THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

MISC. APPLICATION NO.01 OF 2021

(ARISING OUT OF CRIMINAL APPEAL NO.01 OF 2021)

(ARISING OUT OF COURT OF APPEAL CRIMINAL APPEAL NO.0147 OF 2017)

(ARISING OUT OF HIGH COURT CRIMINAL APPEAL NO.357 OF 2012)

(ARISING FROM MEN-CRM-CO-493-2015)

MUHUMUZA CRESCENT::APPLICANT

VERSUS

UGANDA:: RESPONDENT

RULING OF RUBBY OPIO-AWERI, JSC

1.0: Background

The applicant, Muhumuza Crescent was tried and convicted by the Grade One Magistrates Court, sitting at the Law Development Centre, on two counts of Forgery contrary to section 342 and 347 of the Penal Code Act, three counts of Uttering False Documents contrary to section 351 of the Penal Code Act, Criminal Trespass contrary to section 302 of the Penal Code Act, Forcible Detainer contrary to section 78 of the Penal Code Act and Theft contrary to section 254 (1) & 261 of the Penal Code Act. He was however acquitted of the offence of Obtaining Registration by Fraud contrary to section 312 of the Penal Code Act and one count of Uttering False Documents contrary to section 351 of the Penal Code Act. The applicant was sentenced to imprisonment on the respective counts he was found guilty, to between Six (6) months and two (2) years imprisonment, with two (2) years imprisonment being the longest

period. The sentences were to run concurrently meaning the applicant would utmost, serve two (2) years in prison.

Dissatisfied with the finding of the trial court, the applicant lodged an appeal with the High Court against both the conviction and sentence. The High Court allowed the appeal, quashed the conviction and set aside the prison sentences and as a consequence, the applicant was set free.

The State was however dissatisfied with the finding of the High Court and challenged the acquittal of the applicant by lodging an appeal with the Court of Appeal. In its finding, the Court of Appeal allowed the appeal, set aside the orders of the High Court and reinstated the judgment and orders of the Grade One Magistrates Court.

Aggrieved by the decision of the Court of Appeal, the applicant filed a Notice of Appeal with this court wherein, he intends to challenge the findings of the Court of Appeal. It is from that notice of appeal that the applicant now, commenced this application.

2.0: The Instant Application

Upon filing his Notice of Appeal with this court, the applicant then filed this application seeking orders that he be granted bail pending appeal in Criminal Appeal No.01 of 2021, and that the costs of the application be provided. The application is supported by an affidavit, with a supplementary and further affidavit all deposed by the applicant.

3.0: Grounds in support of the application

The applicant enlists a number of grounds in support of the application but in brief, he emphasizes the following:

a) That he is of a reputable and or good character and only a first offender having been convicted and sentenced by the Grade 1 Magistrates Court of Law Development Centre in November 2016,

a conviction and sentence that the justices of Appeal upheld on a 2nd appeal upon setting aside the appellate decision of acquittal of the applicant, before the High Court.

b) That the applicant has commenced an appeal by a Notice of Appeal in this court vide Criminal Appeal No.01 of 2021 challenging the decision of the Court of Appeal against him where he intends to raise points of general and or great public importance.

c) That he believes that his appeal is meritorious and not frivolous and vexatious

d) That he was convicted of offences which do not involve personal violence

e) That he was granted bail by the trial court and the 1st appellate court, and did not at all abscond until the determination of the appeal.

f) That there is a likelihood of delay in hearing and determining the appeal in this court owing to the complexity, in requiring the grant of a certificate of general or great public importance as a third appeal.

g) That in addition to having substantive sureties who properly understand their obligations, the applicant equally has a permanent place of abode at Ssemwogerere Zone, Bukoto 1 Parish, Nakawa Division within Kampala City, within the jurisdiction of this court and undertakes to abide by the bail terms set by the court, and

h) That it is in the interest of justice that the applicant be granted bail pending appeal.

In support of the above grounds, the applicant deposed an affidavit in support of the application and filed another supplementary affidavit, with a further supplementary affidavit in support of the application also

filed. Each of the affidavits filed contained over twelve (12) averments save for the further supplementary affidavit which had seven (7) averments. I do not intend to reproduce those affidavits in this ruling but will refer to specific paragraphs as and when the need arises.

4.0: Reply to the application

The respondent through the Office of the Director of Public Prosecutions filed an affidavit in reply deposed by one Nabisenke Vicky, an Assistant Director of Public Prosecutions. Briefly, Ms. Nabisenke described the instant application as being incompetent before the law, devoid of merit and merely an abuse of due process. She observed that the application is full of falsehoods and deliberate lies intended to mislead this court and that the applicant's appeal has no chance of success given the fact that he has been convicted by two courts on a finding of fact. That the assertion by the applicant that there would be a delay in the hearing and determination of the appeal in this court is merely speculative but the fact remains that the applicant is not a person of good character as on a number of occasions in the court of Appeal, the applicant absconded court even at the time when judgment was to be delivered. That this is envisaged by the fact that the applicant had to be arrested after delivery of judgment on a warrant issued by the court of Appeal meaning that judgment was delivered in his absence. Ms. Nabisenke concluded her assertions insisting that the applicant is not a fit and proper person to be granted bail pending appeal given his nature and conduct but he equally does not meet the conditions for grant of bail by this court. She thus prayed that the applicant is not granted bail but rather have the same dismissed and instead, have his appeal first tracked.

5.0: Submissions

For the applicant, it was argued by Mr. Byarugaba and Mr. Ampaire Felix that Rule 6 (2) (a) of the Rules of this court (The Judicature (Supreme Court Rules) Directions, provides that the institution of an appeal shall not operate as a suspension of a sentence or stay of execution, but the court in any proceedings, where a notice of Appeal has been given in accordance with Rule 56 and 57 of the Rules order an appellant to be released on bail or that the execution of any warrant or distress be suspended pending the determination of the appeal. That rule 3 of the rules of this court envisage an appeal for purposes of this court to include an intended appeal. That consequently, the applicant has lodged a Notice of Appeal in accordance with the rules of the court, the basis of which he should be released on bail pending the determination of the appeal.

Justifying further, the grounds as to why this application should be allowed, Mr. Byarugaba observed that the applicant is of reputable and or good character, the offences in issue did not involve violence, the applicant is a first offender, the appeal is meritorious and not frivolous, the applicant was on bail during the pendency of his appeal in the high court and never absconded, the applicant has substantial sureties who will ensure that he does not abscond if granted bail, he has a permanent place of abode, that there is a likelihood of delay in hearing and determining the appeal and that it is in the interest of justice that the applicant is released on bail. Highlighting the decision of **Arvind Patel versus Uganda, Criminal Application No.01 of 2003**, Mr. Byarugaba argued that this court laid down the principles upon which grant of bail pending appeal should be exercised and that the grounds enlisted by the applicant fall squarely within the principles laid down in Arvind Patel (supra).

As to the character of the applicant, Mr. Byarugaba was of the view that the applicant is a first offender with no prior criminal record which argument was equally accepted by the trial court. He thus argued that the law does not favour habitual offenders for once a habitual offender is released, he/she will most likely commit other offences before the offence(s) for which he was convicted and sentenced are determined on appeal. Mr. Byarugaba also argued that crime is hazardous to society and therefore it is safe in protection of society that habitual offenders are kept in custody until their appeal is determined. That since the applicant did not abscond bail during the trial and pendency of his appeal in the High Court, it is unlikely that he will abscond when granted bail by this court.

Further to the above, Mr. Byaraguba also convinced this court that the applicant's appeal is not frivolous and vexatious, the reason he successfully appealed against the trial court decision to the High court. That though the Court of Appeal overturned the finding of the High Court, the applicant is confident that the intended appeal to this court stands higher chances of success as there are questions to be taken on a third appeal that need consideration by the appellate court.

On the assertion that the appeal will take long to be heard, Mr. Byarugaba argued that the applicant's appeal is a third appeal to this court which as per the law necessitates acquisition of a certificate of importance/leave to appeal from the court of appeal failing of which a litigant comes to this court for the same. He thus opined that there is a likelihood of delay in hearing and determining the appeal in this court owing to the complexity and or procedural requirements. This court was referred to annex KM4 to the further supplementary affidavit which shows that the applicant has taken a step-in filing, in the court of appeal an application for the grant of a certificate of public importance and that, that application has not been fixed for hearing. Mr. Byarugaba

further argued that this court should take judicial notice of having come out of a major election, electoral disputes will be lodged in the courts and as per the law, they have to be disposed of in a definite time. That this therefore makes it uncertain as to when the applicant's application in the court of appeal and in the unlikely event it is denied by the court of Appeal then to this court, shall be handled. That if this trend is to occur, the applicant may have served the two years in prison, and on this basis, he may be found innocent by this court after serving the punishment.

Finally, it was argued for the applicant that he has a permanent home of abode and family at Ssemwogerere zone, Bukoto 1 parish, Nakawa Division Kampala and that the applicant has people of substance who are ready to stand for him as sureties, and who understand the duties of a surety. Mr. Byarugaba was of the view that the sureties will ensure that the applicant does not abscond from the jurisdiction of this court. The sureties were named and they included; Mr. Mutagubya Frank, Mr. Tumwikirize Mike Duncan, Mr. Tuwmesigye Valley Kanzira, Mr. Lukwago Benon all friends to the applicant and Dr. Muhwezi K. Deus a brother. Full particulars and identification details of the proposed sureties were given in the supplementary affidavit and submissions.

For the respondent, Ms. Nakafeero Fatinah, Chief State Attorney from the office the Directorate of prosecutions opposed the application arguing that the same is incompetent and should be dismissed as it does not satisfy the requirements for grant of bail pending appeal before this court.

Ms. Nakafeero was of the view that this being an application for bail pending a 3rd appeal, it is relevant for this court to refer to section 5(5) of the Judicature Act, which requires that where an appeal emanates from a judgment of the Chief Magistrate or Magistrate Grade 1 in the

exercise of their original jurisdiction and either the accused or the Director of Public Prosecutions has appealed to the High Court and the Court of Appeal, the accused or the DPP may lodge a third appeal to the Supreme court with a Certificate of the court of Appeal that the matter raises a question of great public importance, or that the supreme court considers that the appeal should be herd in considering that justice is done. That without that certificate from the Court of Appeal that the matter raises a question of law of great public importance, no appeal lies to the Supreme court.

Ms. Nakafeero further submitted that a thorough perusal of the applicant's pleadings reveals that no such certificate was obtained nor has this court granted leave to the applicant for the applicant to file his appeal which would then be the basis for the instant application. She made reference to the case of **Busulwa Bulasio versus Uganda, Criminal Reference No.01 of 2016**, which emphasized the need for grant of a certificate of great public or general importance in regard to third appeals to this court. She thus opined that without that certificate, the instant application is incompetent and that the same should be dismissed.

Citing the decision of **Waswa Peter Weraga, Criminal Miscellaneous Application No. 09 of 2019, MS. Nakafeero** insisted that bail pending appeal ought to be granted only upon proof of exceptional circumstances as a legal requirement and that the instant application falls short of that legal requirement. That there is no evidence to show that the applicant has filed an appeal in this court which would give him the basis for filing the instant application and that without that evidence, this application is not properly filed in this court. She also argued that the applicant cannot benefit from the presumption of innocence having been convicted by two courts. She equally questioned the character of the applicant when she insisted that the applicant had

absconded court in the court of appeal whenever the matter was called for hearing and during the delivery of judgment, the reason the Court of Appeal issued a warrant of arrest to ensure compliance with the sentence. She wound up her submissions insisting that the application lacks merit and that the same should be dismissed or in the alternative, the applicant's appeal be fast tracked and fixed for hearing.

6.0: Determination of the application

In determining this application, I have fully considered the pleadings, the submissions by respective counsel, the authorities cited and the law in their entirety.

This application was brought under section 40(2) of the Criminal Procedure Code Act, Rules 6(2)(a), 43(1), (2) & 44 of the Judicature (Supreme Court Rules) Directions, S.I 13-11.

Section 40 (2) of the Criminal Procedure Code Act gives discretionary power to court to admit an appellant to bail pending the determination of appeal by a Magistrates court and when the Magistrates court declines to so admit an applicant to bail, then the appellant may apply for bail to the appellate court where the appeal has been lodged. I wish to point out from the very inception that this provision in my view does not apply in the circumstances of this application. This matter is way beyond the powers of a Magistrates Court having been heard and determined by the High Court and the Court of Appeal. It was thus erroneously invoked.

Rule 6(2)(a) of the rules of this court provides thus;

> *"....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 execution of any warrant of distress be suspended pending the determination of the appeal".*

Before I delve into the determination of this application, it is important to note that the institution of criminal appeals in the Supreme court is a constitutional dictate enshrined under article 132(2) of the Constitution. This constitutional provisional provides that an appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law (underlining for emphasis purposes). This constitutional provision is in parametria with the provisions of section 4 of the Judicature Act Cap. 13.

One such law that prescribes how appeals lie to this court is the Judicature Act. Specifically, Section 5 of the Judicature Act is quite elucidative on how criminal appeals lie to this court. I will not reproduce the whole of section 5 of the Judicature Act as that will be more academic. I will however lay emphasis on sec. 5(5) of the Judicature Act which has by, and large formed the subject of contention in this application.

Section 5(5) of the Cap.13 is worded in the following terms;

> *''Where an appeal emanates from a judgment of the Chief Magistrate or Magistrate Grade 1 in the exercise of his or her original jurisdiction, and either the accused person or the Director of Public Prosecutions has appealed to the High Court and the Court of Appeal, the accused or the Director of Public Prosecutions may lodge a third appeal to the Supreme Court, with the certificate of the Court of Appeal that the matter raises a question of law of great public or general importance or if the Supreme Court in its overall duty to see that justice is done, considers that the appeal should be heard, except that in such a third appeal by the Director of Public Prosecutions, the Supreme Court shall only give a declaratory judgment".*

Related to section 5(5) above is rule 38 of the rules of this court which prescribes the procedure of obtaining that certificate from the Court of Appeal, and where the Court of Appeal declines to grant such certificate, then a formal application has to be made to this court for leave to appeal on the ground that the intended appeal raises one or more matters of public or general importance which would be proper for the court to review in order to see that justice is done.

The question of obtaining a certificate from the Court of Appeal to the Supreme court on a third appeal is so emphasized, so that even the record of appeal is deemed not to be complete without such certificate. This is the import of rule 60(2)(f) of the rules of this court which provides that the record of appeal can only be complete in regard to third appeals to this court with a certificate of the court of Appeal that a point of law or great public or general importance is involved. In fact, the Registrar of the Court of Appeal is precluded from preparing the record of appeal where the appeal cannot be heard without leave to appeal or a certificate that a point of law of great public or general importance is involved, until he or she has been notified that leave or a certificate has been given or unless the Chief Justice otherwise directs. Ref. rule 60(3)(b) of the rules of this court.

In **Busulwa Bulasio versus Uganda, Criminal Reference No.01 of 2016**, the applicant sought a similar remedy before this court (Opio-Aweri, JSC), and was denied bail having skipped the important stage of first obtaining a certificate that the matter raises a question of law of great public or general importance from the court of Appeal before filing his appeal in this court. He made a reference to a panel of three justices of this court and my learned sister Arach-Amoko, JSC discussed at length the legal import of a third appeal and the need for obtaining a certificate from the Court of Appeal that justifies the competency of a third appeal to this court. In her words, Arach JSC observed and i quote;

".....It is thus the number of times the proceedings are placed before a higher court for review that count. At every stage, the case has to be reviewed by court regardless of the appellant. The first appellate court actually has the duty to subject the evidence to fresh scrutiny and reach its own conclusions [See. Kifamunte Henry versus Uganda, SCCA No. 10 of 1997]. In the instant case, the proceedings which originated from the Magistrate Grade 1 court were first placed before the High Court and then secondly, before the Court of Appeal. That makes Supreme Court Criminal Appeal No.75 of 2015 a third appeal. As such, the applicant required a certificate of importance from the Court of Appeal that the matter raises a question of law of great public importance or leave from the supreme court, otherwise it would be incompetent, and as the learned justice pointed out rightly in my view, such an appeal stood no chance of success in this court".

A clear interpretation of the above statutory provisions, and the decision of this court leads me to the finding that a third appeal to this court cannot competently lie to the Supreme Court from the decision of the Court of Appeal on a second appeal without a certificate of the Court of Appeal; that a point of law of great public or general importance is involved, or leave has been granted by the Supreme Court. As a consequence, no valid application can emanate from an incompetent appeal.

It was however the argument of the applicant that rule 3 of the rules of this court define an appeal to the court to include an intended appeal. Related to this, is the argument by the applicant that in all criminal matters, an appeal is commenced by a notice of appeal. I beg to disagree with this line of argument that not all appeals to this court lie as of right. There are exceptions to this general rule and one such exception is in regard to third appeals which can only and validly be competent

when the court of Appeal issues a certificate that a point of law of great public or general importance is involved. Where the court of Appeal does not issue such certificate, then the appellant has to apply to this court for leave to regularize their appeal. Where such certificate or leave is not granted, then there cannot be said to be a competent appeal before this court.

Regarding the argument that in all criminal matters, an appeal is commenced by notice of appeal, it is true that quite often than not, all appeals are commenced by a notice of appeal but a notice of appeal in itself does not amount to an appeal. For third appeals to this court, one can argue that the appeal has been instituted when he or she has obtained a certificate of public or general importance from the Court of Appeal or this court has granted leave in case of denial by the court of Appeal in granting the certificate. It is only in circumstances that a valid appeal exists before this court, that an appellant can legally commence another action arising out of that appeal. The above discussion rests the applicant's argument that there is a valid appeal before this court simply because he has filed a Notice of appeal. I hasten to add that there is no formal appeal filed yet before this court by the applicant.

The applicant further argued that an application for grant of bail before this court, be it a third appeal does not require the applicant to have secured a certificate of importance. That nonetheless, he has taken a step to file an application for a certificate, and referred this court to annexture KM4 to his supplementary affidavit in support of the application to buttress his argument.

In addressing this issue, I will make reference to the remedy the applicant is seeking from this court; "…. **that the applicant be granted bail pending appeal in Criminal Appeal No. 01 of 2021"**. The phrase

pending appeal is not defined in the rules of this court neither is it defined in the Judicature Act and or the Criminal Procedure Code Act. It can be interpreted from the reading of Rule 6(2)(a) of the rules of this court hence, ... **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 execution of any warrant of distress be suspended pending the determination of the appeal, (underlined for emphasis).** Pending the determination of the appeal in my view implies a validly filed appeal and not one that is intended and or implied. I have already addressed what amounts to a valid appeal filed in this court.

The state prayed for an alternative remedy that the applicant's appeal be fast tracked and fixed for hearing rather than having him released on bail. Like I have indicated before, there is no valid appeal filed by the applicant in this court. This court cannot therefore fast track what is not rightly before it. I find this alternative prayer misplaced and is consequently not granted.

Overall, I find no merit in this application as the same is incompetent. It is not validly placed before this court. In the premises, I decline to grant the orders sought. It is accordingly dismissed. The applicant should go back to the drawing board and secure the required certificate from the Court of Appeal or secure leave from the Supreme Court before he can file for bail pending appeal.

Dated at Kampala this.....18th.....day of.....February.....2021

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RUBBY OPIO-AWERI

JUSTICE OF THE SUPREME COURT