

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CRIMINAL APPLICATION NO. 01 OF 2023
ARISING OUT OF CRIMINAL APPEAL NO. 026 OF 2019

MELLAN MARERE: ===== APPELLANT

VERSUS

UGANDA : ===== RESPONDENT

BEFORE HONORABLE JUSTICE MIKE J. CHIBITA; JSC.

RULING

The Applicant applied for bail pending determination of her appeal. The application was lodged by Notice of Motion under Rules 6 (2) (a), 42 and 43 of the Judicature (Court of Appeal Rules) Directions. The grounds of the application as contained in the Notice of Motion and are that:

- a) The Applicant is a first offender
- b) The appeal that has been filed by the applicant is not frivolous and has a high probability of success.
- c) There is a high possibility of substantial delay in the determination



d) The Applicant's state of health requires specialized medical attention and a balanced nutritional diet which she is unable to access while serving her custodial sentence in prison.

e) The Applicant has complied with the bail terms and conditions granted by the High Court.

f) It is just and fair that the Applicant be granted bail pending her appeal.

The application was filed in the court registry on 12th April 2017 and is supported by the affidavit of the Applicant commissioned on 17th March, 2017. In the affidavit in support of the application, the Applicant deposed that she is a female adult Ugandan of sound mind aged 77 years, former District Councilor representing Rugyeyo Sub County and a recipient of the Golden Jubilee Medal, Kanungu District.

On 7th 06, 2017, she was convicted of murder contrary to Section 188 and 189 of the Penal Code Act and sentenced to 29 years and 10 months' imprisonment. She is currently serving the sentence at Luzira Prisons. She filed an appeal against conviction and sentence in the Court of Appeal which reduced sentence to 18 years.

She was previously released on bail before her trial in the High Court and fulfilled all the conditions imposed on her until her conviction. She is of advanced age and suffers from asthmatic attacks, HIV WHO stage II, non-pitting oedema of the legs and her legs have been amputated. The significant medical findings are that the vascular system in which she has enlarged heart, systolic murmurs, increased jugular vein pressure and galloping rhythm.

That these require specialized medical attention and a balanced nutrition diet which she is unable to access while serving her custodial sentence in prison.

She deposed that she has a constitutional right to apply for bail and it may take long before her appeal is heard and determined considering the heavy workload of the court. Apart from the charge for which she was convicted, she has no previous criminal record or pending charges against her in any other court of law. In the main she repeats the grounds in the Notice of Motion that she has a fixed place of abode at Burora Village, Katungu Parish, Rugyeyo Sub County, Kanungu District within the jurisdiction of this court and is willing to abide by all the conditions that may be imposed upon her by this honourable court and will not abscond. Furthermore, she has substantial sureties who are resident within the jurisdiction of this honourable court who are willing to and will stand for her to be produced at the hearing of the application with the leave of court.

The affidavit in reply is that of Nabaasa Caroline PADPP working with the office of the DPP. She denied the contents of the Applicant's affidavit and deposed that this honorable court has already heard and dismissed a similar application by the applicant which was based on the same averments in Misc. Application No.04 of 2021. She deposed that paragraphs 7,8 and 9 of the applicant's affidavit were superfluous since the main appeal has already been argued and is pending judgment. That there is no legal provision conferring a right to the applicant to apply for bail pending judgment and thus the application is bad in law. She deposed that paragraph 18 of the applicant's affidavit is



misconceived since the process of determining her appeal is at the tail end of the appeal process. She prayed that the application be dismissed.

At the hearing of the application, Counsel Nabaasa Caroline PADPP from the office of the DPP represented the Respondent while Counsel Awelo Sarah represented the Applicant. The Applicant was produced in Court by the Prisons authorities at the hearing. The Applicant's Counsel reiterated the grounds in the Notice of Motion and Affidavit in support.

The Applicant's case in summary is hinged on the case of **Arvind Patel V Uganda, Supreme Court Criminal Application No. 1/2003** where this court laid out considerations to an application for bail pending appeal. In that case court emphasized that it is not necessary that it is not necessary that all the conditions stated should be present in every case, but that a combination of two or more criteria may be sufficient and that each case must be decided on its facts and circumstances.

Counsel submitted that the applicant is a mother and a grandmother who has been looking after orphans, a law-abiding citizen who contributes positively to her family and community, a former Local Council (LC) 5 Woman councilor for Rugyeyo Sub County, Kanungu District, a recipient of the Golden Jubilee Medal and a District Counselor for people living with HIV/AIDS.

Counsel for the applicant further submitted that the applicant is a first-time offender, had previously been released on bail by the High Court, where she fulfilled all the conditions and attended court religiously until conviction.



Counsel for the applicant also submitted that the applicant suffers from chronic allergic bronchitis with asthmatic components, HIV/AIDS, Peripheral Neuropathy and old age which according to Dr Kakoraki, make the applicant unable to withstand prison conditions as envisaged in annexure c1 of the Notice of Motion.

Counsel added that according to the medical report annexure c2 of the Notice of Motion, dated 3rd May 2022 where the applicant's legs were amputated and her current photo attached as annexure c3.

Counsel submitted that there has been substantial delay on the determination of the matter

Counsel introduced two people as sureties, furnished copies of their national identity cards, office identity Cards, LC introductory letters and phone contacts;

1. Aturinda Rosemary, a Nursing Officer at Kanungu District Local Government, a daughter of the Applicant.
2. Akankwasa Judith, a senior Clinical Officer at Kanungu District Local Government, a daughter of the applicant

Counsel submitted that the applicant had a permanent place of abode as evidenced by the letter from Ariko Frank, the LC Chairperson Buroro, showing that the Applicant was arrested in Buroro cell Sothern Ward Nyakabungu Town Council, Kanungu District.

In brief, counsel for the applicants' case was based on the fact the applicant has been sick, and both her feet have been amputated, the living conditions are hard for her to be in prison, she needs



constant care and also the fact that she brought into court substantial sureties

She prayed for the application to be allowed.

A brief summary of the Case for the Respondent

Counsel for the respondent adopted her averments in the affidavit in response to the applicant's affidavit and stated, *inter alia*, that the appeal referred to has been handled by this honorable court and thus she considered it determined.

Counsel submitted that in a session that was handled in September, 2021, submissions on appeal by the applicant who is the appellant in the main case were admitted in court, together with the reply for the respondent and the matter awaits delivery of judgment.

Counsel submitted that what was before court was an application pending the delivery of judgement, which, according to her submission, confers no such right or offers no procedure for bail pending judgement delivery.

Counsel submitted that counsel had not addressed her mind to that, and that the appeal has actually been determined and on the tail end of being concluded.

Counsel reiterated that the applicant has been convicted twice and sentenced twice thus it will be new precedent by this honorable court to grant bail when it is pending delivery of judgement.

Counsel submitted that this is the second application for bail to this honorable court seeing that a similar application based on

similar facts and same grounds was dismissed vide **Misc. Application No. 04/ 2021**. Counsel informed court that the same was dismissed and that the grounds have not changed since that time. Finally, she observed that the main ground she advanced of sickness was advanced then.

Counsel stated that a similar application in the Court of Appeal vide Misc. Application. No. 52 of 2017 was advanced and still the Court of Appeal found no merit.

Counsel averred that this evidenced that there is no merit in the main appeal and thus instead prayed for court to expedite delivery of judgment of the appeal which has already been handled.

Counsel further prayed that the court expedites its judgment instead of creating a precedent where people can assume that court is failing to deliver judgment on the case that is already heard.

The applicant in rejoinder stated that the applicant's condition has since worsened. She further averred that she still had her legs until recently when they were amputated and the condition worsened and thus, she prayed to the Honorable court to give the applicant a chance to have her health condition monitored out of the prisons.



I have carefully considered the application for bail pending appeal together with the evidence and taken into account the submissions of Counsel.

The conditions for grant of bail pending appeal have been set out in a wealth of jurisprudence. I shall consider the following;

In Arvind Patel v Uganda Supreme Court Criminal Appeal No. 1 of 2003 Oder JSC included the fact of whether the appeal is no frivolous and has a reasonable prospect of success. Furthermore, the question, *inter alia*, includes whether the Applicant complied with bail terms that had previously been granted by the lower court. Other factors to consider include the character of the Applicant; (2) whether he/she is a first offender or not; (3) whether the offence of which the Applicant was convicted involved personal violence; (4) Whether there is possibility of substantial delay in the determination of the appeal. A combination of two or more criteria may be sufficient and each case must be considered on the basis of its own facts and circumstances.

Regarding the presumption of innocence, the Supreme Court in **Busiku Thomas v Uganda Criminal Appeal No. 33 of 2011 (Tumwesigye & Dr. Kisaakye JJSC; Tsekooko, Okello and Kitumba Ag. JJSC)** held:

"It should also be further noted that the presumption of innocence guaranteed to a person accused of a crime, ends when the accused person is found by an impartial Court guilty of the offence he or she was charged with. From this point onward, the interests of justice demand that the Courts should



not only take into account the rights of the convicted person, but also the interests of the victim and the society as a whole."

Bail pending appeal is provided for under **Rule 6 (2) (a) of the Judicature (Court of Appeal) Rules** provides as follows:

"6. Suspension of sentence and stay of execution

1. 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 rule 59 or 60, 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; and..."

Secondly, **section 40 (2) of the Criminal Procedure Code Act Cap, 116** gives the appellate Court discretionary power whether to admit an appellant to bail pending appeal:

"40. Admission of appellant to bail and custody pending appeal.

*(2) The appellate Court may, if it sees fit, admit an appellant to bail pending the **determination of his or her appeal**; but when a magistrate's Court refuses to release a person on bail, that person may apply for bail to the appellate Court."*

Such discretionary power is exercised judicially and in accordance with the principles of set out in the above authorities.

Notwithstanding the above authorities, bail pending trial for capital offences has special statutory provisions under **section 15 of the Trial on Indictment Act Cap 23**. This received judicial consideration in **Kairu Arajab and Kange Patrick v Uganda Court of Appeal Miscellaneous Application No. 34 of 2014** where **Hon. Mr. Justice Kenneth Kakuru** held that a convict can be granted bail pending appeal subject to the exceptional circumstances under **Section 15 of the Trial on Indictment Act Cap 23**. He said:

"Before conviction an Applicant charged with a serious offence is required to prove exceptional circumstances as set out in Section 15 of the Trial on Indictments Act. It cannot be the law that upon conviction the same person has no duty to prove those exceptional circumstances."

Section 15 of the Trial on Indictment Act Cap 23 provides as follows:

"15. Refusal to grant bail.

- 1. Notwithstanding section 14, the court may refuse to grant bail to a person accused of an offence specified in subsection (2) if he or she does not prove to the satisfaction of the court—*
 - a. that exceptional circumstances exist justifying his or her release on bail; and*
 - b. that he or she will not abscond when released on bail."*

Offences under section 15 (2) include under sub section (a) an offence triable by the High Court such as the offence of murder of

which the Applicant has been convicted. Secondly, exceptional circumstances are defined by section 15 (3) and additional factors are considered by section 15 (3) which are reproduced for ease of reference:

"(3) In this section, "exceptional circumstances" means any of the following—

- a. grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody;*
- b. a certificate of no objection signed by the Director of Public Prosecutions; or*
- c. the infancy or advanced age of the accused.*

(4) In considering whether or not the accused is likely to abscond, the court may take into account the following factors—

- a. whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda;*
- b. whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;*
- c. whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and*
- d. whether there are other charges pending against the accused."*

The **Judicature (Supreme Court Rules) Directions** however, govern appeals in the Supreme Court, **Rule 6(2) a of the Judicature (Supreme Court Rules) Directions** as rightly cited by the applicant provides for grant of bail pending appeal.

“(2)” ... the institution of an appeal shall not operate to suspend any sentence or to stay execution but court may

*(a) In any criminal proceedings where a 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.***

From the wording of the statute its pertinent for this court to state the meaning of the word determination as used in the parent statute.

The **Blacks’ law Dictionary 4th edition at Page 536** defines Determination as the decision of a court. It implies an ending or finality, the ending of a controversy or suit. It further explains the coming to an end in any way whatever as per **Hanchett Bond Co. v Fibre 208 Mo. App 169.**

It’s the understanding of this court that the import of this rule is that bail pending appeal may be granted **during the pendency of the determination of the appeal** or in simple terms **before the court grants its judgement.**

It was court’s finding after deliberation and evidence as per the record of court as submitted by the respondent that the main appeal had already been determined and it just awaits judgement.

The respondent further submitted that this would render the instant application one for bail pending judgement and not bail pending appeal. This would set a new precedent that the court should not encourage. This is because apart from the applicant fronting sickness there is no other justification in law or reason whatsoever necessitating creation of this new precedent.

It is based on this rationale that this court finds that this application fails by law because the right to bail pending appeal is already extinguished by the very provisions provided by the applicant; Rule 6(2)(a), 42 and 43 of the Judicature (Supreme Court Rules) Directions SI 13-11.

To further buttress this conclusion court has the considered its wealth of jurisprudence as well as those cited by the applicant but pertinently the decision of **Henry Bamutura V Uganda Miscellaneous Application No.19 of 2019** where **HON JUSTICE LILLIAN TIBATEMWA** justifications for bail pending 2nd Appeal was given as the substantial delay in determination of the appeal.

Court held that delay in disposing of the appeal should be assessed in light of whether there is real risk that the sentence or a considerable portion of it will have been served before the appeal is heard. Pursuant to this application this threat has already been extinguished since the appeal in the instant application was already heard and is just pending judgment.

Furthermore, as regards to substantial delay in disposing the Appeal as a ground to get bail, the judge in the above case stated

that this in itself may be an unusual circumstance, however it ought not be speculative but factual.

This was also stated by **Trevelyan J in Somo V Republic [1972] E.A 476-481** that delay alone can only be an unusual or exceptional circumstance if it is unusual itself. In this present application the court finds that the assertion in her Notice of Motion that there has been substantial delay in the determination of the matter is mere speculation and no evidence or facts have been adduced. This is more so since the court has already heard the matter and merely awaits judgment, thus rendering the application premature.

The learned Justices of appeal at page 14 paragraph 3, line 16 judgement of Honorable Justice **Christopher Madrama** stated that in the premises, the applicant's application for bail is premature due to lack of evidence that within one year an appeal whose memorandum was filed by 2nd May, 2018 could not have been heard within a year.

This is the exact assertion this court makes that there is no evidence that an appeal that has already been determined awaiting judgment will not be rendered soon.

Where the appeal has already been determined as is the case in issue, then it's the finding of this court that since this court is in the process of delivering its judgement then this application fails before even delving into the merits of the application.



The delay to render judgment was caused by the demise of one of the justices on the panel. On 2nd May, 2023, a reconstituted panel introduced to the parties and Counsel. It is evidence that judgment in this case will be rendered sooner than later.

It would be a matter of immense cruelty if the Applicant were granted bail today and tomorrow judgment in her appeal is rendered confirming her sentence whereupon her bail would be cancelled and she would be returned to prison.

It is in the interest of justice to wait for the judgment in the appeal to be rendered. All indications are that this will be done very soon.

Consequently, this application is dismissed.

Dated at Kampala this...^{5th}... day of May..... 2023


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Mike J. Chibita
Justice of the Supreme Court




