

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CRIMINAL DIVISION**

**CRIMINAL MISCELLANEOUS APPLICATION NO.64 OF 2015**

**(Arising out of Criminal Case No. 83 of 2015, which also is arising from Criminal Case No.727 of 2011 from Chief Magistrate’s Court of Buganda Road Court, at Kampala)**

**WASSWA LUBYAYI JOHN**

**GASTAVAS ROBERT :.....:APPLICANT**

**VERSUS**

**UGANDA :.....:RESPONDENT**

**RULING BY HON.MR.JUSTICE JOSEPH MURANGIRA**

**1. Introduction**

1.1 The applicant is represented by Mr. Ampaire Tumwebaze from Kafeero & Co. Advocates. Whereas, the respondent is represented by Ms. Nalwanga Sahrifah, Senior State Attorney.

1.2 The applicant brought this application by Notice of Motion which is supported by an affidavit, sworn by the applicant on 3<sup>rd</sup> September, 2015, under Section 205 of the Magistrate’s Courts Act, Cap. 16, Section 14 of the trial on Indictments Act, Cap.23; Section 40 (a) of the Criminal Procedure Code Act, Cap. 116, Laws of Uganda, and Rule 6 (2) of the Judicature Act Statutory Instrument No. 13 -10 (Court of Appeal Rules). In reply, the respondent filed in Court an affidavit in reply to this application.

**2. Grounds of this application**

2.1 This application is seeking to be released on bail pending the hearing of his appeal.

2.2 This application is based on the following grounds; that:-

- a) That the applicant is a first time offender.
- b) The applicant is of an advanced age.
- c) The applicant is suffering from diabetes.
- d) That the applicant is a person of good conduct and character.
- e) The offence the applicant was convicted of did not involve personal violence.
- f) The appeal is likely to take a long time to be heard and disposed of.
- g) The appeal has high chances of success.
- h) The applicant is likely to serve a very long period of time in prison before his appeal is heard and disposed of, given the length of his sentence.
- i) The applicant has a fixed place of abode.
- j) The applicant has substantial sureties and confirms that he will not jump bail but turn up in Court as Court directs until his appeal is fixed and heard.
- k) The applicant has no other pending charges against him.

2.3 In reply to this application, the respondent raised the following grounds in opposition; that:-

- i. ....
- ii. ....
- iii. There is no likelihood of substantial delay in hearing the appeal as the notice of appeal was filed on 3/9/2015 and was fixed for hearing on the 8<sup>th</sup> September 2015.
- iv. That the appeal has no chances of success as per the record of proceedings.
- v. The applicant has failed to prove that he has substantial sureties thus a high likelihood of absconding from this jurisdiction.

### **3. Resolution of this application by Court.**

Counsel for the applicant argued the abovestated grounds of this application one by one. He supported his submissions with the affidavit evidence, adduced by the applicant in his affidavit in support of this application. He relied on the cases of Akitta Olupots Justine – vs- Uganda, Court of Appeal Criminal application No. 160 of 2013; Arvind Patel-vs-

Uganda, Supreme Court Criminal application No. 1 of 2003, and Kawuma Freddie School-vs- Uganda, Court of Appeal Criminal application No 10 of 2009.

Further the applicant presented to Court the following five sureties:-

1. Kyewalabye Nathan Kayongo.
2. Mulambuza Pafra Nsereko.
3. Kagere Elly.
4. Nakidde Victor Lillian.
5. Mwanje Samuel.

Counsel for the applicant finally prayed to this Court to allow the application with the orders being sought therein.

In reply, Counsel for the respondent abandoned the ground in their affidavit in reply which was about the sureties being not substantial. In essence, the respondent's Counsel conceded and found the sureties presented by the applicant substantial. I thus agree with both Counsel for the parties that the five (5) sureties that were presented by the applicant are substantial.

However, Counsel for the respondent objected to this application and relied on the only two (2) remaining grounds 3 and 4 of the affidavit in reply. On their ground 3 of the affidavit in reply, she argued and submitted that there is no substantial delay in hearing the applicant's appeal. That this Court was ready to hear the appeal, but that Counsel for the applicant said he was not ready to proceed with the hearing of the appeal. That the appeal is only being delayed by the applicant.

Again, on ground 4 of the affidavit in reply, she submitted that the appeal has no likelihood of success. In Council for the respondent relied on the case of Arvind Patel – vs- Uganda (Supra), at page 14 whereby it was held that:-

**“In considering an application for bail pending appeal, the only means by which the Court can access the success of the appeal is by perusing the**

**relevant record of proceedings, judgment of the Court from which the appeal arises and the memorandum of appeal in question.”**

She further submitted that going back to this application what is attached on this application is a draft memorandum of appeal, which is not a memorandum of appeal. I agree with that submission.

Consequently, Counsel for the respondent submitted that the applicant is not a person of advanced age. That the medical report tendered in Court by the applicant puts the applicant's age at 70 years. That going by the applicant's passport, a copy of which was put on record, the applicant was born on 26<sup>th</sup> April, 1946. That the applicant in his affidavit in support of this application told Court that he is aged 69 years. That considering the inconsistencies in age, this Court should not trust the applicant.

In addition to all the above submitted to grounds, Counsel for the respondent submitted and argued that despite the fact that the applicant never jumped bail in the lower Court, that the applicant is now a convict and that because of that the applicant is likely to abscond trial and jump bail. She finally prayed that the applicant be denied bail.

The applicant presented eleven (11) grounds he based on his application. Counsel for the applicant argued all the grounds. In reply, Counsel for the respondent only attached the ground of: advanced age, applicant delaying the appeal, and that of there being no likelihood of the appeal succeeding. The rest of the eight (8) grounds of this application were not challenged by the respondent in its affidavit in reply and in the submissions by Counsel for the respondent. In the case of Arvind Patel-VS- Uganda (Supra) at page 14, lines 1-3 from top, Justice A.H.O Order (Rip) held that:-

**“In my view it is not necessary that all these conditions should be present in every case. A combination of two or more criteria may be sufficient.”**

On the medical report, I have perused the said medical report and noted that it contains among other things health issues about the applicant, which health, issues were never challenged by Counsel for the respondent in her submissions. The said report concludes:-

**“Conclusion;**

**Therefore, Wasswa Lubyayi Gastas John Robert is an old man who has congestive cardiac failure and also suffers from urinary incontinence.”**

Wherefore, the inconsistencies in the age do not go to the root of the contents of the medical report, which had not been contested by the respondent. Above all, going by the year he was born which appears in the applicant’s passport, the applicant is now above 69 years of age. The said discrepancy in the age is so minor.

On the issue or fact of the applicant being a convict, according to the law under which this application is brought, this Court has discretion to grant or not grant bail to the applicant pending the final determination of his appeal. In the case of Akutta Olupots Justine-vs- Uganda (Supra) at page 15, Hon. Justice S.B.K Karuma, Ag.DCJ, held that:-

**“To deny one bail pending appeal because one was convicted would in essence be to prematurely extinguish one’s right before one’s fate is finally determined by the final appellate Court.”**

Further, I have perused the cases of Arvind Patel-vs- Uganda (Supra) and Kavuma Freddie School-vs- Uganda (Supra) in detail and noted that all the applicant’s grounds in the application we resolved the higher appellate Court. The arguments by Counsel for the applicant are all picked from the judgments of abovestated cases. In those said cases all the grounds in this application we held in the affirmative or in favour of the applicants therein. Therefore, the findings in these said cases do bind me in determining this application.

Finally, the applicant presented substantial sureties.

#### **4. Conclusion.**

In closing, considering the submissions by both Counsel for the parties, my own evaluation and analysis of the said submissions and considering the law applicable to this matter, I find that this application has merit. It is accordingly allowed in the following terms:-

- a) This application for grant of bail pending appeal to the applicant is granted.
- b) The applicant is granted cash bail of 1,000,000/= (one million shillings only).
- c) Each surety is bonded in shs.2,000,000/= (two million shillings only) not cash.
- d) The applicant/convict shall be reporting to the Court Assistant Registrar of this Court every last Wednesday in a month, starting with this month of September, 2015 unless there are other orders to the contrary from this Court.

Dated at Kampala this 11<sup>th</sup> day of September, 2015.

**Joseph Murangira**  
**Judge.**

**Order:** The applicant's criminal appeal No.83 of 2015 is fixed for hearing on 2<sup>nd</sup> October, 2015 at 9:00 a.m.

**Joseph Murangira,**  
**Judge.**

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**PRESENTATION**

Mr. Bwiso Charles Senior State Attorney, holding brief for Ms. Nalwanga Sharifah for the respondent.

The matter is for a ruling on bail pending appeal.

Mr. Ampaire Tumwebaze for the applicant and the applicant are in the Court.

Ms. Margaret Kakunguru the Clerk and Ms Sarah Nasimbwa the interpreter are in Court.

**Court:** Ruling is delivered to the parties in open Court.

**Joseph Murangira**

**Judge.**

**11/9/2015**