

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE
MISCELLANEOUS APPLICATION NO. 62 OF 2023
(Arising from High Court Criminal Case No. 214 of 2021)
(Arising from Magistrate Court Case Criminal Case No. 81 of 2020 CRB 1650 of 2020)

MONJE STEPHEN APPLICANT

VERSUS

UGANDA RESPONDENT

BEFORE: HON. JUSTICE FAROUQ LUBEGA

RULING

1. The applicant brought this Application by way of Notice of Motion under Article 23(6) of the Constitution of the Republic of Uganda, sections 14 and 15 of the Trial of Indictment Act, Rules 2 and 3 of the Criminal Application Rules for the orders that;
 - i. The Applicant be granted bail pending disposal of the criminal case preferred against him
2. The Application is supported by the affidavit sworn by **MONJE STEPHEN** the Applicant herein whose details are on the court record and briefly stated that;
 - i. On 23rd of September, 2020 I was arrested and charged with the offence of aggravated robbery.
 - ii. On 28th of September, 2020 I was brought before the Chief Magistrate Court where the charges were read to me and I was advised not to take plea since the magistrate did not have the jurisdiction to hear the matter and I was remanded to Maluku Government Prison where I have been held to-date
 - iii. I kept on appearing before the chief magistrate court at Mbale for mention until 27th of April, 2021 when I was committed to High Court for trial but I have never been prosecuted to-date.

- iv. That my arrest and subsequent charge of the offence of aggravated robbery was a matter brought with malice intended to punish me and tarnish my good name
- v. That I am a married man with 11 school going children under my care as a sole bread winner at home
- vi. My children's education is likely to be affected if I continued being in prison since I have been informed by my wife that some of them have failed to continue with school due to lack of school necessities.
- vii. I will not interfere with the investigations since they are already complete.
- viii. I am sickly and I need medical attention since from the time I underwent an operation my life has not been the same. I am required to attend to my doctor for further management.
- ix. I have a constitutional right to apply for bail
- x. This court has jurisdiction to hear this Application.
- xi. I have substantial sureties who are willing to stand for me.
- xii. I have a fixed place of abode at Nabigyo Cell, Namakwekwe Ward, Northern Division in Mbale City and his NIN is CM72051101J6WA
- xiii. My criminal case has higher chances of success.
- xiv. I pray that the Application be granted in my favour.

3. In the affidavit in reply sworn by **ALIWAALI KIZITO** State Attorney whose details are on the court record, the Respondent opposed the Application and stated briefly that;

- i. The Applicant is indicted with a serious offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act which attracts a death sentence on conviction.
- ii. The Applicant was committed to the High Court for trial and for that reason, there is a high likelihood of him absconding and



rendering the trial nugatory once granted bail since the Applicant is privy to the evidence which will be adduced against him

- iii. In response to Paragraph 8 of the affidavit in support, the Respondent averred that it is not true that the Applicant has a fixed place of abode since there is no proof attached in form of land title, or sale agreement, or utility bills.
- iv. In response to paragraph 17 of the affidavit in support, the Respondent averred that it is not true that the Applicant has substantial sureties since the attached documents are subject to verification and are not by them-selves proof of substantiality.
- v. That the Applicant has not advanced any exceptional circumstances to warrant grant of bail
- vi. The Respondent prayed that the Application be dismissed and the case be fixed for hearing.

4. Legal Representation

Counsel Wamimbi Jude represented the Applicant whereas the Respondent was represented by Abbo Patrick State Attorney.

5. Submissions by counsel for the Applicant.

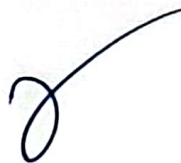
Counsel for the Applicant submitted that the Applicant has a constitutional right to apply for bail as averred under paragraphs 3 and 4 of the affidavit in support. He submitted that there is evidence that the Applicant was charged with the offence of aggravated robbery on the 28th/9/2020 and he was thereafter committed to the High Court for trial. He argued that it is now three years the Applicant has not been tried and there is no consideration of being tried at any earlier opportunity possible.

6. Counsel submitted that the grant of bail is based on the presumption of innocence until proven guilty. He referred to paragraphs 5 and 9 of the



affidavit in support where the Applicant says he is not guilty and did not commit the offence of aggravated robbery.

7. Counsel further submitted that the Applicant is entitled to a fair and speedy trial and for 3 years he has not been tried. He argued that the Applicant is a married man with a family and school going children and the children have found difficulties in pursuing their right to education. He referred to para 6, 7 and 8 of the affidavit in support.
8. On the 2nd ground, counsel submitted that the Applicant is sick suffering from Asthma. He showed court a medical report signed by a one Robinson the in charge and senior medical officer Mbale Main prison. The report was signed on 15th of November, 2022. Basing on that report, Counsel argued that the Applicant's condition cannot be managed from prison and since there no contrary evidence from the respondent, he prayed that this court finds that this condition falls under the exceptional circumstances.
9. On the 3rd ground, counsel submitted that the Applicant has a permanent place of abode at Nabigyo Cell, Namakwekwe Ward, Northern City Division in Mbale City which is within the jurisdiction of court. To prove permanent residence the Applicant attached a copy of the letter from the LC.1, photographs of his house and a national identification card.
10. Counsel also submitted that the Applicant has substantial sureties who are ready to stand surety for the Applicant. He stated that the 1st surety is Fango David a resident of Nabigyo Cell, Namakwekwe Road and he is a friend to the Applicant and they come from the same village. He manages a bar in the same area. He has a letter from LC.1 and a national identification card with NIN.CM7905110HQTD, the 2nd surety is Mr. Wasukira Edirisa and he comes from the same village Nabigyo Cell.



He is a neighbor to the Applicant and LC.1 defence secretary in the area and he has a national identification card No. CM50026101ECPK and the 3rd surety is Mr. Makoha David a resident of Nabigyo Cell. He is a friend of the Applicant and deals in Mobile Money in Mbale City. He has an LC.1 letter and national identification card No. CM90042104315E.

11. Following the above, Counsel submitted that the duties of the sureties have been explained to them and prayed that court finds them substantial to stand for the Applicant.

12. **Submissions by counsel for the Respondent**

13. Counsel for the Respondent submitted that whereas the Applicant is entitled to a fair and speedy trial, this court has a record in disposing off criminal matters and since the Applicant is already committed to the High Court for trial, it is their prayer that the matter be fixed for hearing at the next convenient criminal session.

14. In relation to the Applicant's sickness; counsel for the Respondent referred this court to the medical report marked annexure "A" and dated 19th of November, 2022 to submit that the letter is addressed "*To Whom It May Concern*" and not to court. Secondly, the letter was written on 19/10/22 which is almost 11 months since it was written. Counsel argued that there is no indication that the condition that was prevailing 11 months is still the prevailing condition today. He contended that even if that was the condition like counsel for the applicant submitted, the Applicant has been having that very condition for about 3 years and the prison medical services have managed the condition. Counsel submitted that the prison is managing the applicant's condition well and that the report should be disregarded since the sickness talked about by the applicant does not fall under exceptional circumstances to warrant grant of the bail application.



15. Regarding the place of abode; counsel for the Respondent submitted that the paragraph referred to by counsel for the Applicant does not present any proof of ownership of the property by the Applicant. He argued that the photographs may have been taken from any other premises and do not show any proof of ownership. Counsel further submitted that proof of a fixed place of abode is by way of certificate of title or sale agreement of the property or at least a document from the family or clan if such property was held by way of customary inheritance.
16. He added that a list of utility bills would suffice as proof of ownership of a fixed place of abode but none of those documents have been presented to this court. Counsel argued that the LC.1 letter describes the Applicant as a resident but it does not present any proof that the Applicant owns the residence. He prayed that court finds that the Applicant has no fixed place of abode as claimed.
17. In relation to the sureties presented, counsel submitted that surety No. 1 Mango David is presented as a friend of the Applicant and that he manages a bar in the area. He contended that the description of the business is not disclosed and for that reason it is not clear whether he is the owner of the business or not. Counsel submitted that the surety has no known place of abode and therefore it is doubtful that if the applicant is granted bail, the 1st surety will fulfill the condition required of a surety.
18. Regarding the 2nd surety, counsel submitted that the only known relationship with the Applicant is that he is a neighbor. He has no known business or proof of a family and in event court binds him to the substantial amount of money, it is doubtful that he will be in position to meet such a condition.
19. In relation to the 3rd surety, counsel submitted that although it is stated that the surety deals in mobile money, the address or description



of the business is not clear. The paragraph referred to by counsel for the Applicant does not describe the relationship the applicant has with the surety. Counsel prayed that court be persuaded to find that all the three sureties presented are not substantial. He referred to the case of **Adriko Yudas Vs. Uganda Miscellaneous Criminal Application No. 0030 of 2016 and Foundation for Human Right Initiatives Vs Attorney General Constitutional Appeal No.3 of 2009.**

20. **Consideration of Court**

21. **Article 28 (3) (a) of the 1995 Constitution of the Republic of Uganda** provides-

“Every person who is charged with a criminal offence shall be presumed to be innocent until proven guilty or until that person has pleaded guilty.”

22. **Article 23(6)(a) of the 1995 Constitution (Supra)** provides that-

“Where a person is arrested in respect of a criminal offence-(a) a 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.”

23. **Section 14(1) of the Trial on Indictment Act Cap 23** provides that-

“The High Court may at any stage of the proceedings release the person on bail, that is to say on taking from him or her a recognizance consisting of a bond, with or without sureties, for such amount as is reasonable in the circumstance of the case, to appear before the court on such and such a date and at such a time as is named in the bond.”

24. **Section 15 of the Trial on Indictment Act (Supra)** provides-

“(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 that justify his or her release on bail; and

(b) that he or she shall not abscond when released on bail

(2).....

(3) In this section, exceptional circumstances means any of the following-
(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 medical treatment while the accused is in custody**

(b).....

(c).....

(4) In considering whether or not the accused is likely to abscond, the court may take into account the following factors

(a) **Whether the accused has a fixed place of abode within the jurisdiction of 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 or his or her bail**

(c) **Whether the accused on a previous occasion when released on bail failed to comply with the conditions of his or her bail and**

(d) **Whether there other charges pending against the accused."**

25. **Sickness of the Applicant**

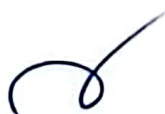
26. In the instant case the applicant averred under paragraphs 11 and 12 of the affidavit in support that he is sickly and he needs further medical attention from his doctor. He attached Annexure "A" which is a medical report dated 19th October, 2022. In that report it is indicated that the Applicant suffers from acute asthmatic attacks and that prior to his arrest, the Applicant underwent skull surgery which still needs further investigation, assessment and management.

27. However, following the report, it was written on 19th October, 2022, which is now almost a year since it was made and since then, the Applicant has been under the management of the prison medical services. This would in my view imply that the prison medical services are capable of managing the applicant's condition. Counsel for the



Applicant prayed that the applicant's sickness be found as one that falls under the exceptional circumstances.

28. It should be noted that for a sickness to be considered grave as per the provision of the law above cited, it should be such sickness or illness where the accused is incapable of medical treatment while is in custody. This is however not the position in the instant case. See **Uganda Vs. Col (RTD) Dr. Kiiza Besigye Constitutional Reference No. 20 of 2005.**
29. In the instant case, the Applicant has been in prison for now 3 years and the prison medical services have managed his sickness for all that long which means his sickness is not grave in nature and can be managed in prison.
30. In addition to the above conditions, the Chief Justice further issued guidelines to guide courts while handling bail. **Paragraph 13 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022** provides for what to consider when handling a bail application and these includes;
- (a) the gravity of the offence*
 - (b) the nature of the offence*
 - (c) the antecedents of the applicant so far as they are known*
 - (d) the possibility of a substantial delay of the trial*
 - (e) the applicant's age, physical and mental conditions*
 - (f) the likelihood of the applicant to attend court*
 - (g) the stage of the proceedings*
 - (h) the likelihood of the Applicant to commit an offence while on bail.*
 - (i) the likelihood of the applicant interfering with witnesses*
 - (j) the safety of the applicant, complainants and the community*
 - (k) whether the applicant has a fixed place of abode within Uganda or whether he or she is ordinarily resident outside Uganda*



(l) whether the applicant has sufficient sureties within Uganda to undertake that the Applicant shall comply with the conditions of his or her bail

(m) whether the applicant has, on a previous occasion when released on bail, failed to comply with his or her bail terms.

(n) whether there are any other charges pending against the Applicant

(o) whether the offence for which the Applicant is charged involved violence.

31. In the instant case, it is evident from the court record that the Applicant was on 29th of April, 2021 committed to the High Court for trial of his case. This in essence means that there is no possibility of a substantial delay of the applicant's trial. Counsel for the applicant submitted that the applicant is entitled to a fair and speedy trial. I agree. However, the fact that the applicant is already committed to the High Court, it is clear that his case will be cause listed on the next convenient criminal session of this court.

32. **Fixed place of abode**

33. The Applicant averred under paragraph 18 of the affidavit in support that he has a fixed place of abode at Nabijjo Cell, Namakwekwe Ward, Northern City Division in Mbale City. To prove a fixed place of abode the Applicant attached a copy of the letter from the LC.1, photographs of his house and a national identification card.

34. **Section 101 (1) of the Evidence Act Cap 6** provides-

"Whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he or she asserts must prove that those facts exist"

35. In the case of **Mugenyi Steven Vs. Uganda, High Court Criminal Miscellaneous Application No. 65 of 2004**, it was held that;



“The onus of proof is on the Applicant to satisfy court that he has a permanent place of abode in a particular known village, sub-county, county and district.”

36. It is trite that a fixed place of abode connotes a place where a person resides with some degree of permanency and where he or she can be traced when needed by court. Therefore, a fixed place of abode can be proved by a sale agreement, tenancy agreement, certificate of title and utility bills like water and electricity. See **Kanyamunyu Mathew Muyogoma Vs. Uganda Criminal Miscellaneous Application No. 177 of 2017** and **Sher Singh sherkhawat Vs. Uganda Criminal Miscellaneous Application No. 11 of 2023.**
37. In the instant case the Applicant only attached photographs of a house alleged to be his, a letter from the local council and his national identification card which in my view do not prove a fixed place of abode. The Applicant ought to at least attach a sale agreement, land title, tenancy agreement or receipts of utility bills.
38. The photographs of the alleged house attached do not show ownership or fixed place of abode since they are just photographs which can be taken from anywhere.
39. In the circumstance, the Applicant has not proved to the satisfaction of this court that he has a fixed place of abode.
40. **Substantial Sureties**
41. Under paragraph 17 of the affidavit in support the applicant averred that he has substantial sureties who are willing to stand for him.

42. It is apparent that in determining the suitability of a surety, courts considers the age of the surety, work and residence address of the surety, character and antecedents of the surety, relationship to the accused person and any other factor the court may deem fit. See **paragraph 15 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022**
43. In the instant case the applicant brought 3 sureties. The 1st surety is called Fungo David, aged 44 years, a resident of Nabigyo Cell, operates and manages a bar in Nabigyo Cell in Mbale City and he is a friend to the Applicant. Considering those facts and the annexures attached to the affidavit in support, the 1st surety is younger than the Applicant and secondly, he is not related to the applicant but he is just a friend. Following that background, I find that the 1st surety will not be able to compel the Applicant to attend court and therefore not substantial.
44. The 2nd surety is called Wasukira Edirisa, aged 73 years, a resident of Nabijjo Cell, deals in animal farming in Nabijjo Cell and a friend of the Applicant. From those facts, considering the fact that the surety is elderly and not related to the Applicant, this court is not convinced that he will be able to compel the Applicant to attend his trial when needed.
45. The 3rd surety is called Makoha David aged 33 years, a resident of Nabijjo Cell, deals in Mobile Money business in Mbale City and a friend of the Applicant. From that background, the surety is younger than the applicant, the name under which his business is registered is not disclosed, the proper address of his business is not given and more so, he is just a mere friend of the Applicant. For those reasons, the 3rd surety is also found not to be substantial.
46. It is important to note that the duty of the surety is to ensure the attendance of the accused person before court whenever required. A

surety to be considered substantial he or she must be in position to compel the attendance of the accused person whenever he or she is needed in court. In other words, he must be able to influence, supervise and control the applicant. **See Halsbury's Laws of England 4th edition Vol II page 112-133 at para166**

47. Accordingly, since all the sureties presented have no close proximity with the Applicant it will be difficulty for them to supervise him.

48. Secondly, the 1st and 3rd sureties being younger than the Applicant, it is will be hard for them to control the applicant in order to ensure his attendance in court when needed.

49. For the above reasons, this court finds that all the sureties presented are found not to be substantial.

50. In the circumstance given above, I decline to exercise my discretion to grant the Applicant bail. The application is hereby dismissed. However, hearing of Criminal Case No. 214 of 2021 should be cause listed for trial at the next convenient criminal session of this court.

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LUBEGA FAROUQ
JUDGE

26th October 2023