

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
MISCELLANEOUS CRIMINAL APPLICATION NO. 05 OF 2015
(ARISING FROM CRIMINAL APPEAL NO. 08 OF 2007 AND NO. 08 OF
2015 SUPREME COURT)

Alenyo Marks (A3)..... Applicant

Versus

Uganda.....Respondent

Before Hon. Lady Justice Faith Mwendha, JSC

Ruling *(SC 111)*

This application was brought by Notice of Motion under section 40 (2) of the Criminal Procedure Code Act Cap 116; Rule 42 (1) & (2) of the Judicature (Supreme Court Rules) Practice Directions.

The applicant, 46 years old currently a convicted prisoner is seeking the following orders:-

- a) To be granted bail pending the hearing and the determination of the appeals
- b) Consequential direction to regulate bail

The grounds supporting this application are contained in the affidavit attached to the Notice of Motion but among others briefly stated as follows:-

- i) That he has a constitutional and legal right to apply for bail pending the hearing and determination of the appeals before this Court.

- ii) That he was convicted and sentenced to death on the 2nd of September 2013 and was resented to 20 years imprisonment on 25th October 2010 by the High court at Jinja (after mitigation of sentence). That on appeal to the Court of Appeal the sentence was enhanced to 27 years imprisonment on the 15th January 2015.
- iii) That being dissatisfied with that sentence he appealed to the Supreme Court on both conviction and sentence in Appeal N0. 8 of 2015
- iv) That the appeals were fixed for hearing the 4th time on 26th May 2015 but the proceedings were stayed by this court.
- v) That he has already served a substantial part of the unconstitutional and illegal enhanced sentence of 27 years imprisonment starting from 2nd September 2003 which totaled to one and half decades spent in prison.
- vi) That he is a victim of a severe chronic illness condition and has no sufficient treatment and care in prison.
- vii) That he is a first offender without previous regard or bad character
- viii) That he has never been granted bail and failed to comply with the conditions.
- ix) That it is in the interest of justice that this court exercises it's the powers and discretion to grant bail pending appeal.
- x) That the applicant has sound and substantial sureties
- xi) That there is a possibility of substantial delay in hearing of the appeal.

The respondent filed an affidavit in reply deposed by one Irene Nakimbugwe a senior state Attorney of the Directorate of Criminal Prosecutions, Kampala. She stated as follows:-

- i) That there is no possibility of substantial delay in the hearing and determination of the appeals as the same have already been fixed for hearing on the 14th March 2016.
- ii) That the probability of success of the appeal is minimal.
- iii) That his ailment is not an exceptional circumstance as it can be managed in prison because it is not so grave.
- iv) That the offence of murder of which the applicant was convicted involved personal violence.
- v) That the appellant has failed to prove to court that he has substantial sureties.

Background

The brief background of this application is that the applicant filed appeals in Court of appeal and two appeals which would have been consolidated to make it one appeal since they were on the same subject. They were Criminal appeals N0.8 of 2007 to the Court of Appeal filed in 2003 and N0.8 of 2015.

On 15th March 2007 the appeal was heard by the Court of Appeal and the same was dismissed, the conviction and death sentence were upheld. He was A3 and he appealed to the Supreme Court vide Criminal Appeal N0. 8 of 2007. The appeal was not heard by the Supreme Court because of the Susan Kigula case decision in 2009. The decision among other things directed that all matters pending before it and those in court of Appeal be sent back to the High Court for mitigation for purposes of fair hearing.

The file was sent back for mitigation and the High Court after mitigation reduced the sentence to 20 years instead of death and the conviction obviously remained. This was on 25th October 2010.

He again appealed to Court of Appel against conviction and sentence of 20 years vide Appeal N0. 75 of 2012. The appeal was disposed of on 15th January 2015 wherein he lost the appeal when the conviction and sentence were upheld and in fact sentence was enhanced to 27 years.

He again appealed to the Supreme Court against both conviction and sentence vide Criminal Appeal N0. 8 of 2015. The appeal was fixed for hearing in the Supreme Court on 26th May 2015. The hearing did not take off because of the application A2, co-accused with A3, made for stay of the hearing until his appeal in the Court of Appeal was heard and or disposed of. The Court allowed A2's application and the hearing was stayed pending completion of A2's appeal in the Court of Appeal (see Ruling of the Supreme Court on record) indefinitely A2 had only appealed against sentence in the court of Appeal.

The Supreme Court before making the order of stay of proceedings had observed that A3's papers (Applicant) were in order and his appeal against both conviction and sentence could have been heard and determined as anticipated. A1 requested court to proceed to hear the appeal against conviction though he had not appealed to the Supreme Court. The justices urged the Court of Appeal to expedite the hearing of A2's appeal on sentence so that the appeals against conviction and sentence could be heard as soon as possible.

Representation

The applicant Alenyo Marks was present unrepresented. He said that he had been let down by both private and state brief lawyers in that there had been no effective representation. He said he decided to exercise his right under Article 28 (3) (d) of the constitution. This court allowed him to proceed with this application.

The respondent was represented by Sharifah Nalwanga, senior State Attorney.

The applicant filed written submissions and he substantiated on them.

He stated that the likelihood of substantial delay was prominent and the same has already occurred from the time this Court stayed the hearing of his appeals until A2s appeal against sentence in the Court of Appeal is disposed of and that it will be after that that the appeals of A2 and A3 will be heard together as they were on the same subject. That it is now 9 years which had lapsed since the filing of his appeals. That the fixing of the appeal on 14th March 2016 is a fifth time of fixing. That his co-appellant A2 seems not to have interest in the appeal. That the DPP does not seem to be ready since he was ordered to file the reply to his written submissions by the 28th January 2016 and the applicant was supposed to file his rejoinder but to date they had not filed and consequently he has not filed his rejoinder. And Court had ordered that the rejoinder is filed by 9th February 2016. With the above, it was likely that the matter will not take off.

He stated that the appeal has high chances of success since the entire trial was a nullity.

He told court that he suffers from chronic ailments and the medical reports were attached on the written submissions. The offence he committed was a duty offence and the duty was executed on people who were armed and were armed robbers. That this cannot be construed to be an offence involving personal violence since it was committed in self-confidence.

He said that he perused the affidavit in opposition to the application for bail he affirmed he had substantial sureties of which he had given particulars as per the record. They were willing to comply with the bail conditions imposed by court.

Sharifah in reply objected to the application and relied on the affidavit in reply which was deposed by Irene Nakimbugwe.

She submitted that for 9 years the appeal was not in Supreme Court and the delays were because of certain procedures not followed by the applicant when he appealed to Supreme Court, so the appeals could not be entertained.

That to conclude that the same thing will happen on 14th March 2016 is a speculation.

She stated further that the chances of success of the appeal is minimal since it is only premised on enhancement of the sentence. She further submitted that the ailment the applicant was suffering from could be managed in prison as it not so grave. The evidence of ailment is embodied in old medical reports and this can't be ably relied on. She argued that the applicant being a police officer he exerted his force on the victims and murdered them. That therefore the offence involved personal violence of which he can't be released on bail pending appeal.

She stated that he failed to produce substantial sureties since none of them produced a certificate of title for land they have or sale agreements. That surety N0. 2 didn't produce the ID of the school he teaches in and Surety 1 failed to prove that he had a permanent place of abode. Surety N0. 3 since Kiwanga in Mukono was a very wide area.

She however stated that in the event that the court was inclined to grant bail stringent conditions should be imposed.

The applicant in reply said that surety 2 has the official ID from the school and is willing to bring it to court. Surety 3 has an agreement in respect of Bibanja holders at Kiwanga and a certificate of title in respect of Surety 1. That they will produce them if those are the conditions that are set by the court.

Consideration of the application'

Section 40 (2) of the Criminal Procedure Code Act provides, "the appellate court may if it sees fit admit an appellant to bail pending hearing and determination of the appeal." Rule 6(2) provides, "subject to sub rule (1) of the Judicature (Supreme Court) Rules the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may

- a) in any criminal proceedings, where notice of appeal has been given in accordance with 56 and 57 of these rules order that the appellant be released on bail.
- b) section 132(4) of the Trial on Indictment Act (Cap 23) provides "except in cases where the appellant has been sentenced to death a judge of the High Court or Court of Appeal may in his or her discretion in a case in which an appeal to the court of appeal is lodged under this section grant bail pending hearing and determination of the appeal."

The celebrated authority on this subject of bail pending hearing and determination of the appeal is Arvind Patel v. Uganda Supreme Court Criminal Application N0. 1 of 2003. That case relying on a number of cases like;

- (1) Akbarali Juma Kanji (1946) 22 KR 17
- (2) Mirali v. Republic [1972] EA 47
- (3) Chimambhi v Republic N0. 2 [1971] EA 343

The applicant cited the Arvind Patel case in the written submissions.

The cases referred to above were cited in the Arvind Patel case. They all agree that the considerations that may be taken into account while considering bail pending hearing and determination of the appeal are as follows though I hasten to add that these are not exhaustive.

- 1) The appellant is a first offender
- 2) The appeal had been admitted to hearing
- 3) That a delay is expected between six to eight weeks before the appeal is heard (Akbarali Juma Kanji case [1946]22 (1) KLR 17 or delay to take between twelve and twenty four weeks before the appeal was heard (Chimambhai case cited supra) summarized as substantial delay
- 4) The offence of which the applicant had been convicted unlike the offence of Kanji (Supra) was not one involving personal violence
- 5) The appeal is not frivolous and has a reasonable chance of success
- 6) Whether the applicant has complied with bail conditions granted after the applicants conviction and the pendency of appeal

In the case of Chimambhai (supra) Haris J concluded **"the principle damage against which the court must guard in granting of bail pending appeal is of course that the appellant may in the meantime either abscond or commit further offences while unlike in the case of getting bail before trial there is usually no damage of his destroying evidence or interfering with witnesses. In regard to the possibility of his absconding a material consideration is the length of the term of imprisonment against which the appellant is appealing for clearly the longer the term the more likely he is likely to abscond and possibly to leave the country.....nevertheless it seems to me that this may be more of a question of conditions to be imposed rather than one of his granting bail itself..."**

Oder JSC in the case of Arvind Patel (supra) pointed out that, **"It is not necessary that all conditions should be present in every case. A consideration of two or more criteria (may be sufficient. Each case must be considered on its own facts and circumstances".**

The applicant told court that he was first incarcerated on the 15th December 2000 and the matter was completed in 2003. When he was convicted and sentenced to death in the High Court at Jinja. In 2007 the appeal against conviction and sentence was filed in this court by the applicant and in 2010 during mitigation of sentence was reduced to 20 years imprisonment. He appealed against the sentence of imprisonment of 20 years and the Court of Appeal enhanced it to 27 years. He appealed against the sentence of 27 years in the Supreme Court. The appeal was fixed to be heard on 26th May 2015.

The Supreme Court stayed the proceedings indefinitely until the co-accused NO. 2s appeal against sentence was disposed of by the Court of Appeal. This was in Ruling of the 26th May 2015 in Criminal Appeal 08 of 2007.

Those hard facts above cannot be over looked by this court. I am of a well-considered view that the possibility of further substantial delay is eminent. The applicant said that the substantial delay has already occurred and I accept that statement without reservation. The DPP who was directed to file written submissions on particular dates in January has not filed and the respondents counsel Senior State Attorney Sharifah did not say anything about it. It is not surprising that the DPP is far from ensuring that the applicants appeal takes off despite the fact that in the affidavit in reply it was stated that "there was no possibility of substantial delay in determination of the appeals. Having been fixed to be heard on 14th March 2016 is not a guarantee that it will be heard. This was not the first fixture, the applicant had already stated that the fixture on the 14 March 2016 is the 5th fixture. Equally on the 26th May 2015, it was fixed but what came out speaks for itself.

The right to bail arises from the presumption of innocence which continues in my view as long as someone decides to exercise his right of appeal. That is why higher

courts of Appeal are provided in the Supreme Law of this land as embodied in the constitution. Until the dissatisfied party exhausts those rights in the highest court of the land in this country. As long as the appeal lies the presumption of innocence exists. This is so because courts can make errors because they are manned by human beings. He or she cannot be denied the benefit of doubt to determine whether he did the act or he did not. Having said that, Article 28 (1) is instructive. It provides, **"In determination of civil rights and obligations or any criminal charge a person shall be entitle to fair speedy and public hearing before an independent and impartial court or tribunal established by law"**. From the above it is clear that the substantial delay had already occurred and it continues to occur and obviously this infringes that provision and fair hearing is already in jeopardy.

In addition, it cannot be true that the reason why the appeals could not be heard on the 26th May 2015 was due to the applicants/appellants failure to comply with the procedures as counsel for the respondent argued. The reason the Justices of the Supreme Court gave for staying hearing of the appeal were clearly stated in their Ruling. The applicant/appellant had no role at all in it since he was neither the Court of Appeal nor A 2 at the same time when he was A3 so there was no way he could have influenced the Court of Appeal to dispose of A2s appeal expeditiously to facilitate the hearing of his appeal. (But even if that was the case, it has been stated over and over again by this court that rules of procedure are handmaidens of justice and are not meant to defeat it. Article 126 (2) (e) of the Constitution is very instructive, it provides, **"Substantive justice shall be administered without undue regard to technicalities."** The argument here is that if there were any procedural errors the applicant was guilty of i.e. failure to comply with, which is not the case, in this case, the fact that A2 had only appealed against sentence in the

Court of Appeal, the appeal could have been disposed of in the Supreme Court as the same was by both A2 and A3. A1 much as he had not appealed had said that the court goes ahead and hear the same. A2 and A3 were appealing against both conviction and sentence and so the same could have been disposed of instead of delaying the disposal further in my view and staying the proceedings in Criminal Appeal N0.5 of 2015 was nothing but merely sacrificing justice at the altar of technicalities to say the least.

I find no logic in the respondent's counsel's submission also to the effect that the appeal in the Supreme Court had not been there for long implying that there was no delay. I cannot accept this blatant misdirection on part of the respondents counsel. The fact of the matter is that for almost 15 years, the applicant appeal has been on the shelves of the various courts which took their time to dispose of the applicants/Appellants appeal. This is an injustice which boarder's cruelty and torture and are apparent infringements of the applicant's rights as provided in the 1995 Constitution as amended. As I said herein above, it infringed Article 28 (1) of the Constitution.

On the consideration above alone, I would have granted the application and the orders sought. But there are other considerations that have to be taken into account on record. The fact that the applicant is a first offender a fact which was not disputed by the respondent. His character before and after the commission of the alleged offence, his good conduct in prison as per the attached prison report. He has never attempted to escape for almost fifteen years he has been in prison. He is only 46 years of age which means he has spent a substantial part of his youthful age in prison. He has children who have been deprived of his parental fatherly care, wisdom and direction. He told court that the murder he allegedly committed did not involve personal violence as it was a duty offence where he was acting in

self-defense, the victims were armed robbers. I will not go deep into it as there is nothing on record to prove it but it is something worth mentioning and give it thought.

As for the possibility of success it is difficult to tell since there is no record of appeal or memorandum of appeal on record. But maybe the record of appeal is not very crucial at this point. But definitely the appeal is not frivolous since the Supreme Court justices before staying the proceedings on 26th May 2016 had found it to be proper for hearing and all documents had been filed.

The considerations as stated above namely substantial delay. Good character coupled with having a family the appeal not being frivolous are strengthened by the fact that he produced substantial sureties to the satisfaction of the court to ensure his presence in court as and when required to do so. I would grant this application and release the applicant on bail pending hearing and determination of the appeals on the following conditions

- i) Deposit cash bail of Shs 3,000,000/=
- ii) The first surety to deposit a certified copy of the certificate of title of his permanent place of abode and surety 3 to deposit a certified copy of the sale agreement of his permanent place of abode to the Registrar Supreme Court while surety 2 has to deposit the official identity card of the school in which he teaches.
- iii) The three sureties by the names of : Surety 1- Acoti Sam; Surety 2- Osogo Moses Ogwal; Surety 3- Ocheng Julius Peter are bound in bail bond of Shs 5 Million **Not** cash each
- iv) The applicant should be reporting to the Registrar every fortnight at 9:00am beginning from 2nd March 2016 until the appeal finally takes off or until further orders of this court

It is so ordered.

JS

Dated at Kampala this 17th day of February 2016.

Faith E. K. Mwendha

Faith .E. K. Mwendha,

Justice of Supreme Court