

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATIONS NUMBERS

99/2013 AND 104/2013

(Arising out of Criminal Appeal No.70 of 2013)

YANG ZHENG JUN:APPLICANT

VERSUS

UGANDA:RESPONDENT

CORAM: HON. MR. JUSTICE REMMY KASULE, JA

RULING

This Ruling is in respect of two consolidated **Miscellaneous Applications Numbers 99/2013 and 104/2013** arising out of **Criminal Appeal No.70 of 2013** which itself arises from High Court at Kampala **Criminal Case No.45/2013**.

In **Miscellaneous Application No.99/2013**, the applicant seeks orders that the hearing in the High Court of **Criminal Case No.45/2013** be stayed pending disposal by this court of **Criminal Appeal No.70/2013**. An order is also sought to stop the service of the Chinese interpreter in that case.

Through **Miscellaneous Application No.104/2013** the applicant prays to be granted bail or to have the bail granted to

him by the High Court be reinstated pending the determination of **Criminal Appeal No.70/2013.**

The applications are respectively brought under **Articles 23 and 28 of the Constitution, Section 11 of the Judicature Act, Section 36 and 40 of the Criminal Procedure Code Act, Rules 31, 32 and 43 of the Rules of this Court.**

Each of the applications is supported by the affidavit of the applicant and is opposed by the affidavit in reply deposed to by Principal State Attorney, Susan Okalany, of the Directorate of Public Prosecutions.

At the hearing Counsel Ssebugwawo Andrew and Yunusu Kisirivu appeared for the applicant while Acting Assistant Director of Public Prosecutions, Betty Khisa, represented the respondent.

The background is that the applicant, a Chinese national staying in Uganda stands charged in High Court at Kampala **Criminal Case No.45/2013** with criminal offences of aggravated trafficking in children, aggravated defilement and simple defilement contrary to the provisions of the appropriate **Penal Code Act** and the **Prevention of Trafficking in Persons Act.**

On 02.04.2013 the High Court granted bail to the applicant on conditions that he deposit his passport in court, execute a cash bail of Ug.Shs.100,000,000/=, report to the court Deputy Registrar every 15th and 30th day of the month and not to travel outside Uganda without the express permission of the court. He was required to produce four sureties and each one was bound in

the sum of Ug.Shs.100,000,000/= not cash. The hearing in the High Court at Kampala of Criminal Case 45/2013 started on 01.05.2013 before his Lordship, Mr. Justice Albert Rugadya Atwooki.

The applicant, not being conversant in English, the language of the court, it was mandatory on the part of the court to secure a Chinese/English language interpreter. Several people were got, but the applicant claimed in respect of each one of them, that he could not follow the interpretation. This caused the hearing to be adjourned a number of times.

On 06.05.2013 the hearing of the case could not go on because, according to the applicant, the interpreter was not effectively communicating with him. Applicant's Counsel prayed for an adjournment so that a proper interpreter is found. The learned trial judge was informed that the applicant was on bail. The court, according to the record, then proceeded thus:

“Court:

I will tell you what I am going to do;

1. Bail is hereby cancelled.

2. The matter is adjourned till an interpreter in Chinese is found.

3. The matter shall come up in court on 13th this month May, 2013.”

Later on, in the course of proceedings and after cancelling the bail, the learned trial judge explained that it was his practice, in order to ensure expeditious trial, that the bail of every accused person whose case proceeds to hearing before the judge, had to be cancelled. Dissatisfied the applicant lodged the appeal as well as the two applications to this court.

Before this court it was submitted that the trial judge acted wrongly to cancel the applicant's bail when the applicant was fully answering and fulfilling all the bail conditions. He had done nothing to warrant the cancellation of his bail. He had not been afforded any opportunity to be heard before the bail was cancelled.

For the respondent, it was submitted that whether to grant or not to grant bail or to cancel the same, was a matter of the judicial exercise of the discretion of the trial judge. In this case the trial judge had exercised his discretion judiciously by cancelling bail. The appellate court should not interfere with the exercise of that discretion.

As to the issue of a proper interpreter being availed to the applicant at his trial, it was submitted for the applicant that it was the applicant's right to demand for such interpreter. The state on the other hand, submitted that the interpreters availed by court were proper and competent. The applicant only wanted to delay the hearing of the case by falsely claiming that the interpreters were not competent.

It is necessary for this court to resolve whether the applicant be granted bail or have his bail granted to him by the High Court reinstated. It is also necessary to resolve whether an order is necessary that the trial court secures the applicant another English/Chinese interpreter at his trial. Finally this court is to resolve whether, in the circumstances, the hearing of criminal case No.45 of 2013 before the Honourable Justice Rugadya Atwooki of the High Court should be stayed pending disposal of **Criminal Appeal No.70/2013** now pending in this court.

This court, as the appellate court, has jurisdiction under **Section 11 of the Judicature Act, Section 40(2) of the Criminal Procedure Code Act, and Rules 42, 43 and 44 of the Rules of this Court**, to entertain these two consolidated applications.

First the issue of bail.

Article 23 (6) (a) of the Constitution provides that

“23

(6) Where a person is arrested in respect of a criminal offence_____

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

The right to bail has its foundation in the right to liberty which is a universal human right and freedom inherent in every human being and is not granted by the state. **Article 20 (2)** makes it

obligatory of all organs and agencies of government and by all persons to respect, uphold and promote such a right, amongst other rights.

The granting of bail by court to one before court is essentially an act of the exercise by court of its discretionary powers. The court considers all that is before it regarding the application for bail and reaches a decision based on the rules of reason, justice and law. Judicial discretion is not private opinion, humour, arbitrariness, capriciousness or vague and fanciful considerations: See: **R V Board of Education [1990] 2 KB 165.**

The applicant in this case, on being charged with the offences he faces in **Criminal Case No. 45/2013** applied to the High Court and the said court in the exercise of its discretion granted him bail on 02.04.2013 on conditions which the applicant strictly complied with until 06.05.2013 when the same court (**Rugadaya Atwooki J.**) cancelled the bail, apparently on the sole ground, which the said trial judge appeared to explain later after he had cancelled the bail, that according to him bail of every accused person the hearing of his/her case commences before the learned judge has to be cancelled.

This court held in **Constitutional Petition No.46 of 2011: Sam Kuteesa & 2 Others V Attorney General** that:

“Where, therefore, a court of law, in the exercise of its judicious discretion, as part of judicial power, decides to grant bail to a person arrested in respect of a criminal offence, it would be contrary to Article

126 (1) of the Constitution, for another court, by the authority of Section 168 (4) of the Magistrates Courts Act, to override the decision granting bail by automatically lapsing the same on the sole ground that the person, the subject of the bail, is being committed for trial by the High court.”

The above reasoning applies with equal force and effect where the court decides to cancel an accused's bail, as a matter of a practice, that the bail of every accused person, the hearing of whose case commences has to have his/her bail cancelled regardless of whether or not that accused person is complying with all the bail conditions upon which he/she was granted bail.

Indeed as the court record of the proceedings shows, the applicant's bail was cancelled without the applicant being heard as to why his bail was being cancelled. This was in contravention of **Article 28(1) of the Constitution**, which is non-derogable under **Article 44(c)**.

I have come to the conclusion that the cancellation of the applicant's bail was contrary to the Constitution and to other laws relating to bail. Accordingly I allow his application to have the bail reinstated on the same terms and conditions as were set by the High Court.

As to the application that the hearing of **Criminal Case No.33 of 2012** which is also the same case as **Criminal Case No.45/2013** be stayed, pending the disposal of **Criminal Appeal No.70 of 2013**, I find that by reinstating the applicant's bail, the

said intended criminal appeal is rendered unnecessary since it was based upon the very issue of cancellation of the applicant's bail. There is therefore no basis why the hearing of the case against the applicant should be stopped. The application to stay the hearing is therefore disallowed. It is ordered that the hearing of the case proceeds, subject to the **Honourable Justice Rugadya Atwooki**, the trial judge, deciding on his own, whether or not, he continues to preside over the hearing of the case.

On the issue of the Chinese/English interpreter, perusal of the court record, clearly shows that the trial court went all the way to get a qualified interpreter for the purpose of ensuring that the applicant clearly and fully understood the proceedings of the trial. This court therefore sees no need to make any order on the issue of an interpreter. It is for the trial court to ultimately ensure that a proper interpreter is secured, and once court is satisfied that no prejudice is being made to the applicant in this regard, the trial of the applicant should continue.

In conclusion, the resolution of the two applications is as follows:

- 1. The applicant's bail is reinstated on the same terms and conditions as were set by the High Court.***
- 2. The hearing of High Court Criminal case No.45 of 2013 the same case also having No.33 of 2012 is to continue subject to the learned trial judge, Honourable Justice Rugadya Atwooki, deciding on his***

own, whether or not he is to continue to preside over the hearing.

3. The trial High Court is to decide on the issue of securing a proper English/Chinese language interpreter, bearing in mind that the interests of a fair trial are not in any way compromised.

After the delivery of this Ruling the Registrar of this Court is to hand over the applicant to the Registrar, Criminal Division, High Court, Kampala, who shall release the applicant on bail and give him further instructions as to when to report to the High Court for the continued hearing of criminal case **No.45/2013 (33/2012)**.

For this purpose a copy of this Ruling is to be forwarded to the Registrar, Criminal Division, High Court, Kampala.

Dated and delivered at Kampala this 12th day of July, 2013.

Remmy Kasule

JUSTICE OF APPEAL