

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPLICATION NO. 83 OF 2016

(ARISING FROM MOR-OO-CR-AA-016/2016 AND NAK-A-NO.14/2016)

COL (RTD) DR. KIZZA BESIGYE:..... APPLICANT

VERSUS

UGANDA:..... RESPONDENT.

BEFORE: HON JUSTICE MR. MASALU MUSENE

RULING

The applicant Col Rtd Dr. Kizza Besigye filled this application by Notice of Motion under **Article 23 (6) of the Constitution** of Uganda, **section 14 of the Trial on Indictments Act**, cap 23 and **rule 2 of the Judicature (criminal procedure)(applications rules S.I 13 -8)** and all applicable laws.

It is an application for bail pending trial. The applicant was represented by Mr. Ernest Kalibala together with Mr. Frederick Mpaga while the state was represented by M/S Florence Akello, principal state attorney and Mr. Brian Kalinaki also principal state attorney from the office of the Director of Public Prosecutions.

The grounds in support of the application are outlined in the affidavit of the applicant, Col (Rtd) Kizza Besigye of Buyinja Zone, Nangabo sub-county, Kasangati in Wakiso district. In summary, they are as follows;

1. That on 13th May 2016, the applicant was charged with the offence of treason in the Chief Magistrates Court of Moroto at Moroto and remanded in custody.

2. That on 18th May 2016, the applicant was charged with the offence of treason in the Chief Magistrates court of Nakawa at Nakawa and remanded in custody.
3. That the applicant is a 60 year old responsible and respectable citizen of Uganda, a retired colonel in the Uganda Peoples Defence Forces and former presidential candidate in the 2016 presidential elections where he represented the Forum for Democratic Change, a dully registered political party.
4. That the applicant has permanent residence at Buyinja Zone in Kasangati, Wakiso district within the jurisdiction of this honorable court.
5. That the applicant is not a threat to any process and is willing to appear before high court of Uganda for trial or mention as and when required and his antecedents demonstrate his respect for the law and compliance with any bail conditions.
6. That the applicant has substantial sureties who are willing to ensure compliance with bail conditions once the applicant is released on bail.
7. That it is fair and just that the applicant is admitted to bail and released accordingly.

Counsel for the applicant submitted that the applicant has good antecedents. He referred to paragraph 14 to 16 of the affidavit in support to demonstrate those antecedents together with paragraph 12 of the affidavit in rejoinder and the annexures to the affidavit in rejoinder. He added that the applicant has substantial sureties who are willing to ensure that he complies with the bail conditions. He referred to paragraph 17 of the affidavit in support as well as paragraph 13 of the affidavit in rejoinder. The sureties presented were;

1. Rtd Maj. General Mugisha Muntu, a resident of Plot 13 BKAR Drive Lower Kololo. That he is the president of the Forum for Democratic Change and knows the applicant from the time they engaged in the bush war in the early 1980s. He concluded that he knows him as a friend and colleague with whom they have worked together for a long time. A copy of his driving permit was provided.
2. Hon Nassan Nandala Mafabi, a resident of Plot 13 Gloucester, Kyambogo and also a Secretary General of the Forum for Democratic Change. That he is also a member of parliament of Budadiri west in Sironko district and former leader of opposition in parliament. He added that Nandala Mafabi is a chairman of Bugisu Co-operative Union and knows the applicant very well as at one point the applicant was his party president. Hon Mafabi provided his East African passport for identification.
3. Hon Rowland Mugume, a member of parliament for Rukungiri Municipality in Rukungiri district and a resident of Mbalwa village, LC 1 Kiira, Municipality, Namugongo division in Wakiso district. He provided a copy of his Ugandan passport and a letter from Mbalwa village LC 1.
4. Mrs Joyce Sebugwawo, the Municipal Mayor of Rubaga division. He added that Mrs Sebugwawo has a long standing knowledge of the applicant, his antecedents as well as her willingness to serve as a surety.

Counsel for the applicant prayed that the court finds those sureties substantial and that they have understood their duties to ensure attendance of the applicant once granted bail.

It was further submitted that under **section 15 of the T.I.A**, exceptional circumstances are required to ensure that the applicant will not abscond if released on bail, and that the exceptional circumstances include; advanced age, **(S.15 (3))**

(c) emphasizing that in our jurisdiction, a person above the age of 50 years would be considered of advanced age. He also submitted that the applicant is 60 years old and that the evidence provided on oath about his age has not been challenged. He quoted the case of **Dr. Alex Kamugisha V s Uganda High court Kampala Misc. Cause No. 94 of 2007** where court observed that any age above 50 may be considered advanced age. Counsel for the applicant also quoted another case of **Mulongo Namubiru Florence V Uganda high court at Nakawa Misc. application No. 84 of 2014**, where court found that exceptional circumstances are not mandatory because the court retains the overall discretion so long as the applicant will re-appear or will not abscond.

On the antecedents of the applicant, it was stated that the affidavit in rejoinder has got three annexures;

- Annexure A is the bail form dating from 2005 on a similar charge of treason, whereby when the applicant was released on bail, he reported 39 times in strict observance of the terms that the court had set.
- Annexure B of the same affidavit is a ruling that demonstrates that the applicant would apply to the court when he wished to vary any of the terms, that ruling relates to travelling outside Uganda on a number of occasions while he was on bail.

It was also submitted while relying on the case of **Col Rtd Dr. Kizza Besigye Vs Uganda Misc. criminal application No. 228 of 2005 High Court Kampala**, by Justice Ogoola (as he then was) that courts of justice have the duty to jealously and courageously guard and defend the rights of all the people. He added that the fundamental importance of bail is a judicial instrument for ensuring the liberty of the individual.

Counsel for the applicant made reference to the affidavit in reply sworn by **Detective Assistant Superintendent of police Etwop Ben**. He submitted that there is no evidence in that affidavit to back the statement that the accused did not respect the court order of the court of appeal, and that those are mere allegations which should not be used to deny the applicant bail. He also added that the applicant should not be kept in prison because investigations are still going on as that would amount to punishing him and effectively erodes the presumption of innocence that he enjoys. He concluded that it is common knowledge that the previous case of treason was dismissed as had been several others. He referred to annexure C to the affidavit in rejoinder to show another case that was recently withdrawn against the applicant and prayed that the court be pleased to find merit in this application and exercise its discretion and power to release the accused on bail.

In reply learned counsel for the state, M/S Florence Akello objected to the bail application by the applicant. She stated that whereas article **23 (6a) of the Constitution** allows the applicant to apply for bail, that the grant of bail is not automatic. She submitted that there are conditions that court must consider whether or not to grant bail. And that **S. 14 of the T.I.A** provides for the discretionary powers of the high court whether or not to grant bail of the accused person. She also referred to **S. 15 of the T.I.A** where exceptional circumstances have to be proved before court can grant bail and that whereas advanced age is one of them, that there is no sufficient proof, documentary to prove the alleged age of 60 years.

Counsel for the state also submitted that the applicant is charged with treason, a very serious offence attracting the sentence of death if convicted. Secondly, that the applicant was a former leader of the Forum for Democratic Change and also a former presidential candidate who has a huge following and is a political figure

with high influence in society. She added that he is likely to interfere with investigations if he is granted bail.

It was further submitted that the applicant has declared a defiance campaign against the government contrary to a court order which was issued restraining his activities and that he has made addresses in public and print media to the effect that he will continue with his defiance campaigns. She also emphasized that it is a constitutional duty of every citizen including the applicant to maintain peace and respect court orders. That it is the prosecutions proposition that court refuses to grant the applicant bail.

It was also stated by the state attorney that the fact that the applicant has ever been tried for treason, released on bail and has been attending court is itself not sufficient to consider the applicant for bail. That while it is persuasive, it is not one of the exceptional circumstances that the applicant must qualify for consideration of bail. She concluded that if court finds it fit to grant the applicant bail, then stringent terms should be set such as; desisting from activities that will lead to the breach of peace. She however did not object to the sureties whom she stated were substantial.

I have carefully studied and internalized the submissions by both sides, learned counsel for the applicant and learned counsel for the state. Overnight I have read through the supporting affidavits and those against. I have also read and analyzed the cases quoted and the law as a whole.

Originally bail meant security given to court by another person that the accused will attend trial on the day appointed. But now it includes recognizance entered into by the accused himself, conditioning him to appear, and failure of which may lead to warrant of arrest and confinement in prison till the trial of the case is heard

and finalized. It may also lead to forfeiture of the recognizance by the accused/ applicant and the sureties whereby they are ordered to deposit the money they were bound to court and state offers.

As a long recognized principle under the criminal law, it is a presumption of law that an accused person is presumed innocent until proved guilty by a competent court and or until such accused pleads guilty to the charge voluntarily. This presumption is enshrined in **Article 28 (3) (a) of the Constitution**. In the same constitution, it is provided under **Article 23 (1) (b) and (c)** that no person shall be deprived of his personal liberty except (b) in execution of the order of court made to secure the fulfillment of any obligation imposed on that person by law, and (c) for the purpose of bringing that person before court in execution of the order of court or upon reasonable suspicion that the person has committed or is about to commit a criminal offence under the laws of Uganda.

Bail is granted to an accused person to ensure that he appears to stand trial without the necessity of his being detained in custody in the meantime. The effect of bail is merely to release the accused from physical custody but he is still under the jurisdiction of the law and is bound to appear at the appointed time and place.

This application is made under **section 14 (1) of the T.I.A** where it is provided that;

- 1. The high court may at any stage in the proceedings release the accused person on bail, that is to say, on taking from him or her recognizance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date and at such time as is named in the bond.**

Furthermore, **section 15 of the T.I.A** provides for circumstances under which bail may or may not be granted. It provides;

Section 15 (1) notwithstanding section 14, the court may refuse to grant bail to a person accused of an offence specified in subsection (2) if he or she does not prove to the satisfaction of court-

- a) That exceptional circumstances exist justifying his or her release on bail and
- b) That he or she will not abscond when released on bail.

What exceptional circumstances mean are elaborated upon under subsection (3) of the act and listed as to include:

- a) Grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody.
- b) The certificate of no objection signed by the Director of Public Prosecutions.
- c) The infancy or advanced age of the accused.

In determining whether the accused will abscond if granted bail, reference must be made to the subsection (4) of section 15 of the act where the court must establish;

- a) Whether the accused has a fixed place of abode within the jurisdiction of the court or is ordinarily resident outside Uganda.
- b) Whether the accused has sound sureties within the jurisdiction to undertake that the accused shall comply with the conditions of bail, and
- 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.

Section 15 of the T.I.A gives court powers to grant bail to an accused person on taking from him such recognizance, with or without sureties to appear before the court on such a date and time as court may order.

Finally **Article 23 (6) (a)** of the constitution provides: **“where a person is arrested in respect of a criminal offence,**

- a) That person is entitled to apply to court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable.**

All the provisions of the law I have quoted above use the expression “may” which means that the court is given or left with the discretion to grant or refuse bail. It must always be borne in mind that where any legislation confers upon court the discretion to do or refrain from doing, grant or refuse to grant a relief sought, such discretion must be exercised without any malice, ill will, ulterior motives or regard to external influence or circumstances. In exercising that discretion, the court must be satisfied that the provision of the law have been complied with.

Turning to the circumstances of the present case, the applicant is indicted with treason, a very serious offence. The indictment is under **section 23 (2) (a)** of the Penal Code Act which provides:

“Any person who forms an intention to effect any of the following purposes

- 1. To compel by force or constrain the government as by law established to change its measures or counsels or to intimidate...and manifests any such intention by an overt act or by the utterance or publishing any printing or writing, commits an offence and shall suffer death.”**

The details of the alleged overt acts are stated in the indictment which is not for consideration now as it is not yet hearing time. However, it is for emphasis on the serious nature of the offence in the event of a conviction. But for purposes of the bail application, this court has to balance the seriousness of the offence with the presumption of innocence as provided under the constitution.

I have listed the considerations for bail in cases of this nature. They include advanced age which has been stated on oath to be 60 years old. Although learned counsel for the state was doubtful of the age, she did not apply to cross examine the applicant on the same and there is no affidavit on record in rebuttal. This court will therefore rule that the applicant has proved on oath that he is aged 60 years, which is advanced age, being over 50 years.

The antecedents of the applicant have been considered. It would indeed be a mockery of the judicial process and a miscarriage of justice if bail is granted to a person who has a staggering record of previous convictions to his name. In the present application, it has been elaborated by counsel for the applicant that there are no previous convictions and that the applicant has religiously attended court in previous cases in honor of bail conditions previously set. In one case, there is an annexure indicating 39 court attendances and the prosecution did not oppose those submissions. In fact, learned counsel for the state conceded that the antecedents of the applicant are persuasive.

On the issue of the applicant having a fixed place of abode at Buyinja zone, Kasangati in Wakiso district, there was no serious objection from the state. In the case of **Livingstone Mukasa & Ors vs. Uganda [1976] HCB 117**, Saied CJ (as he then was) held that;

“The fact that accused persons may be married or have permanent abodes within the jurisdiction of Uganda courts are not by themselves sufficient enough for granting bail. I take the view that where the considerations concerning the liberty of a person are involved, courts must equally bear in mind the interests of justice and neither ought to be sacrificed at the expense of the other.”

This is where the court has to consider and balance the rights of the individual, particularly with regard personal liberty which court will bear in mind. And this is where counsel for the state referred to the affidavit in opposition that once granted bail, the applicant is likely to interfere with investigations. In the case of **Panju V Republic [1973] E.A 282**, it was held that in such circumstances, the investigator should have sworn an affidavit to substantiate. The judge too had this to say:

“If the courts are simply to act on allegations, fears or suspicions, then the sky is the limit and one can envisage no occasion when bail would be granted whenever such allegations are made.”

I entirely agree with the holding in the above case and further find that although the applicant is said to be an influential person with a large political following that should not deny him liberty especially on allegations which have not been proved by affidavit or otherwise.

In **Criminal Misc. Application No. 228 of 2005 and Criminal Misc. Application No. 229 of 2005**, when the same applicant was in court that time, Hon Justice Ogoola PJ (as he then was) emphasized that the right to liberty is crucial in a free and democratic society. I am further persuaded to quote that famous passage from the ruling of Justice Ogoola as it is pertinent and applicable in the present case and circumstances. He had this to say:

“Liberty is the very essence of freedom and democracy. In our constitutional matrix here in Uganda, liberty looms large. The liberty of one is the liberty of all. The liberty of one must never be curtailed lightly, wantonly or even worse arbitrarily. Article 23, clause 6 of the Constitution grants a person who is deprived of his or her liberty the right to apply to a competent court of law for grant of bail. The courts from which such a person seeks refuge or solace should be extremely wary of sending such a person away empty handed –except of course for a good cause. Ours are courts of justice. Ours is the duty and privilege to jealously and courageously guard and defend the rights of all in spite of all”

I entirely concur with that holding of the former principal judge and only add that the safeguarding of those rights will be within the laws of the land.

On the sureties, I must emphasize that the duty of sureties is not merely to assist a friend or relative to get out of prison. The sureties have a duty to the court which duty is to ensure that the accused/ applicant does not abscond. In the event of an accused person absconding, the sureties must explain to court why the accused failed to attend court. And where a surety has reasonable cause to believe that the accused is about to abscond, the surety should cause the arrest of the accused and have him brought to court, otherwise the sureties will be called upon to show cause why their recognizance should not be forfeited. As far as this case is concerned, this court is impressed by the high caliber of the sureties who are no doubt substantial. Even counsel for the state had no objection to the said sureties and that is one of the prime considerations for granting bail.

On the issue of defiance campaigns which counsel for state submitted on. I hasten to state that the issue of defiance campaign is now sub-judice. It is pending in the constitutional court and this court cannot comment on the same.

Finally, on the politics of this country, courts of law are neutral and have no sides. But since a case of treason has been preferred against the applicant, the message to all concerned, including the applicant now before this court **is a message of tolerance and forgiveness; a message of reconciliation and hope; a message of peaceful co-existence of all the people of Uganda.** Uganda should be a free and safe society for all with emphasis on peaceful resolution of conflicts and observance of the rule of law. The applicant is therefore called upon to live peacefully and not to cause any violence as long as the case against him is still pending in court.

Having regard to all the above circumstances and factors, and having judiciously and meticulously weighed one factor against the other, I am inclined to grant the applicant bail on the following conditions:

1. The applicant is to be bound in his own recognizance of UGX 100.000.000/= not cash.
2. Each of the four sureties is also to be bound in the sums of UGX 100.000.00/= also not cash.
3. The applicant to execute a further bond of refraining from any acts of violence or breach of peace till the case is heard and finalized. Failure to do so will lead to cancellation of bail.
4. The applicant will be reporting to the deputy registrar of the criminal division once every two weeks starting on the 26th /07/ 2016.

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W. MASALU MUSENE

JUDGE

12th/07/2016.