

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT
KAMPALA

CRIMINAL APPLICATION NO.160 OF 2013

5 **(ARISING OUT OF CRIMINAL APPEAL NO.61 OF 2013)**

(ARISING OUT OF CRIMINAL APPEAL NO.019 OF
2012)

(ARISING OUT OF CRIMINAL CASE NO.114 OF 2010)

AKUTTA OLUPOTS JUSTINE..... APPLICANT

10

VERSUS

UGANDA..... RESPONDENT

CORAM: HON.JUSTICE S.B.K.KAVUMA, AG.DCJ

RULING OF THE COURT

Introduction

15 This is an application for bail pending the hearing and
determination of Criminal Appeal No.61 of 2013 pending before
this court.

The application is brought by way of Notice of Motion under Rule 6(2) of the Judicature (Court of Appeal Rules) Directions S.I.13-10, Section 40(2) of the Criminal Procedure Code Act, cap 116 and Section 132(4) of the Trial on Indictments Act, cap 23 of the Laws of Uganda. It is supported by the affidavit of the applicant dated 13th August 2013.

Background

The background to the application is that the applicant was charged at the High Court, (Anti-Corruption Division) at Kololo with embezzlement c/S 19 and abuse of office c/S 11 of the Anti-Corruption Act. On 23rd May 2013, he was convicted only on embezzlement and sentenced to 2 years imprisonment. He appealed against that sentence vide Criminal Appeal No.16 of 2013 and also filed this application.

Grounds of application

The grounds upon which this application is premised are stated briefly in the Notice of Motion and laid out in detail in the applicant's affidavit in support of his application. He averred, *among other things*, as follows.

• He appealed against his sentence to the High Court of Uganda, Anti-Corruption Division at Kololo where *Catherine Bamugemereire, J* confirmed the decision of the lower court which is now the subject of the appeal pending
5 before this honourable court,

• he is advised by his lawyers M/s Ochieng, Harimwomugasho & Co. Advocates, whose advice he verily believes to be true, that the hearing of his appeal now pending before this honourable court is likely to delay due
10 to the court's busy schedule,

• the offence he was convicted of did not involve personal violence,

• he has a fixed place of abode in Oburiekori, Ocapa village, Orupe Parish, Kateta sub-county, Serere District within the
15 jurisdiction of this court,

• he is advised by his lawyers, which advice he verily believes to be true, that this Court has the discretion to grant him bail pending the determination of his appeal,

• the offence with which he was convicted is bailable by this
20 honourable court,

- he has sound and substantial sureties who are willing and ready to undertake that he will comply with the conditions of bail pending appeal and he will not abscond if released,
- he is the sole bread winner for 5 children and their mother most of whom are school going, need school fees and whose livelihood is solely dependent on him,
- there are no other pending charges against him and he will not pose any threat to the community in any way,
- his appeal is not frivolous and has merit,
- he suffers from ailments like Asthma, Hypertension and Diabetes which cannot be adequately attended to by the prison health facilities,
- he undertakes that if released on bail pending appeal, he will abide by all the conditions set by this honourable court and attend court whenever called upon to do so,
- it is just, fair and in the interest of justice that he be released on bail pending the determination of his appeal.

Affidavit in reply

In reply to the application, an affidavit dated 10th October 2013 was sworn to by Sarah Birungi, the head of the prosecution unit

at the Inspectorate of Government. She averred, *among other things*, as follows.

- The applicant was convicted by the Chief Magistrate of the offence of embezzlement and accordingly sentenced to two
5 years imprisonment. He was also ordered to refund Ugx 11,500,000/=(eleven million five hundred thousand shillings) that he stole from Kiboga District Local Government,
- the applicant has not shown exceptional circumstances to
10 warrant the grant of bail to him pending the determination of the appeal,
- the applicant's averment that the hearing of his appeal is likely to delay due to the court's busy schedule is speculative as he has not attached and or provided any
15 tangible evidence to prove the same,
- much as the honourable court has the discretion to grant bail and the offences are bailable, the discretion has to be exercised judiciously and the applicant has not provided such facts and evidence upon which the court can base to

exercise its discretion in determining whether or not to grant bail pending appeal,

- it is not true that there are no other pending charges and or conviction against the applicant. The applicant is serving a separate sentence of 12 months imprisonment vide CSC 0146 of 2010 where his appeal against conviction vide CA 013/2012 was dismissed and conviction and sentence of the lower court upheld,
- in the said CSC 0146/2010, the accused was also ordered to refund Ugx 48 Million within 12 months after serving the sentence.

Representation

At the hearing of the application, the applicant was represented by Mr. Ochieng Evans, (counsel for the applicant), while the respondent was represented by Mr. Opiya Akinya Robert, (counsel for the respondent).

The case for the applicant

Counsel for the applicant heavily relied on the applicant's affidavit which he read out in court. He emphasised that the

applicant was sentenced to two years' imprisonment, a considerable part of which he has served and that by 10th May next year, he would have served the whole term.

He submitted that the applicant's appeal is not frivolous and it
5 has high chances of success. Counsel included in the pleadings a copy of the Memorandum of Appeal indicating seven grounds of appeal. He argued that in the grounds of the appeal was, *inter alia*, the fact that the applicant was convicted of charges he did not take plea on and that the court ignored major inconsistencies
10 in the evidence before it.

Counsel further submitted that the applicant is a person of the advanced age of 55 years. He has permanent residence within the jurisdiction of the court and that he is the sole bread winner of his family of five children, most of whom are school going in
15 need school of fees and their mother.

Further, counsel submitted that the applicant is suffering from several ailments which cannot be adequately attended to at the prison health facilities. He invited court to look at annexure E of the applicant's affidavit showing his medical report from Luzira
20 Prison.

He invited court to consider and following the binding authority of **Arvind Patel v Uganda Supreme Court Criminal Application No. 1 of 2003**. He also referred to the case of **David Chandi Jamwa v Uganda Criminal Application No.20**
5 **of 2011** where the same grounds were restated. He further referred to the authority of **Gregory Mugisha v Uganda Criminal Reference No.179 of 2011** where the period of sentence served was taken into account by the court.

Counsel finally submitted that the applicant has substantial
10 sureties and introduced these to court as: Joseph Oriono Eyatu, aged 48 years and resident of Kiwatule Nakawa Division. He is An Assistant Commissioner in the Ministry of Water currently serving as the Assistant Commissioner Rural holding a Ugandan passport No.B1032190 and he is a good friend of the applicant.

15 The second surety was introduced as Olupot Peter James, aged 45 years, a resident of Soroti Town Council. He is a teacher by profession. He is a younger brother to the applicant.

He introduced the third one as Aguti Stella, aged 35 years, a lawyer by profession and a civil servant resident of Kawempe
20 Ttula. She is the holder of a Uganda passport No.B0406879 and

also the holder of Uganda National Identification No.000019680. She is a Senior Research Legal Officer working under the Ministry of Local Government. She is a niece to the applicant.

- 5 He prayed that court finds the sureties substantial as they are already aware of their duties having stood surety for the applicant in the lower courts. He prayed court to allow the application.

The case for the respondent

- 10 Counsel for the respondent opposed the application. He submitted that whereas counsel duly submitted on all the grounds laid out in the **Arvind Patel** case (supra), the only documents attached to the application in that regard was the Memorandum of Appeal and the Judgment of the High Court.
- 15 He prayed that on that ground, court finds that the applicant has not duly exercised his duty.

Counsel argued that bail pending appeal is different from bail the offender's right to the presumption of innocence having been extinguished by the conviction in the lower court. The applicant,

therefore, counsel asserted, has a higher duty to prove exceptional circumstances upon which court can exercise its discretion on whether or not to grant the application. He invited court to look at the authority of **Igamu Joanita v Uganda**

5 **Criminal Application No.107 of 2013.**

It was counsel's view that much as the offence of which the applicant was convicted did not involve personal violence, it nonetheless caused great hardship to the would-be recipients of the embezzled funds.

10 Counsel contended that the claim of a likely delay in the hearing of the applicant's appeal was speculative. He stated that apart from filing the Notice of Appeal and the Memorandum of Appeal, there was no indication that the applicant had vigorously pursued the fixing and hearing of his appeal.

15 Counsel submitted that the applicant was convicted of embezzlement and causing financial loss of 48 million shillings which he had been ordered to refund yet he had not done so. He further pointed out that when he appealed under Criminal Appeal No.13 of 2012, court dismissed the appeal and affirmed
20 the conviction and sentence of the lower court.

Counsel submitted that the medical report the applicant sought to rely on is dated 6th July 2007 from Kiboga Hospital addressed to whom it may concern. It indicated that the applicant had some allergies to smoke. He argued that there were no indications that the medical facility at Luzira has not managed the applicant's condition.

Counsel contended that although the applicant was recommended by All Saints Church Soroti as a good christian, this same good christian had embezzled money meant for the staff of Kiboga District.

He stated that although the **Arvind Patel** case (supra) does not require that all the guidelines in that case need be met, the court should not act on mere speculations, conjecture and fanciful theories. He argued also that although the applicant stated in the application to amend the affidavit that the applicant is 55 years old, no evidence was supplied to prove to court his age.

He prayed that the application be dismissed as there is no exceptional circumstances that have been disclosed. He, however, prayed that should court be inclined to allow the application, the conditions should be stringent. He also prayed

that the applicant should be ordered to pay a total of Shs. 60 million which the court found he had embezzled.

Counsel conceded on two of the sureties as proper and substantial.

5 **Reply**

In reply, counsel for the applicant tendered in court a driving permit as proof of the applicant's age as 55 years and though expired, he asked court to consider the date of birth and not the validity of the permit.

10 On the inapplicability of the presumption of innocence, counsel referred to the case of **Gregory Mugisha** (supra) where this court held that the appellate system envisaged in this country's criminal justice system a possibility of errors during the judicial process at various levels until the final appellate court in the
15 matter before court finally determines the same and the judicial process is sealed.

He asked the court to note that the question of personal violence and the claim of embezzlement of 130 million are still the

subject of appeal. It was his contention that it was prejudicial to discuss them in this application at this stage.

To counsel, the medical reports showed a chronology of the treatment the applicant was undergoing. He stated that on the
5 last one, it was shown that the applicant has hypertension, pressure and others.

For counsel, to require the applicant to pay the Shs.60 million which he was ordered to pay by the lower courts would amount to condemning the applicant yet his appeal is still pending in this
10 court.

He prayed that court be pleased to find that the applicant has made out a case for his application and prayed court to impose reasonable conditions on its grant of bail pending appeal as it may deem fit. He reiterated his earlier prayers.

15 **Court's consideration of the application**

The court's jurisdiction in this matter is not disputed. In the case of **Arvind Patel v Uganda Supreme Court Criminal Application No.1 of 2003** where Oder, JSC (as he then was) laid out a number of guidelines that should govern the grant of

applications for bail pending appeal but held that not all of them need be present and a combination of two or more is sufficient.

The applicant's medical records show that he is a sickly man who would need special attention. However, the medical report
5 did not show that he cannot obtain this kind of attention at Luzira Prison.

Advanced age is one of the considerations to take into account when determining whether to grant or deny an application for bail pending appeal. See **John Kaye v Attorney General,**
10 **Constitutional Application No.25 of 2012**, and the cases cited therein namely **Francis Ogwang v Uganda Cr.Misc.Appl.No.25 of 2003; Andrew Adomora v Uganda Cr.Misc.Appl.No.9 of 1992; Kamanyire John v Uganda Cr.Misc.Appl.No.07 of 2001** on the issue of advanced age. A
15 person of 50 years and above, is according to those authorities, one of advanced age.

In this case, the applicant being 55 years of age as proved from his driving permit, falls within the ambit of persons of advanced age.

The question of an offender losing his right to the presumption of innocence upon conviction was settled in **Arvind Patel's** case (supra) and this court emphasized the same in **Mugisha's** case (supra). To deny one bail pending appeal because one was
5 convicted would in essence be to prematurely extinguish one's right before one's fate is finally determined by the final appellate court.

For court at this stage to order that the applicant pays the entire sum of the money he was found to have embezzled is, in effect,
10 to dismiss his appeal. This court, at this point, is not to consider the merits of the appeal itself. I shall not do so.

I have also taken into account the following aspects of this application as brought out in the pleadings and counsel's submissions as being additional special circumstances in favor
15 of the applicant:

- The offence the applicant was convicted of did not involve personal violence.
- To date, the applicant has served a substantial part of his 2 years' term of imprisonment. There is a likelihood that
20 unless he is granted bail pending the determination of his

appeal, he may serve the entire term before his appeal is determined.

- He complied with all the bail terms in the lower courts.

I find all the sureties presented to court to be substantial. I note
5 that they stood surety for the applicant in the lower courts. I am
satisfied that they will continue to carry out their obligations
diligently.

In the result, I am satisfied that court may exercise its discretion
in the applicant's favor. I, therefore, hereby grant the application
10 on the following conditions:

- 1. The applicant shall deposit with the Registrar of this court a sum of U.shs.500,000/= (five hundred thousand shillings).**
- 2. The Registrar of the High Court Anti-Corruption
15 Division is hereby directed to immediately surrender
the applicant's passport No.B0354116 to the Registrar
of this court.**
- 3. The applicant's passport shall remain in the safe
custody of the Registrar of this court until such other or
20 further orders of this court.**

4. The applicant shall report to the Registrar of this court once every month before mid-day on each due date beginning with the 20th day of December this year until the disposal of his appeal or until such other or further orders of this court.

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5. Joseph Oriono Eyatu, Olupot Peter James, and Aguti Stella shall stand surety for the applicant.

6. All the sureties shall ensure that the applicant shall comply with the conditions of his release on bail pending appeal and attend court whenever he is required to do so.

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7. Each of the sureties shall bind him/herself by signing a bond of Shs.100, 000,000/= (one hundred million shillings) not cash.

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8. A breach of any of the above conditions shall render the bail pending appeal herein granted to the applicant liable to automatic cancellation.

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The Registrar of this court is directed to fix the hearing of the appeal at the next convenient criminal session.

I so order

Dated at Kampala this...22ndday of ...

5 NOVEMBER.....2013

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S.B.K.Kavuma

Ag. Deputy Chief Justice