

Representation:

The applicants were represented by **Kisaalu Henry** of Ms. Kisaalu Advocates while **Lomuria Thomas Davies** of Uganda Revenue Authority appeared for the Respondent. Both applicants were in court.

10 The grounds of the application:

These are set out in the Notice of Motion and the supporting affidavits as follows:

1. That both the applicants had previously been granted bail by the lower court and had complied with the given terms and conditions up to the date of their conviction
- 15 2. That the appeal has a high likelihood of success and is not frivolous.
3. That the applicants have a right to apply for bail and there is a high probability of substantial delay in the hearing and determination of the appeal.
4. That the applicants have no criminal record other than the conviction in respect of the appeal, or pending charges against them in any court of law.
- 20 5. That both applicants have fixed places of abode within the jurisdiction of the court, at Nakilebe Village in Mpigi District and Kikaya Village in Wakiso District. Both are willing to abide with the terms that may be imposed by this Court.
6. That both have substantial sureties resident within the jurisdiction of the court.

25 For the 1st applicant the following were presented:

Babirye Annet: 52-year-old aunty to the applicant, a food vendor in the market in Kanakulya area, resident of Kanakulya Zone, Makindye

30 **Ssaku Edward:** 41-year-old uncle to the applicant, a shoe vendor in Nakasero market, resident of Nkeere Zone Kibuye

Nakyetiba Cissy: 44-year-old aunty to the convict, hairdresser operating a salon in Nkere Zone, resident of Nkere Zone.

Mutesasira James: 58-year-old uncle to the applicant, a builder by profession. Copies of their National Identity Cards and resident of Nkere zone.

35 No sureties were presented for the 2nd applicant. Court was informed that they had not turned up.

5 Legal arguments

It was submitted by the applicants' counsel that the application satisfied the grounds for consideration of bail pending appeal as set out in the classic case of **Arvind Patel versus Uganda**, Supreme Court Criminal Application 1/2003 which are the following:

1. Character of the applicant.
- 10 2. Appeal must not be frivolous / there should be a reasonable chance of success.
3. Whether applicant complied with bail terms.
4. Whether the applicant is a first offender.
5. Whether the offense involves personal violence.
6. Possibility of delay in disposing of the appeal.

15 Probably because there were no sureties for the 2nd applicant, counsel concentrated on making a case for the 1st applicant. He contended that the 1st applicant is a first time offender, has five children and a wife to look after so he will not abscond if granted bail. Further that a notice of Appeal had been filed and the record of proceedings was awaited.

20 He prayed that the application be granted.

In Reply, Counsel for the Respondent opposed the application on the following grounds:

1. The applicants are convicts and therefore have a greater burden of proving their case than when they were still on trial in the lower Court. The presumption of innocence no longer applies and the temptation to flee is higher after conviction.
- 25 2. Whereas the proper position of the law on considerations for grant of bail pending appeal had been espoused, the applicants had dismally failed to adduce evidence in support their case.
3. Apart from the submission that the applicants had complied with their bail terms in the lower court and were first offenders, no evidence had been led to satisfy the court that the applicants were of good character e.g. letters of LC, certificates of good conduct by police etc.
- 30 4. Only a notice of appeal was filed. There is no memorandum of appeal on record, even in draft form, to guide the court regarding the grounds of appeal.
5. That Court should take judicial notice of the fact that appeals at the court do not delay and are expeditiously disposed of
- 35

- 5 6. The specific location of the businesses of the sureties has not been provided, making it difficult to locate the sureties when necessary.
7. The applicants have not demonstrated any exceptional circumstances to warrant their release on bail

He prayed that the application is disallowed.

- 10 Finally, in rejoinder, it was submitted for the applicants that a sentence of 18 months' imprisonment is a short period and not sufficient temptation to warrant the applicants to abscond if released on bail. The temptation to flee is only higher where the sentences are lengthy.

He reiterated his prayer for the grant of the application.

15 **The law regarding Bail pending Appeal:**

The position of the law is settled in several cases. In **Arvind Patel Versus Uganda (Criminal Application No 1/ 2003)**, Justice Oder JSC (as he then was) observed that the grant of bail pending appeal is a discretionary matter to be exercised judiciously and that different principles must apply as the applicants is a convict. That each case must
20 be considered on its own facts and circumstances. In coming up with some guideline on the factors for consideration, he pointed out that not all factors need to be present in every case but that a combination of two or more would suffice.

The conditions have been listed hereinbefore and I will not enumerate them.

- 25 In **Igamu Joanita versus Uganda (Court of Appeal Criminal Application No 107/2013)**, there is a further expounding of the factors set out in Arvind Patel. Justice Kenneth Kakuru observed that a court granting bail must be satisfied that the applicant will comply with bail terms set down and will be available to attend trial or appeal. The conditions established in the Arvind case are all geared towards satisfying the court to that effect. He observed that the applicant is no longer fully shielded by the presumption
30 of innocence and has a greater burden to prove his or her case than he did at the lower court.

- In **Bamutura Henry versus Uganda, Misc. Application No 19/2019**, Justice Lilian Tibatemwa Ekirikubinza held that there must be exceptional circumstances that justify the court to overlook the order for imprisonment and make a counter order for
35 applicant's release until his appeal is heard.

5 In *Mbabazi Rovence Natukunda and Louse Kahunda versus Uganda, Criminal Application No 47/2012*, the Hon. Justice Kavuma JA (as he then was) held that the applicant has the duty to adduce evidence to support his application, and that courts of law should act on credible evidence adduced before them and not indulge in conjecture, speculation, attractive reasoning or fanciful theories.

10 I will proceed, in light of the foregoing established principles, to consider the application, the submissions of Counsel, the facts of the matter and the evidence adduced in its support.

Likelihood of success of the appeal.

15 The burden is on the applicant to demonstrate to the court that the appeal is not frivolous, and that there is a likelihood of success. A simple averment to that effect in the applicants' supporting affidavit or a statement from the bar will not suffice. There should be evidence of the grounds upon which the appeal is based and the errors of the lower court that have been appealed against. Whereas the court must be careful not to descend into determining the matter, there should, on the face of it be evidence that court can rely upon to determine whether the appeal has a likelihood of success. As held in the **Henry Bamutura case (supra)**, the court should be satisfied that there are arguable points on appeal, hence chance of success.

25 In the case of **Mellen Mareere versus Uganda, Misc Application No 52/2017**, Justice Christopher Madrama of the court of Appeal dealt with this question. He considered the memorandum of appeal, the record of proceedings and the conclusions of the trial Judge and found against the applicant. He observed that **"Even if the applicants appeal succeeded in some material respects, it is doubtful whether the applicant would be completely discharged of having committed the offense."** In other words, he was not satisfied that there was a reasonable chance of success or that the applicant had arguable points of law or fact.

35 In the instant case, no mention was made of the grounds upon which the appeal is premised or the arguable points of law or fact relevant to the case. No reference was made to the judgement of the lower court to demonstrate the errors of the lower court justifying the appeal. Not even a draft memorandum of appeal is on record. These are serious omissions. Only a notice of appeal is filed yet.

5 In my considered view, it is a fanciful theory that the appeal has a chance of success. There is not even an iota of evidence adduced to that effect.

I have no justifiable cause to believe that the appeal is not frivolous or vexatious or that it is likely to succeed.

10 The situation is exacerbated by the fact that the applicant seems not to know the offense for which his clients were convicted. In paragraph 1 of the Notice of Motion and paragraphs 2 of the applicants' affidavits he states that his clients were convicted of the offense of smuggling. The bail bond Form on the other hand (Annexure B to the 1st applicant's affidavit, shows they were convicted of possession of uncustomed goods. These two offenses are different in law as pointed out correctly by the Respondents
15 counsel in their affidavit in reply, paragraph 3 thereof. I am convinced that failure to cite the proper offense in his pleadings means the applicant has not addressed his mind to the case, the judgement of the lower court and has no knowledge of the grounds on which his appeal is based in law. Being unaware himself, he cannot advise the court any better.

Failure
20 This ground fails.

Character of the applicant:

In paragraph 5 of the 1st applicants' affidavit, he avers that he had previously been released on bail and met the set terms. He also states that he has no previous record of conviction at paragraph 9. He submitted the bail form Annexure B to his affidavit
25 showing that he reported as and when required by court to do so.

The same averments are contained in paragraphs 5 and 9 of the 2nd applicant's affidavit.

Counsel for the applicants relies on those two paragraphs to state that the applicants are people of good character. The question is whether the above is sufficient to confirm good character. In the case of **Igamu Joanita (supra)**, **Justice Kakuru** in addressing
30 this question observed as follows:

"I find nothing to guide court on the character of the applicant save paragraph in her affidavit that she is of sound mind. Paragraph seven of her affidavit that she complied with bail conditions in the lower court. I think a letter from her previous employer or her CV or her church or mosque would have been of help to court. Whether she is a member of

5 *mother's union or a rotary club would point to her character. No effort was made in that regard."*

Counsel for the Respondent argues that insufficient evidence of character was led, for example letters from the LC in the area of residence of the applicants, or even certificate of good conduct from the police. I agree with his submission.

10 Character refers to the personal attributes of an individual. For purposes of this application, the court would require proof that the applicant is trustworthy and dependable. Whereas the fact that he kept his bail terms may prove that he is of good dependable character, in this case I find the same insufficient on its own. No evidence was led regarding the applicants at all. Who they are, what they do for a living etc. I find
15 that evidence of character is sufficient.

Thull **Whether the applicants are first offenders:**

It is submitted for the applicants that they are first offenders with no criminal record. Other than the averments in the affidavits, there is no evidence led to prove this fact. A
20 certificate issued from police to that effect would have sufficed. There is none on record.

Are sureties presented substantial:

In determining this question, the court has to consider whether they are responsible members of the society who understand their duty to the court. Further, whether they are independent or are likely to be directed or controlled by the accused, whether they
25 are capable of exercising a level of control over the accused as to ensure he obeys the terms of his bond. This is crucial because sureties play a supervisory role over the applicant to ensure that he returns to court as scheduled till the conclusion of the trial, or until they are discharged by court as sureties.

Court also considers whether they can be easily located in case the applicant absconds.
30 This is usually determined from evidence of their places of abode, their work places and known contacts.

Further, as submitted by the Respondent's counsel, court considers whether sureties have the capacity to meet the bond requirements that will be set by the court as they undertake that if the accused fails to appear, they will pay a fixed sum of money to the

5 Government. See: *Obey Christopher, Kiwanuka Kunsu Steven, Lwamafa Jimmy versus Uganda, ACD Miscellaneous Application Nos 045,046 and 047/2015: Dr Ismail Kalule versus Uganda ICD Miscellaneous Application No 1/2018*

I note that in this case, only the 1st applicant presented sureties. The 2nd applicant's failure to present sureties before the court is in my view fatal. There would be no assurance to court that the convict will return for his trial, and if he absconds, efforts to locate his whereabouts will be futile.

I find insufficient evidence laid before the court to show that the sureties are able to pay any bond terms that may be set by this court for the release of the applicant. There is no evidence before the court on the value of the uncustomed goods which are the subject of the conviction. The sureties are a food vendor in the market. shoe repairer, hair dresser and builder. Apart from being relatives of the 1st applicant, there is no evidence on the applicant himself. Who he is, what he does for a living and other factors which may assist this court to establish whether the presented sureties can exercise any control over the convict to ensure his return

I am unable to make a finding that the sureties are substantial.

Likelihood of substantial delay:

The argument was unsupported. The applicant has to provide reasons why he believes there will likely be a substantial delay in disposing of the appeal. The requirement is to prove a "Substantial" delay, and not just a delay.

Conclusion

Whereas there is proof that the applicants complied with their bail terms previously, that they have fixed places of abode, and the offense for which they were convicted does not involve personal violence, I am unable to grant bail. The factors that they have failed to prove outweigh those which they have. The factors they have proved may be sufficient for bail when the presumption of innocence still works in their favour, but not at the appeal level.

It's not just that two or more factors must be proved. The court has to assess the evidence as a whole and determine whether exceptional circumstances have been proved. The failure to prove likelihood of success of the appeal, likelihood of a

- 5 substantial delay in hearing and determining the appeal and failure to produce substantial sureties (or none at all as for 2nd applicant) is fatal to this application.

The applicants have failed to discharge their burden to adduce evidence in support of their application.

The bail application therefore fails and is dismissed.

10



Jane Okuo Kajuga

Judge

30/11/2021

Delivered in open court, in presence of
all parties.

