THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

[CORAM: ENGWAU, J.A]

CRIMINAL APPLICATION NO.57 OF 2008

BETWEEN

NKULA MOSES :::::::::::::::::::::::::::: APPLICANT

AND

UGANDA :::::::::::::::::::::::::::: RESPONDENT

(Arising from Criminal Appeal No.62 of 2008)

RULING OF ENGWAU, J.A:

This is an application for an order granting bail to the applicant pending the determination of his appeal to this Court in Criminal Appeal No.62 of 2008. It is brought under **rules 6(2) (a), 42, 43 and 44 of the Rules of this Court and section 132(4) of the Trial on Indictment Act.**

The applicant's affidavit in support of the application shows that he was initially charged with the offence of murder but was convicted, after a trial, of the lesser cognate offence of manslaughter, and sentenced to 5 years imprisonment by the High Court at Kampala on 4.6.2008. He filed a Notice of appeal in this Court on 5.6.2008 and thereafter lodged a memorandum of appeal on 24.9.2008.

Mr. Kafuko-Ntuyo, the applicant's learned counsel, argued four grounds in support of the application. The first is that due to the busy schedule of work in the Court of Appeal, there is a possibility of substantial delay in hearing the appeal.

The second is that the applicant attended his trial at the High Court while on bail. Mr. Kafuko-Ntuyo pointed out that the applicant did not violate the terms and conditions of his bail until he was convicted and sentenced by the High Court.

The third is that the appeal is not frivolous. According to counsel, the appeal has high chances of success as death was accidentally caused.

Last ground but not least is that this Court has discretion to release the applicant on bail on its own terms and conditions.

Learned counsel referred me to the Supreme Court decision of **Arvind Patel vs Uganda No.1 of 2003** in which Order, JSC (RIP) set out guidelines upon which a person serving a prison sentence pending appeal may be released on bail. Counsel further referred me to the rulings of my learned brother, Hon. Justice Nshimye, JA in **Nsubuga Gerald & Anor vs Uganda**, **Criminal Application No.37 of 2008** and in **Nalukenge Muldred vs Uganda, Criminal Application No.56 of 2008** in which the learned judge granted bail following the principles laid down in **Arvind Patel case (supra).**

In his affidavit, the applicant stated that he has a permanent place of abode at Keti Fallawo Zone, Kawempe where he has a residential house where he lives together with his wife and two children.

Learned counsel also introduced to the court prospective sureties for the applicant if he were granted bail. First, the applicant's wife, Norah Ntono, a shopkeeper resident at Makerere Zone 1. The second one is the applicant's sister, Jackline Taweeka, Co-operative Executive with New Vision, and a resident of Makerere Zone 1. The third one is Mr. Bomboka Joshua, a friend of the applicant and businessman in Kikuubo, residing at Mpererwe. Counsel prays that this application be allowed.

Mr. William Byansi, learned Principal State Attorney for the respondent, opposed the application for the following reasons:-

First, that the applicant has not proved exceptional circumstances for his release on bail pending determination of his appeal. Learned Principal State Attorney pointed out that the grounds advanced by the applicant are the usual grounds before conviction.

Secondly, counsel for the applicant submitted that there is a possibility of substantial delay in hearing of the appeal. Learned Principal State Attorney responded that likely delay of hearing the applicant's appeal was speculation. The applicant is sentenced to 5 years imprisonment. According to Mr. Byansi, the applicant's appeal will have been heard by then.

Thirdly, regarding the possibility of success of the applicant's appeal, learned Principal State Attorney submitted that the appeal is frivolous and intended to delay the cause of justice. Learned counsel pointed out that the death of the deceased was not accidentally caused. The evidence on record shows that the applicant assaulted the deceased

and medical report shows that multiple injuries were inflicted on the body of the victim. Counsel further contended that the applicant failed to give court guidance as to how his appeal is likely to succeed.

The fourth reason is that the offence with which the applicant was convicted involved personal violence. In support of that argument, learned Principal State Attorney relied on the decision of the Supreme Court in **Arvind Patel vs Uganda, Criminal Application No.1 of 2003.**

Last but not least, learned Principal State Attorney conceded that the applicant was released on bail by the High Court while writing for his trial. Nevertheless, that in itself does not entitle the applicant who is a convict to be released on bail. In counsel's view, the applicant who is serving a prison sentence of 5 years is likely to abscond.

Regarding the sureties presented to the court, Mr. Byansi submitted that they are not substantial. Learned counsel pointed out that the applicant's wife has no number on her identity card and the village from where she hails is not clearly stated.

Learned Principal State Attorney had no objection to the second surety, the sister of the applicant, an Executive Officer with the New Vision. However, learned counsel pointed out that the 3rd surety, Mr. Bomboka Joshua, was not substantial. His identity card expires on 6.01.2009, and whereas he claims to be a resident of Mpererwe but his identity card is for Kanyanya-Kikuubo. In his final prayer, counsel asked for dismissal of the application.

This court has jurisdiction to grant bail to any convicted person, who has lodged a criminal appeal to court before the appeal is determined. Rule 6(2)(a) of the Court of Appeal provides:-

> **"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".**

Section 132(4) of the Trial on Indictment Act provides:-

> **"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 her 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".**

It is clear to me from the above provisions that grant of bail is a discretionary jurisdiction, which should be exercised judiciously. Considerations which should generally apply to an application for bail pending appeal may be summarized as follows:

(i) ***the character of the applicant;***

(ii) ***whether he or she is a first offender or not;***

(iii) ***whether the offence of which the applicant was convicted involved personal violence;***

(iv) ***the appeal is not frivolous and has a reasonable possibility of success;***

(v) ***the possibility of substantial delay in the determination of the appeal;***

(vi) ***whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal.***

The above principles were set out in the Supreme Court in the case of **Arvind Patel vs Uganda, Criminal Application No.1 of 2003**. The Supreme Court further stated that it is not necessary that all those conditions should be present in every case. A combination of two or more criteria may be sufficient. I agree entirely.

In the instant application, this Court was not addressed about the character of the applicant. Nonetheless, I have endeavoured to peruse the record of proceedings in the High Court and found thus:

> **"A closer examination of the post-mortem report shows that the deceased sustained more than one injury on the head as well as minor abrasion on the right fore-arm. The larger abrasion was on the left side of the head measuring 4.5x0.3cm that was surrounded by a swelling measuring 6x4cm…….. These injuries are extensive and serious. The injuries are most consistent with an assault. On the evidence, I am convinced that the injuries were not sustained in an accidental fall but in an atrauma-an assault. Death was due to unlawful act".**

It is clear from the evidence on record that the deceased met his death after the applicant had assaulted him. Though the applicant is a first offender, the offence with which he was convicted involved personal violence. As to whether the appeal has a reasonable possibility of success, I was not guided on the matter sufficiently by counsel for the applicant.

The applicant was convicted of manslaughter and sentenced to 5 years imprisonment on 4.6.2008. Counsel for the applicant conceded that after lodging the appeal in this Court, he has not asked for it to be fixed for hearing. In my view, the possibility of substantial delay in the determination of the appeal, is mere speculation.

Regarding the sureties introduced to the court, only one surety, the sister of the applicant, is substantial. The applicant is a convict serving a sentence of 5 years imprisonment. There is need, therefore, for him to present substantial sureties to ensure that he will attend court when released on bail. His previous release on bail by the high Court before his conviction, in itself, is not sufficient ground that he should be released also by this Court.

In the result, I would dismiss this application for lack of merit.

Dated at Kampala this 25th day of November 2008.

S.G. Engwau

JUSTICE OF APPEAL