

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CRIMINAL APPLICATION No. 0004 OF 2017
(Arising out of Criminal Case No. 108 of 2015)

YALI AKBAR **APPLICANT**

VERSUS

UGANDA **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application for reinstatement of bail. The applicant is indicted with one count of Aggravated Defilement c/s 129 (7) (a) of *The Penal Code Act*. It is alleged that on 13th May 2015 at Luzira village in Yumbe District, the accused applicant had unlawful sexual intercourse with Rongum Amimu, a boy under the age of 14 years. He was charged on 30th June 2015. On 5th January 2016, he was released on mandatory bail. He kept on reporting to the court for the mention of his case until 4th May 2016 when he was committed for trial by the High Court whereupon his bail was cancelled and court directed that he should be kept on remand, hence this application by which seeks the reinstatement of his bail pending his trial.

His application is by notice of motion under Article 23 (6) (a) and (c) of the *Constitution of the Republic of Uganda*, and sections 14 and 15 (4) of the *Trial on Indictments Act Cap.23*. It is dated 6th June 2017 and it is supported his affidavit sworn on 3rd May 2017.. The main grounds of his application as stated in the notice of motion and supporting affidavit are that; before his committal to the High Court, he had been granted mandatory bail and he had accordingly honoured the bail conditions until then. Upon committal, his bail was cancelled and he was remanded. The respondent did not file an affidavit in reply.

At the hearing of the application, the applicant was represented by Mr. Mohammed Nasur Buga 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 neither opposed the application nor the sureties presented.

The Constitutional Court decided in *Hon Sam Kuteesa and two others v. The Attorney General, Constitutional Reference No. 54 of 2011*, that section 168 (4) of *The Magistrate's Courts Act* must be construed as if the Legislature enacted it under the authority of the 1995 Constitution. For that reason, "the automatic cancellation of bail, without any right to be heard, based on the mere fact that one is being committed to the High Court for trial, contained in section 168 (4) of *The Magistrates Courts Act*, is not part of the expressly stipulated circumstances of derogation from the right to protection of liberty in the Constitution." It continued further;

Automatic lapse of bail by the court committing an accused to the High Court for trial has the unconstitutional effect of condemning that person unheard on whether or not he / she should continue to enjoy the right to liberty, restored to him or her when he / she was first granted the bail. It is therefore inconsistent and in contravention of Article 28 (1) of the Constitution. That Article is non derogable under Article 44 (c) of the Constitution. It is a sacrosanct Article.

We have therefore come to the conclusion that section 168 (4) rescinds the constitutionally guaranteed power of the court to grant bail, through the court's exercise of its discretion. It acts counter to the fundamental right of an accused person to apply for and receive the discretionary consideration of the court before which such accused person is brought, to maintain the already granted, or to grant bail. Its purpose and effect, if construed in accordance with the 1995 Constitution, results in its being contrary to Articles 23 (6) (a) and 28 (1) of the Constitution.

We hold that pursuant to Article 274 of the Constitution, section 168 (4) of the Magistrate's Courts Act must be construed in such a way as to provide that:

1. Bail granted, by a court of competent jurisdiction, to a person arrested in connection of a criminal case does not automatically lapse by reason only of the fact of that person being committed to the High Court for trial.
2. Subject to being competently seized of jurisdiction under the law, the court committing an accused person to the High Court for trial, has power derived from Article 23 (6) (a) of the Constitution to maintain bail already granted or to grant bail to an accused person, or to cancel bail for sufficient reason, after hearing the parties concerned on the matter.

This decision is binding on this court and on all magistrates' courts. Bail should be maintained by the court committing an accused person except where that court, for sufficient reason, considers that bail ought to be cancelled. Sufficient cause does not include the mere fact of committal.

I perused the record of committal and found that the Magistrate did not furnish any reason for cancellation for the applicant's bail. It would appear that the Learned Magistrate cancelled bail by virtue of the provisions of section 168 (4) of the Magistrate's Courts Act, simply because of the fact of committal. As indicated in the authority cited above, such a practice was declared unconstitutional and it is for that reason that I decided to re-instate the applicant's bail pending trial.

In the circumstances I found merit in the application and ordered the accused to be released on bail on the following terms; -

1. The applicant is to execute a non-cash bond of Shs. 5,000,000/=.
2. Each of the 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 commencement of his trial or further orders of the court and to the Officer in Charge of Criminal Investigations at Yumbe Police Station on the last working day of every month until the commencement of his trial or further orders of the court.
4. It is for those reasons that the application was allowed and an order made for the release of the applicant on bail subject to him meeting the above conditions.

Delivered at Arua this 15th day of June, 2017.

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Stephen Mubiru
Judge.
15th June 2017.