



**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT – 05 – CR– CM- 0073 OF 2022
[ARISING FROM COURT NO MBR-CR-CO-AA-82/2021]**

1. Kamugisha Aaron ----- APPLICANTS
2. Musinguzi Nazario
3. Tusingwire Denis
4. Magezi Moses
5. Bakega Joseph
6. Murungu John
7. Tumuhimbise Deus
8. Turyahebwa Devis

VERSUS

UGANDA ----- RESPONDENT

Before: Hon. Justice Nshimye Allan Paul. M.

BAIL APPLICATION RULING

REPRESENTATION

Adv Moses Nuwagaba for the applicants.

Adv. Jacob Nahurira for ODPP

BACKGROUND

The applicants were charged with murder C/S 188 and 189 of the PCA (refer to POLICE CASE NO: MBR CRB 666/2021 and DPP CASE NO: MBR-CO-1224/2021). The applicants who are Boda Boda riders save for applicant no 2, are all alleged to have killed one Agaba Clovence who was riding a motorcycle to work and they suspected him of being a motorcycle thief, beating him to death. They were remanded to prison and subsequently filed this application to be released on bail.

APPLICATION

This application is brought by way of Notice of Motion and is relying on Article 23 (6) (a) of the Ugandan Constitution, S. 14 (1) of the Trial on Indictments Act and rule 2 of the Judicature (Criminal Procedure) (Applications) Rules S.I. 13-8

GROUNDNS

The grounds of the application as presented in the Notice of Motion and supporting affidavits by the applicants are as follows;

1. That the applicants have a constitutional right to apply for bail.
2. the applicants are presumed innocent having denied the offence.
3. that the high court has authority to grant bail in this matter.
4. That the applicants have fixed places of abode within the jurisdiction of the court.
5. That the applicants do not have any other pending charges.
6. That they have substantial sureties.
7. That the applicants have never jumped bail before.
8. That it is in the interests of justice that this applicant be granted bail.

SUBMISSIONS

The applicants filed affidavits in support of the application, and also later filed a supplementary affidavit on 07/10/2022 sworn by Mpririrwe Scholar, signing as the mother of the deceased person, supporting the grant of bail to the applicants.

Adv Nuwagaba Moses for the applicants told court on 20-10-2022, that they had filed written submissions, where they stated that the applicants are presumed to be innocent and they referred to the case of **Uganda vs Dr Kiza Besigye constitutional reference 20 of 2005**, that court must consider and give the applicant the full benefit of their constitutional rights. Counsel added that the applicants have substantial sureties.

The applicants further submitted that guideline 13(1) of The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions 2021 provide that: *"court may give a victim of a crime an opportunity to submit any information that in their view court should consider in making a bail decision"*. they stated that it is in this regard that the mother of Agaba Clovence, in her capacity as a complaint, swore a supplementary affidavit stating in paragraph 6 that she does not object to the release of the applicants on bail.

Adv Jacob Nahurira for the state while submitting on 20-10-2022 opposed the bail application and stated that he notices that there is a supplementary affidavit from the complainant. He prayed that court do delay ruling on the matter and adjourn it to another date to allow the DPP interact with the complainant, because any such affidavit from her would have come from them.



The court adjourned the application to 4th November 2022 as requested by the DPP. On this date only the applicants and their lawyer were in court, the matter was then adjourned to 3pm for ruling.

DETERMINATION

It is trite law that *"Every person who is charged with a criminal offence shall be presumed to be innocent until proved guilty or until the person has pleaded guilty"* as provided for in Article (28) (3) (a) of the Constitution of the Republic of Uganda and in Rule 5 (a) of The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022.

The same principle of presumption of innocence is contained in Article 11(1) of the UDHR and Article 14(2) of the ICCPR, which provisions, Uganda is duty bound to respect as a signatory to both international instruments.

It is also trite that a person arrested in respect of a criminal offence has a right to apply for bail pursuant to the provisions of Article 23 (6) of the Constitution of the Republic of Uganda. It should be noted though, that the grant or refusal to grant bail is at the discretion of court as was held by the court of appeal in ***Uganda v Kiiza Besigye (Constitutional Reference 20 of 2005)***.

It is further noted that the law in section 15 of the Trial on Indictments Act (TIA) requires the applicant seeking bail to prove to the satisfaction of court exceptional circumstances (***refer to section 15(3) of the TIA***) and also prove that he or she will not abscond (***refer to section 15(4) of the TIA***).

The provisions in section 15 of the TIA must nonetheless be considered in line with the interpretation of the Supreme Court in ***Foundation for Human Rights Initiatives Vs Attorney General (supreme Court Constitutional Appeal 3 of 2009)*** where it stated that;

"I also note that section 15 of the TIA also predates the 1995 Constitution. It is however saved as an existing law under Article 274 of the Constitution which enjoins Courts to construe existing laws, to bring it in conformity with the Constitution. Such construction requires that if Court finds it necessary to consider exceptional circumstances in the course of hearing a bail application involving offences listed under section 15(2) of the TIA, Court should not restrict itself to only considering the exceptional circumstances provided for under section 15 (3) of the TIA. Other 'exceptional circumstances' might exist."



I am alive to the fact that even after considering whether the applicants have proved exceptional circumstances or that they will not abscond, the court in exercising its discretion to grant or deny bail, ought to also apply a balancing test.

The court ought to balance between the interests of the individual and those of the society represented by the ODPP, which is without doubt interested and entitled to a crime free environment for its inhabitant's peace of mind. On this aspect, the words of Hon Chief Justice Bart M Katureebe in the decision of ***Foundation for Human Rights Initiatives vs Attorney General (supreme Court Constitutional Appeal 3 of 2009)*** are instructive. He stated that;

"the institution of bail is meant to protect and guarantee the fundamental rights of the individual to liberty, the presumption of innocence and the due process of the law on the one hand; and the societal interests on the other hand. ...This calls for a balance by the courts in exercise of this judicial function between the interests of the accused and those of the community".

I have carefully considered the arguments of both the applicants and the state, I have also considered the evidence on court record and the law applicable, and It is my opinion that when dealing with bail applications two requirements in the law must each be independently addressed and proved, namely;

1. The applicants ought to prove exceptional circumstances as listed in the Bail Rules 2022, or The Trial on indictments Act (*refer to section 15(3) of the TIA*), or any other exceptional circumstance different from those listed in the Bail Rules 2022 and the Trial on indictments Act, if the applicants want to base their proof of exceptional circumstances on the interpretive ruling of the supreme court in *Foundation for Human Rights Initiatives vs Attorney General (supreme Court Constitutional Appeal 3 of 2009)*.

A perusal of the affidavit evidence on court record shows that the applicants have not addressed or proved any exceptional circumstances as required in the law.

2. The applicants ought to also independently prove that they each will not abscond (*refer to section 15(4) of the TIA*). In this category court will consider whether the applicant has a fixed place of abode, or substantial sureties among others.

I find that the evidence on court record is sufficient to show that the applicants have fixed places of abode. I also find the sureties presented substantial.



I will now address the supplementary affidavit of the complaint that was filed by the applicant's lawyer in support of their application, which counsel for the applicant's states was done under guideline 13(1) of The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions 2021.

I have read the bail guidelines and find that the relevant rule that refers to getting the views of the victim is guideline 13(2) and not 13(1) as stated in the applicant's submission, be as it may the supplementary affidavit states in the heading that "*I Mpirirwe Scholar of C/o Ms Cumberland advocates ...*" and in paragraph 3 it states that "*That I am advised by my lawyers*" It is clear that the complainant is in the supplementary affidavit represented by the same lawyers representing the applicants.

This is irregular considering that the applicants are charged with a capital offence prosecuted by the ODPP under their constitutional mandate. The complainant who is supposed to aid the case for the prosecution is now stating on oath that her lawyers are the lawyers of the accused persons, this can lead to all kinds of insinuations. If The complainant had approached the applicants with her free will to prepare an affidavit in support of her bail application, that supplementary affidavit should have been made by the ODPP or a different law firm to avoid possibility of conflict.

In balancing the applicants' interests emanating from their constitutional rights and the interest of the public as protected by the Office of Director of Public Prosecutions, I find that this is NOT a deserving case for court to grant bail.

I hereby order that the bail application is dismissed.



.....

Nshimye Allan Paul M.

JUDGE

04-11-2022