

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL MISCELLANEOUS APPLICATION NO. 426 OF 2023

(Arising from Criminal Appeal No. 102 of 2023)

(Arising from Criminal Case No. 493 of 2023 at Chief Magistrate Court of Nakawa Holden at Nakawa)

KAWANGUZI NSEREKO DAVID.....APPLICANT

-VS-

UGANDA..... RESPONDENT

Before: Hon Lady Justice Rosette Comfort Kania.

Ruling

Background

Kawanguzi Nsereko David (hereinafter referred to as "the applicant") brought the instant application by way of Notice of motion under ostensibly Article 23(6)(a), 28(3) of the Constitution of the Republic of Uganda 1995 as amended, sections 14 and 15(1)(b) of the Trial on Indictments Act seeking orders that;

- a). Applicant who was convicted on his own pleas of guilty on charges of grievous harm on the 15th of August 2023 and now at Luzira Upper Prison but appealed in the criminal division High Court against the decision and sentence of the learned grade one Magistrate her Worship Akello Irene be released on bail pending hearing and determination of his Appeal.
- b). Consequential direction be issued to regulate the applicant's bail.

Brief Facts

It is alleged that on 2nd day 2023 at Mutungo Zone 4, Nakawa Division the accused/ applicant beat the complainant resulting in her admission at Emmanuel Medical Centre. The matter was reported to police and applicant arrested. He was subsequently charged with causing grievous harm contrary to section 219 of the Penal Code Act and convicted on his own plea of guilty. The applicant was sentenced to twenty (20) months imprisonment and ordered to compensate the complainant the sum of UGX 800,000/= (eight hundred thousand Uganda shillings).


Being dissatisfied with the judgment and decision of the Magistrate Grade 1 of Nakawa Chief Magistrate's Court which was delivered on 5th September 2023, he appealed to this court, which appeal is pending hearing and hence this bail application.

Representation.

At the hearing of the application, Mutoni Hope Senior State Attorney appeared for the respondent while Caroline Kongai counsel on state brief appeared for the applicant. Both parties filed written submissions which have been duly considered where necessary.

Grounds of the application.

The grounds of this application as briefly stated in the application and further detailed in the affidavit in support deposed by the applicant are that:

 1

- a). The applicant was arrested on the 2nd of May 2023 and produced before the chief Magistrate's Court of Nakawa on the 15th of August 2023 he was charged with the offence of causing grievous harm contrary to section 219 of the Penal Code Act.
- b). The applicant was convicted on his own plea of guilty and sentenced to twenty (20) months in prison a decision against which the applicant has appealed to this Honourable Court.
- c). That the applicant suffers a mental illness and therefore did not understand the proceedings and what he was asked in court
- b). The applicant has a fixed place of abode at Mutungo Zone 3, Mutungo Parish, Nakawa Division.
- c). The applicant has substantial sureties
- d). It is the Constitutional requirement that a convict may apply for bail pending the determination of his Appeal.
- e). It is just and equitable that this application be granted.

Objections to the application

This application was objected to by Senior State Attorney Hope Mutoni on the following grounds; the offence with which the applicant is charged is an offence of violence, the appeal is frivolous or has no possibility of success, the applicant failed to prove his fixed place of abode given that the letter of introduction from the LC was only endorsed by the Chairperson and not at least by another member of the LC committee, the applicant has not provided any information proving the social economic standing of the sureties, she cited the case of *Aganyira Albert-vs- Uganda, Criminal Miscellaneous Application NO. 0071 of 2013*, where Lady Justice Jane Alvidza observed that failure to provide documentary evidence of facts pointing to the economic standing of the sureties to meet the obligation to pay the bond in the event that the applicant absconds.

Law Applicable

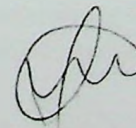
This application was brought under Article 23(6)(a) and Article 28(3) (a) of the Constitution of the Republic of Uganda 1995 as amended, sections 14 and 15(1) of the Trial on Indictments Act and Rules 2 and 4 of the Judicature criminal Procedure Rules.

I note that although the applicant with the exception of Article 28(3) of the Constitution of the Republic of Uganda as amended, erroneously brought this application for bail pending appeal under the above cited law, the right law for bail pending appeal is as follows;

Article 28 (3) (a) of the Constitution of the Republic of Uganda 1995 which provides that, "every person who is charged with a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty. "

Section 14 (1) of the Judicature Act provides that the High Court shall, subject to the constitution, have unlimited original jurisdiction in all matters and such appellant and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law.

Section 40(2) of the Criminal Procedure Code Act, provides that the appellant court may, if it sees fit, admit an appellant to bail pending the determination of his or her Appeal.



Further Section 205 of the Magistrates Court Act is to the effect that, an appellant may, at any time before the determination of his or her appeal, apply for bail to the appellant court, and the appellant court may grant the bail.

The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions NO. 8 of 2022 Paragraph 19 provides that, the court shall, in handling an application for bail pending appeal take into consideration the following factors-

- (a) The character of the applicant
- (b) Whether the applicant is a first offender or not
- (c) Whether the offence for which the applicant was convicted involved violence
- (d) The appeal is not frivolous and has a reasonable possibility of success
- (e) The loss incurred by the complainant or the victim
- (f) The possibility of substantial delay in the determination of the appeal; or
- (g) Whether the applicant has complied with the bail conditions granted by the trial court before the conviction of the applicant.

Submissions

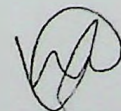
In the applicant's written submissions, he pointed this court to the principles that could guide court in making the decision whether or not to release the applicant on bail pending appeal as was set out in the case of *Ddegeya Hassan v Uganda Miscellaneous Application No. 16 of 2021* in which the case of *Arvind Patel v Uganda Supreme Court Criminal Appeal No. 1 of 2003* was cited. The principles which are as follows;

- a). The character of the applicant
- b). Whether or not the applicant is a first offender
- c). Whether the offence the applicant was convicted of involved personal violence
- d). The intended appeal isn't frivolous and has reasonable possibility of success
- e). The possibility of substantial delay in determination of appeal
- f). Whether the applicant has complied with bail conditions.

In addition to the above which are set out in both the case of *Ddegeya Hassan-vs- Uganda* and paragraph 19 of the Bail Guidelines, paragraph 19 (e) enjoins court to take into account the loss suffered by the complainant or victim.

He submitted that he meets the requirements as outlined above.

It was submitted that the offence with which the applicant was charged, to which he pleaded guilty involved occasioning bodily harm to the complainant and he was therefore guilty of a misdemeanor. However, considering the state of mind of the convict in question, he did not have the intention and the motive to commit the alleged offence. The applicant prays that he be released on bail or be committed to a mental hospital pending the determination of his appeal since there are exceptional circumstances to guarantee his release on bail pending determination of his appeal.



It was the argument of counsel that the applicant's appeal is not frivolous and has a reasonable possibility of success. That according to the sworn affidavit of the applicant in support of this application, the applicant suffers mental illness and that Butabika Hospital has a record of the same, the application the mental health there. That therefore, his conviction on the preferred charges was unlawful on the basis of his mental illness which points to the possibility of success of this appeal.

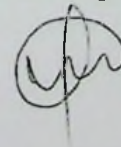
Counsel further submitted that the applicant has a fixed place of abode at Mutungo Zone 3, Mutungo Parish, Nakawa Division Kampala District within the jurisdiction of this court. She cited the case of **Abindi Ronald and another vs Uganda Criminal Misc Application No. 20 of 2016** where Justice Mubiru was of the view, " the applicant should not be denied bail pending appeal if he has a fixed place of abode and has sound sureties capable of guaranteeing that he will comply with the conditions of his or her bail."

Counsel also submitted that the applicant has substantial sureties who include Kawanguzi Robert and Kalule Frank Kawanguzim his father and brother respectively, who presented their LCI introduction letters and their original national IDs in court for inspection. She stated that all these circumstances are sufficient to diminish the risk of jumping bail by the applicant if this court was to exercise its discretion to grant bail.

For the respondent, it was argued that the applicant has no sufficient grounds to justify his release on bail pending appeal. Counsel for the respondent cited the case of **Arvind Patel v Uganda Supreme Court Criminal Appeal No. 1 of 2003**, ".....court stated that, this is a discretionary jurisdiction which should be exercised judiciously. That principles which govern the granting of bail pending the determination of an appeal by an appellant court should be the same whether it is in the High Court or in its appellant jurisdiction the Court of Appeal or the supreme court. She submitted that in the instant case the offence of grievous harm which the applicant was convicted of involved personal violence. The appeal is frivolous the applicant was convicted on his own plea of guilty and sentenced to serve (twenty) 20 months imprisonment, for an offence which carries a maximum sentence of seven (7) years. The respondent notes that during plea taking the applicant did not raise a defence of insanity, raising that defence now is an afterthought.

She further submitted that, in determining whether an accused person may abscond from its jurisdiction, the following factors should guide court; whether the applicant has a fixed place of abode within the jurisdiction of this court or is an ordinary resident outside Uganda, whether the applicant has sound sureties within the jurisdiction to undertake that the applicant shall comply with bail conditions of his or her bail, whether the applicant has on previous occasions been released on bail, failed to comply with the conditions of his, whether there are other charges pending against the applicant.

Counsel for the respondent further stated that the High Court is empowered to grant bail in exceptional circumstances even though the requirement of demonstrating exceptional circumstances is not mandatory, but where the applicant demonstrates the same, it would be viable to make his application viable. In the instant case the applicant has not demonstrated there are any exceptional circumstances. The onus of establishing any of the above factors to the satisfaction of court squarely lies on the applicant and the obligation is discharged by



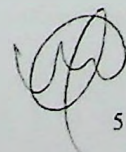
presenting credible evidence of high value as it was observed in the decision of **Aganyira Albert-vs Uganda Criminal Miscellaneous Application No. 71 of 2013**.

She further submitted that the applicant does not have a fixed place of abode. According to paragraph 1 of the affidavit, he deponed that he has fixed place of abode at Mutungo 3, Mutungo Parish, Nakawa Division, Kampala District. The applicant did not attach proof of residence such as the tenancy agreement, rent receipts, kibanja agreement, a land title, utility bill to confirm location among others. Therefore, the applicant has failed to discharge the obligation to prove that he has fixed place of abode.

Further more, counsel for respondent submitted that the applicant deponed in paragraphs 7 and 8 of his affidavit that he has substantial sureties. He attached documents, the introductory letter of Frank Kawanguzi as the 1st surety and the 2nd surety. Where both indicate that they are residents at Mutungo Zone 3, Mutungo Parish, Nakawa Division, Kampala District. The LCI letters do not provide the particulars of their fixed place of abode neither does it provide detailed particulars of the sureties such as their occupation, how long they have resided in the area, and their relationship the applicant. The letters were endorsed by the Chairperson and not at least by another member of the LC committee, as this was emphasized in the case of **Aganyira Albert-vs Uganda (supra)**, where Lady Justice Alvidza Jane Elizabeth observed that, " Local Council officials are usually among the most important and/or respected members of the community and their evidence of a fact should be treated as very credible. The evidence of a letter from the Local Council confirming the fact the applicant has a fixed place within this court's jurisdiction would be of higher evidential value if it had been endorsed by at least another member of the LC that includes, the vice chairperson, secretary, defence, finance, information among others. This would remove the danger of speculating that the Chairperson as an individual knows every human being who resides in his area on a day to day basis. Evidence of the exact location of residence of the applicant, how long he has resided in the area, whether he is a permanent resident or he is renting premises and the names of the landlord would have added value. "

Additionally, counsel for the respondent submitted that whether the applicant's sureties are substantial calls for documentary evidence of facts to prove the capacity of sureties to meet monetary obligations incase ordered to forfeit the bond and proof of surety particulars that can be easily verified to the satisfaction of court as this was the position in the case of **Aganyira Albert-vs Uganda (supra)**. The test is whether in case of breach of the bail agreement, the state has verified information that enables police to trace and arrest the sureties and bring them before court. Therefore, in order to prove that the sureties are substantial, the applicant ought to have produced documentary evidence to prove the capacity of his sureties to meet the monetary obligations in case ordered to forfeit the bond. The applicant should also have provided proof of the sureties' particulars that can be easily verified to the satisfaction of court. Therefore, she prayed that the applicant is denied bail pending determination of his Appeal and his application dismissed.

Having examined the applicable law on bail, I will now turn to the merits of the application. In so doing, I will adopt the order of argument used by the applicant's counsel in their submissions.



5

Determination

This court has the discretion to grant bail pending appeal which discretion it must exercise judiciously. In exercising its discretion, this court is enjoined to determine each case based on its circumstances. Section 40 (2) of the Criminal Procedure Act empowers the High Court to admit an appellant to bail pending the determination of his or her appeal. The main criteria for granting bail pending appeal is that the court must be satisfied that the appellant shall in compliance with bail conditions be available to attend the trial as was decided in the case of **Kyeyune Mitala vs Uganda Supreme Court Miscellaneous Application No.04 of 2017**. It was stated in that case that, in the applications of such a nature, the legal status of the applicant is amenable to the provisions of Article 28(3) of the Constitution of the Republic of Uganda as amended. That the presumption of innocence continues as long as someone decides to exercise the right of appeal. The presumption does not stop at the trial level. The presumption of innocence acts as a rail guard to the protection of personal liberty and the right to fair hearing, under the constitution as provided in **Kyeyune Mitala vs Uganda (supra)**.

The guiding principles in the determination of applications for bail pending appeal were laid down by the supreme court in the case of **Ddegeya Hassan v Uganda Miscellaneous Application No. 16 of 2021** which cited with approval the case of **Arvind Patel v Uganda Supreme Court Miscellaneous Application No. 01 of 2003** and **David Jamwa v Uganda Supreme Court Miscellaneous Application No.9 of 2018**;

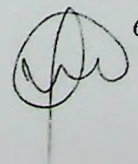
- i). The character of the applicant
- ii). Whether the applicant is a first offender or not
- iii). Whether the offence with which the applicant was convicted involved personal violence
- iv). The appeal is not frivolous and has a reasonable possibility of success
- v). The possibility of substantial delay in the determination of the appeal
- vi). Whether the applicant has complied with bail conditions granted before the applicant's conviction and during the pendency of the appeal if any.

The above principles also enumerated by paragraph 19 of The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions NO. 8 of 2022 which on top of the six (6) matters set out above, also in paragraph 19 (e) enjoins the court to consider the loss incurred by the complainant or victim.

It is important to note however that, the applicant does not need to prove all the above grounds. Proof of two or more is sufficient to warrant the grant of the application. It must be noted however, that the application for bail pending appeal must be subjected to strict conditions than one pending trial as was emphasized in **Arvind Patel v Uganda (supra)**. I will now address each of the principles set out in the case of **Ddegeya Hassan**.

(i) Character of the applicant

Regarding the character of the applicant, it was the submission of the applicant that he has a fixed place of abode at Mutungo Zone 3, Mutungo Parish, Nakawa Division, Kampala District. Counsel further described the applicant as a law binding citizen as an element to show that



6

the applicant is of good character. The assertion that the applicant is a law abiding citizen is belied by the silence of LCI introduction letter regarding his character. The LCI Chairperson only says that he is a resident of his area of jurisdiction and that he lives with his father. He does not state whether he is of good character or law abiding.

ii) whether the applicant is a first offender or not

There is no information to indicate that the applicant is not a first offender. Therefore, this court will consider that he is a first offender.

iii) Whether the offence with which the applicant was convicted involved personal violence

The charge sheet indicates that the applicant was charged with unlawfully doing grievous harm contrary to section 219 of the Penal Code Act. This is an offence involving personal violence.

iv). The appeal is not frivolous and has a reasonable possibility of success

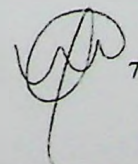
The determination of whether or not the appeal is frivolous and has a reasonable possibility of success can be arrived at by perusing the record of proceedings, the judgment of the court from which the appeal emanates and the memorandum of appeal (collectively referred to as records) in question as was stated in the case of *Arvind Patel v Uganda (supra)*. On perusal of the records, the applicant avers as the ground of his appeal that he is of unsound mind and that he did not understand what was being said in court. Accordingly, this court wrote to Butab 2nd February 2024 to Butabika Hospital, where it is alleged that the applicant is a patient, requesting Butabika Hospital to share the medical records of the accused to aid the court in arriving at the determination of whether or not as by the applicant, applicant is of unsound mind. On 6th February 2024, Dr. H. Birabwa- Oketcho, responded informing court that, their records reveal that a one Kawanguzi David first attended Butabika Hospital as an outpatient on 20/06/08, 12/8/08, 23/09/08 and lastly 22/10/08. The appeal was premised on the mental illness of the applicant, however as stated by Butabika Hospital, the applicant last attended Butabika Hospital almost 16 years ago in 2008. The facts giving rise to the complaint against the applicant arose in 2023, more than fifteen (15) years after he last attended the Butabika Hospital in 2008. It is my considered opinion, that the applicant was cured of any mental illness he may have suffered that necessitated his attendance at Butabika Hospital. In addition, it was submitted by the prison authorities that the applicant has responsibilities at the reception at Luzira prison and that he does not exhibit any unusual conduct to support the assertion of mental illness.

v) The possibility of substantial delay in the determination of the appeal

There is no prospect of substantial delay in the determination of this appeal as its hearing has already been fixed for Monday 26th February 2024.

vi) Whether the applicant has complied with bail conditions granted before the applicant's conviction and during the pendency of the appeal if any.

There is no indication that there is any occasion when having been released on bail, the applicant complied with or did not comply with his bail conditions. Accordingly this court considers that he has never jumped bail.



vii) the loss incurred by the complainant or the victim.

From the record there is evidence that the complainant spent Ugx. 1,500,000 (one million five hundred thousand shillings only) in medical expenses of which the applicant reimbursed Ugx. 700,000 (seven hundred thousand shillings only), leaving a balance of Ugx. 800,000 (eight hundred thousand shillings only).

In the case of **David Chandi Jamwa v Uganda** (supra) Lady Justice Stella Arach Amoko observed that before granting an applicant bail pending appeal, the court must be satisfied that the applicant will comply with the bail conditions and be available to attend trial or the appeal. It is therefore incumbent upon the applicant to satisfy court that the application warrants the grant of bail pending appeal and that if granted bail, the applicant will not abscond.

Accordingly, this court will now consider the other relevant considerations for grant of bail; whether the applicant has a fixed place of abode and substantial sureties.

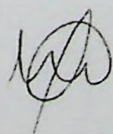
1. Fixed Place of Abode

Regarding whether or not the applicant has a fixed place of abode, the applicant submitted and LCI introduction letter endorsed by the LCI Chairperson of Mutungo LCI Zone 3, Mutungo Parish, Nakawa Division, Kampala dated 20th December 2023 attached to the application. In that letter, LC1 Chairperson states that the applicant is a resident of his area of jurisdiction and that before he was convicted and sentenced, he was living with his father. In my view, that is sufficient proof of place of abode as the father of the applicant who is one of his sureties informed this court that he lived with his son and he attached a land sale agreement in respect of his kibanja and as well as the LCI introduction letter signed by the Chairperson proving his permanent residence. Further, In the case of **Kayongo Bashir-vs-Uganda Miscellaneous Application NO. 158 of 2019** Lady Justice Flavia Senoga Anglin held that, the contention that the Applicant has no fixed place of abode is belied by the letter of introduction from the LC and his national ID". Moreover, paragraph 12 (b) of The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions NO. 8 of 2022 provides that an application for bail shall contain the particulars of the applicant accompanied by an introduction letter from the local council I Chairperson of the area where the applicant resides. I therefore find that the applicant has satisfied the requirement to prove his place of abode.

2. Substantiality of Sureties

The applicant presented two (2) sureties who, according to his counsel have been explained to and understood their respective roles as sureties. The two sureties include;

a). kawanguzi Robert aged 54 years Ugandan, the father of the accused person and he is self employed. He is a permanent resident of Mutungo Zone 3, Mutungo Parish, Nakawa Division, Kampala District. He furnished court with a copy of his land sale agreement in respect of his kibanja and he told court that the original is with UNRA because a road is going to pass by his land and therefore UNRA took it in order to process the necessary compensation. He further presented his original national ID to court for inspection together with his LCI introduction letter stamped and sign by the LCI Chairperson Mutungo zone 3.

 8

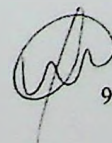
b). Kalule Frank Kawanguzi aged 26 years Ugandan, a brother to the applicant and he is self employed. He is a resident of Mutungo Zone 3, Mutungo Parish, Nakawa Division, Kampala District. He presented the original of his national ID for Court's inspection together with the original of the LCI introduction letter. He rents and a receipt of rent payment from where he lives was furnished for Courts inspection.

Counsel for the respondent argued that the sureties are not substantial because no evidence has been adduced of their ability to forfeit the bond in the event that the applicant absconds. She cited the case of **Aganyira Albert –vs- Uganda Criminal Miscellaneous Application NO. 71 of 2013**, where it was observed that proving that an Applicant's sureties are substantial calls for documentary evidence of facts to prove the capacity of the sureties to meet monetary obligations in case ordered to forfeit the bond and proof of surety particulars that can be easily verified to the satisfaction of court.

It is my considered view that, the role of a surety goes beyond the ability to forfeit the bond, bail is not designed as an income generating avenue for courts to which bail applications are made. What is pertinent about sureties is that there must be indication that they have been advised of their roles as sureties, they identified themselves properly and have shown and proved their authoritative relationships in respect to the applicant showing that they are able to exercise their authority and command appearance of the applicant in court when needed. Counsel for the applicant informed court that the sureties had been informed of their duties in respect of bail, which duties they understood well and committed to executing. In **Angura Paul Francis & Others-vs-Uganda Miscellaneous Application NO.0031 of 2022-** Justice Dr. Henry Peter Adonyo held that; "... the sureties presented by each of the Applicants are each considered substantial given the fact that they are all residents of the same village of Akanyuko Village where each of the Applicants come from and are indeed close to the Applicant as blood relatives, which fact implies that each of them have a measure of authority over the applicants and thus should be able to supervise the applicants to ensure that each of them does not abscond from their trial." Accordingly, the declared blood ties between the applicant and the 1st surety who is the father of the applicant and the 2nd surety who is the elder brother of the applicants augments their substantiality. Accordingly, I find the sureties substantial.

Although it was stated in the case of **Arvind Patel v Uganda (supra)**, that an applicant need not prove all the grounds for release on bail pending appeal and that proof of one or two are sufficient and the applicant has met the requirement to prove that he has a fixed place of abode and has substantial sureties, I will exercise my discretion not to grant bail pending appeal on the following grounds;

- (a) The crime of which the appellant was convicted is one that involved violence
- (b) The appeal has no reasonable ground of success on the basis of unsoundness of mind, owing to the fact that Butabika Hospital informs this Honourable Court that the applicant last sought medical attention at that facility in 2008. It is my view that, the fact that the applicant last attended Butabika Hospital in October 2008 points to the fact that any

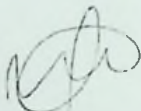


9

mental illness the applicant could have been suffering from in the past was cured therefore requiring no further visits at Butabika Hospital.

- (c) Accordingly, the claim of unsoundness of mind cannot be substantiated. Moreover, the prisons authorities informed court that the applicant does not exhibit any unusual mannerisms and the applicant was assigned responsibilities at the prison reception.
- (d) There will not be substantial delay in hearing the appeal as this court is ready to hear the applicant's appeal, without delay.

Therefore, I reject this bail application pending appeal and order that the hearing of the appeal be fixed for 26th February 2024.



Rosette Comfort Kania

Judge

19th February 2024