

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CRIMINAL APPLICATION No. 0028 OF 2016

ANDIMULE JOSEPH **APPLICANT**

VERSUS

UGANDA **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application for bail. The applicant is indicted with one count of Murder c/s 188 and 189 of *The Penal Code Act*. It is alleged that on 17th April 2016 at Orionzi village, in Arua District, the accused together with others still at large, murdered a one Gadafi Majid. He was on 27th October 2016 committed for trial by the High Court but is yet to be tried and hence this application by which he seeks to be released on bail pending his trial.

His application is by notice of motion under Articles 23 (6) (a) and (c), 44 (c) of the *Constitution of the Republic of Uganda*, and sections 14 and 15 of the *Trial on Indictments Act Cap.23*. It is dated 7th November 2016 and it is supported by his affidavit sworn on the same day. The main grounds of his application as stated in the notice of motion and supporting affidavit are that; the applicant has a right to apply for bail, the offence with which he is indicted is bailable, he is presumed innocent until found guilty, has substantial sureties willing to guarantee his attendance of court, he will not interfere with prosecution witnesses and has a fixed place of abode at Orionzi village, Ariwara Parish, Dadamu Sub-county, Ayivu County, Arua District within the jurisdiction of the Court.

In an affidavit in reply sworn by a one D/Cpl. Alekua on 10th November 2016, he states that he is investigating officer of the case, and that the state is opposed to the grant of bail to the applicant mainly on grounds that; the accused is facing a charge carrying a maximum penalty of death and is likely to jump bail, he has already been committed for trial, and there are no exceptional

circumstances to be considered in his favour, there is a likelihood of the applicant compounding the offence and the family of the deceased still pose a threat to the applicant if granted bail.

At the hearing of the application, the applicant was represented by Mr. Ben Richard Bundu while the state was represented by Mr. Emmanuel Pirimba, State Attorney. Counsel for the applicant, in his submissions, elaborated further the grounds stated in the motion and supporting affidavit and presented three sureties for the applicant. In his response, the learned State Attorney too elaborated further the grounds for opposing the application as contained in the affidavit in reply, and opposed the suitability of the third surety who is a wife of the accused and traditionally housewives tend to be submissive to the husband which might prevent her from fulfilling her duties as surety.

Persons accused of criminal offences have a right to apply for bail by virtue of Article 23 (6) (a) and 28 (3) of the *Constitution of the Republic of Uganda*. However, the grant of bail is discretionary to the court (see *Uganda v Kiiza Besigye; Const. Ref No. 20 of 2005*). By virtue of sections 14 and 15 of the *Trial on Indictments Act*, a person indicted may only be released on bail if he or she proves to the satisfaction of the court that exceptional circumstances do exist to warrant his or her being released on bail. The circumstances which are regarded as exceptional include grave sickness, infancy or old age, and if the state does not oppose the applicant being released on bail. These exceptional circumstances though are not mandatory as courts have the discretion to grant bail even where none is proved. The applicant does not seek to rely on any of those circumstances in this application.

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 and the summary of the case attached to the indictment which constitutes an annexure to the affidavit in support of the application, this would not be a proper case to disregard the requirement of proving exceptional circumstances.

Although, the applicant is presumed 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 fending for his family, however court should be mindful of the possibility of the grant of bail being turned into an end in itself by having the practical effect of terminating the pending trial even before it starts. The right balance must be struck between ensuring the appropriate disposal of the pending case, and safeguarding the rights of accused person.

The basic principle is that every accused person is innocent until proven guilty, and as such is entitled to his freedom, unless there are compelling causes to the contrary. The right to personal liberty though should be upheld without exposing the public to harm or bringing the rule of law into disrepute, taking care at the same time not to allow ourselves to be deflected by the adverse consequences arising from the occasional wrong decision where persons granted bail have wrongly taken advantage of the system. Inevitably, some compromise has to be made. Not all accused persons can be allowed to roam free pending their court appearance. In *Uganda (DPP) v. Col. Rtd Dr. Kiiza Besigye, Constitutional Reference No. 20 of 2005*, it was stated that while

considering bail, the court needs to balance the Constitutional rights of the applicant and the needs of society to be protected from lawlessness, among other considerations. This clearly shows that public interest is a valid consideration in a bail application.

This application comes against the backdrop of a significant number of cases within this circuit where accused persons have been granted bail and their subsequent trials have been frustrated by the unwillingness of witnesses to turn up to testify or the absence of accused persons themselves who abscond after grant of bail. Committal for trial presupposes the existence of facts established through investigation, which raise reasonable suspicion against the accused at the least but also a reasonable prospect of conviction. For those reasons, an indictment presented to the High court can only be disposed of in four ways; by conduct of a full trial, by a successful plea bargain, by filing of a *nolle prosequi* or by the demise of the accused where, in the latter case, the indictment will abate. An accused committed for trial deserves to have the suspicion around him or her cleared in one of those ways and it is incumbent upon court to guarantee that the right to apply for bail is not abused by using it as an avenue to short-circuit the administration of criminal justice. Bail should be granted after court is fully satisfied that it is deserved on account of the presumption of innocence and the need for the accused to prepare for the trial but will not in the circumstances of the case be used to frustrate the trial.

I have considered the facts as pleaded and the arguments of counsel before me. I have considered the fact that the applicant is the L.C. 1 Chairman of the village where the offence was committed. He owned the cow the victim of the offence is suspected to have stolen. The victim of the offence died as a result of mob justice involving a number of persons, several of whom are still at large. In those circumstances, the potential witnesses will most certainly be resident in the neighbourhood or are relatives of the deceased. Where the victim of murder is killed in a situation of mob justice, this is an indication of uncontrolled passion on the part of the perpetrators usually met with vengeful passions on the side of the relatives of the victim. This may partly explain why several of the suspected perpetrators are still at large. In the circumstances, there is not only a mere possibility but a real risk or a reasonable likelihood of the applicant interfering in the prosecution of the case, and of being the victim of reprisal attacks.

While the accused is presumed innocent, in this application the court has not been furnished with any facts that provide an assurance that the grant of bail will not compromise the possibility of

disposal of the pending indictment by one of the four methods adverted to before. There has to be some way of restraining an accused person who even though is innocent before the law until convicted, is likely, if released, to commit further crimes, or interfere with witnesses or hamper the investigation or prosecution of the case or flee the jurisdiction before trial so as to ensure that the accused can be trusted not to do any of these things and to appear in court when required. It is contrary to the interests of justice for accused persons to be unnecessarily held in custody. This has to be counterbalanced by the need to have a proper disposal of cases committed to this court for trial. Proper disposal of the indictment is usually guaranteed by the imposition of rigorous terms as conditions for release on bail, including requiring the accused to enter into an undertaking prohibiting contact with, or proximity to the complainant or other witnesses.

In the circumstances of this case, I am unable to fashion out conditions which will prevent the applicant from exerting his authority as the L.C.1 Chairman of the village to compromise his prosecution. In *Uganda v. William Nadiope and five others, H.C. Misc. Criminal Applications Nos.51-56 of 1969*, bail was refused for A1 on grounds that because of his prominence and apparent influence in life, there was a likelihood of his using his influence to interfere with the witness. He was refused bail because “the more prominent a person is, the greater is his fear of conviction and the greater the temptation to use his influence to interfere with witnesses.” I find that a similar fear is not a mere illusion in the application before me and the reasoning in that case applies with equal force to the application before me.

The safety of the applicant too cannot be guaranteed when he is released so soon after he is suspected of complicity in the crime when the passions are still high. The burden of proof lies upon the accused person to satisfy the court that he should be released on bail, not upon the state to satisfy the court that the accused person should not be granted bail. The accused has failed to discharge that burden.

In the final result, this application is rejected and accordingly dismissed.

Dated at Arua this 14th day of November, 2016.

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Stephen Mubiru
Judge.