

**THE REPUBLIC OF UGANDA**

**IN THE HIGHCOURT OF UGANDA HOLDEN AT KAMPALA**

**CRIMINAL REVISION NO:14 OF 2023**

**(Arising from HCT-00-CR-CDM-0056-2020)**

**LT.GEN. (RTD)HENRY TUMUKUNDE APPLICANT/ACCUSED**

**VERSUS**

**UGANDA ..... RESPONDENT/PROSECUTION**

**RULING**

**BEFORE: HON.JUSTICE ALEX MACKAY AJIJI**

The applicants instituted this application by Notice of Motion seeking for orders that: -

- 1) This Honorable court reviews and/or temporarily varies the conditions set in the bail ruling in HCT-00-CR-CM-0056-2020
- 2) This Honorable court grants the Applicant his passport for purposes of temporary travel abroad for medical attention.

The application is brought under the provision of Article 23(6) (a), (b), 28(3) of the constitution of the Republic of Uganda 1995, section 14(1) of the Trial on Indictment Act Cap .23 and 33 of the Judicature Act cap 13. The grounds for the application are that;

- a) This Honorable court granted bail to the Applicant on the 11<sup>th</sup> May 2020 vide HCT-00-CR-CM-0056-2020.
- b) That it was one of the conditions for bail that the Applicant deposits his passport with the deputy Registrar, High Court Criminal Division.
- c) That the Applicant did comply with all the conditions that were duly set by the court.
- d) That it was a further condition that if the Applicant needed to use his passport, the same could only be released to him on leave of this honorable court.
- e) That the Applicant is in need of travelling out of the country for further medical attention as recommended by his doctors and independent medical experts.
- f) That the Applicant has diligently complied with all the terms of his bail as granted by court and he is a law abiding citizen.
- g) That it is in the best interest of justice that this Application is granted.

The background of this application is that the applicant was charged with the offence of treason c/s 23 of the Penal Code cap 120.

### **Representations**

Counsel Turyamusima Geoffrey from Wameli & Co. Advocates represented the accused person while Irene Nakibugwe argued against the application.

In his submissions, counsel for the applicant submitted that this application is based on eight grounds which are well articulated in the affidavit sworn by the Applicant together with that of Stella Tumukunde who is a wife to the Applicant. That this court granted bail to the Applicant on the 11/05/2020 on several conditions including depositing his passport in court which was condition number two. The Applicant diligently deposited the same and complied with all the conditions set. However, court further conditioned the Applicant that incase he would need his passport he would need leave of this court and it was the reason as to why they are in court on this application.

*missed*  
Further that the Applicant has continuously appeared for his bail extension since it was granted until 7<sup>th</sup> day of February 2021 when his matter was referred to high court for interpretation on the question of violation of his fundamental rights. However, a ruling was made hereinafter attached as Annexure "J" to this Application. However, since then, the same matter has never been fixed to determine his rights. Seemingly he has also never been committed to high court on the offence of treason. Under paragraph 7,8 and 9 of the Applicant's affidavit in support together with paragraph 6 and 7 of a one Stella Tumukunde, they state that the Applicant has a number of ailments that cannot be managed adequately here in Uganda. Considering the fact that he is of advanced age of 60 years and above as seen in Annexure "C" and "E" respectively of this Application. He therefore prays that the prayers sought be granted.

In reply, state submitted that the Applicant is charged with a very serious offence, however the applicant before this court is in respect of varying the terms that were set so as to grant the Applicant his passport for purposes of going abroad for treatment.

Counsel for the state further prayed that if this court is inclined to vary the bail terms, then it should set conditions of when the passport should be returned after review of the medical conditions. Otherwise she has no objections to the Applicant's decision to seek medical attention.

### **COURT 'S DECISION**

There is no automatic right to bail and the right cited under Article 23(6) of the constitution is limited to the right to apply for bail. Court is seized with the discretion to grant or not to grant bail, I must note that this discretion must be exercised judiciously and each case must be determined on its own merits as seen in the case of **Walubiri Godfrey vs Uganda Criminal Application No.44 of 2012**) in fact, the purpose of bail should be to ensure that the applicant appears to stand trial, without the necessity of being detained in custody during the period of trial **see Col (Rtd) Dr.Kizza Besigye vs Uganda – Criminal Application no.83/2016**

The power to grant or refuse bail remains with the court which must be convinced on a high balance that all circumstances considered, the applicant will not abscond when released as it was held in **Uganda vs Col (Rtd) Dr. Kizza Besigye Constitutional Reference**

**No.20/2005.** A court should carefully exercise its judicial mind before depriving one of their liberty.

Under **Article 28(3)** of the constitution, every person is presumed innocent until proved guilty or pleads guilty. Consequently, an accused person should not be kept on remand unnecessarily before trial. Therefore, the accused should be granted bail if they fulfilled the conditions for their release. An applicant should not be incarcerated if he has a fixed place of abode, has sound sureties capable of guaranteeing that he will comply with the conditions of his or her bail and is willing to abide by all other conditions set by the court.

Paragraph 21(1) of the Constitutional (Bail Guidelines) provides for Review of bail terms, that the prosecutor, an accused person or a surety may apply to court to vary, review or set aside the conditions of bail at any time after the ruling has been made.

Further sub clause (3) states that this application shall be made to court by notice of motion supported by an affidavit.

Therefore this Application for review is rightfully before this court.

The accused bears the onus on review to show cause on a balance of probabilities why the current order/conditions should be varied. This may be done showing a material change in circumstances that would make it unjust not to vary the order.

In considering this application, to vary bail, this court must have regard to;

- a) The seriousness of the charges,
- b) The character, antecedents and general background,
- c) The compliance with previous grants of bail,
- d) The alleged victim's attitude towards the variation to bail terms,
- e) Where there is a material change in circumstances.

Looking at the charge against the Applicant, he is charged with the offence of Treason C/S 23 of the Penal Code Act cap 120 which is a very serious offence attracting the sentence of death if convicted.

On the antecedents of the Applicant and compliance with previous grant, it was stated in his affidavit in support in paragraph 4 that he has complied with the said conditions among the other conditions prior to his being released on bail as seen in Annexure B. Further Annexure A of the same affidavit is a ruling that demonstrates that the Applicant would apply to the court when he wishes to vary any of the terms. Thirdly, the state's attitude towards the variation of bail is that applicant before this court is in respect to varying the terms that were set and that is granting the Applicant his passport for purposes of going abroad for treatment. And she prayed that if this court is inclined to vary the bail terms, then it should set conditions of when the passport should be returned after review of the medical conditions. Otherwise she has no objections to the Applicant's decision to seek medical attention.

Where there is a material change in circumstances coupled with other evidence, this should be expected to have affected the result. In this case, the Applicant needs to use his passport which can only

be released to him on the leave of this honourable court and in this case, he needs to travel out of the Country for further medical attention due to illness that cannot be effectively managed within Uganda as per Annextures "C" and "D". his doctor's appointment was scheduled on 24<sup>th</sup> May, 2023 at specialists for Health Cardiology, Crockett park location 1715 McCullough Avenue, second floor, an Antonio, and TX 78212 as seen in annexture "E".

Therefore, in this case, I find that despite the offence of treason being a serious one, the Applicant has already proved to this court that he had previously complied with all the conditions that were given by the first court as seen in Annexture "A". furthermore, the Applicant suffers from grave illness and he is of advanced age, hence he has fulfilled the exceptional circumstances under Section 15 of the Trial on Indictment Act in order to be released on bail if this were the former.

I am satisfied that the Applicant, having furnished this court with a recent referral letter from his doctor at Nakasero Hospital for treatment abroad, makes this application genuine. Therefore, regarding the same, I am inclined to vary the conditions as previously stated by this court in 2020 as follows;

The application is hereby allowed and bail granted on the new conditions that;

1. The Applicant shall be bound in a sum of 100,000,000(not cash)
2. The three sureties of the Applicant namely:
  - (a) Stella Tumukunde

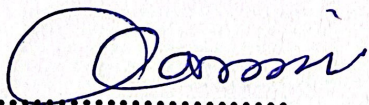
(b) Hannington Karuhanga

(c) Mathew Rukikaire, are hereby retained as in the former ruling. Each of the three sureties is bound in the sum of UGX 150,000,000 (not cash)

3. The sureties that is, 2<sup>nd</sup> and 3<sup>rd</sup>, shall report to court once a month in his absence in case his stay out of the Country exceeds one month.
4. Once the Applicant returns, he shall return his passport to the Deputy Registrar, Criminal Division, within seven days after his return.
5. Hence let his passport be released to him on the above terms.

I so order.

Dated at Kampala this 4<sup>th</sup> day of July, 2023.



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**ALEX MACKAY AJIHI**

**JUDGE**