THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: DR ESTHER KITIMBO KISAAKYE, JSC]

MISC. APPLICATION NO.11 OF 2019

MAGOMBE JOSHUA :: APPLICANT

v

UGANDA :: RESPONDENT

RULING OF DR. ESTHER KISAAKYE, JSC

Magombe Joshua (hereinafter referred to as the applicant) filed this application by Notice of motion seeking for an order that he be granted bail pending hearing and determination of Supreme Court Criminal Appeal No. 39 of 2019.

The brief background to this application is that on the 27th of April 2015, the applicant was convicted by the High Court Anti-Corruption Division with 4 offences namely Theft; Electronic Fraud; Unauthorised Access contrary to the Computer Misuse Act 2011; and Conspiracy to commit a felony. He was sentenced to serve 7 years' imprisonment each on the counts of Theft, Electronic Fraud and Conspiracy to commit a felony and 9 years' imprisonment on the count of Unauthorised Access. These sentences were to run concurrently.

The applicant appealed to the Court of Appeal. The Court acquitted him of the offences of unauthorised access and

Conspiracy to commit a felony, but upheld his convictions and sentences for Theft and Electronic Fraud.

Dissatisfied with part of the judgment of the Court of Appeal, the applicant filed a Notice of Appeal on the 11th day of September 2019 and the present application for bail pending appeal on 18th November 2019.

The applicant was represented by Mr Ochieng Evans, while the respondent was represented by State Attorney Joanitah Tumwikirize.

Applicant's submissions:

Relying on Article 126(2)(e) of the Constitution of 1995 as amended and Rules 2(2), 6(2), 42 and 43 of the Supreme Court Rules, counsel for the applicant submitted that rule 6(2)(a) gives Court discretionary powers to grant bail pending appeal.

Counsel further relied on ***Arvind Patel vs Uganda, Supreme Court Criminal Application No. 1 of 2013*** and summarized six considerations that generally apply to an application for bail pending appeal. He contended that these include (i) the character of the applicant; (ii) whether he/she is a first offender or not; (iii) whether the offence of which the applicant was convicted involved personal violence; (iv) that the appeal should not be frivolous and should have a reasonable possibility of success; (v) the possibility of substantial delay in the determination of appeal; and lastly (vi) whether the applicant has previously complied with bail conditions granted after his or her conviction.

Relying on the considerations summarized above, which he deduced from **Arvind Patel v Uganda** (supra) and the applicant's Affidavit in support respectively, counsel for the applicant contended that:

(i) the applicant is of good character and a person who can be trusted.

(ii) the applicant had complied with the bail terms imposed by the Court of Appeal until the final disposal of the appeal.

(iii) the offences the applicant was convicted of did not involve personal violence.

(iv) the applicant is a first offender.

(v) the intended appeal is not frivolous and has high chances of success.

(vi) there was a possibility of substantial delay. He contended that the applicant had spent 2 years and 8 months in custody as at the time of filing the application, which was almost halfway his sentence of seven years. He further contended that there will be grave injustice occasioned to him if he remained in custody and this Court eventually allow his appeal.

(vii) the applicant has a fixed place of abode at Balintuma Zone Local Council 1 Kiwatule Parish, Nakawa Division; Kampala District within the jurisdiction of this Court, where he was renting. He relied on a Tenancy Agreement and a letter from the Local Council Chairman of the area annexed to his Notice of Motion, as proof of that the applicant had lived in the area for a while.

(viii) the applicant has four sureties who were ready to stand for him. These are (a) his biological father Damian Wamajje, aged 75 years and a resident of Sawa cell; (b) his sister Namukhura Grace, aged 44 years, a teacher at Musese Senior Secondary School and resident of Sawa Cell; (c) his sister Nandudu Mary, aged 40 years, a teacher at Meryland High School and resident of Nazziba cell; and (d) his brother in law Okello James, aged 39 years who is a resident of Naggulu.

Originals and copies of the identification documents and introduction letters for the proposed sureties were tendered into evidence at the hearing.

Citing other single Justice rulings, namely ***Seggujja Danny and Anor v Uganda, Supreme Court Miscellaneous Application No. 05 of 2019*** and ***Sserunkuuma Edrisa v Uganda Supreme Court Application No. 09 of 2019*** which had allowed the applications for bail pending appeal for the applicant's co-convicts, counsel for the applicant contended that there was need for this Court to have consistency in its decisions.

The applicant also relied on ***Imere Deo v Uganda, Miscellaneous Application No. 2 of 2015*** and ***Jamwa v Uganda, Miscellaneous Application No. 09 of 2018***.

Counsel for the applicant prayed that his client be released on bail pending appeal on favourable terms.

Respondent's submissions

Relying on the Affidavit in reply sworn by Baine Stanley on the 26th day of November 2019, counsel for the respondent opposed the application. She contended that:

(i) the fact that the applicant was granted bail before cannot be a basis for him to be granted bail in this Court. She submitted that the stakes were higher for the applicant because the Supreme Court is the final court of appeal.

(ii) the applicant is a serving convict and that his character could no longer be relied on to grant him bail pending the hearing of his appeal. She further contended that the trust in the applicant was broken when the applicant was convicted and sentenced by the High Court and when his convictions and sentences for unauthorized access and conspiracy to commit a felony were upheld by the Court of Appeal.

(iii) the applicant's claims that the offences he was convicted of did not involve personal violence were not valid, because financial crimes are far worse crimes which impact on all the users of the Mobile Money service and the economy of the nation as a whole. She contended that it would be very dangerous if the public lost its trust in the Mobile Money services of the Telecom companies.

(iv) the intended appeal was frivolous and vexatious and had minimal likelihood of success, because the applicant's intended grounds of appeal in this Court are the same as those that were rejected by the Court of Appeal.

(v) since the Court is fully constituted, there was no evidence of substantial delay to dispose of the appeal. She further refuted the applicant's claims that he had already served half of his sentence.

(vi) the applicant does not have a fixed place of abode. She submitted that the Tenancy Agreement the applicant had submitted was effective from February 2019 and yet the applicant had been remanded in prison as of 23rd August 2019. Therefore, the applicant had not been in the area long enough to be regarded as a permanent resident of the area.

Secondly, she contended that the five months the applicant was in the area were not sufficient time for the LC Chairman to know the applicant and to vouch for him as a resident of the area.

Counsel for the respondent further contended the applicant's reference letter from the LC Chairman had no telephone contact, while the Tenancy Agreement also did not have the Landlady's telephone number contact. On the other hand, the mobile number of the witness on the Agreement could not go through.

(vii) Some of the applicant's proposed sureties number 1 and 2 who are both resident in Mbale, while the applicant resident in Kiwatule, Kampala may not be able to prevail over the applicant to attend Court, because of the long distance between them. She further submitted that the

driving permit of surety number 4 had expired while the LC Chairman's letter he submitted did not show the relationship between him and applicant. She prayed to the Court to find that Sureties number 1, 2 and 4 were not substantial.

(viii) the instant application should be determined on its own merit and not on the basis that the applicant's co-accused persons had been granted bail. She contended that the offences the applicant was convicted of carried individual liability and the sureties were not the same. She further contended that the grounds on which the other applications were made were also different and that consistency should not bind the Court. Rather, the Court could only refer to those decisions for guidance, where applicable.

(ix) the applicant's claims that he is a first offender faded in light of the offences the applicant was convicted of, which were premeditated, and which showed the mind and character of the applicant.

Counsel for the respondent prayed that this Court decline to grant this application.

Applicant's submission in Rejoinder

In rejoinder, counsel for the applicant submitted that rule 6(2)(a) of the Supreme Court Rules could only be applied where there was a conviction. He contended that the Rule recognizes that the

appeal process is there to correct any errors the lower Court made and that the applicant had duly appealed. He requested Court to give the applicant the benefit of this Rule.

Counsel further contended that the applicant should not be made to serve a sentence while his appeal was pending because this would cause him an injustice, in the event that his conviction was quashed. Counsel for the applicant contended that if the lower courts were right, the applicant would still serve that sentence. On the other hand, if the applicant was to be acquitted by this Court, the injustice that would have been occasioned to him would be greater.

Counsel further contended that the offences the applicant had been convicted of were not violent in nature because violence is physical.

With regard to the Tenancy Agreement, counsel contended that the applicant had been in the same location since 2015 when Court of Appeal granted him bail pending appeal and that the time the LC Chairman had known him was sufficient time for the Chairman to recommend him.

On the issue of sureties, counsel contended that there was no requirement that the sureties should be living in the same house or area. He contended that the sureties only had to demonstrate close proximity to the applicant, either by blood or other relationship, for them to be able to bear influence on the

applicant to show up for his appeal. He further submitted that the applicant would not run away from his father and that he had demonstrated this at the Court of Appeal.

On the issue of consistency, counsel for the applicant submitted that although decisions made by other single Justices in the applications of other co-appellants were not binding in this application, he prayed that they persuade this Court to grant the application.

On the applicant being a first offender, counsel submitted that the respondent had not provided Court with any evidence of the applicant's previous criminal record. He submitted that Court should treat him as a first offender.

Counsel for the applicant reiterated his prayers for this application to be granted.

CONSIDERATION OF THE APPLICATION

The application was brought under Article 126(2)(e) of the 1995 Constitution as amended and Rules 2(2), 42 and 43 of the Judicature (Supreme Court) Rules. I will refer to these legal provisions later in this Ruling as necessary.

This application was also brought under Rule 6(2)(a) of the Judicature (Supreme Court) Rules which provides as follows:

"(2) Subject to sub rule (1) of this rule, 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 rules 56 and 57 of these Rules, order that the appellant be released on bail pending the determination of the appeal;"

As I indicated earlier, the applicant also relied on the decision of Oder JSC in ***Arvind Patel (supra)*** and contended that this decision laid down the conditions that generally apply to an application for bail pending the hearing and determination of an appeal. Counsel for the applicant contended that this is the law I am bound to apply in considering his client's application.

The other applicants in ***Serunkuuma Edrisa & 5 Ors v Uganda, Court of Appeal Criminal Appeal No. 0147 of 2015*** who were already granted bail pending appeal are:

(i) Serunkuuma Edrisa who was granted bail on the 20th day of November 2019; in Supreme Court Criminal Application No. 09 of 2019.

(ii) Segujja Danny who was granted bail in Supreme Court Misc. Application No. 05 of 2019 and

(iii) ***Matovu Edgar who was granted bail in Supreme Court Misc. Application No. 05 of 2019.***

Counsel for the applicant contended, among others, that the applicant in this case was similarly entitled to be granted bail pending appeal.

Furthermore, I am aware of and I have read other Rulings of single Justices of this Court, where Bail Pending Appeal was granted. These include:

(i) ***Alenyo Marks (A3) v Uganda, Supreme Court Criminal Application No. 05 of 2015;***

(ii) ***Bireete Sarah v Uganda, Supreme Court Criminal Application No. 04 of 2016;***

(iii) ***Baingana John Paul v Uganda, Supreme Court Criminal Application No. 05 of 2016;***

(iv) ***Kyeyune Mitala Julius v Uganda, Supreme Court Misc. Application No. 4 of 2017;***

(v) ***Simba Jean Louis v Uganda, Criminal Application No. 1 of 2019; and***

(vi) ***Kimeze Jerimiah v Uganda Supreme Court Misc. Application No. 12 of 2019.***

On the other hand, there are other decisions of this Court where other single Justices of this Court declined to grant bail pending appeal. These include:

(i) ***Imere Deo v Uganda, Supreme Court Criminal Application No. 2 of 2015;***

(ii) ***Kyeyune Mitala Julius v Uganda, Criminal Application No. 9 of 2016;***

(iii) ***Kitaka Robert Nsubuga v Uganda, Criminal Application No. 08 of 2019; and***

(iv) ***John Muhanguzi Kashaka v Uganda, Misc. Application No. 18 of 2019.***

As I have noted earlier, the Ruling in ***Arvind Patel (supra)*** and the other Rulings I have referred to above were made by single Justices of this Court. I agree with counsel for the applicant that it is good practice for the Court to be consistent in handling and disposing of applications and appeals brought before it.

At the same time, I also agree with the submissions of counsel for the respondent that the Rulings of other single Justices of this Court are not binding on me. I would therefore only decide in a similar manner as my learned colleagues did, if after considering the law applicable to granting of bail pending the hearing of an appeal, I am convinced that I should do so.

Let me now turn to consider the law applicable to applications for bail pending appeal.

A critical review of the 1995 Constitution shows that it ushered in a legal regime not only governing applications for bail. The Constitution also provides for situations when a person can lawfully be deprived of his or her personal liberty.

First, Chapter 4 of the 1995 Constitution clearly provides for a comprehensive Bill of Rights. Article 23 of the Constitution in particular is devoted to the protection of personal liberty. Under the different sub-sections of this Article, the Constitution guarantees the rights of a person arrested, restricted or detained.

Article 23(6) of the Constitution is of particular interest to us here. It provides as follows:

> ***"Where a person is arrested in respect of a criminal offence—***

(a) the person is entitled to apply to the Court to be released on bail, and the Court may grant that person bail on such conditions as the Court considers reasonable;

(b) in the case of an offence which is triable by the High Court as well as by a subordinate Court, if that person has been remanded in custody in respect of the offence for sixty days before trial, that person shall be released on bail on such conditions as the Court considers reasonable.

(c) in the case of an offence triable only by the High Court, if the person has been remanded in custody for one hundred and eighty days before the case is committed to the High Court, that person shall be released on bail on such conditions as the Court considers reasonable."

The reasoning behind the provisions of Article 23(6) can be found in Article 28(3)(a) of the Constitution which provides thus:

"Every person who is charged with a criminal offence shall—

(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;"

Note should be taken that under Article 23(6), it a person who has been arrested in respect of a criminal offence who is given a

right to apply for bail. On the other hand, Article 28(3) also talks about "a person who is charged with a criminal offence."

The effect of these two Sub-Articles when read together was to entrench in the Constitution the presumption of innocence of a person who has been charged with a criminal offence. This right subsists until such an accused person has either pleaded guilty or been proven guilty of the offence he or she has been charged with.

It is trite law that before a Court of law finds a person guilty as charged and proceeds to convict him or her, the prosecution must prove his or her guilt beyond reasonable doubt. If any reasonable doubt remains in the mind of the Judge, the accused person is acquitted.

An analysis of the Constitutional provisions discussed above has left me in no doubt that ***Arvind Patel*** (supra), was not correctly decided and that the whole concept of Courts granting bail pending appeal is unknown to the 1995 Constitution human rights regime. No Article of the Constitution talks about or supports the proposition that the presumption of innocence subsists after conviction of a person with a criminal offence. On the contrary, Article 28(3) of the Constitution is explicit that the presumption of innocence is extinguished upon conviction.

Secondly, nowhere does the Constitution provide for the right of a convicted person to apply for bail. As I noted earlier, Article 23(6)(a) which provides for the right to apply for bail only refers to a person arrested in respect of a criminal offence and NOT to a person already convicted of a criminal offence.

I have found no constitutional or legal basis to support the Ruling in ***Arvind Patel (supra)*** and other Rulings that have since followed it.

The only provision in the Constitution that caters for deprivation of the person liberty of a convicted person is Article 23(1), which provides as follows:

> ***"No person shall be deprived of personal liberty except in any of the following cases—***
> ***(a) in execution of the sentence or order of a court, whether established for Uganda or another country or of an international court or tribunal in respect of a criminal offence of which that person has been convicted, or of an order of a court punishing the person for contempt of court;"***

As the underlined text clearly shows, the Constitution permits the non-deprivation of one's liberty "*where a person is in custody in execution of the sentence or order of a Court ... in respect of a criminal offence of which that person has been convicted.*"

I have reached the conclusion on the non-existence of a right to apply or to be granted bail after conviction when I am fully aware of the provisions of Rule 6(2)(a) of the Rules of this Court, which I have already reproduced above. This Rule, which the applicant relied on, expressly gives this Court powers to grant bail pending the determination of the appeal. However, I note that these Rules which were made under the Judicature Act, Cap 13, cannot

override the clear provisions of the Constitution I have cited above.

Furthermore, I have also noted that the powers of this Court to hear criminal appeals are laid down under Article 132(2) of the Constitution, which provides as follows:

> ***"(2) An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law."***

This Article leaves no doubt in my mind that the mandate of the Supreme Court in criminal matters is restricted to hearing appeals. It is not necessary for me to lay out what hearing an appeal means in detail. It suffices for me to note that this entails the Court examining the grounds of appeal that an appellant has laid out in his or her Memorandum of Appeal and the legal arguments made in support of his or her grounds of appeal should bring out the errors of law he or she contends were made by the Court of Appeal in confirming his or her conviction and/or sentence.

Since Court derives its powers and mandate to hear criminal appeals from Article 132(2) the Constitution of Uganda, it therefore follows that this Court only gets ceased with jurisdiction to hear an appellant challenging his or her conviction either when it is preparing for hearing or when it is hearing and determining his or her appeal. Prior to that, this Court only has jurisdiction to deal with matters directly relating to preparations for the hearing of the criminal appeal or incidental thereto, but no powers to consider the release on bail of a convicted person

before the final disposal of his or her appeal. Nothing more, nothing less.

It also follows that this Court cannot and should not assume jurisdiction under the Judicature (Supreme Court) Rules to exercise powers that are not vested in it under the Constitution of Uganda, to enforce a purported right to apply for bail pending appeal of a convicted person to apply and to be granted bail pending the disposal of his or her appeal.

It is therefore my view that when the Court hears an intended appellant, seeking to regain his liberty pending the hearing and disposal of his or her appeal as is the case in the present application, the Court is assuming jurisdiction it does not have under the Constitution of Uganda.

Based on the Constitutional provisions I have cited earlier in this Ruling, it is clear to me that when the people of Uganda, finally promulgated the 1995 Constitution, they resolved the issue of the personal liberty as follows:

(i) That law-abiding Ugandans as well as non – Ugandans living in Uganda would enjoy their personal liberty, except in those circumstance where the Constitution clearly permits their liberty, to be taken away.

(ii) That where a Ugandan citizen or non – citizen was suspected of having committed a crime which harmed or jeopardised the enjoyment of the rights of other Ugandans and other residents, such a person could be lawfully detained in authorised places and accorded his

or her rights while in detention awaiting his or her trial and its completion.

(iii) That while such a person awaits for his or her trial, he or she has a right to apply for bail under Article 23(6)(a) of the Constitution of Uganda to enable him or her temporarily regain his or her freedom, pending his or her conviction or to be granted mandatory bail under Article 23(6)(b) or (c) of the Constitution.

(iv) On the other hand, that those persons who have enjoyed all the Constitutional protections as accorded to them and who are eventually found guilty, should go and serve their lawful sentences as handed down to them by a Court of law.

Inherent in these Constitutional provisions permitting the deprivation of personal liberty of convicted persons was the expectation by the people of Uganda that those who are convicted of crimes requiring them to be locked up in prison during the continuance of their sentence would indeed remain in prison until they have either served their sentences or until they have successfully challenged their conviction in an appellate Court.

The Constitution is very clear. Law abiding citizens should enjoy their liberty which should not be deprived from them. On the other hand, non – law abiding citizens should not enjoy their liberty and their being locked up while serving a sentence cannot give rise to a Constitutional violation of Article 23(1)(a). The language and spirit of Article 23(1)(a) of the Constitution is that

the deprivation of personal liberty of a person serving a sentence after a conviction of a criminal charge does not violate the Constitution. This being the case, I have found no Constitutional basis to support this Court's entertaining of or the granting of an application for bail pending appeal.

I am aware that the same Constitution also provides for the rights of certain categories of convicted persons to lodge an appeal against conviction and the legality of their sentence up to the Supreme Court. In the case of this Court, these provisions are laid out in Article 132(2) of the Constitution, which I reproduced earlier. I am also further aware that the Supreme Court as a second appellate Court, is vested with powers to quash a conviction and to set aside a sentence confirmed by the Court of Appeal.

It is however my firm view that the power of the Supreme Court to hear Appeals does not in any way negate the position of the law I articulated earlier about (a) the extinction of the presumption of innocence upon conviction, and (b) the non – existence of provisions in our Constitution which give this Court or even a lower Court power to consider and grant bail to a convicted person pending the hearing of his or her appeal.

The applicant in this case, relied on Rule 6(2)(a) the Judicature (Supreme Court) Rules. These were made under the Judicature Act. However, neither Rules of this Court nor the Judicature Act under which they were made can override the clear provisions of the Constitution I discussed earlier in this Ruling.

Article 2(1) of the Constitution clearly provides that:

> ***"This Constitution is the Supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda"***

Article 2(2) of the same Constitution further provides that:

> ***"If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."***

A reading of Rule 6(2)(a) shows that it is inconsistent with Articles 23(6), 23(1)(a), 132(2), 21,126(1) and 2(2) of the Constitution. As I discussed earlier, these inconsistencies arise from the fact that the Rule 6(2)(a) purports to give jurisdiction to the Supreme Court to consider and grant bail to convicted persons pending the hearing of their appeals, which jurisdiction is not conferred on the Court by the Constitution.

The good news is that the drafters of our Constitution were far sighted and ensured that the Constitution contained provisions to rectify such cases as the one currently paused by Rule 6(2)(a). Article 2(2) provides that not only shall the Constitution prevail, but also that the inconsistent law shall, to the extent of the inconsistency, be void. In this case, that other law includes the Rules of the Supreme Court which by necessary implication covers Rule 6(2)(a) of the said Rules.

Article 2(2) is a dictate of the Constitution. It does not give any authority or person or even the Courts any power to override it. I am therefore bound to follow it. I find that Rule 6(2)(a) is void to the extent that it gives this Court power to grant bail to a person convicted of an offence pending the hearing of his or her appeal, when such:

a) No such right to apply for bail pending appeal exists under the Constitution, and
b) No such power is vested in the Supreme Court under the Constitution.

In arriving at this decision, I am fully aware of the provisions of Article 137 of the Constitution which requires that any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as a Constitutional Court.

I am also aware that although the applicant did not argue his application as a Constitutional one, he however brought this application under Article 126(2)(e) of the Constitution.

Furthermore, under ground 13 of the applicant's Notice of Motion, he asserted that he has a Constitutional right to apply for bail pending the hearing and determination of his appeal. This being the case, I am left with no option but to consider the merits or otherwise of this application and the submissions made to the Court.

The applicant invoked his purported rights under the Constitution to make his application and implored Court to grant his application basing itself on the Constitution. In so doing, he

expected the Court not to interpret the Constitution, but to apply its provisions.

It is therefore in this context that I have also critically examined the Constitutional provisions and the Rules of this Court with a view of determining whether indeed:

a) The applicant has the Constitutional rights he is claiming and relying on to make this application, and
b) Whether this Court is vested with powers under the Constitution to hear and grant bail pending appeal.

In the circumstances, I have not found it necessary to refer this matter to the Constitutional Court under Article 137(5) of the Constitution because the provisions in question simply required me to apply and adhere to them and not to seek for their interpretation.

I therefore find that this application was brought under a Rule which this Court is required by virtue of Article 2(2) of the Constitution to treat as void because of its inconsistency with the Constitution.

Besides reviewing the Constitution, I have also extensively reviewed the Ruling of my late brother Oder (JSC as he then was), in ***Arvind Patel (supra).*** As I noted before, the applicant relied on this Ruling as the authority for the conditions that an applicant for bail pending appeal has to fulfil before being granted bail.

Secondly, I have also noted that ***Arvind v Patel*** *(supra)* has subsequently been followed by some of my learned colleagues at

this Court, who have allowed similar applications for bail pending appeal, such as this one.

With all due respect to my learned brother Oder, JSC, I do not think the outlined conditions warranting the grant of bail pending appeal were correctly arrived at by Justice Order, JSC (as he then was).

In his Ruling, Oder, JSC, cited the provisions of Rule 5(1), which is similar to the current Rule 6(2)(a) of the Rules of this Court. He further pointed out that there was no decision of the Supreme Court granting bail prior to the ***Arvind Patel (supra)*** application. The learned Justice of this Court then considered the Uganda High Court decision of **Girdhar Dhanji Masarani v R (1960) E.A 320** as well as two other decisions of the High Courts of Tanzania and Kenya which had dealt with applications for bail pending appeal. A closer review of the decisions that Justice Oder relied on to arrive at the criteria that he summed up, shows the following flaws in the reasoning and the summing up that he made:

First, all the authorities he cited involved minor offences of cases triable by Magistrates Court. For example in ***Girdhar Dhanji Masarani v R (supra)*** the applicant for bail pending appeal had been convicted by a Magistrate for offences contrary to the East African Customs Management Act, 1952 and sentenced to 18 months imprisonment. Sheridan J, in the High Court of Uganda declined to grant bail pending appeal, holding as follows:

> ***"Different principles must apply after conviction, the accused person has then become a convicted person***

and the sentence starts to run from the date of his conviction. Here the applicant received a substantial sentence of 18 months imprisonment and if he were granted bail pending appeal he might be sorely tempted to abscond, at any cost."

The learned Judge went on to note that:

"It is unfortunate that some delay must occur before this appeal is heard but that, in itself, is not a good ground for granting bail at this stage".

Similarly, in the earlier Tanganyika case of **Raghbir Singh Lamba v R, (1958) E.A. 337**, Spry, Ag. J declined to grant bail pending appeal to the applicant who had been sentenced to 15 months imprisonment by the Resident Magistrate for obtaining money by false pretences. The applicant in that case had contended among others that, his case was complex; that his appeal could more easily be prepared if he was on bail, that he had previously been of good character and that his dependants would face hardships if he remained in prison.

Spry, Ag. J. declined to grant bail and dismissed these reasons as follows:

"Where a person is awaiting trial, the onus of proving his guilt is on the prosecution and consequently the onus is also on the prosecution of showing cause why bail should not be allowed. On the other hand, when a person has been convicted, the onus is on him to show

cause why as a convicted person he should be released on bail."

However, in a Kenyan case **Chimambhai v Republic (No. 2)[1971] E.A 343,** the applicant had been convicted of the offence of handling stolen goods (a tape recorder) by the Resident Magistrates Court and sentenced to 7 years imprisonment with hard labour, which was the maximum term of imprisonment set for that offence. Harris J. allowed his application for bail pending appeal on the ground that the applicant was a first offender; that his appeal had been admitted to hearing; that it would take between 12 to 24 weeks before the appeal was heard; and lastly that the offence he had been convicted of did not involve personal violence.

In allowing the application, the Judge however observed as follows:

'It is manifest that the case of the appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available for an accused person seeking bail before trial; namely that of presumption of innocence.'

The Judge nevertheless proceeded to grant bail pending appeal.

The Judge in ***Chimambhai (supra)*** followed an earlier decision in **R v Akbarali Juma Kanji, Criminal Appeal No. 46 of 1946** where the appellant and another had been convicted of assault occasioning bodily harm and sentenced to 8 months and 4 months respectively by a Magistrate. The said Magistrate then

granted bail pending hearing of the appeal to the applicant's co – convict, but declined to do so for the appellant/applicant.

On appeal, the applicant was granted bail pending appeal taking into account the appellant's good character; delay in hearing the appeal, the fact that the appeal had been admitted for hearing and that the co – appellant had been released on bail pending appeal.

In granting the applicant bail, De Lestang, Ag. J. observed as follows

> ***"The mere fact of delay in hearing an appeal is not of its self an exceptional circumstance, but it may become an exceptional circumstance, for example when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal, constitute an exceptional circumstance."***

The Judge went on to consider that the appellant was a first offender, that his appeal was not frivolous because it had been accepted for hearing and the fact that his co-appellant who was not in a different position from the applicant had been granted bail.

However, the Judge in rendering his Judgment noted as follows with respect to granting bail pending appeal:

> ***"It is not the practice of this Court following in this respect the practice both of the English Courts ... and the Court of Appeal for East Africa ..... to grant bail to***

an appellant after he has been convicted and sentenced to imprisonment unless in very exceptional circumstances."

Similarly, in ***Chimabhai (supra),*** Harris J. also noted as follows:

"Although the practice in Criminal Law and Procedure in the three East African territories has always followed generally that of the English Courts, the practice in regard to bail is possibly not entirely uniform as between the three states themselves. Both the Tanganyika decision in Raghbir Singh Lamb v R (1958) E.A 337 and the Uganda decision in the Masarani's case (supra) would suggest a somewhat rigid approach than that found in Kanji's case (supra)."

Having correctly laid out the principles in the cases cited and above cited background, it is then surprising that the learned Justice Oder, JSC then summed up the way he did by affirmatively asserting that six considerations that:

a) ***"should generally apply to an application for bail pending appeal" and that***
b) ***"It is not necessary that all these conditions should be sufficient. Each case must be considered on its own facts and circumstances"***

As the analysis of the Ruling of Justice Oder, JSC clearly indicated and my own analysis of the case law he cited *vis a vis* the principles and position of the law he deduced from them

clearly shows, the cited authorities did not wholly support the conclusions that the learned Justice reached.

So, with all due respect to my learned brother's long-standing Ruling, I respectfully differ from his reasoning, conclusions and prepositions of the law on bail pending appeal that he summarized and outlined in his now famous Ruling.

Note should be made of the fact that ***Arvind Patel (supra)*** being a Ruling of a single Justice of this Court, I was not bound to follow it. But beside the above point, I also note that ***Arvind Patel (supra)*** was decided in 2003, almost 8 years after the 1995 Constitution of Uganda had been promulgated. Yet the learned Justice did not make any mention of or any reference to the Constitution, which is the Supreme law of the land.

This omission by the learned Justice Oder to consider the clear provisions of the Constitution relating to applications for bail and those permitting restrictions on personal liberty, support my conclusion that the learned Justice did not address himself to the provisions of the Constitution. Had he done so, I do believe that it would have been evident that the provisions of the 1995 Constitution as amended, do not extend the right to apply for bail to persons such as the applicant who have already been convicted of an offence.

Let me now turn to look at the other grounds of this application and the arguments made to support them.

In ground 14 of the Applicant's Notice of Motion, the applicant pleaded as follows:

"That it is just and equitable that his application be granted"

Furthermore, in paragraph 19 of his affidavit in support of his Notice of Motion, the applicant also deponed as follows:

"That it is just, fair and in the interest of justice that I be released and/or admitted on bail pending the hearing and determination of my appeal before this Honourable Court."

Once again, I find the applicant's prayers not only interesting but clearly unfounded in law. First, I have noted that although the applicant made these prayers with the assistance of his counsel, his counsel either chose or conveniently forgot not to address Court on them, when he made submissions on behalf of the applicant.

However, in his submissions in rejoinder, counsel for the applicant contended that, Rule 6(2)(a) of the Supreme Court Rules recognizes that the appeal process is there to correct any error the lower Court has made and that the applicant has duly appealed to this Court. He prayed that this Court gives the applicant the benefit of Rule 6(2)(b) so that he does not serve a sentence which will cause an injustice to him, in the event that his conviction is quashed.

He further submitted that, "if lower Courts were right, he (the applicant) will still serve his sentence. But the injustice that

would have been occasioned to him will be greater, if he is acquitted."

Counsel for the applicant did not put any material or authority before me to support his contentions. It is however surprising that the applicant, whose conviction has been confirmed by two Courts of Record, can contend that it is just, equitable and in the interest of justice that he should be released on bail, pending the hearing of his appeal.

With all due respect to the applicant and his counsel, I am not convinced with these contentions and reasoning. First, as the underlined text above clearly indicates, the arguments are primarily based on speculation about the outcome of the applicant's intended appeal to this Court. This Court exercises its jurisdiction basing on the facts or evidence on record that is put before it and not on mere speculation about a possible outcome of an appeal that is pending before this Court.

If I were to agree with the applicant that he should be released on bail pending the final determination of his appeal because there is a possibility that the lower Courts made errors which may be reversed by this Court, this would be tantamount to the Court smuggling in and according the applicant the Constitutional presumption of innocence, which he no longer enjoys. As I noted earlier in this Ruling, the applicant no longer has this right. It was extinguished when he was convicted partly on the basis of his own admission and partly on the basis of prosecution

evidence of 40 witnesses and other evidence that convinced the two lower Courts beyond reasonable doubt.

The other flow in this line of reasoning is the assumption and speculation that whenever this Court identifies any errors of law made by the lower Court, it will automatically result in an acquittal of the appellant or the quashing of his or her sentence. This is not always the case.

Thirdly, the reasoning that a convicted person should be allowed to first exhaust all his rights of appeal before he can start serving his sentence in our legal system is also flawed. If this were the case, then this 'right to bail pending appeal' should extend to all convicts who have pending appeals not only in this Court, but also in the Court of Appeal and the High Court. It should not selectively apply to only who can afford a lawyer "the haves" or those benefitting from the loot or the proceeds of their theft like the applicant or to those who can actively pursue their application immediately after their conviction in the lower Court has been confirmed. In this application under consideration, the applicant's dual conviction was confirmed by the Court of Appeal on 29th of August 2019 and by 4th November 2019, he had lodged his application for bail pending the hearing of his appeal in this Court.

In paragraph 17 of his Affidavit in support of his Notice of Motion, the applicant was already complaining of likely delay in hearing of his appeal as follows:

> ***"That I verily believe that this Court hears cases on a basis of first come, first serve basis and by the time my***

appeal is heard, I will have substantially served my term hence occasioning miscarriage of justice in case my appeal is allowed."

Article 21 of our Constitution very clearly provides that:

"All persons are equal before and under the law... in every other respect and shall enjoy equal protection of the law".

Article 21(2) of the same Constitution further provides that:

"Without prejudice to Clause (1) of this Article, a person shall not be discriminated against on the ground of ..... social or economic standing."

Furthermore, Article 21(3) of the same Constitution defines "discriminate" to mean:

"to give different treatment to different persons attributable only or mainly to their respective descriptions ... social or economic standing..."

As the above Articles clearly indicate, giving preference based on a person's higher economic and social standing is prohibited by the Constitution.

Therefore, a convict who either intends to or who has lodged an appeal before this Court and who demands that he or she should be released on bail pending the hearing of his appeal, because the Court will delay to hear his or her when it is hearing appeals

that were lodged earlier, is in effect asking this Court to do one of the following things which are prohibited by the Constitution.

The applicant is either asking the Court to engage in direct discrimination by EITHER (i) taking off time from hearing appeals or applications that were filed earlier in this Court and prioritizing his or her own application for bail pending the hearing of his or her appeal. OR (ii) to allow him or her to jump the cue and have his or her appeal to be heard first. This is because the applicant would be asking the Court to ignore the Constitution dictate of treating all appellants who come before it as equal, before and under the law and instead make the applicant jump the queue by considering his or her appeal first instead of other appeals that were lodged earlier.

This Court should have no business in encouraging such entitlement mind-sets of convicts such as the applicant, at the expense of other similarly situated appellants, who are waiting in the queue for their appeals to be heard by this Court. Allowing this to happen would amount to discrimination amongst criminal appellants to this Court, which I cannot condone, because it is prohibited under the Constitution.

In reaching the position that I have, I am equally mindful of the provisions of Article 20(2) of this Constitution which provides that:

> ***"The rights and freedoms of the individual and groups enshrined in this chapter, shall be respected, upheld and promoted by all organs and agencies of Government."***

This Court is part of the Judiciary, which is an independent but the third arm of the Government, so this Article equally applies to it.

I am also mindful and aware of the provisions of Article 28(1) which provides in the relevant part that:

> ***"In the determination of ... any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent ...court ... established by law."***

Furthermore, Article 126(2)(b) also provides in the relevant part that:

> ***"In adjudicating cases of both civil and criminal nature, the Courts shall, subject to the law, apply the following principles-***
>
> ***a) .....***
>
> ***b) Justice shall not be delayed"***

I agree and take notice of the fact that the principle of speedy justice is entrenched in both Articles of the Constitution I have cited. However, this Court cannot be accused of delays or potential delays when its dealing with appeals previously filed and or heard by it. It goes without saying that an appellant, just like the litigant in the lower courts does, expects to find some matters already before the Court and therefore is expected to wait for his or her turn and not to jump the cue. Indeed, Article

126(2)(a) re-emphasizes the point I earlier made by providing as the first principle the Court should consider when it is adjudicating cases of both a civil and criminal nature; that is:

> ***"(a) Justice shall be done to all irrespective of their social or economic status".***

So turning to the present application before me, I have found no merit in the arguments of the applicant that "*it is fair, just and equitable to grant his application and that he would suffer an injustice if his application is not granted and if he continues to serve his sentence even when his appeal is pending before this Court.*"

The law on invoking equity is very clear. You can only invoke equity if you are coming to Court with clean hands. I would be applying the law of equity upside down if I allowed this applicant, who has a dual conviction for theft and electronic fraud, to rely on equity to grant his application.

Secondly, after my analysis in this Ruling, it is my finding that actually allowing this application would neither be fair nor just.

Contrary to the contentions of the applicant which I have discussed and found to be of no merit, I find that the interests of justice actually dictate that the applicant should remain in prison serving his sentence, even when his appeal is pending before this Court for the following reasons:

When a person has been convicted of a serious offence or offences such as the ones of the applicant in this case was, namely; Theft and Electronic fraud, the interests of justice

demand that the scales of justice be titled in favour of protecting the wider public or community, (the people of Uganda) from such a person. Criminals are by their nature dangerous to society. That is the reason why Criminal Law was developed to punish those that engage in conduct that is harmful to society. That is also why the overriding interest to protect the public so dictates. Our laws give responsibility to the State to prosecute such persons before Courts of law, not only on behalf of the direct victim, but also on behalf of the whole community, all the people of Uganda. That is exactly why the criminal prosecution of the applicant, just like many others, criminals like him is phrased as **Uganda versus ... (accused person).**

The place of criminals such as the applicant, who has been accorded all his Constitutional rights and due process of the law before his conviction and sentence is handed out and confirmed by the two lower Courts, is in prison, where he or she should be handled in accordance with the term of his or her sentence.

The only category of convicts who were spared the immediate serving of their sentence are those who have been sentenced to suffer death. Article 22(1) of the Constitution clearly provides for an exception for them by providing that:

> ***"no person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a Court of competent jurisdiction in respect of any criminal offence under the laws of Uganda and the***

conviction and sentence have been confirmed by the highest appellate Court."

But even in those cases, the Constitution only directs that such convicts should not be hanged and not that they should be set free pending the finalization of their respective appeal by the highest appellate Court.

In the application before me, the applicant was convicted of Theft and Electronic fraud and sentenced to 7 years imprisonment on each of the counts to run concurrently.

Relying on the criteria set by **Arvind Patel** (supra), the applicant also contended that he is a person of good character!! He also adduced a letter from his LC Chairman showing that he has been a good resident of his area. His sureties also presented their respective documentation which was intended to convince Court that they are substantial. The sureties are also undertaking to ensure that the applicant shows up for the hearing of his appeal. Lastly, as I mentioned earlier, the applicant also relied on the **Arvind Patel** criteria to contend that the offences he was convicted of, do not involve personal violence.

Basing on the constitutional provision and principles I have already discussed in this Ruling, I totally reject these contentions which have no basis in law or even in logic. For example how and why should an appellate Court ignore two concurrent Judgments of the High Court and the Court of Appeal confirming that the appellant is a criminal and instead rely on the unfounded claims of the appellant, a Tenancy Agreement and a letter from a Local Council Chairman contending that the

applicant is a person of good character!! What law would this Court be relying on to make this Judgment of an applicant's alleged good character? I have found none.

Turning to the claims made by the Local Council Chairman, again these are not tested. They are contained in a letter and not even an Affidavit!! The author has not been subjected to any cross-examination to test the veracity of his evidence. In my humble view, the Court would not be justified or right to rely on unsworn testimony smuggled in at the second appellate Court level.

Similarly, I am not persuaded by the applicant's reasoning that I should grant the applicant bail pending appeal because he has substantial sureties. What is at stake is not how substantial or influential the surety is. The focus should be and always remain on the applicant, who is a convict, until he is proved innocent by this Court.

Lastly, the argument that the offences he was convicted of do not involve physical violence is also not sound in law. I totally agree with the arguments of counsel for the respondent that the crimes that the applicant was convicted of are indeed very serious crimes. Besides, there is still no basis in law for this Court to hold that persons convicted of offences that do not involve physical violence are any less harmful to society than those who are harm to society arising from criminal actions and behaviour can take any form. Physical violence or risk is only one form of harm but it is not the only one. In my view, Courts shall not engage in such exercises of evaluating which harm to society is

more and which is less. Once a certain conduct has been classified as an offence, that classification should be sufficient to the Court that it is harmful to society and to hold so. There is absolutely no reason or basis for the Court to engage in such classifications of harm which are not based on law.

As I discussed earlier, in as much as these offences are not capital offences, there are serious offences with far reaching implications for our society. This Court should not therefore treat the applicant with "kid gloves" and prematurely release him back into society, where he may go ahead to commit even other bigger financial crimes.

The law requires that I should exercise the power vested in me judiciously. As a single Justice of this Court, I am exercising power vested in this Court. I would also add that exercising power judiciously requires that I should do so, bearing in mind (a) the wider justice interests for not only the users and implementers of Mobile Money Services in Uganda, but also (b) the interest of justice of all Ugandans who benefit from having reliable sound financial services and systems to transact their business and affairs.

Until his conviction is set aside, the applicant is a criminal who was convicted by Courts of law, after following the due process of the law. He should therefore not be waiting for the filing and/or disposal of his appeal in the comfort of his home or be left free to mingle with the rest of the population either in the towns or the countryside. Rather, he deserves to be locked away until either his appeal is determined in his favour or until he completes his

sentences. This will not only to protect the community from his actions, but it will ensure that he serves his punishment and that he is also rehabilitated to reform.

Courts of law should have no business releasing such persons back into the community prematurely, on the basis of unconstitutional and legally indefensible and unproven criteria such as the one that was developed in the ***Arvind Patel*** Ruling and the other precedents of this Court that have since followed it. Therefore, exercising power vested in me judiciously requires that I deny this application.

For all the reasons I have given in this Ruling, I have found no merit in the submissions of the applicant. I decline to grant the applicant's prayers for bail pending the determination of his appeal. The appellant should continue serving his sentence, while his lawyers complete the filing of his appeal, which will be heard when the Court finalizes its program to hear Criminal Appeals, while duly observing the principle of first come first serve.

Dated at Kampala this 14th day of October 2020.

.....

JUSTICE DR. ESTHER KISAAKYE, JSC