THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CRIMINAL APPLICATION No. 0012 OF 2016

(Arising from H.C Cr. Case. No. 0001 of 2016)

OCHIMA VICTOR } ……..… 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 139 (3) and (4) (c) of the *Penal Code Act*. It is alleged during December 2013, the applicant, a teacher at Anyangaku Primary School in Koboko District, had unlawful sexual intercourse with one of his primary seven pupils, a girl under eighteen years of age. He was on 20th June 2014 committed for trial by the High Court. He is yet to be tried and hence this application by which seeks to be released on bail pending his trial.

His application is by notice of motion under Article 23 (6) of the *Constitution of the Republic of Uganda* and section 14 of the *Trial on Indictments Act Cap.23*. It is dated 17th May 2016 and it is supported by his affidavit sworn on an unspecified date. The main grounds of his application as stated in the notice of motion and supporting affidavit are that; the applicant is a family head with a family to look after, he has a fixed place of abode at Tabi village, Awunga Parish, Dranya Sub-county, Koboko District within the jurisdiction of this court, has substantial persons willing to be his sureties and that it is in the interests of justice to grant the application.

In an affidavit in reply sworn by a one No 19158 D/CPL Onzi Jimmy on 18th July 2016, who claims to be the investigating officer of the case, the state is opposed to the grant of bail to the

applicant mainly on grounds that; the applicant went into hiding after the case was reported to the police and it took the police nearly a month to arrest him, he is likely to abscond bail considering the gravity of the offence against him, he is likely to interfere with witnesses since the victim was his pupil and at the time of arrest was pregnant with his child and that there are no exceptional circumstances justifying his release on bail.

At the hearing of the application, the applicant was represented by Ms. Daisy Patience Bandaru while the state was represented by Mr. Pirimba Emmanuel, State Attorney. Counsel for the applicant, in her submissions, elaborated further the grounds stated in the motion and supporting affidavit and presented three sureties for the applicant; Ms. Onziru Grace Afeku (a 39 year old teacher and sister of the accused), Mr. Edema Ejidio (a 57 year old peasant and paternal uncle to the applicant), and Mr. Adiga Peter Aziku (a 40 year old administrator of a Medical Laboratory Training School and cousin of 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 in the alternative, prayed for stringent conditions in the event that the court is inclined to grant them bail.

Although not raised by either counsel at the hearing, perusal of the application as filed in court reveals that the affidavit in support of the motion, though duly commissioned, is not dated. Section 6 of the *Oaths Act*, cap 19, provides that:

> "Every Commissioner for Oaths, or Notary Public before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

Further, Section 5 of the *Commissioner for oaths (Advocates) Act*, Cap. 5 provides that:

> "Every Commissioner for oath before whom an oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the affidavit or oath is taken or made."

From the above provisions, an affidavit which is not dated offends the law. Such affidavits have been rejected by courts before as seen in *The Church of Almighty God Malaki Ltd v Administrator General and Another, (Misc. Civ. Appn. No. 92 of 2009*) and *Fred Kigozi v Paul*

Musoke, Misc.App.No.509 of 2002, where applications were struck out on ground that the affidavits supporting the applications were undated and therefore lacked evidential value.

However, it has also been decided elsewhere that not dating an affidavit is not fatal. For example in *Saggu v Roadmaster Cycles (U) Ltd [2002] 1 EA 258* it was held that a defect in the jurat or any irregularity in the form of the affidavit is not fatal because it is a mere lapse or error that cannot be allowed to vitiate the affidavit in light of Article 126 (2) (e) of the Constitution which stipulates that substantive justice shall be administered without undue regard to technicalities. This decision was followed in *Stone Concrete Ltd v Jubilee Insurance Co. Ltd, Misc. Appn. No.358 of 2012*.

I have examined both lines of authority. The decisions striking out applications on account of the supporting affidavits not being dated are not binding on this court. However this court is bound by the decision in *Saggu v Roadmaster Cycles (U) Ltd [2002] 1 EA 258,* which holds that such defects should not be fatal. I am therefore inclined to proceed and consider the merits of this application inspite of this defect. Such leniency though should not encourage laxity in pleadings filed before this court. This kind of laxity is unacceptable.

The application is premised on section 14 of the *Trial on Indictments Act* which empowers this court to release an accused person on bail at any stage in the proceedings. The main considerations for the release of an accused on bail are the presumption of innocence, the likelihood of the accused not to abscond and his or her unlikelihood to interfere with prosecution witnesses. The court may, in its discretion, consider the presence or absence of the special circumstances specified in section 15 of the same Act. Apart from the presumption of innocence, the other two major considerations are opposed by the respondent.

With regard to the likelihood to abscond, the main argument is that the applicant went into hiding when the case was reported to police and that it took the police a while and a lot of effort to arrest the accused. However, the affidavit in reply contains some unexplained inconsistencies about this fact. Whereas in paragraphs 2 and 3 of the affidavit in reply the deponent states that investigation into the case started on 11th December 2013 and that the applicant was arrested on

23rd January 2014 (slightly over a month after), in paragraph 4 he states that the applicant was arrested "after three months." This is a significant inconsistence which remains unexplained. An affidavit is a serious document and once it contains a falsehood in one part, the whole becomes suspect (see *Bitaitana and four others v Kananura [1977] H.C.B.* 34).

Secondly, as rightly contended by counsel for the applicant, the affidavit does not furnish details of the nature of effort it took the police to arrest the applicant. On his part, in his paragraph 2 of the affidavit in support of the application, the applicant claims to have been arrested at his workplace. Yet paragraph 3 of the affidavit in reply reveals that the applicant was arrested by unspecified people and handed over to the deponent on 23rd January 2014. This leaves the circumstances of the applicant's arrest very unclear as regards the place from which he was arrested, by whom and under what circumstances. I have therefore decided to resolve this doubt in the applicant's favour. In the result, I find that the respondent has not furnished any reliable evidence to support its contention that the applicant was on the run before his arrest.

Any likelihood of absconding on basis of the gravity of an offence can in this case be mitigated by the imposition of reasonably stringent terms. I also note that the respondent did not challenge the suitability of any of the proposed sureties. I have further examined the antecedents of each of the proposed sureties and have found that they are all gainfully employed, are resident within the jurisdiction of this court, are persons of significant social status and are closely related to the applicant. That the applicant has a fixed place of abode within the jurisdiction of this court has not been challenged and I am satisfied that the proposed sureties live within reasonable proximity of the applicant to be able to guarantee his appearance in court whenever required.

Considering his likelihood to interfere with prosecution witnesses, it is now over two years since the investigations were concluded and his committal for trial. His trial is not likely to start soon. The applicant's likelihood to compromise the principal prosecution witness can be prevented by forbidding any contact between him and the victim for the duration of his bail.

In the circumstances I do find merit in the application and hereby order the accused to be released on bail on the following terms; -

1. The applicant is to execute and pay a cash bond of Shs. 4,000,000/=
2. Each of his three sureties is to execute a non-cash bond of Shs. 10,000,000/=
3. The applicant is to report to the Assistant Registrar of this Court on the first Tuesday of every month until the disposal of the case against him or further orders of the court.
4. The applicant is not to enter into the premises of or get into any distance of less than one kilometer within the proximity of Anyangaku Primary School, Koboko District.
5. The applicant is not, whether directly or through intermediaries, to talk to the victim in this case or get into her proximity within a distance of less than fifty metres without the express authorization of or except in the presence of the O/c Koboko Police Station.

This application is therefore allowed. I order the release of the applicant on bail subject to his meeting the above conditions, failure of which he is to be remanded. I so order

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Dated at Arua this 20th day of July, 2016.

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Stephen Mubiru
Judge.