 15 of the T.I.A lays down the grounds upon which Court may grant bail.

It should be observed that the Applicant sought the grant of bail on the basis that he falls within the exceptional circumstances. Paragraphs 3 & 4 of the Applicant's Affidavit in support of the Application, the Applicant deposed that he was on 1st September 2012 prior to his arrest diagnosed with Kidney Failure resulting into reduced Urea and Creatinine Clearances. A copy of the diagnosis Report was attached as **Annexure "A"**. further, in Paragraph "B" the deponent stated that an examination was conducted on him while in Murchison Hospital and the results disclosed that the Applicant was still suffering from Acute (End stage Glumerulonephritis (Kidney disease). The Report was attached and marked **Annexure "C"**.

It should be observed that before the hearing of the Application could proceed, I asked Counsel Mooli to adduce a recent copy of the Medical Report showing the Applicant's health condition. On 9/05/2014, the Applicant adduced a Medical Report dated 2nd May 2014.

I agree with the State Attorney with regard to the issue that the Law requires that the Medical Report must state that the Applicant's health condition cannot be handled in prison. **Section 15(3) of the T.I.A** requires that grave illness certified by a medical officer of the prison or other institution or place where the Accused is detained as being incapable of adequate medical treatment while the Accused is in custody. In accordance with the facts, the Applicant's Medical Report does not show that the Applicant's health condition cannot be monitored in prison and this is a necessary requirement under the law. Therefore failure to state the same is fatal. And the Applicant failed to prove any exceptional circumstances warranting his release on bail.

I am aware that proof of exceptional circumstances is not mandatory. See **Foundation for Human Rights Initiatives vs. Attorney General Constitutional Petition No. 020 of 2006**

In accordance with the facts, the Applicant is indicated with a grave offence of Murder contrary to Section 188 & 189 Penal Code Act. It should be noted that notwithstanding the fact that bail is premised on the presumption of innocence, and proof of exceptional circumstances is not mandatory. The Applicant is required to show that he will not abscond if released on bail and likely he will not interfere with Prosecution evidence. Section 15 (4) of the T.I.A lays down considerations on whether the Applicant is not likely to abscond if released on bail among others that he has sound sureties and whether he has a fixed place of abode. In ***Foundation for Human Rights Initiative vs. Attorney General Constitutional Petition No. 020 of 2006, before Leticia Kikonyogo Mukasa J.*** where it was held that *'it is relevant, unless the offence is minor to take into account, certain matters like the gravity of the offence, nature of accusation, antecedents of the Accused person whether he has a fixed place of abode within the Court's jurisdiction'*

In ***Paragraph 10*** of the Affidavit, the Applicant averred that he has a fixed place of abode within the jurisdiction of Court. He however did not specify where this place is nor is there any introductory letter from the LC of his area. Therefore with this fact I find that the Applicant failed to adduce any such evidence.

On the issue of Sureties, Surety No. 1 is substantial but sureties 2 and 3 (nephew and friend respectively) are not. I don't think they will be able to exercise such authority to ensure that the Applicant appears in Court when required to do so. And bearing into mind the issue that the Applicant is charged with the Offence of Murder which is a grave offence under the law, the period of sixteen months spent by the Applicant under detention, the Applicant has not proved any exceptional circumstances warranting his release on the bail.

Under Section 15 (2) of the T.I.A Court may refuse to grant bail if the Applicant fails to prove to its satisfaction that exceptional circumstances exist justifying his release on bail; and that he or she will not abscond when released on bail.

In the circumstances, the Applicant has not showed any exceptional circumstances as per Section 15 (2) of the T.I.A Cap.23 and **I DECLINE TO EXERCISE COURT'S DISCRETION TO GRANT THE APPLICANT BAIL.**

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HON.LADY JUSTICE ELIZABETH IBANDA NAHAMYA
JUDGE
14th May, 2014