THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CRIMINAL APPLICATION NO. 23 OF 2003

IN THE MATTER OF BAIL APPLICATION BY

TIGAWALANA BAKALI IKOBA

CRIMINAL CASE NO. 0161 OF 2003

BEFORE: HON. MR. JUSTICE V. A. R. RWAMISAZI-KAGABA

JUDGMENT

This is a Ruling/Judgment in an application for bail brought under section 14A of the Trial on Indictments Decree (as amended by Act 9/1998) and presumably under the Criminal Procedure (Applications) Rules S. 1 41-1 of the Criminal Procedure Act.

The application is supported by an affidavit of Tigawalana Bakali Ikoba, who is the accused in Criminal Case No. 0161/2003, which is registered in Buganda Road Chief Magistrate's Court.

The applicant was represented by Blaise Babigumira and Richard Mwebembezi while the State was represented by Atenyi Ndamurani, a State Attorney representing the Director of Public Prosecutions.

In support of the application, Mr. Mwebembezi submitted that the applicant is the Chairman of LC V Mayuge District, has a fixed place of abode at Dwaliro zone, Mayuge, cannot abscond, has no previous criminal conviction and cannot interfere with prosecution witnesses.

Secondly, Counsel (for the applicant) produced two sureties, in the names of Wilberforce Kiwagama, a Member of Parliament for Bunya West Constituency, and Ikoba Badru, the father of the accused/applicant. The court saw- the sureties and examined them as to their social background.

Lastly, Counsel submitted that the applicant suffers from asthma and hypertension for which he has been receiving medical treatment, and which are now aggravated by the overcrowding and dusty conditions obtaining in prison. Counsel relied on the medical (Photostat copies)

reports annexture **"Al", "A2", "A3" and "A4"** together with the Medical report issued by Dr. Kakoraki Alex of Murchison Bay Hospital.

In reply, learned State Attorney, agreed that the accused's condition of asthma and hypertension amount to **"grave illness"** within section 14A (3) of the T. I. D. He agreed that the two sureties were substantial. He however, submitted that stiff conditions should be attached to bail as the offence with which the accused is charged, is serious and carries a death sentence, if the accused is convicted.

The accused is charged with Murder contrary to sections 183 and 184 of the Penal Code Act. He first appeared in the Magistrate's Court (G1) on the 3/2/2003. No plea was taken as the Magistrate has no jurisdiction to take a plea or entertain a bail application involving the charge of murder, hence this application.

It is a presumption of law that an accused person is presumed to be innocent until proved guilty by a competent court and or until such accused pleads guilty to the charge voluntarily. This presumption is enshrined in Article 28(3) (a) of the Constitution. In the same Constitution, it is provided under Article 23(1)(b) and (c) that no person shall be deprived of his personal liberty except (b) in execution of the order of a court made to secure the fulfillment of any obligation imposed on that person by law, and, (c) for the purpose of bringing that person before court in execution of the order of a court or upon reasonable suspicion that the person has committed or is about to commit a criminal offence under the laws of Uganda.

Bail is granted to an accused person to ensure that he appears to stand trial without the necessity of his being detained in custody in the meantime. The effect of bail is merely to release the accused from physical custody but he is still under the jurisdiction of the law and is bound to appear at the appointed time and place.

This application is made under section 14A of the Trial Indictments Decree where it is provided:

(1) Notwithstanding section 14 of the Decree, the court may refuse to grant bail to a person accused of an offence specified in subsection

(2) of this section, if he does not prove to the satisfaction of the court

(a) that exceptional circumstances exist justifying his release on bail,

(b) that he will not abscond when released on bail.

What **"exceptional circumstances"** mean are elaborated upon under subsection (3) of the Act and listed as to include:

(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) the certificate of no objection signed by the Director of Public Prosecutions,

(c) the infancy or advanced age of the accused.

In determining whether the accused will abscond if granted bail, reference must be made to subsection (4) of section 14A of the Act where the court must establish;

(a) whether the accused has a fixed place of abode within jurisdiction of the court or is ordinarily resident outside Uganda.

(b) whether the accused has sound sureties within the jurisdiction to undertake that the accused shall comply with the conditions of his bail, and

(c) whether the accused has on previous occasion when released on bail failed to comply with the conditions of his bail, and

(d) whether there are other charges pending against the accused.

Section 14 of the T. I. D. gives the High Court powers to grant bail to an accused person on taking from him such recognisance, with or without sureties to appear before the court on such a date and time as the court may order.

Finally Article 23(6) (a) of the Constitution reads: **"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.

All the provisions of the law I have quoted above use the expression **"may"** which means that the court is given or left with the discretion to grant or refuse bail. It must always be borne in mind that where any legislation confers upon the court the discretion to do or refrain from doing, grant or refuse to grant a relief prayed for, such discretion must be exercised judicially and with transparency. The discretion must be exercised without any malice, ill will, ulterior motives or regard to external influence or circumstances. In exercising that

discretion, the court must be satisfied that the provisions of the law have been complied with. Whereas section 14 of the T. I. D. gave court general powers to grant bail to an accused person, section 14A limited and qualified those powers. Thus the use of the expression **"may"** is not obligatory but **"discretionary" or "directory"**

Section (1) Steven Bazanye & 2 others vs. Uganda Criminal Misc. Application No. 184/1998 (Byamugisha J - as she then was).

(2) Mulondo Simon vs. Uganda - Misc. Cr. Appl. 214/1998 'Ogoola J)

While section 14 14A of the T. I. D. and Articles 23(6) and 28 of the Constitution lays down the general law governing bail applications, I think the Court would not be deviating from its judicial function if the two grounds are considered together with other circumstances which may be relevant to the accused and the case generally.

In the case of **Uganda vs. Asumani Lwanyaga and two others - Criminal Appeals 816 - 818 of 1966 Justice Sheridan** observed that the Courts in Uganda had consistently applied the considerations set out in paragraph 203 of Archbold, 35th Edition, as the proper test. Of relevance to this case, are sub paragraphs (1) (g) and (h) of section 5 where it is provided:
(f) where the act or any of the acts constituting the offence with which he is charged consisted of an assault on or threat of violence to another person or of having Or possessing a firearm, an imitation firearm, an explosive or an offensive weapon or of an indecent conduct with or towards a person under the age of sixteen years
(g) where it appears to the court that unless committed or remanded in custody he is likely to commit an offence.
(h) where it appears to the court necessary for his own protection to refuse to remand or commit him on bail.

In considering the bail application by an accused, the court may also address itself to the following facts and circumstances, namely:
a) the nature of the accusation
b) the gravity of the offence charged and the severity of the punishment which the conviction might entail.
c) the antecedents of the applicant so far as they are known
d) whether the applicant has a fixed place of abode within the area of the jurisdiction of the court.

e) whether the applicant is likely to interfere with the witnesses for the prosecution or any evidence to be tendered in support of the charge

See (1) Re Barronet (1842) 1E and B1

(2) Re Robinson (1854) 23 L.J. - Q. B. 286

(3) Crim. Misc. Applc. 89/98 - Quarish Goloba

I will now turn to the facts and circumstances of this application and the law as it relates to those facts. I will first deal with the ground of **'exceptional circumstances'** which the applicant has advanced in support of his application for bail. He has narrated his history of asthma and hypertension and produced annexture **"Al" and "A2" and A3" "4" and** a letter/report from Dr. Kakoraki Alex - Section 62 of the Evidence Act states:

"Documents must be proved by primary evidence except in cases hereinafter mentioned" Section 63 of the same Act lists the circumstances under which secondary evidence may be admitted. What is secondary evidence is defined in section 61 of the Act. (Evidence Act)

In the case of **Ben Byabashaija vs. Attorney General - High Court Civil Suit No. 134/91 - (1992)** KALR **161,** the High Court held:-

"There is no doubt that section 62 of the Evidence Act requires that the documents must be proved by primary evidence. This section prohibits proof of documents by secondary evidence. But this is a general rule. There are exceptions to this general rule. Section 63 of the Evidence Act allows proof of the documents by secondary evidence under certain circumstances, for example, where there is evidence that the original document sought to be so proved is with the opposite party. What constitutes secondary evidence is shown in section 61 of the Evidence Act. This section covers photocopies.

On the same issue of primary/secondary evidence, the Supreme Court in the case of **Prince J. D. C. Mpuga Rukidi vs. Prince Solomon Iguru Civil Appeal 18/1994,** held (holding No. IV) "whether evidence by the maker of a copy of a document or of the circumstances in which such a copy is made should be adduced before such document is admitted in evidence depends on the circumstances of each case. What is imperative is that there must be absolute certainty that the copy produced is a genuine reproduction of the original and not a forgery."

Both from the application, affidavit of the applicant and the submissions of counsel, no explanation was given why the annexture Al - A4 were tendered in that secondary form so as

to avail themselves "the exception and exemption under section 63 of the Evidence Act. By failing to do so, the evidence contained in those annexture is rendered inadmissible. The other evidence which the applicant adduced to prove the grave illness and exceptional circumstances was a Photostat copy of Dr. Kakoraki's report which was referred to in paragraph 8 of the applicants' affidavit. **Paragraph 8 of the applicant's affidavit reads:** "That I suffer from asthma and hypertension and my arrest and detention is worsening my health condition (copies of the provisions medical treatment notes from Iganga hospital are attached and marked **"Al, A2 A3 and A4)** and a medical report to that effect will be produced at the hearing.'

I was surprised when the learned State Attorney did not question the absence of the medical report and or the reliance on the photostat copies of the medical report and annexture Al to A4 which are Medical Form 5. The medical report sought to be relied on is secondary evidence, which is inadmissible, unless brought under section 63 of the Evidence Act. No leave has been sought or an explanation given why the report should be admitted as secondary evidence. I do not understand why it never occurred to the applicant's counsel as well as the State Attorney that the medical evidence in support of the applicant's grave illness was inadmissible under sections 62 and 63 of the Evidence Act.

The medical evidence as contained in the photostat copies of **PF5** and the **"Medical report"** are opinions supposed to be given by an expert. The authors of those reports were not witnesses in court and their reports, findings and opinions were never tested as to their accuracy. The authors of Annextures Al - A4 and the report (if they had been given in their primary form) were never tested to their expertise in the field they were giving their opinions about. Lastly the opinions given in the medical reports are not contained in sworn affidavits of their authors so as to persuade the court to attach credibility to them or treat them as evidence. I think it is desirable, in the circumstances of these applications (of this type) that the information of the expert should be given either by an affidavit or by the medical personnel coming to court and substantiating what is in his or her report. This will assist the court at arriving at the truth about the condition of the applicant and exclude reports which are coined and or do not contain the truth about the patient they purport to talk about.

In this regard I shall refer to the case of **Kit Smile Mugisha vs. Uganda - Criminal Appeal 78/ 1976 (1976) HCB 246** where the Court of Appeal for Eastern Africa held:

(1) that expert opinion is opinion evidence and it can rarely if ever, take the place of substantive evidence. That opinion is only a piece of evidence, and it is for the court to decide the issue one way or the other upon such assistance as the expert might offer,
(2) although there is no general rule requiring an expert to state in evidence the grounds for his opinion, there may be cases in which it is necessary for the expert to lay a proper foundation for his opinion.

Turning to the doctor's report (which I have held is secondary evidence and inadmissible) there is no mention in that **"report"** that the asthma and hypertension which the applicant has advanced constitute, in the words of section 14A (3)(a) of the Trial on Indictments Decree, **"grave illness"** and are incapable of adequate medical treatment while the accused in custody".

I saw the applicant in court I did not notice on him any sign or signs of serious illness.

The court can form its opinion about certain facts in everyday life without necessarily transforming itself into an expert witness.

See: R. vs. Turner (1975) Q B 834

In the cases of

(1) Criminal Misc. Appl 84/88 - Stephen Bazanye & 2 others vs. Uganda.
(2) Criminal Misc. Appl 89/ 1995 - Uganda vs. Golooba
(3) Kandole Patrick vs. Uganda - Misc. Crim. Appl. 198/98

This court High Court declined to grant bail on the grounds that the applicants in those cases had not satisfied court that the illness they were complaining about was incapable of being treated in the prison or custody where the prisoners were being held. The court held that any discomfort caused by the diet and congestion in accommodation do not amount to **"exceptional circumstances"** stipulated under section 14A (3) (a) of the T.I.D.

I also hold as my brothers and sisters held in the above cited cases, that the applicant has not adduced evidence to the satisfaction of the court that he is suffering from such grave illness which cannot be treated in prison where he is currently being detained,.

The second ground is that the applicant will not abscond if granted bail because of his position in society, his having a fixed place of abode and sound sureties. But it must be borne in mind that he applicant is charged with murder which is punishable with death on conviction. It is a serious offence.

In Constitutional and Administrative Law Reports - Law Reports of the Commonwealth 1986 - at p.306 Simpson J sitting in the High Court of Kenya said:
"Bail as a general rule should not be granted where the offence charged carried a mandatory death penalty. So great is the temptation to abscond or jump bail in such cases. This is the practice also in England in cases of murder although the death penalty has been abolished."

Mr. Justice V. F. Musoke Kibuka made a somewhat similar observation in Misc. Criminal Application 14/1999 (Mbarara) Hamujuni & 2 others vs. Uganda.
He (Justice Musoke Kibuka) after accepting evidence of the applicant's sureties and residence within the Court's jurisdiction, said:
"But be that as it may, I am not fully satisfied that exercising the discretion of this court in the overall circumstances of this case to release the three applicants on bail will serve the greater interest of justice. The applicants are relatively young. And this Court's experience has shown that such persons are more likely to jump bail and run off to the City. They are charged with a very grave offence which carries a maximum sentence death. They have been on remand for a relatively short time of about six months."

While dealing with the question of bail and the likelihood of accused absconding Justice Phadke, in Miscellaneous applications 80/1969 and 81/1969 Hezekiya Washington vs. Uganda and Joshua Kamulegeya vs. Uganda, made the following statements about the law relating to bail and the considerations to be addressed: -
(a) on a charge of murder some special or exceptional circumstances must exist to justify the granting of bail
(b) an allegation that the accused person was a citizen of Uganda and therefore unlikely to abscond was an oversimplification.

A person charged with the offence of murder faced upon conviction the death penalty, and it was not possible to exclude, in the absence of cogent evidence to the contrary, the possibility that he might be the type of person who would be tempted to avoid the Supreme penalty by absconding. The meager facts disclosed in the affidavits did not indicate that the applicants were persons who would not succumb to such temptation. The test given in section 123(d) of the C.P.C. was only one of the general tests formulated in the section and should be construed in conjunction with all other matter relevant to the application.

(a) the allegations that the charge may be reduced or that the trial may take long to come are no grounds for granting bail.

(b) since there are no unusual, special or exceptional circumstances to justify the granting of bail, it would be refused.

I think what their Lordships observed and stated in the above cases is the correct statement of the law. The applicant in this application is a young man of 33 years who would be tempted to abscond, leave the Country and start a fresh life elsewhere. His having no Passport does not stop him or anyone else leaving Uganda without any official travel document. He could by-pass any Immigration offices at the borders or travel via village roads/paths (panya roads) where there are no immigration officials to check on his movement.

See also the observation of Justice Musoke Kibuka in Misc. Criminal Application No. 14/1999 (supra).

I have already stated that section 14A of the T. I. D. is not exhaustive on the issues to be address when considering the application for bail. The Court may in addition to what is stated in that section, consider the antecedents of the accused/applicant.

In this regard, the applicant is a young man holding the post of Chairman of LC V. The person holding this post wields a lot of power and influence which he could use on the prosecution witnesses who may be listed to come and testify at his trial, if that were to happen, which is likely to happen, justice will have been obstructed and or defeated. I am fortified in this view by the holding of **Justice Saldanha in Miscellaneous Criminal Applications No.51-56/1969. Uganda vs. W. Nadiope, P. Mwase, C. Parmer, F. Kalisa, S. Kalulu and D. Zirabamuzale**

The learned Judge held:

'Bail was refused for Al and A3. Al was refused bail because the more prominent a person is, the greater was his fear of conviction and the greater the temptation to use his influence to interfere with witnesses. As for A3, the hypothesis of his absconding seemed viable as professional people were not immune from the temptation to flee from justice.

Every case has its own peculiarities and circumstances. The court must decide each case according to the facts presented. Be that as it may, the court may consider or even adopt what another court has decided in another case if the facts and circumstances are similar. In this regard, I may borrow a leaf from the reasoning and conclusions arrived at in the case I have

cited (supra). Like in that case, this case involves a politician. It does not prejudice me or the accused's case if I state that we have many cases of politicians who have fled this country in order to avoid the long arm of the law. Some have absconded after being granted bail while others fled when they sensed they were going to be arrested to face some criminal charges. This case, to say, the least presents such a situation where the accused politician would rather flee than stand by to face a criminal trial with all the consequences that go with it.

The observations of justice Saldanha are relevant to this case. The judge was dealing with a situation involving prominent politicians and professional persons. I am, now, in this application, dealing with a bail application involving a young, educated and prominent politician. He has a lot to fear and a lot to lose, when and if, he has to face the charge now preferred against him. He would do anything and go to any length to avoid or avert the proceedings now hanging on his neck. This may involve or include absconding or exerting his influence on the would-be prosecution witnesses.

In conclusion, I find the applicant has not adduced evidence to the satisfaction of the court that he suffers from such grave illness that cannot be treated medically while he is in custody where is he being held. I also find that notwithstanding the sound sureties who he produced and who I regard as substantial, the applicant, if released on bail, would interfere with the prosecution witnesses or abscond or do both. For the reasons stated above, this application for bail fails and is accordingly dismissed.

V. A. R. RWAMISAZI-KAGABA
JUDGE
12/8/2003

N. B. A: In order to meet the wishes and aspirations of the applicant, the D.P.P. should at the earliest opportunity,

(a) Prepare the Summary of Evidence for his case.

(b) Commit him for trial by the High Court,

(c) Fix the case for hearing during the earliest available Criminal Session.

B: This judgment/ruling should be circulated to:

(a) The Registrar - High Court.

(b) Deputy Registrar - Criminal Division.

(c) The Director of Public Prosecution.

(d) Hon. Justice Akiiki-Kiiza -High Court Circuit Nakawa.

V. A. R. RWAMISAZI-KAGABA

JUDGE

12/8/2003