THE REPUBLIC OF UGANDA,

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPLICATION NO 2 OF 2023

RO/12031 2LT. AMBROSE OGWANG} ..... APPLICANT

VERSUS

UGANDA} .....RESPONDENT

RULING OF CHRISTOPHER MADRAMA IZAMA, JSC

The applicant filed this application under the provisions of article 50 (3) of the Constitution of Uganda, section 40 (2) of the Criminal Procedure Code Act; section 8 (1) & (2) of the Judicature Act, Rule 6 (2) (a) of the Judicature (Supreme Court Rules) Directions and any other enabling law, for an order that the applicant be admitted on bail pending the hearing and determination of the Criminal Appeal Nos 093 of 2018 and 048 of 2021, and on such favourable terms and conditions as the court shall deem appropriate.

The grounds of the application averred in the notice of motion are that:

1. This court is seized with powers and discretions to admit the applicant on bail pending the hearing of the appeal.
2. The applicant's appeal against the Court of Appeal first retrial order or the later conviction/sentence arising from the retrial raises serious points of law for failure of the judge to recuse himself from the proceedings and therefore leaving high possibilities of success.
3. The applicant has a fixed place of abode and a permanent home in Aweki Paro village in Dokolo district.
4. The applicant has substantial sureties who understand their roles under the law.
5. The applicant has already served 13 years in custody, a substantial portion of the sentence imposed by the High Court, which began to run from 18th of June 2010.

6. The applicant has exigent circumstances of chronic peptic ulcers and chronic kidney disease which cannot be managed in the prison for want of specialised treatment.
7. There is possibility of the appellant continuing to suffer inordinate delays for the two appeals to be heard and determined by the court.
8. The application be granted on non-onerous terms and conditions.
9. It is in the interest of justice that the application be allowed.

The applicant in support of the notice of motion, deposed to an affidavit where he states that he was initially arrested on 23rd March 2010, tried and convicted on 18th June 2010 by the Uganda People's Defence Forces third Division Court Martial at Mbale for the offence of murder and sentenced to suffer death. On 13th September 2012, the General Court Martial sitting at Makindye confirmed the said conviction for murder but substituted the sentence with life imprisonment. On 12th July 2010 the UPDF Court Martial Appeal Court sitting at Makindye confirmed the decision of the General Court Martial. Being dissatisfied with the decision of the Court Martial, the applicant made a third appeal in Criminal Appeal No 106 of 2013 to the Court of Appeal on 8th November 2018 and the conviction was quashed and a retrial ordered in the High Court. The matter was remitted to the Chief Magistrate's court of Mbale for indictment process and on 23rd November 2018, the applicant was committed for trial before the High Court. The High Court Mbale on 11th June 2019 convicted the applicant for the offence of murder and sentenced him to 29 years and two months' imprisonment. The High Court ordered the sentence to run from 18th June 2010. On 6th of August 2021 the Court of Appeal in Criminal Appeal No 145 of 2019 upheld the conviction and sentence of the High Court.

The applicant deposed that both appeals against the Court of Appeal first retrial order filed in this court as SCCA No. 093 of 2018 or the later conviction and sentence arising from the retrial appeal the in S.C.C.A. No. 045 of 2021 are pending in this court. The petitioner asserts that he has taken all the necessary steps to have the two appeals heard and determined by court but all this was in vain. He asserts that the appeals are not frivolous

and there is a memorandum of appeal already filed in the registry of this court. That based on the busy schedule of the court, he will continue to suffer inordinate delay before the two appeals are heard and determined by the court.

He states that he continues to grapple with chronic peptic ulcer diseases and chronic kidney disease which cannot be managed within the prisons. The applicant's appeal against retrial and the later conviction/sentence raises serious points of law in terms of failure of the judge to recuse himself from the proceedings and therefore giving the applicant's appeal a high chance of success. Further the appeal has a reasonable chance of success as the said violence or fateful gunshot did not emanate from the exhibited SMG rifle according to the evidence of PW 4, the ballistic expert. The applicant further reiterated the averments in the notice of motion and additionally stated that save for the single conviction which is contested, he has no history of violence in the community or the prison where he has spent in custody 13 years with effect from 2010. That it is in the interest of justice that the application be found to be of merit and he is admitted on bail pending hearing and determination of the appeal.

In reply, the Director of Public Prosecution opposed the application and filed an affidavit in reply of the Chief State Attorney Mr Richard Birivumbuka. The said Chief State Attorney deposed that he read and understood the application for bail pending appeal and the supporting affidavits together with the annexures thereto as well as the record of appeal. He contends that the application for bail pending appeal lacks merit. He agrees that the applicant was arrested, was in lawful detention, went through the trial, prosecution, conviction and was sentenced. There is an appeal pending before this court. The applicant was convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act Cap 120. The applicant murdered Inspector of Police Mr. Koire George with an SMG rifle. Further the deceased was murdered by the applicant while the former was in the course of employment. The late Inspector of police died of severe open head injury caused by gunshots. Shortly after causing the death of the deceased,

the applicant hid in a building with two guns. The applicant was arrested by a joint team involving the Uganda Police Force and the Uganda Peoples Defence Forces in an operation that lasted for six hours. During the arrest, the applicant was requested to surrender to security forces but resisted arrest.

Mr. Birivumbuka further deposed that following his conviction, the applicant was sentenced to 29 years' imprisonment whereupon he appealed to the Court of Appeal in Criminal Appeal No 145 of 2019. The Court of Appeal upheld his conviction and sentence. Thereafter the applicant further appealed to the Supreme Court in Criminal Appeal No 48 of 2021. Further the said appeal was cause listed for hearing and parties were given schedules to file written submissions. The applicant filed written submissions on 12th July 2023 and served the respondent who filed written submissions in reply. What is pending is for the court to fix the appeal for hearing so that the submissions and the reply are adopted as arguments for and against the appeal.

Mr. Burivumbuka further deposed that the respondent's appeal is frivolous and has no reasonable chance of success. That the offence committed by the applicant involved personal violence and the use of a deadly weapon. Further, there was no possibility of substantial delay in the determination of the appeal. The applicant never attached any evidence of his alleged sickness which he stated cannot be managed by the Prisons Medical Team. Further his application does not raise any serious points of law. Mr Richard stated that the applicant has no fixed place of abode and did not have substantial sureties. He contended that the applicant is a convict and not a law abiding citizen. Further, there is a very high likelihood of the applicant absconding if he is released on bail pending appeal. The contention that apart from the offence, the applicant was not a violent person, was not tenable because the applicant exhibited a very high degree of violence before and during his arrest. In the premises, he stated that it is in the interest of justice that the application is dismissed.

Both parties filed written submissions. The applicant filed written submissions on the 18th of November, 2022. Pursuant to directions of court the respondent replied to the written submissions and filed them on the 2nd of October 2023. The applied filed written submissions in rejoinder on the 18th of October, 2023.

The applicant's written submissions.

The applicant relied on factual background in his affidavit in support and as averred in the notice of motion. He submitted that he has undertaken all the necessary steps to pursue the two appeals. The memorandum of appeal is on court record and there are several communications to the registry of the court imploring it to have the matter cause listed for hearing and determination by the Supreme Court, but all in vain. That given the busy schedules of this court, the possibility of more undue delays are very certain and this is a very good ground for to grant bail to the applicant. In **Arvind Patel vs Uganda; [2003] UGSC 25, Criminal Application No 01 of 2023**, this court considered the possibility of delay and granted bail to the applicant. He further contended that he has exhibited medical conditions showing that he continues to grapple with a chronic peptic ulcer disease and a chronic kidney disease which cannot be managed within the prison walls as they lack specialised treatment. The applicant submitted that he cannot access regular treatment and review of gastrointestinal tract from a specialised hospital, if any. The prison setting leads to delays in access to treatment. Yet he has a life-threatening disease. He submitted that regular meals are required but not available to sustain his condition. The prison menu routinely consists of beans and maize meal or other unsuitable meals which have acidity and this triggers ulcers.

With regard to the chronic kidney disease, he contends that treatment is very expensive and not available in the Prison medical facility. Lack of treatment has a likelihood of causing enlargement of the kidney or development of "perforated peptic ulcer" disease. That the condition if not well-managed, would lead to renal impairment with a possibility of organ failure and fatality.

Further the applicant submitted that the appeal has a reasonable chance of success as the fateful gunshots were not from the exhibited SMG rifle according to the evidence of the ballistic expert PW4. Save for the single conviction which he contests, he has no history of violence in the community or in the prison where he has spent about 13 years in custody with effect from 2010. Further the possibility of reasonable success of the delayed appeal is very high. The panel that heard and dismissed the appeal was constituted by one Hon Justice Kenneth Kakuru, JA ought to have recused himself from the proceedings of the Court of Appeal. That the Justice of Appeal whose panel ordered a retrial without giving reasons in the Judgment of court disposed the first appeal Criminal Appeal No. 107 of 2013 decided on 8th November 2018 at Kampala. He contended that the same Justice in that appeal again chaired the second appeal that confirmed the conviction and sentence of the High Court at Mbale which conducted the retrial without first giving a chance for this court to dispose of its own appeal No. 093 of 2018. That this meant that his constitutional right of appeal to a competent court under article 50 (1) and (2) of the Constitution was grossly infringed by the two lower courts. Because of that conduct, substantial bias cannot be overlooked. That the decision of the Court of Appeal is more likely to be found null and void by this court on account of failure to render justice. Further the applicant submitted that it is trite law that a man cannot be a judge in his own case. That the possibility of success of the appeal is therefore strong. He contended that, strangely, this seems to be a recurrent issue as it was in the court-martial in 2010.

Further the applicant submitted that he has a fixed place of abode and a permanent home as indicated in the affidavit in support of the application. Although his birth certificate reads that he is from Lira district, there was succession in 2005 giving rise to the current Dokolo district.

In addition, the applicant submitted that there are three Ugandans who are willing to stand as sureties for him. He has substantial persons who understand their role to ensure that he attends court, if released on bail. He further made reference to the particulars of the sureties disclosed in the

documentation attached. He is ready to undertake and abide by such terms and conditions as this court may deem fit to impose. He already served 13 years of the sentence and is left with six years of the sentence imposed by the High Court and upheld by the Court of Appeal. He submitted that save for the single conviction which he disputes, he has no history of violence.

The applicant relied on section 40 (2) of the Criminal Procedure Code Act and rule 6 (2) (a) of the Judicature (Supreme Court Rules) Directions for the power of the court to release a prisoner on bail pending his appeal. He contended that the presumption of innocence still subsists because he pleaded not guilty before the High Court and this lasts until the matter is determined by the Supreme Court.

The applicant submitted that the case falls within the exceptional cases on account of grave illnesses which he suffers from possible egregious delays pending appeal. He contended that both appeals have not been cause listed from 2018 to date. In **Alenyo Marks vs Uganda; Criminal Appeal No 05 of 2015** the Supreme Court granted bail on the ground of substantial delay to hear the applicant which contravened his constitutional right to a fair hearing. The applicant submitted that the court has discretion to admit him on bail at the discretion of the judicial officer. He reiterated earlier submissions on the length of his custody without hearing. He submitted that if he is not released on bail on onerous terms and conditions, he will continue to suffer injustice. He prayed that the application be found meritorious and his application granted.

Submissions of the respondent in reply.

The respondent's counsel submitted that the respondent objects to the application and prayed that it is dismissed. The respondent relies on the facts deposed to in the affidavit in reply of Mr Richard Birivumbuka, Chief State Attorney, Office of the DPP.

The submissions rely on the facts and contents of the affidavit in reply. Further the respondent contends that the applicant is a convict and the presumption of innocence is not available to him. In **John Muhanguzi**

Kashaka vs Uganda; Supreme Court Miscellaneous Application No. 18 of 2019 and in **Henry Bamutura vs Uganda; Supreme Court Miscellaneous Application No 19 of 2019** it was held that after conviction, the legal status of an offender changes and the consideration for release is whether there are exceptional and unusual circumstances warranting release pending appeal. This is because the applicant is no longer fully shielded by the presumption of innocence under article 28 (3) of the Constitution. In the circumstances the applicant must prove exceptional and unusual circumstances to warrant his release. The applicant has not proved any unusual circumstances to warrant his release on bail pending appeal.

Further, the respondent's counsel submitted that the main consideration this court should have in determining whether to grant bail pending appeal is whether the convict will not abscond if bail is granted. To this effect, the law outlines what factors to take into account. This include whether the applicant deserves to be released on bail pending appeal. He submitted that the applicant will definitely abscond if it is released on bail pending appeal. He is a convict serving a sentence of 29 years' imprisonment and the case of **Chimambhai vs Republic (No 2) (1971) EA 346,** cited in **Arvind Patel vs Uganda** (supra), holds that the principles for refusing bail are that the appellant may in the meantime either abscond or commit further offences. He submitted that this court has discretion to release the applicant on bail pending appeal and certain guiding principles and conditions must be present before the applicant is released on bail pending appeal.

Further paragraph 19 of the **Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions**, 2022 states the facts to be considered in an application for bail pending appeal include:

a. The character of the applicant,
b. Whether the applicant is a first offender or not,
c. Whether the offence for which the applicant was convicted involved violence
d. Whether the appeal is not frivolous and has a reasonable possibility of success

e. The loss incurred by the complainant or the victim
f. The possibility of substantial delay in the determination of the appeal and
g. Whether the applicant has complied with the bail conditions granted by the trial court before the conviction of the applicant.

The respondent's counsel submitted that the applicant application falls short of the requirements for the release on bail pending appeal.

In the premises he opposed the application on the ground that the offence for which the applicant was convicted involved violence. Secondly, the appeal is frivolous and has no possibility of success. Thirdly there is no possibility of substantial delay in the determination of the appeal. Fourthly the applicant has no unusual or exceptional circumstances to warrant his release on bail and lastly the applicant has no fixed place of abode and no substantial sureties.

On the question of whether the applicant committed an offence involving violence, the applicant was convicted of murder and the respondent's counsel relied on the circumstances stated in the affidavit in reply. He submitted that the applicant is such a violent man and the only place that he deserves to be is in prison so that he can continue being rehabilitated. That releasing him on bail pending appeal would amount to releasing danger back into the community. That the applicant has no fear and respect for human life. He contended that the rationale for the court denying bail pending appeal to prisoners who had committed offences involving personal violence is to protect the community. He prayed that this court protects the public against lawlessness by ensuring that a person who causes anarchy is locked up. The court ought to instil confidence in the criminal justice system in the public, including those close to the accused, as well as those distressed by the audacity and horror of the crime.

On the assertion that the appeal is frivolous and has no reasonable prospect of success, the respondent's counsel submitted that both the learned trial judge and the learned Justices of Appeal respectively properly evaluated

and re-evaluated the evidence on record. The offence was committed during the day, and the applicant was properly identified and placed at the scene of crime. He shot the deceased in the presence of PW1 and PW2. By the time of commission of the offence there were only two policemen in the building. The other soldiers and policeman had not yet arrived. The applicant told various lies and this corroborated the prosecution case. That the failure to tender the killer gun or forensic report was not fatal to the case because the weapon was described by the witnesses and corroborated by the post-mortem report.

Whether the point of law that the applicant is emphasising is not tenable. The presence of Justice Kakuru, JA who sat on both panels of the Court of Appeal on the two occasions did not cause a miscarriage of justice to the applicant. This is so because the first appeal was determined on a point of law and not on the merits of the case.

Further the justices did not re-evaluate the evidence but merely decided the appeal on a point of law. Besides, the appeal was heard by three justices who unanimously agreed that the learned trial judge had properly evaluated the evidence and came to the right conclusion to convict the applicant.

The appellant's defence lawyers represented him throughout the trial. The lawyer only missed the part where the judge fixed the case for hearing. Furthermore, Criminal Appeal No 98 of 2018 is the fourth appeal and it was filed illegally. The law only allows a maximum of three appeals and a third appeal can only be filed with the leave of the Supreme Court. Since the appeal has no merit, the applicant will not suffer a miscarriage of justice if the application is dismissed.

The respondent's counsel also submitted that there is no possibility of substantial delay in the determination of the appeal. He submitted that this court has taken steps to have the applicants appeal fixed for hearing. The applicant's appeal numbers 048 and 098 were fixed for hearing. The court gave the parties a schedule for filing submissions, reply and a rejoinder which they complied with. Counsel further contended that the judiciary

through its transformation agenda is disposing of cases expeditiously and it is a fallacy for the applicant to speculate that his appeal will delay and yet the purposes of hearing is in motion.

With regard to the contention that the applicant has unusual or exceptional circumstances to warrant his release on bail, the respondent submitted that the applicant has not demonstrated that he has unusual or exceptional circumstances to warrant his release on bail pending appeal. He alleged that he is suffering from exigent circumstances of chronic peptic ulcer and chronic kidney disease. However, the applicant never attached evidence from the prison's medical team that his life is in danger or that his condition cannot be managed from the prisons.

In relation to the question of whether the applicant has fixed place of abode, the respondent contended that the applicant has no fixed place of abode. The applicant attached introduction letters in respect of Ocen Denis, Lira Jimmy and Liira Raymond. However, the letters do not indicate his relationship to the sureties. The introduction letters of the sureties were also short of mentioning the antecedents of the sureties, the letters nowhere mention their work or whether the sureties are employed. He contended that failure to disclose such vital information from the LC 1 Chairpersons make it difficult for this court to determine whether the sureties are suitable or substantial. The introduction letters have not complied with paragraph 15 (a), (c) and (d) of **the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022.** He submitted that the application has no merit and it ought to be dismissed.

In rejoinder, the applicant addressed the court on 5 grounds on the following:

1. Whether the offence for which the applicant was convicted involved violence.
2. That the appeal is frivolous and has no possibility of success.
3. That there is no possibility of substantial delay in the determination of the appeal.

4. That the applicant has unusual or exceptional circumstances to warrant his release on bail and
5. That the applicant has no fixed place of abode and substantial sureties.

I have taken these submissions into account and have decided to highlight number 4 of the rejoinder. On the issue of unusual or exceptional circumstances, the applicant reiterated submissions about his attached medical report dated 4th December 2018 as proof that the Prisons Authorities know about his medical condition which is dire. This report speaks for itself and I will consider it in my ruling. The applicant relied on section 15 (1) and (3) of the Trial on Indictment Act to advance the point that his grave illness had been certified by a Prisons Medical Officer or a certified practitioner.

The applicant submitted that this court has a duty under article 23 (5) (c) of the Constitution, 1995 to allow a convicted person access to medical treatment. He submitted that one way to grant that access is through releasing the convict on bail pending appeal.

He submitted that the submission of the respondent that he would pose a danger to the public when released on bail was made in bad faith. He submitted on the circumstances under which he was arrested and stated that the 4 hours taken to arrest him was because the police were in panic and shot their own officer and wasted time waiting for the army to respond. He contended that the claim that the police were pursuing him as a suspected robber was false and all the lower courts dismissed that claim. The applicant expects to have completed serving his sentence in the year 2029 and wonders whether prisons should be his permanent home when the lower courts did not intend it to be.

Consideration of the application.

I have carefully considered the applicant's application together with the affidavit in support and the affidavit in reply. I have also read the written submissions of the applicant and the respondent. An application for bail pending appeal is filed under rule 6 (2) (a) of the Rules of this Court. Rule 6 (2) (a) provides that:

> 6. Suspension of sentence, stay of execution, etc.
>
> (1) ...
>
> (2) Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may—
>
> (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 or that the execution of any warrant of distress be suspended pending the determination of the appeal;

While rule 6 (2) (a) provides the procedure, the considerations for bail are contained in two Acts of Parliament. Initially when the Court of Appeal was the highest appellate court, second appeals would originate from the appellate decision of the High Court to the Court of Appeal and bail pending second appeals was provided for under section 47 of the Criminal Procedure Code Act Cap 116 which provides that:

> 47. Admission to bail pending second appeal.
>
> A judge of the High Court may in his or her discretion, in any case in which an appeal from a decision of the High Court in ***its appellate jurisdiction*** to the Court of Appeal is filed, grant bail pending the hearing of the appeal. (Emphasis added)

The second appeal envisaged is an appeal from the decision of the High Court in the exercise of its appellate jurisdiction and it envisages appeals originating from the original trial decision of a Magistrates' Court. Such appeals arise from decisions in a trial for offences triable by Magistrates Courts, which courts, have jurisdiction to only try non capital offences. It follows that the provision does not cover murder which is a capital offence

triable by the High Court. Secondly and on the face of it, section 47 of the Criminal Procedure Code Act does not expressly apply to appeals from the Court of Appeal to the Supreme Court unless its provisions are applied analogously. Similarly, section 45 of the Criminal Procedure Code Act, which provides for the second appeals, envisages an appeal originating from the trial decision of a magistrate's court. It is section 5 (11) of the Judicature Act Cap 13 which imports provisions on bail under sections 132 (4) and (5) of the Trial on Indictments Act cap 23 (the TIA) to the Supreme Court and the imported sections apply with the necessary modifications to the Supreme Court. Sections 132 (4) and (5) of the Trial on Indictment Act provide that:

> 4) Except in a case where the appellant has been sentenced to death, a judge of the High Court or the Court of Appeal may, in his or its discretion, in any case in which an appeal to the Court of Appeal is lodged under this section, grant bail, pending the hearing and determination of the appeal.
>
> (5) Section 40 of the Criminal Procedure Code Act other than subsection (2) of that section shall apply to a convicted appellant appealing under this section.

This section applies with modifications to the Supreme Court and can be read as if the words "Court of Appeal" stated under the section can be read as; Supreme Court". The section allows a prisoner who has not been sentenced to death to apply for bail pending his or her appeal. Section 132 (4) of the TIA has to be read in conjunction with section 132 (5) of the TIA and section 40 of the Criminal Procedure Code Act. To quote only section 40 (1) and (2) of the Criminal Procedure Code Act, among other subsections, it provides that:

> 40. Admission of appellant to bail and custody pending appeal.
>
> (1) A convicted appellant who is not admitted to bail shall, pending the determination of his or her appeal, be treated as an appellant prisoner for the purposes of the Prisons Act.
>
> (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.

The applicant has a right to apply for bail pending his appeal on the basis of the above law and owing to the fact that he was not sentenced to death. The procedure and grounds for consideration for bail however need to be further elaborated upon. The considerations include whether his appeal has a reasonable chance of success.

I would like to start with the first point of contention between the parties in their written submissions as to whether the applicant can be presumed innocent as submitted by the applicant. This is fairly straightforward as the presumption of innocence is an aspect of fair trial under article 28 (3) of the Constitution when a person is charged with a criminal offence before a court exercising original jurisdiction. The presumption of innocence is found under article 28 (3) (a) of the Constitution which provides that:

> (3) 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;

Article 28 (3) (a) of the Constitution gives a right to any accused person undergoing trial for a criminal offence to be presumed innocent until proven guilty or until the person has pleaded guilty. It follows that the presumption of innocence applies until an accused is found guilty by a competent court or tribunal or until that person pleads guilty. Thereafter the presumption of innocence is extinguished and the burden of proving that the court erred to find the convict guilty shifts to the convict or the prisoner. This was considered by the Supreme Court in **Busiku Thomas v Uganda; Criminal Appeal No. 33 of 2011** per Tumwesigye, Dr. Kisaakye; Tsekooko, Okello JJSC and Kitumba Ag. JSC when they found that upon a finding of guilt of the accused, the presumption of innocence after his or her conviction is extinguished:

> 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.

The Supreme Court entrenched the long standing law that the presumption of innocence is not available to a convict who has been convicted of a crime by a court of competent jurisdiction. Suffice it to examine a few historical decisions of the High Court on the issue.

In **Raghbir Singh Lamba v R [1958] 1 EA 337** it was held by the High Court of Tanganyika that on appeal, bail is granted in exceptional circumstances. Particularly Spry Ag J at page 338 held that the burden on appeal shifts to the convict to show cause why he should be released on bail:

> 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 the conviction should be set aside and similarly the onus is on him to show cause why as a convicted person he should be released on bail. If that is so, it follows that the reasons must be exceptional.

In **Girdhar Dhanji Masrani v R [1960] 1 EA 320** (judgment of the High Court of Uganda) Sheridan J held that different principles should apply to applications for bail pending appeal after conviction from applications for bail pending trial. Bail pending appeal would be granted in exceptional circumstances. Lastly in **Chimambhai v Republic (No. 2) [1971] 1 EA 343 (High Court of Kenya at Mombasa)** Harris J held at 344 that:

> It is manifest that the case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, that of the presumption of innocence

In Uganda, bail pending appeal in the Supreme Court proceeds under Rule 6 (2) (a) **of the Judicature (Supreme Court) Rules** Directions. A distinction has to be made between bail pending appeal for a person convicted of a capital offence and bail pending appeal for a person convicted of a noncapital offence triable by a Magistrates' Court.

In **Arvind Patel v Uganda; Supreme Court Criminal Appeal No. 1 of 2003,** Oder JSC set out from earlier precedents of the High Court principles to be applied in applications for bail pending appeal and they include:

1. 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 the appeal is not frivolous and has a reasonable possibility of success;
5. Whether there is possibility of substantial delay in the determination of the appeal.
6. Whether the Applicant has complied with bail conditions granted after the Applicant's conviction and during the pendency of the appeal (if any).

These considerations are not exhaustive. Secondly, the applicant in this application was convicted of threatening violence which is an offence triable by a Magistrates Court. The general considerations have to be modified by certain applicable statutory provisions that apply to bail in capital offences triable exclusively by the High Court. The statutory provisions give specific requirements before bail may be granted pending trial for capital offences and bail pending appeal from such a conviction.

Bail pending trial for a capital offence has considerations that are different from other lesser offences that are triable by Magistrates' Courts and these considerations are provided for under section 15 of the Trial on Indictment Act Cap 23. Section 15 of the Trial on Indictment Act Cap 23 provides that:

> "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."

The two considerations are that exceptional circumstances must exist and that the accused will not abscond. The offences listed section 15 (2) (a) of

the TIA are the offences triable by the High Court which include the offence of murder of which the applicant was convicted. Exceptional circumstances are defined by section 15 (3) of the TIA which provides that:

> (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.

In addition, the second consideration in establishing whether the accused will abscond includes facts which the court may take into account such as the factors (a) – (d) listed under section 15 (4) of the TIA which provides that:

> (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.

In **Kairu Arajab and Kange Patrick v Uganda; Court of Appeal Miscellaneous Application No. 34 of 2014** the Court of Appeal in the ruling of Kakuru, JA held that a convict can be granted bail pending appeal subject to the exceptional circumstances provided for under Section 15 of the Trial on Indictment Act Cap 23. This decision stated clearly that one cannot have such exceptional circumstances in the High Court for bail pending appeal and then have the conditions relaxed after the accused has been convicted when considering bail pending appeal from conviction and sentence for a capital offence. The requirements under section 15 of the TIA for bail pending

appeal is further applied under the **Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022** and rule 19 thereof which provides for considerations for bail pending appeal. A perusal of rule 19 demonstrates that it applies to two different kinds or specie of appeals. These are appeals from offences which are triable by a Magistrates Court and appeals from offences triable by the High Court where exceptional circumstances have to be proved and it has to be proved to the satisfaction of Court that the convict will not abscond.

There is a clear distinction between considerations for bail for persons convicted for any capital offences under rule 14 and those convicted for a noncapital offence triable in Magistrates Courts under rule 13 of the **Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022**. Rule 14 (1) provides that:

> (1) The High Court may, in exceptional circumstances, grant bail to a person accused of committing any of the following offences-...
> (a)...(k)
>
> (2) The exceptional circumstances referred to in subparagraph (1) include:
>
> (a) grave illness certified by a medical officer of the prison or other institutions or place where the applicant is detained as being incapable of adequate medical treatment while the applicant is in custody;
>
> (b) a certificate of no objection signed by the Director of Public Prosecutions; and
>
> (c) the infancy or advanced age of the applicant.

The rule 14 cited above imports section 15 of the TIA with the necessary modifications for purposes of bail pending appeal for persons convicted of an offence only triable by the High Court.

The grave illness referred to under rule 14 (supra) has to be certified by a medical officer of the prisons or other institution or place where the applicant is detained. The applicant attached a letter from Mbale Regional Hospital dated 4th December 2018 which reads inter alia as follows:

> TO WHOM IT MAY CONCERN

Dear Sir/Madam

RE: OGWANG AMBROSE – AGE 32.

The above named young man, incarcerated in Mulukhu government prison is a patient with chronic peptic ulcer disease and chronic kidney disease (pyelonephritis). These conditions require thorough investigations including upper GIT endoscopy for effective management. He is incapable of accessing this kind of management while in prison.

All the necessary assistance rendered to him will be appreciated.

The above letter is not certified by a medical officer of the prisons or other institution or place where the applicant is detained. The application was filed in November 2022. The applicant is apparently detained at Min Max Prison Kitalya and not Mulukhu Maximum prison in Mbale. Further rule 14 (2) (a) of the **Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022** reproduces section 15 (3) (a) of the TIA and requires certification by a medical officer of the prisons or other institutions or place where the applicant is detained.

The applicant has not adduced such a certification by a medical officer of the prisons or other institutions or place where he is currently detained. The applicant has therefore not fulfilled a fundamental ground of the exceptional circumstance he relied on for the grant of bail on the ground of illness. The applicant is required by section 15 of the TIA and rule 14 (2) (b) of the **Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022** to produce a certificate of no objection of the DPP. This requirement would enable the court to consider the application.

I must add that grave illness is an exceptional circumstance that should be proved and further the prove is the certification of the medical officer from the place where the applicant is detained. The second requirement is the letter of no objection of the DPP.

Last but not least the issue of medical treatment of the applicant for the illness he has referred to in a facility where the treatment can be accessed should be taken seriously by the Prisons Authorities.

Though the applicant's application is premature for failure to produce the requisite medical certification from the prescribed authorities and the letter of no objection of the DPP and this application for bail ought to fail on the ground, something must be done to get the applicant get appropriate treatment, if his condition is established to be as that pleaded in his application.

The Prisons Act 2006 and sections 75 and 76 thereof allow a prisoner to be transferred to a hospital for treatment on medical grounds. It provides as follows:

> 75. Removal of sick prisoners to hospital
>
> (1) In the case of illness of a prisoner confined in a prison where there is no suitable accommodation for that prisoner, the officer in charge on the advice of the medical officer, may make an order for his or her removal to a hospital and in cases of emergency, the removal may be ordered by the officer in charge without the advice of the medical officer.
>
> (2) A prisoner who has been removed to a hospital under this section shall be deemed to be under detention in the prison from which he or she was so removed.
>
> (3) Where the medical officer in charge of a hospital considers that the health of a prisoner removed to hospital under this section no longer requires his or her detention there, he or she shall notify the officer in charge who shall cause the prisoner to be brought to the prison if he or she is still liable to be confined in the prison.
>
> (4) Every reasonable precaution shall be taken by the medical officer in charge of a hospital and the other officers and employees of the hospital to prevent the escape of a prisoner who may at any time be under treatment in the hospital.
>
> (5) The officers and employees of the hospital shall take such measures to prevent the escape of the prisoner as shall be necessary but nothing shall be done under the authority of this section which in the opinion of the medical officer in charge of the hospital is likely to be prejudicial to the health of the prisoner.
>
> 76. Measures for security of prisoners in hospital
>
> (1) Where in any case from the gravity of the offence for which a prisoner may be in custody or for any other reason, the officer in charge considers it desirable to

take special measures for the security of a prisoner while under treatment in hospital, the officer in charge shall leave the prisoner into the charge of fit and proper persons, not being less than two in number, one of whom shall always be with the prisoner day and night.

(2) The persons under subsection (1) shall be vested with full power and authority to do all things necessary to prevent the prisoner from escaping and shall be answerable for his or her safe custody until such time as he or she is handed over to the officer in charge on discharge from hospital or until such time as his or her sentence expires, whichever may first occur.

(3) If a prisoner escapes while in hospital, mental hospital or leper settlement, no prison officer shall be held answerable for the escape, unless the prisoner shall have been in the personal custody of the officer.

What I want to highlight is that, where the medical condition of the applicant cannot be managed in the Prisons, the medical officer where he is detained can have him referred for treatment in a hospital where his condition can be managed under available facilities to the state and there should also be room for any third parties under article 23 (5) (c) of the Constitution, to take care of the applicant's medical costs and health issues in a private hospital. The only proviso is that prisoner is kept under security of prisons officials as provided for under section 76 of the Prisons Act 2006. In the circumstances therefore, the medical officer of the Prisons where the applicant is detained should examine the prisoner or have him examined for purposes of ascertaining his state of health and where necessary, having him removed and transferred to a hospital, if his medical condition warrants that action for him to get the appropriate treatment.

In addition, the applicant advanced his right to treatment under article 23 (5) (c) of the Constitution which provides *inter alia* that where a person has been restricted or detained...

> (c) that person shall be allowed access to medical treatment including at the request and at the cost of that person, access to private medical treatment.

I agree that the applicant is entitled to medical treatment under article 23 (5) (c) of the Constitution at available government facilities or at his own costs or the cost of any sponsors at private medical facilities.

In the circumstances of this application, applicant's application for bail lacks the basic conditions under section 15 of the TIA as well as 14 (2) of the **Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022** and it is in that regard prematurely filed and I hereby dismiss it.

Dated at Kampala the 19 day of October 2023

Christopher Madrama Izama

Justice of the Supreme Court

Appearances

1- Kuluo Ecthambi Asst DPP for Respondent

2- Applicant's counsel not present and he represented himself.

- Applicant via video link from Kitalya Prison