

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO

MISC APPLIC-NO's. 045, 046, and 047/2015

Obey Christopher, Kiwanuka Kkunsa Steven, Lwamafa Jimmy

Vs

UGANDA

RULING

This is a ruling on bail applications by Mr Christopher **Obey**, Mr Jimmy **Lwamafa** and Mr **Kiwanuka Kkunsa** who are jointly charged with various counts of Causing Financial Loss, abuse of office, corruption, false accounting and conspiracy to defraud. The applications are premised on the following grounds;

- 1. The applicants are already committed to the high court.*
- 2. They are presumed innocent.*
- 3. They have a right to apply for bail.*
- 4. They have fixed places of abode, and are law abiding citizens, ready and willing to abide by the bail conditions set by the Court.*
- 5. They have families and dependants for whom they are the sole bread winners.*
- 6. They have substantial sureties.*
- 7. They are not likely to abscond.*
- 8. The offences are bailable.*
- 9. They honoured bail terms in an earlier case.*
- 10. For Lwamafa and Kkunsa, there exist exceptional circumstances justifying his release.*
- 11. They cannot interfere with investigations which are in any case completed.*

The applicant's right to apply for bail and the presumption of innocence are fully recognised. That they were committed to the high court is irrefutable.

THE ARGUMENTS.

Counsel Evans **Ochieng** for Mr Lwamafa submitted that the applicant has a clear record of obedience to bond and summons. He answered bail in a similar case which was dismissed for want of prosecution. Citing **Uganda Vs. Col Dr Kiiza Besigye, Constitutional Reference No. 20 of 2005**, he submitted that bail should not be denied mechanically just because the state wants. The grounds for objection have to be substantiated. He relied on **AKBAR GODIVs UGANDA, Misc APPLICATION 20 OF 2009** for the submission that courts should not act on mere suspicion. The overriding principal, he argued, should be whether the applicant will turn up for his trial. Whether the applicant has a fixed place of abode, and whether he breached any bail terms in a previous case are indicators of the applicants ability to turn up for trial.

The applicant, so it was said, indeed has a fixed place of abode at plot 13 Yusuf Lule road, and answered bail in the earlier case. The sureties he furnished in the earlier case are the ones to stand surety in this case having executed their roles satisfactorily in that earlier case.

Counsel cited **Kashaka Muhanguzi vs Uganda criminal reference no 797 of 2014** arguing that there are exceptional circumstances of advanced age (60) years) and numerous health complications, (Hypertension) justifying the release of Mr Lwamafa on bail.

Counsel **Himbaza** for the second applicant (Mr **Obey** Christopher) argued on the authority of **Attorney General Vs Tumushabe, (2008) 2 East African Law Reports page 28**, that the right to bail under Article 23 of the constitution is non-derogable. He relied on **BESIGYE** (supra) for the submission that the only consideration in an application of this nature should be whether the applicant is likely to abscond or not to attend his trial.

He invited court to take judicial notice of the fact that the applicant answered bail in the earlier case and determine that he will not abscond. He has a permanent place of abode in Muyenga, and proposes to furnish the same sureties he had in the previous case.

M/s **Barbara Kawuma (RSA)** while objecting to Mr Lwamafas application pointed out that other than having the same accused persons, criminal case 10 of 2013 which involved 165b/= is different from this case on facts. She submitted on the key aspects of the application as follows;

ADVANCED AGE.

The age of the applicant has not been proved. Moreover considerations of the age of an applicant as an exceptional circumstance have to be made without losing sight of the seriousness of the offence.

Ill-health

Section 15(1) and (3) of the T.I.A requires that ill-health must be certified by the prisons medical officer which was not done in this case. The applicant can be adequately catered for in the prison. The court of appeal in **BESIGYE (supra)** ruled that the court should consider the rights of the accused and the needs of society.

Public interest

The court should take into account the fact that this is a case of public interest. The charges are grave and big sums of money are involved (88b/=).

Likelihood of interference with the course of justice.

The witnesses were people under the applicant and some are accomplices. He was permanent Secretary for over 15 years.

Secondly there were allegations of bribery of the investigators in criminal case 10 of 2013, as evidenced by newspaper extracts attached to the affidavit in rebuttal. The learned State Attorney asked the court not to take the reports lightly saying that the bribery allegations affected the investigations and led to the dismissal of the case.

Further that the prosecution is ready to commence with the trial since the applicant has already been committed to the high court, but now that the applicant is aware of the evidence he may abscond.

The sureties.

Court should consider their personal, social and economic circumstances, since the bail terms are to reflect the realities of the case. Two of the sureties are retired and may not be able to pay the recognisance in the event the accused absconded.

M/s **Marion Acio** (state attorney) objected to the application by Mr Obey, and argued that unlike **BESIGYE (supra)**, the decision in **Tumushabe (supra)** that the court must always grant bail was by a court that was not sitting as a constitutional court. Responding to the assertion that this case is the same as case no 10 of 2013 which was dismissed, she asked the court to view this one as different since it differs on facts and amounts involved.

Burden of proof

Under S.15 (1) of the T.I.A., the applicant must prove that he deserves to be released on bail. The main issue is whether he will abscond, which can be determined by looking at;

1. Whether he will interfere with the course of justice/witnesses. The investigating officer averred that there is a likelihood of interfering with witnesses. The applicant worked as Principal Accountant for a long time and many of the witnesses were his subordinates and close acquaintances.

2. He bribed police officers during investigations in criminal case 10 of 2013 and tried to bribe the director of the C.I.D, notorious facts which the court should take judicial notice of, having been widely publicised in the media.
3. The state is not under obligation to prove the allegations beyond reasonable doubt. Moreover there was no rebuttal by the applicants of that part of evidence.

Public interest

Under Article 126 of the Constitution, courts are to exercise judicial power in the name of the people, in conformity with the law, the values, norms and aspirations of the people. The court should note that this is a case of great public interest.

Nature of the offences.

These are corruption related offences. Corruption is a very serious matter which though not violent can kill quietly. It has far reaching implications, ranging from financing terrorism, to deprivation of services. In this case the allegation relates to the pension fund and to vulnerable people.

Sureties

They are not substantial. Frank Katusiime did not bring his passport. Henry Muheebwa, Apollo Turyasiima and Arthur Atuhairwe all work in companies owned by the applicant, or in which he owns majority shares. He has influence over them. They can't compel him to attend trial.

In rejoinder, **Counsel Ochieng** relied on Kashaka (supra) to submit that a person of 50 years and above is of advanced age. About the gravity of the offences, he said that 88b/= compared to 165b/= in respect to which the applicant was released on bail is not a colossal amount of money.

Likelihood of interference with the case.

The court was not told how the applicant may interfere with the case. Moreover, even in prison he could interfere with the case. Those allegations have not been proved.

Bribery

The opinion of journalists are not facts to be relied on by the court.

Counsel Himbaza for **Mr Obey** submitted in rejoinder that the bribery allegations are speculative. On the authority of **Godi (supra)** he said that such allegations must be reasonably substantiated. The proposed sureties are substantial. Persons who work with the applicant are the best sureties since they are always with him and can remind him to attend court.

Public importance

It does not override the fundamental right to bail.

I have reviewed the cases that were relied on by counsel and note that;

1. The assertion that the right to bail is non-derogable is not true and it was not what the court said in **TUMUSHABE, E.A.L.R 2008 VOL 2 PAGE 28**. The court was clear that "...every such person at any time, upon and after being charged, **may** apply for release on bail, and **the court may at its discretion**, grant the application irrespective of the class of criminal offence..." (See page 34, paragraph 2 of the judgment).
2. The judge in **Akbar Godi (supra)** heavily relied on **Col Kiiza Besigye (supra)** in which the court of appeal gave guidance on what constitutes reasonable considerations in an application for bail. **Besigye** seems therefore to be the *locus classicus* on the issue at hand.

It appears to me that the overriding principle in an application of this kind succinctly set in **BESIGYE** is that in the exercise of its discretion to grant or refuse bail, the court does in principle address only one all-embracing issue, which is whether the interests of justice be prejudiced if the accused is granted bail. And in this context it must be borne in mind that, if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced.

Four subsidiary questions arise.

1. *If released on bail, will the accused stand their trial?*
2. *Will they interfere with State witnesses?*
3. *Will they commit further crimes?*
4. *Will their release be in public interest?*

WHETHER THE ACCUSED WILL STAND THEIR TRIAL IF RELEASED ON BAIL.

This is a function of a number of factors which include the gravity of the offence(s), the likely penalty in the event of conviction, whether or not the applicants have known addresses and tangible interests within the courts jurisdiction, and the quality of sureties they have furnished.

There can be no doubt, going by the amount of money involved, and the likely penalties in the event of conviction, the offences are grave. The applicants though seem to have fixed places of abode.

The respondent assailed the substantiality of the sureties. Two or three of those furnished by Mr Lwamafa were assailed for being retired therefore unable to pay up any recognisance in the event circumstances required. Three of those of Mr Obey were assailed for being employees in companies he owns or where he is a majority share-holder. The substance of these objections was not seriously refuted.

The applicants sought to make capital ought of the fact that some of these sureties are the very ones who stood for the accused persons in the case that was dismissed.

Many things have however changed. This application cannot of necessity be handled the same way the previous one was handled. One of the changes, for example, is the advancement in age of the sureties. Retirement ordinarily comes with issues of reduced mobility and reduction in income.

I have made the point and repeat it here that sureties in economic crime cases, especially cases involving big monies should demonstrate the ability not only to ensure that the accused answers bail, but also the ability to pay up the recognisance they will be required to sign. Bail

terms are supposed to reflect the realities of the case, which include the value of the subject matter. Asset recovery and the “**follow-the-money**” principle are major aspects of the Anti-corruption legislation. Persons who are in retirement, those doing undefined businesses, and those on the applicant’s pay roll are not the kind to persuade me to grant the orders sought.

POSSIBLE INTERFERENCE WITH STATE WITNESSES

It was said that the witnesses were people either under the applicants or are their acquaintances or accomplices and can be easily influenced by the applicants.

Secondly that there were allegations of bribery of the investigators in criminal case 10 of 2013, as evidenced by newspaper extracts attached to the affidavit in rebuttal. The learned State Attorney asked the court not to take the reports lightly saying that the bribery allegations affected the earlier investigations and led to the dismissal of that case.

It was argued in rebuttal that the bribery allegations are speculative and not reasonably substantiated and that the court was not told how the applicant may interfere with the case. Further that even in prison they could interfere with it.

It should be remembered that bail proceedings are *sui generis (unique or of their own kind)*. The state is not obliged to produce evidence in the true sense and is not bound by formality. The court may take into account whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must prophesy/prognosticate for that matter. To do this it must necessarily have regard to whatever is placed before it in order to decide the matter.

The allegations of bribery were made by affidavit. The applicants did not require the presence of the deponent for cross examination purposes, and no sworn rebuttals to the allegations were filed. This is strange considering the nature of charges the applicants are facing and the obvious fact that the allegations were bound to be the turning point in today’s decision. It is the law that the court is to take the unrebutted averments in an affidavit as unchallenged, see **CO-OPERATIVE BANK LTDVs VINCENT KASAIJJA HCCS 586 OF 1994**. The unchallenged evidence that the applicants bribed investigators in a similar case is sufficient basis for the finding that there is not only a “*reasonable possibility*” but “*a real risk or a reasonable likelihood*” of interference in this case.

Will their release be in public interest?

It was argued that Article 126 of the Constitution requires the courts to exercise judicial power in the name of the people, in conformity with the law, the values, norms and aspirations of the people, and that the court should note that this is a case of great public interest in light of the gravity of the charges and the big sums of money involved (88b/=).

For the applicants it was submitted that public interest does not override the fundamental right to bail. It should however be clarified that the Constitution does not guarantee the right to bail.

On the issue of public interest, in the final resort it is the court seised of the particular application, which must make the value judgment as to what is in the interest of the administration of justice or the public in the particular circumstances.

In this case the amounts involved are big. It has been ruled that there is likelihood of interference with witnesses by the accused. The applicants have ever been charged with similar offences and released on bail only for the case to be dismissed amidst allegations of corruption.

For the applicants it was argued that journalist's opinions are just that, and should not be the basis of an adverse finding. The newspaper reports prove at least one fact that is that the allegations were made. The unchallenged affidavit on the court record goes to lend credence to those allegations. The interest of the public and that of the administration of justice is to protect the integrity of the justice system so that it may duly execute its role of dispensing justice. This may not be attained just as it was not in the dismissed case.

I have perused the summary of the case that was attached to the affidavits in reply to the applications. The summary of the case seems to bear *prima facie* evidence that the case against the applicants is strong. Moreover, the indications are that the applicants who *prima facie* were involved in the alleged offence were successful over a long period of time at deceiving employees in the ministry of finance, manipulating systems, disguising a multitude of transactions and giving plausible explanations which set the minds of Ministry Officials and Auditors at rest. Based on this alleged conduct they come across as highly intelligent and adept at concealment. Any interference with witnesses or evidence will likely not be done openly or by use brute force. It seems to me that the applicants have a keen appreciation of this fact.

The available evidence (*prima facie again*), suggests that they successfully got the 88b/=. They might therefore, in addition to being too intelligent and too manipulative and well networked, be too wealthy to be trusted.

Considering the seriousness of the case, the huge amounts of money involved, and the antecedents of the applicants, it will neither be in the interest of the public nor of the administration of justice for them to be allowed to bail.

Exceptional circumstances.

In determining whether or not a bail applicant has established the existence of "exceptional circumstances" within the meaning of section 15 (1) of the T.I.A, the court has to make a decision on the facts judged within the context of the particular case. Facts which might be sufficient in one case might not be enough to warrant the grant of the bail application in the peculiar context of another matter.

The exercise required of the court entails the making of a "value judgment" as to whether the proven circumstances are of such a nature as to be "exceptional". In exercising its judicial discretion, a court must consider the totality of the circumstances.

It was argued that Mr Lwamafa and Mr Kkunsa are labouring under advanced age and multiple ill-health conditions. There was no attempt at proving the ill health. As to the issue of age, the applicants may be about the stated ages. The case of **Kashaka** relied on by the applicants is however distinguishable, on facts, from this case. The prima facie evidence available is that even at those ages the applicants can't be trusted outside prison.

I will here deal a little bit more with Mr Kiwanuka Kkunsa's application given that it was made later than the other two applications.

It was argued that he answered bail in criminal case 10/13, he has a permanent place of abode and four substantial sureties who stood for him in criminal case 10/13. He is of advanced age (57 years) with a family to look after. He was the one who was looking after her his sick wife and he suffers from arthritis.

The key issues that arose in the application;

1. Public interest

Counsel argued that it should not be a ground in considering in bail. Further that there was bigger public interest in criminal case 10/13 which involved 165b/=.

2. Bribery

The applicant denied the allegation on oath. Counsel said that the applicant was not mentioned as the one who bribed the police officers, and that these are mere newspapers reports which should be disregarded. The contents of the affidavit in reply are purely speculative since those who were allegedly bribed did not file affidavits.

That the applicant answered bail in criminal case 10/2-13 is not doubted. The sureties who stood for him that time did a meticulous job and thank we them, but so much has changed since that time.

1. Some of them have become advanced in age – this comes with reduced mobility and reduced resources.
2. The allegations of bribery of police officers that came up in relation to that case highlight the fact that in a case of this magnitude, the quality of sureties may in fact be of little relevance. That is why it is important to consider all factors as a whole.

On the issue of Public interest, Article 126 of the Constitution is clear that judicial power shall be exercised in conformity with law and with the values, norms and aspirations of the people. This can only mean that public interest is a relevant consideration in judicial decisions.

In **Uganda Vs Kiiiza Besigye Constitutional ref No. 20/05** the Court's guidance was that "while considering bail, the court would need to balance the Constitutional rights of the applicant, the needs of society to be protected from lawlessness...etc. This clearly shows that public interest is a valid consideration.

The applicant denied the bribery allegations which counsel argued are based on mere newspapers reports.

Negative reports coming out at the time such a case is dismissed for want of prosecution are not to be taken lightly.

In this case the relevant factors are;

1. The allegations of bribery.
2. The gravity of the charges (the big amount of money involved and the prima facie evidence that the applicants were involvement in the loss, and the likely penalty on conviction.
3. On the other hand the accuseds personal circumstances so far as have been brought to my attention – his advanced age, his family obligations, his antecedents (he answered bail in criminal case 10/2013), and is furnishing the same sureties who stood for him in that other case.

In cases of an economic nature, the assurance that the accused shall attend his trial should weigh far less than whether he will interfere with the course of justice which is a real possibility. This is because in such cases the stakes are high. Big monies are involved. The temptation to try and interfere with witnesses is high and cannot be easily detected.

In this case given the presence of allegations of bribery in a similar case I am not persuaded that justice will be served by admitting Mr Kkunsu to bail.

All the information placed before me considered, I remain unpersuaded on the merits of the applications. The applicants have failed to acquit themselves of the onus of proving, on a balance of probabilities that exceptional circumstances exist within the context of the case, which in public interest and the interest of the justice justify the granting of bail to them. The applications are rejected.

ORDER

The in-charge of Luzira prison is hereby ordered to make sure that the accused persons are taken to see a doctor should he be requested.

Margaret Tibulya.

Judge.

30th August 2015.