

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CRIMINAL APPLICATION No. 0023 OF 2016

ANDAMA SWALE **APPLICANT**

VERSUS

UGANDA **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application for bail. The applicant is indicted with one count of Aggravated Defilement c/s 129 (3) and (4) (c) of *The Penal Code Act*. It is alleged that on 9th October 2015 at Rimbe Trading Centre, in Yumbe District, the accused had unlawful sexual intercourse with Anifa Sida, a girl below the age of 18 years while being a person in authority over he. He was on 6th 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 Article 20 (1), 23 (6) (a) and 28 (3) of the *Constitution of the Republic of Uganda*, sections 14 and 15 of the *Trial on Indictments Act Cap.23*. It is dated 6th October 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 and has a fixed place of abode within the jurisdiction of the Court.

In an affidavit in reply sworn by a one D/Cpl. Banduga on 20th October 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.

At the hearing of the application, the applicant was represented by Mr. Ben Ikilai 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 two 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 second surety who is ordinarily resident in Arua while the applicant ordinarily resides in Nebbi 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, 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 pursuing further studies, 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.

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 anxiously considered the facts as pleaded and the arguments of counsel before me. I am disturbed by the deafening silence regarding the circumstances of the victim of this offence who at the time of the offence was found to have been below the age of 13 years but yet found pregnant, according to the summary of the case attached to the indictment. I raised this concern during the hearing of the application and do so again now; who speaks for the girl child victim of a sexual offence in proceedings of this nature? Should the court close its eyes to an apparent lack of concern for the victim when past experience within this circuit has shown that parents, guardians, relatives and the accused persons after the grant of bail collude to frustrate prosecutions intended to protect and secure justice for such vulnerable children? Who speaks for the child victim when the voices of adults around her fall silent in the pursuit of considerations which don't seem to have her vulnerability and interests in mind? Should the court allow the institution of bail to be used as an end in itself for the final disposal of pending criminal prosecutions rather than as a vindication of the presumption of innocence? In my view, it is incumbent upon court to balance the right to apply for bail with the need to guarantee the integrity of the criminal justice system by preventing the use of bail as a facility and vehicle for the compounding of such serious felonies, to the detriment of vulnerable victims.

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. That possibility of 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. I am unable to fashion out such conditions in absence of the necessary facts that would guide the determination of the scope and projected effectiveness of such conditions, which then the sureties would be required to supervise, monitor and guarantee. It was incumbent upon the applicant to satisfy court that the grant of bail is appropriate in this case but he has been unable to satisfy court that he will not instead use bail as an end in itself. In the final result, this application is dismissed.

Dated at Arua this 10th day of November, 2016.

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Stephen Mubiru
Judge.