

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
MISCELLANEOUS CRIMINAL APPLICATION NO. 02 2016
(Arising from Supreme Court Criminal Appeal No. 20 of
2014)**

AND

**(Arising from Court of Appeal Criminal Appeal No. 173 of
2012)**

AND

**(Arising from High Court Criminal Session Case No. 28 of
2012 and Criminal Session Case No. 16 of 2009).**

KATO KAJUBI GODFREY ::

APPLICANT

VERSUS

UGANDA ::

RESPONDENT

BEFORE: HON. JUSTICE PAUL. K MUGAMBA, JSC

RULING

This is a ruling on an application for bail pending appeal.

An amended notice of motion was filed which is what I shall rely on. The application was brought by notice of motion under Article 23(6) of the Constitution, section 40(2) of the Criminal Procedure Code Act, Rules 6(2), 42 (1) and (2), 56 and 57 of the Judicature

(Supreme Court Rules) Practice Directions as well as section 132(4) of the Trial on Indictments Act.

This application is supported by an affidavit sworn by the applicant.

The grounds supporting this application are set out in the notice of motion. They read as follows:-

- (i) That it is the applicant/appellant's fundamental right to apply for bail pending the hearing and determination of the appeal, under the Constitution of Uganda 1995, as amended.*
- (ii) That on the 30th day of October 2008, the applicant/appellant as soon as he received information that he was wanted at the CIID headquarters, he did declare himself to the Police, got arrested, charged, tried and acquitted on or around the year 2010 for murder C/S 188 and 189 of the PCA, Cap 120.*
- (iii) That on the 19th day of December 2011, while in transit to work, he was re-arrested by Kajjansi Police Station for the very offence of murder C/S 188 and 189 of the PCA, Cap 120, for which he was acquitted by the then Hon. Justice Moses Mukiibi following an appeal made by the prosecution (DPP) to court of Appeal which ordered for a re-arrest and re-trial.*
- (iv) That on the 26th day of July 2012, the applicant/ appellant was convicted and sentenced to serve a prison term sentence of life in prison.*

- (v) *That the applicant/appellant being dissatisfied by both the conviction and sentence given by the honourable High court of Uganda Holden at Masaka, he appealed to Court of Appeal on the 6th day of August 2012, the conviction and sentence were upheld by the same court under Criminal Appeal No. 173 of 2012.*
- (vi) *That sometime back in or around the month of June 2014, the applicant/appellant filed an appeal in the Supreme Court of Uganda in which he was contesting his conviction and sentence upheld by the 3 Justices of Court of Appeal, but he has never been considered for a supreme court session case to hear the appeal and he is not sure when he will be cause listed for hearing.*
- (vii) *That the applicant has since applied to the Court of Appeal for his record of proceedings so as to pursue his appeal at the Supreme Court but to date the Court of appeal has not released the record of proceedings.*
- (viii) *That on the 10th day of October 2017, the Registrar of the Supreme Court intervened and expressly wrote to the Court of Appeal to release the record of proceedings to aid the appeal process but there is still no success.*
- (ix) *That the applicant/appellant before his re-arrest and re-trial, he already had a chronic illness condition and he has also started developing prison related diseases that have no sufficient treatment and care while serving a prison term sentence of life imprisonment.*

- (x) *That the applicant/appellant is a law abiding citizen with no previous criminal records and there are no other pending charges against him.*
- (xi) *That the applicant's overall conduct in prison has been exemplary and positive.*
- (xii) *That it is in the best interest of Justice that the honourable Supreme Court exercises its powers and discretion to grant bail pending appeal hearing and determination of the appeal.*
- (xiii) *That the applicant/appellant has never absconded bail terms and conditions imposed upon him by any lawful court.*
- (xiv) *That the applicant/appellant has a permanent place of abode at KANSANGA Village, MASAANA ZONE, MAKINDYE DIVISION in Kampala District on Block 751 Plot 254 Kibuga Kampala and also a permanent house at MASAKA Village on Block 405, Plot 211, Masaka District within the Jurisdiction of this honourable court.*
- (xv) *That the applicant/appellant is married to 2 wives and has 25 children, inclusive 10 (ten) of his late TWIN Brother Wasswa Robert whose livelihood and dependency is on him.*
- (xvi) *That the applicant/appellant contributes partly to the economy of Uganda through revenue collection as taxes from his business of the British American Tobacco, under his company City Tobacco Stores, P. O. Box 21458*

Kampala, William Street, Plot 46, to a tune of UGX 120,000,000/= (One hundred and twenty million shillings) annually.

(xvii) THAT the applicant/appellant since the 19th day of December 2011, when he was re-arrested, re-tried, convicted and sentenced to date, the Government has lost revenue as tax collection from his Business to a total tune of UGX 500,000,000/= (Five hundred million shillings).

(xviii) That the applicant/appellant shall not interfere with the appeal process in the Supreme Court once released on bail pending the hearing and determination of his appeal.

The affidavit in support expounds on these grounds.

The application was opposed by the respondent. The respondent relied on an affidavit deposed by Ms Nabasitu Daisy, a Principal State Attorney in the Directorate of Public Prosecutions, wherein the following words appear:

- ' 1. That I am a female adult Ugandan of sound mind and a Principal State Attorney with the Directorate of Public Prosecutions.*
- 2. I have had occasion to peruse the notice of motion filed by the applicant and the accompanying affidavit and object as hereunder;*
- 3. That the appeal has no likelihood of success.*
- 4. That the appeal has no likelihood of substantial delay.*
- 5. That the matter involved physical violence.*

6. *That the position of the applicant changed, his conviction having been confirmed at court of appeal, hence the high likelihood of absconding.*
7. *I swear all the above knowing it to be true and in objection to the applicant being admitted to bail.'*

The applicant deponed an affidavit in rejoinder which partly reads as follows:-

- '
1.
 2. *That I am advised by my Legal counsel that the contents of the affidavit in reply dated 22nd March 2018 is riddled with falsehoods and contradictions and we shall accordingly pray the same is disregarded by this Honourable court.*
 3. *That in response to paragraph 3 and 4, my counsel advises the same is a blatant falsehood and largely unsubstantiated.*
 4. *That no reasons have advanced by the Respondent's regarding the likelihood of non-success of my appeal before Court as I still maintain that my appeal has high chances of success as I never committed the said offence.*
 5. *That the evidence evaluation at the lower Courts was lopsided and the truth shall finally be crystal for this Honourable appellate Court to see.*
 6. *That similarly the contents of paragraph 5 shows that the state is intentionally hiding information from Court*

- as the record of proceedings in the lower court show that there was no participation on my part in the offence.*
- 7. That my co-accused persons who actually participated in the heinous crime were left to walk scot free, whilst I was falsely accused.*
 - 8. That from the contents of the said paragraph, it is clear for court to see that the averments of the Respondent is dress rehearsed and a pure concoction jeered at diverting this Courts attention from the real issues and truth.*
 - 9. That in response to paragraph 6, I am still advised by my counsel that the averment is routine in form and unsubstantiated.*
 - 10. That from the onset;*
 - (i) I will cooperate with all authorities regarding the said charge in both the High Court and Court of appeal and never did I attempt to run.*
 - (ii) I have a lot of socio-economic ties to this Country including my business livelihood, my family and all my properties and would not develop imagined enthusiasm to abscond.*
 - (iii) That I am willing to abide by any conditions the Court shall direct to keep within the jurisdiction of Court.*
 - 11. That in the premises I pray that I be released on bail pending my appeal so that I can be with my family in the twilight of my life as my years are advancing.*

12. That I swear this affidavit in rejoinder in further support of my application.'

When this matter came up for hearing the applicant's counsel was Mr. Joel Olweny. The respondent on the other hand was represented by Ms. Sharifa Nalwanga. The applicant was present in court.

Both parties relied on the pleadings/submissions already on record and did not find it necessary to make oral submissions.

Before I deal with this application, I must emphasize that bail and particularly bail pending appeal is granted at the discretion of court. There is no automatic right to bail. The right cited in 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. Needless to say this discretion must be exercised judiciously and each case must be determined on its own merits.

The circumstances in bail pending appeal present a peculiar scenario. The applicant is no longer wholly shielded by the presumption of innocence under Article 28 of the Constitution. The applicant is a convict with a right of appeal. At this stage, it is often advanced by those opposing the application that the applicant has an added incentive to jump bail.

Certainly I am mindful that this Court has in countless applications upheld the principle that the Constitutional

presumption of innocence embedded in Article 28(3) is not entirely extinguished by a conviction from the lower courts till all the appellate levels have been exhausted. I believe in that and my conviction is unalloyed.

The conditions upon which Court grants bail pending Appeal have been laid down in a number of cases. In **Arvind Patel Vs Uganda, Supreme Court Criminal Appeal No. 001 of 2003**, they were summarised as follows:-

1. The character of the applicant.
2. Whether he/she is a first offender or not.
3. Whether the offence with which the applicant was convicted involved personal violence.
4. The appeal is not frivolous and has a reasonable possibility of success.
5. The possibility of substantial delay in the determination of the appeal.
6. Whether the applicant has complied with bail conditions granted before the applicant's conviction and during the pendency of the appeal if any.

Courts have found that the main purpose of granting bail pending appeal is that the court must be satisfied that the applicant or applicants as the case may be will comply with bail conditions and be available to attend trial or the appeal. For the above reasons, the applicant in this case has to satisfy Court that he deserves to

be granted bail pending appeal and that if bail is granted there is no risk of him absconding. Justification either way has to be found in the pleadings, notably the grounds stated in the notice of motion and supporting affidavits.

In the instant case the applicant stated in his affidavit that he was a law abiding citizen with no previous criminal record and that there are no other charges pending against him. He further stated that his overall conduct in prison has been exemplary and positive. A letter on record from the Officer in charge Uganda Government Prisons Upper reflects that the applicant has reformed and has been rehabilitated. The state did not contest the applicant's stated character. Going by what we have on record, I find no ground to gainsay the appellant's character in prison as presented.

The application apprehends substantial delay in the determination of the Appeal. I note that the appeal before this court was filed around the month of June 2014. I note also that the applicant in his affidavit stated that he has since applied to the Court of Appeal for his record of proceedings so as to pursue his appeal at the Supreme Court but that the Court of Appeal had not been forthcoming.

The applicant avers also that on 10th October 2017 the Registrar of the Supreme Court intervened and expressly wrote to the Court

of Appeal to have the record of proceedings released in order to aid the appeal process but that this too was to no avail.

The record shows that the applicant first applied for bail on 11th April 2016 but the application failed because his appeal was slated to be heard in May 2016. However in May 2016 the appeal was not heard because the applicant's record was incomplete. Admittedly such a long delay is regrettable. As to whether such delay warrants grant of the application, the circumstances of the case must be considered in their entirety. Needless to say before any bail is granted the cardinal consideration is whether the applicant will answer the terms on which bail is granted, particularly by availing himself or herself to court whenever required to do so. It is with this background that matters canvassed in **Arvind Patel v Uganda (Supra)** are best recalled.

The offence with which the applicant was convicted involved personal violence.

The conviction was upheld by the Court of Appeal and in effect the applicant is a convict serving his sentence. Consideration of him not being presumed guilty was eclipsed by the conviction, the reason why he applied for bail pending appeal. The risk exists that once admitted to bail the severity of the sentence could trigger the urge for him to abscond. I am not persuaded that the appeal will not be heard in the near future. Indeed the Registry should at the earliest opportunity fix the applicant's appeal for hearing.

Given the gravity of the conviction and the attendant sentence and taking into account other grounds of this application, I find no compelling reason to grant this application. It is accordingly dismissed.

Dated this19th day ofApril.....2018.

HON. JUSTICE PAUL K. MUGAMBA
JUSTICE OF THE SUPREME COURT