

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**MISCELLANEOUS CRIMINAL APPLICATION No. 0011 OF 2016**

**ORINGI ELIA** ..... **APPLICANT**

**VERSUS**

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

**Before: Hon Justice Stephen Mubiru.**

**RULING**

This is an application for bail. The applicant is indicted with the offence of murder c/s 188 and 189 of the *Penal Code Act*. He was arrested on 12<sup>th</sup> March 2016 on suspicion of having murdered his eight year old daughter. On 11<sup>th</sup> October 2016 he was committed for trial by the High Court but is yet to be tried, hence this application by which he seeks to be released on bail pending his trial.

His application is by notice of motion under Article 23 (6) (a) and (c) of the *Constitution of the Republic of Uganda*, sections 14 (1) and 15 (1) of the *Trial on Indictments Act Cap.23* and rules 2 and 4 of the *Judicature (Criminal Procedure) (Application) Rules S.I 13-8*. It is dated 26<sup>th</sup> April 2016 and it is supported by his affidavit, sworn on the same date. The main grounds of this application as stated in the notice of motion and supporting affidavit are that; the offence with which he is indicted is bailable, he is aged 52 years old and therefore of advanced age, he is presumed innocent and needs to be granted bail to enable him adequately prepare for his trial and has a fixed place of abode within the jurisdiction of the court, with substantial persons willing to be his sureties.

In an affidavit in reply sworn by the Investigating Officer, a one D/AIP Onek on 11<sup>th</sup> October 2016, the application is opposed on grounds that; the accused has already been committed for trial and he is likely to interfere with or influence the prosecution witnesses. Further that the offence enraged the public and he will be exposed to their wrath if released on bail.

At the hearing of the application, the applicant was represented by Mr. Donge Opar while the state was represented by Mr. Pirimba Emmanuel, State Attorney. Counsel for the applicant, in his submissions, elaborated on the grounds stated in the motion and supporting affidavit and presented two sureties. In his response, the State Attorney too elaborated on the grounds for opposing the application as contained in the affidavit in reply and in the alternative, prayed for stringent conditions in the event that the court is inclined to grant them bail.

Whereas accused persons have a right to apply for bail by virtue of Article 23 (6) (a) and 23 (3) of the *Constitution of the Republic of Uganda*, the grant of bail is discretionary to the court (see *Uganda Vs Kiiza Besigye; Const. Ref No. 20 OF 2005*). By virtue of sections 14 and 15 of the *Trial on Indictments Act*, a person indicted is ordinarily released on bail if he or she proves to the satisfaction of the court that special circumstances do exist to warrant his or her being released on bail. The exceptional circumstances include grave sickness, infancy or advanced age or there being no objection by the state. Proof of these circumstances though is not mandatory as courts have the discretion to grant bail even where none is proved.

It is trite law that under Article 28(3) of the *Constitution of the Republic of Uganda*, every person is presumed innocent until proved guilty or pleads guilty. Consequently, an accused person should not be kept on remand unnecessarily without trial. In well deserving cases the accused person should be granted bail if he or she fulfils the conditions for his or her release. An Applicant should not be incarcerated if he or she is unlikely to abscond or interfere with witnesses for the prosecution, has a fixed place of abode, has sound sureties capable of guaranteeing that he or she will comply with the conditions of his or her bail and is willing to abide by all other conditions set by the court.

In deciding whether or not to grant of bail, the court will consider the personal circumstances of the accused, the circumstances of the crime and other relevant information which includes; the seriousness of the offence; the need to protect the victim of the offence; protection of the community from further offending; the strength of the prosecution's case; the severity of the possible sentence; the probability of conviction; the prior criminal history of the accused; the potential to interfere with prosecution witnesses; the possible delay in conducting the trial; the requirements for preparing a defence; and the view of the police and prosecution.

The onus is placed upon the accused person to show why a grant of bail is appropriate, and the Court is often able to craft conditions around the need for the protection of the victim and witnesses. It is usually impossible at this stage to determine all the circumstances of the offence including its nature in its entirety, the seriousness and the strength of the prosecution case. However in this case, considering the gravity of the accusation made against the accused in light of the circumstances surrounding the commission of the offence as contained in the affidavit in reply, this would not be a proper case to disregard the requirement of proving exceptional circumstances.

The exceptional circumstance relied on by the applicant is that of advanced age. In his affidavit in support of the application he claims to be 52 years of age. Advanced age for purposes of exceptional circumstances in bail applications has generally been settled as being 50 years of age (see *Andrew Adimola v Uganda, H.C. Misc. Crim Appl. No.9 of 1992* and *Hon. Vincent Nyanzi v Uganda, H.C. Misc. Crim. Appl. Appl. No.7 of 2001*). In cases such as this where the applicant claims to be over that age by only a couple of years and ocular observation of court may not remove doubt of the possibility of the applicant being under that age, the affidavit of the applicant will not suffice in age determination. There is need of other independent evidence to corroborate the averment of the applicant as to age. The applicant has not furnished any and therefore has not discharged the onus of proving that he is of advanced age.

Furthermore, although, the applicant is presumed to be innocent and is entitled to be freed from incarceration to prepare for his appearance in court, obtain legal representation, and be free for any other lawful purpose, including looking after and providing for his family where it would be in the best interests of the whole family for the accused to remain in his employment, however in cases committed within the context of domestic violence, the right balance must be struck between ensuring the safety and wellbeing of victims, and safeguarding the rights of accused person.

Safety concerns are especially important in a family violence context because crimes related to family violence are unlike many other crimes. For one thing, they are more likely to have a history, perhaps a long history, of fear, coercion and control. In a study completed by the Domestic Violence Death Review Committee in Ontario ("*Annual Report to the Chief Coroner: Case Reviews of Domestic Violence Deaths, 2002*"), where information was collected to

establish the context of the deaths, including the history, circumstances, and conduct of the abusers / perpetrators, the history and circumstances of the victims and their families, as well as community and systemic responses, with the purpose of determining the primary risk factors in those cases and identify possible points of intervention, with the goal of preventing similar deaths in the future, the common factors were found to be; a history of violence outside of the family by perpetrator; a prior history of domestic violence; pending or actual separation or estrangement; obsessive behaviour displayed by perpetrator; perpetrator depressed in the opinions of professionals and / or non-professionals; prior threats of suicide or attempted suicide; prior threats to kill the victim; prior attempts to isolate victim; the perpetrator was unemployed; possession of or access to firearms; excessive alcohol and/or drug abuse; controlling most or all of victim's daily activities; actual or perceived new partner in victim's life; perpetrator displaying sexual jealousy; prior threats with a weapon against victim; the perpetrator was abused and / or witnessed domestic violence as a child; a history of violence or threats against children; mental health / psychiatric problems; age disparity between couple; presence of stepchildren in the home; prior destruction of victim's property; child custody or access disputes; forced sexual acts or assaults on victim by perpetrator; prior assault on victim while pregnant; a history of suicidal behaviour in perpetrator's family, and so on.

Therefore, in consideration of a bail application by a person accused of murder committed within the context of domestic violence, a court ought to proceed with considerable caution. Where the accused is suspected of having committed a crime in the context of family violence, the accused will know the victim and the potential witnesses with whom he or she might live in the same home. All these factors suggest that a person who has committed a crime in the context of family violence might, if granted bail, be more likely to interact with the witnesses and so endanger them unlike a person accused of a crime against a stranger. In circumstances of this nature therefore the court needs to be alert to the importance of providing for the safety of victims and related witnesses. Release on bail should normally be made subject to the accused entering into an undertaking prohibiting contact with, or proximity to, the complainant or other witnesses.

In the instant case, it is neither possible to require the accused not go to a specific place, for example his home where the complainants may be living, nor to prevent the accused from

communicating with any of the prosecution witnesses before the trial. In my view, in the absence of proof of exceptional circumstances, a court should be slow to grant bail to a person accused of an offence committed in the context of domestic violence unless satisfied that the person poses no danger to victims or witnesses when released on bail. Release of the person on bail should only be made where court is satisfied that such release is not likely to adversely affect the safety, wellbeing and interests of an affected person or witness considering the complexities of family violence, and the degree of risk to which victims and witnesses can be potentially exposed.

I have considered the two sureties presented to court. None of them satisfies me as having the capacity to guarantee that the applicant when released on bail will not pose a threat to victims or witnesses. None of them is substantial within the context of this application. In the circumstances of this application therefore, I am not satisfied that the applicant does not pose a danger to the witnesses when released on bail and that his release is not likely to adversely affect the safety, wellbeing and interests of the complainants and the witnesses. The circumstances not only raise a very high likelihood of interfering with witnesses, but also the grant of bail would expose the applicant to the danger of mob justice. I therefore do not find merit in the application and hereby dismiss it.

Dated at Arua this 4<sup>th</sup> day of November, 2016.

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Stephen Mubiru  
Judge.