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THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: ARACH-AMOKO, JSC; Single Justice)

MISCELLANEOUS APPLICATION NO. 09 OF 2018
(Arising from Court of Appeal Criminal Appeal No. 02
of 2018)

DAVID CHANDI JAMWA:::::::::::::::::::::::::::::::::APPLICANT

VERSUS

UGANDA::: RESPONDENT

RULING OF ARACH-AMOKO, JSC

25 The applicant Mr. David Chandi Jamwa instituted this application by Notice of Motion seeking for an order that:

- 30 i) The applicant be granted bail pending the hearing and determination of his criminal appeal No.2 of 2018 before this Court.

The application is brought under the provisions of Rules 6(2) (a), 42 and 43 of the Supreme Court Rules. The grounds for the application are that:

- 35 a) The Applicant is a first offender.

- b) The offence of which the applicant was convicted did not involve personal violence.

- 5 c) The appeal that has been filed by the applicant is not frivolous and has a high probability of success.
- d) There is a high possibility of substantial delay in the hearing and determination of the appeal in this matter.
- 10 e) The applicant's state of health requires specialized medical attention and a balanced nutritional diet which he is unable to access while serving his custodial sentence in prison.
- 15 f) The applicant has complied with the bail terms and conditions granted by the High Court and later by the Court of Appeal.
- 20 g) It is just and fair that the applicant be granted bail pending his appeal.

The application is supported by the affidavit of the applicant sworn on 20th April, 2018 and the affidavit of Ms. Mercy Odu the applicant's Advocate, sworn on 19th April, 2018, respectively. Both affidavits substantially expound on these grounds.

25 The respondent did not file a reply to the Notice of Motion although the affidavit of service filed by Emmanuel Odoi a process server employed by M/S Mpanga Advocates, bears a stamp which indicates that he effected service on the respondent on the 2nd May, 2018.

30 **Background**

The brief background to the application is as follows: The applicant was indicted by the High Court on two counts namely: Abuse of office c/s 11 of the Anti-Corruption Act, 2009 and Causing financial loss c/s 20 of the same Act respectively. He was tried and convicted of the offence of causing financial loss but was acquitted of the offence of abuse of office. He was then sentenced to 12 years imprisonment and barred from holding any public office for a period of 10 years after serving the sentence. He appealed to the Court of Appeal against the conviction and

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5 sentence. The respondent also appealed to the Court Appeal
against the acquittal. The two appeals were consolidated by the
Court of Appeal. His appeal to the Court of Appeal was
dismissed. He was instead sentenced to 4 years imprisonment for
10 the offence of abuse of office which was to run concurrently with
the 12 years imposed by the trial judge for the offence of causing
financial loss. He has lodged a Notice of Appeal and a
Memorandum of Appeal in this Court under **Criminal Appeal
No. 2 of 2018**, hence this application.

Representation:

15 Mr. David Mpanga argued the application on behalf of the
applicant while Senior State Attorney Mr. Rogers Kinobe
appeared for the respondent.

Submissions:

20 Mr. Mpanga stated that the law on bail pending appeal is settled
in the case of **Arvind Patel vs Uganda, SC Criminal Application
No. 1 of 2003** where Justice Oder (R.IP) set out the conditions
for the grant of an application for bail pending appeal that the
Court has to consider, namely:

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

5 He also relied on the statement by Justice Oder in the same judgment where the learned Justice emphasised that

10 ***“it not necessary that all these conditions should be present in every case. A combination of two or more criteria may be sufficient. Each case must be decided on its facts and circumstances.”***

Regarding the applicant's character, Mr. Mpanga submitted that the applicant is a first offender, he has six children, he runs a consultancy firm, he is law abiding and contributes positively to his family and to the community.

15 Mr. Mpanga submitted that the offences for which the applicant was convicted do not involve personal violence. They arose out of the sale of bonds when the applicant was the Managing Director of the NSSF.

20 Referring to the Memorandum of Appeal and the affidavit of Ms. Odu, Mr. Mpanga submitted that the appeal is neither frivolous nor vexatious. The intended appeal raises a number of issues that this Court will have to address and pronounce itself on, and if properly argued and heard by court, there is a possibility of success. They are:

- 25 (i) Whether the offence of causing financial loss can be made out purely on the basis of the fact that the bonds were sold 20 or so days before maturity in light of the uncontested evidence on record;
- 30 (ii) Whether one can be convicted where the sale of the bonds were approved by the Board and the Minister of Finance as part of the re-alignment of the NSSF Portfolio;
- (iii) Whether the definition of loss adopted by the Court of Appeal is correct;
- 35 (iv) Whether the conviction should stand in light of uncontroverted evidence where the money yielded from

5 the sale of the said bonds was invested and yielded profit;

(v) Whether courts are well suited to second guess management of investment matters;

10 (vi) Whether the court can construe a penal section purposely in light of clearly admitted words;

(vii) The issue of the coram of the Justices of the Court of Appeal who delivered the judgment. It was delivered by Justice Kakuru. Justice Opio-Aweri had been promoted to the Supreme Court and Justice Kavuma had retired and did not sign the judgment.

15 (viii) The applicant also appeals against the legality and severity of the sentence.

20 Mr. Mpanga further submitted that there is a risk of substantial delay due to administrative and structural constraints in this Court and the policy of first come first serve as well as issues of funding. The applicant was only convicted in January, 2018. There is no guarantee that his appeal will be fixed in the next criminal session. We are now in May. This creates the risk that if the appeal is successful, irreparable loss would have been occasioned to the applicant in that he would have served time in prison that would not be restored to him.

30 Regarding the health of the applicant, Mr. Mpanga referred to the medical report annexed to the applicant's affidavit and submitted that he was in very poor health. He has severe heart disease, an enlarged heart, gross obesity with high cholesterol levels and high blood pressure all of which pose a high risk of cardiac complications, that is, a high risk of suffering a heart attack. The report indicates that this condition has been for over 10 years. It has to be managed by specialised medical attention and a balanced diet which is not available in prison. Mr. Mpanga further submitted that each

5 day poses a substantial delay and court should take judicial
notice that if the applicant were to suffer a cardiac arrest
while in custody, it would be very difficult to get him to the
best medical facility in the country. In those circumstances,
10 the applicant faces a possibility of not getting his day in court
with cardiac complications resulting into severe injuries or
even death.

15 Lastly, Mr. Mpanga submitted that the applicant was granted
bail on the 24th June 2011 by the Court of Appeal, he
complied with the bail terms until 2018 when judgment was
finally delivered on appeal. The bail terms set out in
annexture "B" commends the applicant to this court as a law
abiding citizen who complies with court orders. The conditions
are sufficient to diminish the risk or any thought of flight or
20 jumping bail. If this court were to exercise its discretion and
grant the applicant bail, the same conditions would suffice.

Counsel introduced the sureties as follows:

- (i) Hon. Tezira Jamwa, mother;
- (ii) Mrs Catherine Jamwa; wife;
- (iii) Mr. Odoy Onyango, maternal uncle;
- 25 (iv) Mr. Charles Okolong, maternal uncle
- (v) Hon. Othieno Okoth, MP North Budama, family friend.

30 In addition Mr. Mpanga offered the land title to property
comprised in Kyadondo Block 225 Plot 1334 Munyonyo in the
name of Mrs. Catherine Jamwa valued at approximately 2.5
billion shillings by M/S MPG Associates on the 2nd March,
2018 (See: Valuation Report.)

35 Mr. Mpanga also offered to deposit the applicant's passport
number B 074124 with a supplementary condition that the
applicant does not apply for another passport to control his
travel.

He was agreeable to the same terms as in the Court of Appeal
including the:

5 (i) 10 million cash (which is still in court, or can be paid if it is established from the Registrar that it has been collected).

10 (ii) The shs 500,000,000 non cash bond for each of the sureties. This would total to shs. 2.5 billion which is equivalent to the amount of money alleged to have been lost as a result of the applicant's action.

15 Lastly, Mr. Mpanga submitted that he had informed the sureties and they have fully understood their obligation as sureties and have assured him that they will ensure that the applicant attends court as and when he is required. He assured court that the sureties stand ready to pay the non-cash bail in case of non-compliance. He prayed that the applicant be granted bail pending appeal.

20 Mr. Kinobe opposed the application very strongly. He submitted that:

The law under which the applicant is proceeding uses the word "may", therefore court can deny him bail.

25 Secondly, the applicant is no longer presumed innocent, therefore, he does not enjoy that right.

30 Thirdly, the medical letter annexure "C" simply indicates the applicant's sickness to be obesity and hypertension. It does not recommend him for external treatment and does not also say that the medical facilities in prisons cannot handle his condition. In any case, the 10 years indicated are as told to the Medical Officer. It was not a Professional finding.

Fourthly, the application defeats the purpose of conviction and sentence. According to annexure "B" it means the applicant has since 2010, never served even 5 % of the sentence.

35 Fifthly, the appeal is frivolous and has no possibility of success. Being a second appeal, it should have been grounded in law as opposed to evaluation of evidence. It also imports the issue of the

5 severity of sentence which was not raised before the Court of Appeal. The issue of coram in Ground 5 of the Memorandum of Appeal was raised before Justice Kakuru at the Court of Appeal. It should have come to this Court by a separate appeal.

10 Sixthly, unlike the case of Arvind Patel, cases involving public funds touch on the economy with adverse effects on the savers, the majority of who are low income earners. Therefore, cases such as the instant one should not be treated like the case of Arvind Patel because that case has been overtaken in cases of public interest. Counsel did not cite any authority to support this
15 proposition.

His response to the issue of delay was that this Court is now well staffed. The issue of delay can only come from the head of the Court or the Judiciary, not Counsel for the applicant.

20 Regarding the affidavit of Ms. Odu, Mr. Kinobe contented that the issues deponed therein are her personal opinion as a lawyer, and Court should not rely on it.

Counsel also contented that the title deed tendered in Court, was not in the applicant's name, but in the name of his wife. Under the RTA, the applicant would require a Power of Attorney from
25 her to use it as security, which was not the case.

Regarding irreparable loss, Mr. Kinobe argued that it does not arise since the applicant was in Luzira Prisons legally, following a sentence by the Court of Appeal.

30 Lastly, Mr. Kinobe submitted that in case the Court is inclined to grant the applicant bail, Court should give stringent terms restricting his movement and he should deposit shs 30 to 50 million and his passport.

His prayer was that the application be dismissed or the financial terms and restrictions on his movement be imposed.

35 Mr. Mpanga made a brief response in which he reiterated his earlier submissions and prayer.

5 **CONSIDERATION OF THE APPLICATION BY COURT**

The jurisdiction of this Court to grant bail pending appeal is provided under Rules 6(2) (a) of the Rules of this Court. It reads:

10 ***“Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may in any criminal proceedings, where notice of appeal has been given in accordance with rules 56 and 57 of these Rules, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.”***

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It cannot be over emphasized that bail pending appeal is not a right but it is granted at the discretion of Court which should be exercised judiciously and each case must be determined on its own merit and circumstances. **See; Arvind Patel v Uganda No.1 of 2003, Imere Deo v Uganda No.2 of 2015, Busulwa Bulasio v Uganda No. 06 of 2015 and Kato Kajubi v Uganda No. 2 of 2016.**

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The above cases have further stated that at this stage, the appellant is a convict in at least two Courts. He is no longer wholly shielded by the presumption of innocence. His only right is thus the right of appeal. The applicant at this stage has an incentive to jump bail. Therefore the conditions are likely to be applied more stringently.

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30 In a plethora of cases, following the case of **Arvind Patel v Uganda** (supra) this Court has laid down the guidelines for the grant of such applications set out earlier in Mr. Mpanga’s submissions summarized in this Ruling. I will not repeat them, but will proceed to apply them to the facts and the circumstances of the instant case with the following findings and conclusion:

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Regarding the first three conditions, I do not find any controversy. He is a family man, there is no record of any previous conviction and he was not convicted of any offence of a

5 violent nature. No affidavit was filed by the respondent to controvert these assertions.

Regarding the possibility of success, in **Arvind Patel v Uganda** (supra) followed in the case of **Imere Deo v Uganda** (supra), this Court held that:

10 ***“In considering an application for bail pending appeal the only means by which the Court can assess the possibility of success of the appeal is by perusing the relevant record of proceedings, the judgment of the Court from which the appeal has emanated, and the***
15 ***memorandum of the appeal in question.”***

The applicant has, in line with the above authorities, attached the relevant documents as annexure “A” including; the judgments from the courts below, the Notice of Appeal and the Memorandum of Appeal setting out the grounds of Appeal. I have
20 perused the said documents and carefully considered the submissions of both learned Counsel. I am satisfied that the points raised by Mr. Mpanga which I have summarized earlier on in this Ruling especially the issue of coram, will require serious consideration by this Court. In my considered opinion, therefore,
25 the appeal is not frivolous. I have, of course, refrained from delving into the issues raised at this stage as it will be for the full bench to determine at the appropriate time.

On the issue of substantial delay the applicant avers that there will be a substantial delay in hearing his case. In my view this is
30 speculative and without evidence. As Mr. Kinobe rightly pointed out, the Court is now fully constituted. But then we still have the policy of first in and first out in criminal cases and there are several pending appeals that were filed in this Court before the one of the applicant. So, there is no guarantee that the appeal
35 will not delay in this Court.

5 On the issue whether the applicant complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal, in the case of **Kato Kajubi v Uganda** (supra) this Court re-affirmed its position that:

10 ***“...the main purpose for bail pending appeal is that the court must be satisfied that the applicant will comply with bail conditions and be available to attend trial or the appeal.”***

15 The burden therefore lies on 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.

20 In the instant case, the applicant deponed in paragraph 10 that he complied with the bail conditions both in the High Court and the Court of Appeal and attached his bail application form as annexure “B”. He further deponed that he has a fixed permanent place of abode and attached a copy of the title deed to property comprised in Kyaddondo Block 255 Plot 1334 Munyonyo registered in his wife’s name thereto. These factors favour the applicant’s grant to bail.

25 He has also produced the same sureties he produced in the Court of Appeal to prove that they will ensure that the applicant will not abscond if released on bail pending appeal. I have seen them and perused their particulars. I find them substantive. They are:

- 30 (i) Hon. Tezira Jamwa, mother;
(ii) Mrs Catherine Jamwa; wife;
(iii) Mr. Odoy Onyango, maternal uncle;
(iv) Mr. Charles Okolong, maternal uncle
(v) Hon. Othieno Okoth, MP North Budama, family friend.

35 The applicant further deponed in paragraph 13 of his affidavit that he suffers from severe hypertension with an enlarged heart. A perusal of the medical report dated 27th March, 2018 confirms that he suffers from moderate to severe hypertension with an enlarged heart and poor function of the left ventricle as well as

5 gross obesity with high serum (blood) cholesterol levels which
pose a high risk of cardiac complications. Given the potential risk
to his health that may require constant checking and monitoring,
this in my opinion further compels me to warrant bail pending
10 appeal. I have not been shown any medical report to the contrary
by the respondent.

In the premises, I take judicial notice of the fact that the
applicant stands a high risk of suffering a cardiac arrest while in
prison and may even end up dying before having his day in court
thus rendering the appeal nugatory.

15 From the forgoing I am satisfied that the applicant has met the
criteria for the grant of bail pending appeal and I hereby grant
the application on similar orders as in the Court of Appeal as
follows:

- 20 1. Payments by the applicant of cash bail of shs
10,000,000/=.
2. Surrender to the Registrar of this Court of the
applicant's passport on condition that the applicant
shall not apply for a new passport upon its expiry in
October 2018.
- 25 3. The applicant shall report to the Registrar of this Court
on the last working day of every month, beginning
from 31st May, 2018 at 9.00am until disposal of his
appeal.
- 30 4. The sureties are bound in the sums of shs.
500,000,000/= each not cash.
5. In addition the Certificate of Title of Mrs. Catherine
Bulinda Jamwa of land comprised in Kyadondo Block
255 Plot 1334 Munyonyo should be deposited in Court
as additional security.

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5 Dated at Kampala this ^{15th} day of ^{May}2018.



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HON. M.S.ARACH - AMOKO
JUSTICE OF THE SUPREME

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