

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CRIMINAL APPLICATION Nos. 0015, 0016, and 0017 OF 2016

(All arising from H.C Cr. Case. No. 0066 of 2016)

1. ALIOBE JOSEPH }
2. BADA ALFRED alias SINA } APPLICANTS
3. ROKONI GEORGE }

VERSUS

UGANDA RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

The three applicants are jointly indicted with another, a one Amandi Leonard alias Andi, with one count of Murder c/ss 188 and 189 of the *Penal Code Act*. It is alleged that the four of them, with others at large, during the night of 18th December 2015, at Orube village in Arua District, murdered a one Yikii Herbert. They were on 6th April 2016 committed for trial by the High Court. They are yet to be tried and hence this application by which they seek to be released on bail pending their trial.

Each of the three applicants filed a separate bail application. Upon perusal of the three applications, I found that they were based on the same facts, founded on more or less similar grounds and sought similar relief from the court. Therefore, the three applications, though filed separately, would raise questions of law and fact that were common to all. Unlike the *Civil Procedure Rules* which under Order XI specifically provide for the consolidation of suits, either upon the application of one of the parties or at the court's own motion and at its discretion, where two or more of them are pending in the same court in which the same or similar questions of law or fact are involved, the *Trial on Indictments Act* is silent as regards the consolidation of cases and criminal applications. Considering that consolidation of proceedings is generally a case management tool, consolidating these applications would be consistent with good case management principles, one of which is finding opportunities to improve efficiency.

The three applications give rise to a common theme or set of circumstances which I considered convenient to dispose of at once. I therefore invoked the inherent jurisdiction of this court under section 17 (2) of the *Judicature Act* by which this court is empowered, with regard to its own procedures, to curtail delays, and directed a consolidation of the applications.

The consolidated applications are by notice of motion under Articles 20 (1) and (2), 23 (6) (a) and 28 (3) of the *Constitution of the Republic of Uganda, 1995* and sections 14 and 15 of the *Trial on Indictments Act Cap.23*. They are all dated 7th July 2016 and each is supported by the affidavit of the respective applicant sworn on 6th July 2016. The main grounds of the consolidated application, common to all applicants as stated in the respective notices of motion and supporting affidavits are that; they have a constitutional right to apply for bail, the offence with which they are charged is bailable by this court, they are presumed to be innocent, they each have a fixed place of abode at Orube village, Andruvu Parish, Dadamu Sub-county, Arua District within the jurisdiction of this court, each has substantial sureties willing to ensure their attendance of court and that it is in the interests of justice to grant them bail. The first applicant in addition states that he has a wife and three school going children. The second applicant states that he is fifty two (52) years old. The third applicant states that he has dependants who include a grandmother and his uncle, the second applicant.

In an affidavit in reply sworn on 20th July 2016 by a one D/AIP Afemia Alex (who is the investigating officer of the case) the state is opposed to the grant of bail to the applicant mainly on grounds that; all applicants were in hiding at the time investigations into the case started and are likely to jump bail because of the gravity of the offence with which they are charged, the witnesses in the case are close neighbours of the applicants and therefore the likelihood of interference is high since there was an attempt at settling the case out of court which failed, the applicant's safety is at risk since the offence involved violence, and that none of them has proved any exceptional circumstance to justify release on bail.

At the hearing of the application, the applicant was represented by Mr. Ben Ikilai while the state was represented by Mr. Pirimba Emmanuel, State Attorney. Counsel for the applicant, in his submissions, elaborated further the grounds stated in the consolidated motions and supporting affidavits and presented two sureties for each of the applicants, namely; for the first applicant, Ms. Oliru Kezia (a 67 year old peasant and mother of the applicant), Mr. Draku Jean Joe (a 64

year old Church Lay Leader at Mvara Cathedral and maternal uncle to the applicant); for the second applicant, Ms. Ocokoru Brenda (a 28 year old peasant and daughter of the applicant) and Mr. Ejidra Isaac (a 36 year old civil engineer, husband to the first surety and son-in-law of the applicant); for the third applicant, Mr. Adiga Godfrey Okuti (a 36 year old peasant and paternal uncle to the applicant) and Mr. Apangu Nelson (a 67 year old peasant and maternal grandfather to the applicant). He cited *Immaculate Lugoloobi v Uganda, H.C. Cr. Apn. No. 30 of 2013* for the proposition that court may grant bail even in absence of proof of exceptional circumstances; *Okumu Reagan and another v Uganda, H.C. Cr. Apn. No. 23 of 2005* for the proposition that the applicant's committal for trial is of little consequence to a bail application, and *H.C. Cr. Apns. No. 228 and 229 of 2005 Col. (Rtd) Kiiza Besigye v Uganda* as applied in *Annet Namwanga v Uganda, H.C. Cr. Apn. No. 4 of 2011* for the proposition that bail is a fundamental judicial instrument for ensuring the liberty of the individual and that the right to personal liberty is an important constitutional right which should not be unnecessarily curtailed.

The application is premised on section 14 of the *Trial on Indictments Act* which confers a wide discretion onto 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. 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. The respondent argues that the applicants have not shown any exceptional circumstances and are likely to abscond due to the gravity of the charge they face. Counsel further challenged the suitability of the first surety for the first applicant due to her advanced age and the first surety for the second applicant being the applicant's daughter, as persons incapable of guaranteeing attendance of the applicants. The rest of the sureties were not objected to.

In reply, counsel for the applicants argued that the sureties objected to are capable of fulfilling their duties since they live in close proximity of the applicants and the alleged likelihood of

interference was mere speculation since there was no evidence linking any of the applicants to the alleged attempt to settle the matter out of court. He cited *Panju v Republic* [1973] E.A 282.

The decision whether or not to grant bail is of fundamental importance in the process of prosecution and trial of a criminal case. The results of such a decision can have far reaching consequences for the liberty of the accused, the safety of victims of crime and the public in general interested in the integrity of the criminal justice system. It is a decision that must be reached after careful consideration of the material presented to court, taking into account the risk posed to victims, the public and the course of justice, carefully balancing all interests involved and ensuring to the extent that it is possible, that none of the interests is unduly prejudiced at the expense of another. The applicable principle is that of upholding the liberty of the individual, while simultaneously protecting the administration of justice.

Unfortunately, courts are rarely presented with sufficiently comprehensive information in connection with the decision whether or not to grant bail. The court will usually want to examine the community ties of the applicant in order to come to an informed decision on how likely it is that he or she will abscond or compromise the course of justice. The court will usually find the following information useful: how long the applicant has lived at his or her address (and whether it is owned by the applicant or rented); the applicant's marital status; the applicant's family ties, especially whether he or she has dependent children; whether the applicant is in employment (and for how long); the circumstances surrounding the commission of the offence and how the applicants came to be implicated, impact of the offence on the community and possible impact of release of the applicants, and so on. In most cases, a court must rely on its sense of fairness based on the little information available to it. It must also be mentioned that every application must be considered on its merits.

The first consideration in an application of this nature is the likelihood or otherwise of the applicants to abscond. Section 15 (1) (b) of the *Trial on Indictments Act* provides that bail may not be granted to someone charged with a capital offence, such as murder in this case, unless the court is satisfied that he or she will not abscond when released on bail. Such a decision is reached (as guided by section 15 (4) of the same Act) by considering; (a) whether the accused

has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda; (b) whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail; (c) whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and (d) whether there are other charges pending against the accused.

Except for two of the sureties, it is not disputed that each of the applicants has presented sound securities within the jurisdiction capable of undertaking that the applicants shall comply with the conditions of their bail. It is further not disputed that each of the applicants has a fixed abode within the jurisdiction of the court. It is not alleged that any of the applicants has pending charges against him and there is no contention of a previous failure to satisfy the conditions of bail.

At this stage, the court is not concerned with determinations of the weight of evidence or the strength of the prosecution's case, since the applicants are presumed innocent. However, the court will not ignore the fact that article 21 (1) (c) of the *Constitution, 1995*, authorises the arrest and deprivation of a person of his or her liberty on account of reasonable suspicion that the person has committed an offence. Although presumed innocent, the applicants are currently deprived of their liberty based on that kind of reasonable suspicion.

The basis of the reasonable suspicion is to be found in their annexure "A," common to each of their respective affidavits in support of the consolidated application. That annexure is a copy of the indictment. It is trite law that a document annexed and referred to in the affidavit forms part of the affidavit and constitutes part of the evidence. Paragraphs 1 to 9 of the "summary of the case" explain the basis of the suspicion leveled against and leading to the arrest and subsequent charging of the applicants, as part of a mob that is alleged to have lynched the deceased who was accused of having stolen a cow that belonged to the third applicant.

Once the police is presented with some credible evidence or indication such as that which touched the applicants in this case, it would presumably justify the arrest, the subsequent charge and committal for trial of the applicants. Now that the basis of their committal has been placed

before Court, on one hand public interest requires that the prosecution must prove that their continued detention is required, particularly past the stage when the investigations are already concluded, because of the accused persons' fundamental rights, the protection of which is in the interests of the public and of the administration of justice, as enshrined in the Constitution of Uganda as well as in our criminal law and procedure.

The main contention, as contained in paragraphs 3 and 4 of the affidavit in reply is that the applicants were at large when the case was reported to police (and presumably arrested shortly thereafter) but because of the gravity of the offence, they are likely to abscond. Indeed the first applicant is said to have ran to Kampala only to be arrested on 4th January 2016 when he surrendered. By his affidavit in support of the application, the first applicant admits being arrested on 4th January 2016 when he reported to the police, the second and third applicants in their respective affidavits in support of the motion admit having been arrested on an unspecified date between 18th December 2015 and 30th December 2015 when they reported to the police, following the arrest of one of their female relative. It would appear from these averments, that it is only in respect of the first applicant that there is a serious question of an antecedent suggestive of absconding. In respect of the rest of the applicants, the fear is not based on specifically detailed antecedents but rather on the gravity of the offence.

In *Hurnam v State of Mauritius* [2006] 1 WLR 857, PC, it was held that;

A person charged with a serious offence, facing a severe penalty if convicted, may well have a powerful incentive to abscond or interfere with witnesses likely to give evidence against him, and this risk will often be particularly great in drugs cases. Where there are reasonable grounds to infer that the grant of bail may lead to such a result, which cannot be effectively eliminated by the imposition of appropriate conditions, they will afford good grounds for refusing bail, but they do not do so of themselves, without more. They are factors relevant to the judgment whether, in all the circumstances, it is necessary to deprive the applicant of his liberty. Whether or not that is the conclusion reached, clear and explicit reasons should be given.

A similar decision was made in *R (Thompson) v Central Criminal Court* [2006] A.C. 9, where it was decided that the degree of temptation to abscond or the risk of failing to surrender owing to the severity of the likely sentence, if convicted is a matter to be assessed in the light of other relevant factors. The likely sentence could not of itself provide grounds for denying bail.

In the consolidated application before me, there is no evidence to conclusively prove that any of the applicants evaded arrest. However, the fact that the applicants could have handed themselves over to the police during the early stages of the investigation of the underlying case, does not mean that they may still not abscond, now that the charges against them have reached an advanced stage and have resulted in their committal for trial.

On the other hand, public legal convictions as reflected in section 15 of the *Trial on Indictments Act* hold that an accused person should not be released on bail provided there is a reasonable suspicion against such person that he or she has committed the type of serious offence specified in the section, and is therefore in the opinion of the Court, a potential threat to the victims or to other innocent members of society or is perceived by them on reasonable grounds to be such a threat or a person likely to evade justice. It is the reason why in such cases bail is granted only on proof of exceptional circumstances.

Courts will ordinarily grant bail where there is no significant risk that, if released on bail, the applicant will commit an offence that would be likely to cause physical or mental injury to another person or expose the applicant to reprisal by the victims of the offence for which he or she is in custody, or interfere with witnesses. In retrospect, the traditional considerations, including the seriousness of the offence, prior criminal record and the probability that the accused will show up for subsequent hearings, are geared toward the primary consideration of public safety, since they appear to be predictors of the accused's dangerousness. The court will therefore inevitably address the public safety aspect by considering the underlying genesis of the accusation against the applicants.

In bail applications, courts should lean in favour of and not against the liberty of the accused as long as the interests of justice will not be prejudiced. In coming to a decision, the court must not lose sight of the fact that the applicants are presumed innocent but at the same time will not ignore the fact that their committal for trial, at a bare minimum, is based on a reasonable suspicion. The question is whether or not in the circumstances, the applicants pose a threat to public safety or the integrity of the prosecution. I am aware of and entirely agree with the

decision in *Panju v Republic* [1973] E.A 282 to the effect that courts should not act on mere speculative fears but I am also aware that in matters of applications for bail, such questions of public safety are not to be answered in accordance with the strict rules of evidence. For example, in *Re Moles*, [1981] Crim. L.R.170, it was held that it was permissible for a police officer to narrate what he had been told by a potential witness about threats that had been received. In my view, all that is required therefore, is proof of substantial grounds for believing that the applicant would breach the conditions set, would fail to turn up for trial, would interfere with witnesses, would be a victim of reprisal attacks or would commit further offences.

The basis of believing that the applicants will be a probable target for reprisals is that according to the summary of the case, the killing was perpetrated by a mob. For the applicants as persons singled out as suspects in such circumstances, whether justifiably or not, there would be a reasonable basis, not a mere speculation, to fear that they can be the target of reprisal attacks if released on bail before the passions that led to their arrest have been allowed to cool down. The complainants, who probably know the applicants very well and live close to them, pose a risk of real danger of being attacked by or of attacking the applicants.

Although this court has not been presented with any evidence of violence or threats towards, or undue influence by the applicants over the victims of the crime, or other vulnerable witnesses, if any, the applicants and the victims of the offence live in close proximity. I do not at this moment in time, perceive of any conditions which if imposed, will prevent the applicants from interfering with the witnesses, if they chose to. After all, an accused bent on contacting a specific person living in close proximity is unlikely to desist just because a judge told him not to approach the person. The applicants have not offered an address outside the area in which the offence was committed, nor offered any guarantee that they would live at that address without the danger of interfering with prosecution witnesses and would attend court when required to do so.

This therefore is a case where the court would be hesitant to exercise its discretion in favour of the applicants, except upon proof of exceptional circumstances. Apart from the second applicant, the other two applicants did not advance any exceptional circumstance in support of their application. In paragraph 1 of his affidavit in support of the application, the second applicant

deposes that he is 52 years old. In several previous decisions of this court, the age of 50 years has been considered to be advanced age, these include; *Erika Mutiiba v Uganda, H.C. Misc. Crim. Appl. No. 4 of 1992*; *Andrew Adimola v Uganda, H.C. Misc. Crim. Appl. No. 9 of 1992*; *Hon. Vicent Nyanzi v. Uganda, H.C. Misc. Crim. Appl. No. 7 of 2001*; and *Francis Ogwang Olebe v Uganda, H.C. Misc. Crim. Appl. No. 25 of 2003*.

The burden of proof is upon the Applicant to adduce evidence sufficient to prove that he is of advanced age. The best evidence as to age in the instant case would have been a birth certificate, baptism certificate or other evidence of a similar type. I find reliance on the applicant's paragraph one of his affidavit as unsafe without corroborative evidence. This ground has not been proved to the satisfaction of the court.

On an application for bail by an accused charged with a serious offence, all that is required of court is to demonstrate that it has considered such safeguards as are proffered by the applicants as being sufficient to overcome any concerns which the court may have about granting bail. The only safeguards advanced by the applicants are the sureties. I have given careful consideration to the circumstances surrounding the offence, to the sureties offered by the applicants and I have not found any measures stringent enough to protect the applicants from the danger of reprisal attacks and from interfering with the prosecution witnesses. I am of the considered opinion that the respondent has advanced substantial grounds for believing that granting the applicants bail at this stage of the proceedings is not in the best interests of the administration of justice but also will compromise public safety. Release of the applicants at this point in time will endanger their own lives as well as that of other members of their community.

In the result, I find that the applicants have not furnished any reliable evidence to support their grounds for release on bail or offered safeguards sufficient to overcome the concerns which the court has expressed about granting them bail, and I hereby dismiss their applications. I so order

Dated at Arua this 25th day of July, 2016.

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Stephen Mubiru
Judge.