THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISC. APPLICATION NO. 2 OF 1995

FROM CRIMINAL APPEAL NO. 1/95

ARISING FROM CRIMINAL CASE NO. MJ. 395/93

CHRISTOPHER LUBAALE::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

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

BEFORE: THE HONOURABLE JUSTICE C.M. KATO.

RULING

This is an application by the applicant Christopher Lubaale for bail pending the hearing of his appeal. The application was filed by Notice of Motion dated 9/2/95 under the provisions of section 217 of the M.C.A as amended by Act. 4/85. The application is supported by the affidavit of the applicant dated 9/2/95. The applicant was charged with the offence of shop breaking & theft c/s 252 and 283(a) of the Penal Code Act. He was convicted and sentenced to 18 months imprisonment. He has appealed against that conviction and sentence. In support of his application he gave 4 grounds:-

1. That he is suffering from AIDS and has been getting services from TASO which he cannot get while in prison.

2. That the appeal has high chances of success.

3. That there is a possibility of substantial delay in the hearing of the appeal.

4. That it is just and equitable that he should be granted bail pending the hearing of his appeal.

When the application came up for hearing Mr. Kania who appeared for the applicant argued that there were exceptional circumstances to warrant the applicant being released on bail pending his appeal being heard and he relied on the case of: Kilanda v. Uganda KCB 18 and cases which were quoted when this particular case was being dealt with which included the cases of: Chinambhai V. Republic (1971) EA 343; Masrani v. R. (1960) EA 320 and Merali v. Republic (1972) EA 47 at page 49. Mr. Okwanga who appeared for the respondent on his part strongly opposed the application on the ground that the applicant had the duty to prove that there were special circumstances to warrant his being released on bail pending the hearing of his appeal and that in the present case the applicant hat not discharged that burden.

Arguing the first ground of the application Mr. Kania maintained that the applicant was a victim of AIDs and that be needed special attention which can not be done while in prison. While court treats AIDs as a catastrophic misfortune which must be considered with sympathy, I have been unable to find any authority suggesting that sickness of whatever nature can be a ground for releasing a person on bail pending the hearing of his appeal. I agree with Mr. Okwanga when he says that AIDs has no cure whether in prison or outside prison. To release a person suffering from such an incurable disease on bail pending the hearing of his appeal may result in real absurdity when the appeal is heard and dismissed, because at that stage the prisoner might become weaker and therefore incapable of going back to serve part of his sentence. I find that the first ground of this application unhelpful to the applicant much as I am sympathetic to his ill health.

On the second ground of the application Mr.Kania argued that the case has chances of success on appeal and that the appeal is not frivolous. On his part Mr. Okwanga felt that after reading through the record he saw no chances of the case succeeding on appeal. It was stated in the case of: Lamba v. R. (1958) EA 337 at page 338 that the burden is upon the applicant to prove that his case had got chances of success. In his affidavit the applicant did not establish the grounds on which he based his notion that his case had chances of success; I quite agree with the learned counsel for the respondent when he says that the case may not have chances of success.

As regards to the third ground, it was argued on behalf of the applicant that the record of the lower court was ready but all the same the delay of the hearing of the appeal was still a possibility. Considering the fact that the Resident Judge continuously sits at Jinja and that the proceedings of the lower court have already been typed I cannot see any reason why the

appeal should take long to be heard. The facts of this case must be distinguished from those in the case of: Kilanda (supra) which was quoted to this court by the learned counsel for the applicant, of the lower court due to lack of typing materials which is not the case in the present case, the state also did not oppose the application in Kilanda's case but in the present case the state has strongly opposed the application.

Regarding the fourth and last ground of this application I do not see anything special to warrant this court treating this case as an equitable matter. It must be stressed that once an accused has been convicted he can only be released on bail under special circumstances and that the mere fact that he respected his earlier bail conditions, as pointed out by Mr. Kania, is not in itself very relevant in an application of this nature following the principles laid down in the cases of: Somo v. Republic (1972) Ea 476; Lamba v. R (1958) EA 338 and Masrani v. R. (1960) EA 320. It must be pointed out here as it was pointed out in the case of Somo (supra) at page 478 that a sentence of 18 months imposed on the applicant is long enough not to be completed before the appeal is heard.

Considering all these circumstances I find this application is misconceived and cannot succeed it is accordingly dismissed.

C.M.KATO

JUDGE

6/4/1995