THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL DIVISION
MISCELLEANOUS APPLICATION NO.008 OF 2024
ARISING FROM NAKAWA CRIMINAL CASE NO.043 OF 2023

1. **KAKWANZA PATRICIA**
2. **NKWANZI MARTHA KATANGA**
3. **OTAI CHARLES**
4. **AMANYIRE GEORGE** **APPLICANTS**

VERSUS

UGANDA **RESPONDENT**

BEFORE HON: JUSTICE ISAAC MUWATA
RULING

This application is brought under article 23(6)(a), (c) and Article 28(3)(a) of the Constitution, Section 14 of the Trial On Indictment Act, Rules 2&11(2) of the Constitution Bail Guidelines for Courts of Judicature (Practice) (Directions),2022 for orders that the applicants be released on bail pending the hearing and disposal of their trial.

The grounds of the application are briefly that;

1. **The 1st and 2nd applicants are charged with destroying evidence contrary to section 102 of the Penal Code Act which is a bailable offence.**
2. **The 3rd and 4th applicants are charged with the offence of being an accessory after the fact of murder contrary to sections 393(1) of the Penal Code Act which is a bailable offence.**

3. **The applicants are presumed innocent until proven guilty and that they have substantial sureties to guarantee their attendance in court.**
4. **The applicants are bread winners of their respective families and that they have fixed places of abode within the jurisdiction of this court and that they shall not abscond if released on bail.**
5. **The applicants also stated that they have substantial sureties who undertake to ensure that they attend court when required.**

More specifically, the 1st applicant stated that she suffers from fluctuating severe hypertension heart diseases, chronic clinical gastris which requires regular access to specialized medical treatment and monitoring not accessible in the women's prison.

The 2nd applicant also stated that she's a nursing mother and suffers from post-partum complications detailed in the medical report attached to the application. She contends that her condition demonstrates special circumstances for courts consideration.

I have also considered the grounds raised by the 3 and 4th which are contained in their respective affidavits in support of the application which I have considered in the course of the determination of this application.

The respondent opposed the application through the affidavits sworn by Anna Kizza, Chief State Attorney and No.30844 D/SGT Beteise David. They contended that the applicants are a flight risk with a possibility of absconding.

They also contend that the 4th applicant has no known permanent place of abode of his own. The respondents also further contend that the particulars of the sureties presented by the 3rd applicant indicate that they do not have a permanent fixed place of abode.

The respondent further contended that with no evidence of a fixed place of abode, the accused persons are likely to abscond. It was further contended by the respondent that the offences which the applicants are charged with are connected to a charge of murder which is grave and thus they are likely to abscond or frustrate the hearing of the case.

The respondent further contended that 2nd applicant neglected and/or defied court summons and was only compelled to appear in court upon issuance of a warrant of arrest. The respondent also contended that none of the applicants have presented any exceptional circumstances to warrant their release on bail by the High Court.

It was also further contended by the respondent that matter in issue is of great public interest and there is a real possibility of the accused persons interfering with witnesses.

The respondent also contends that the investigations in the case are complete and all the applicants have been committed for trial in the High Court and that it will serve the interests of justice if the case is instead fixed for hearing as opposed to releasing the applicants on bail.

The applicants made a rejoinder to the points raised by the prosecution which I have considered but I shall not reproduce here.

At the hearing of the application, the applicants were represented by Mr. Kabega Macdusman, Jet Tumwebaze, Elison Karuhanga and Bruce

Musinguzi. The prosecution was represented by Mr. Jonathan Muwaganya and Ms. Samalie Wakooli

Both parties filed their written submissions and made oral highlights which I have carefully considered.

I will deal with the preliminary objection raised by the state in respect of the admissibility of the affidavit in rejoinder filed by counsel for the applicant specifically Mr. Bruce Musinguzi. It is the contention of the respondent that the affidavit in rejoinder cannot be relied on for being argumentative, prolix and in none compliance with Order 19 of the Civil Procedure Rules which provides that an affidavit shall be confined to such facts as the deponent is able on his own to prove except in interlocutory applications on which statements of his belief may be admitted provided that the grounds there of, are stated.

Counsel for the respondent specifically referred to paragraphs 7,8 and 9 of the affidavit in rejoinder and argued that they amount to hearsay as counsel for the applicant does not state the source of his information.

I have considered the relevant paragraphs of that affidavit in rejoinder. In paragraph 7, counsel for the applicant avers that the 1st and 2nd applicant presented medical reports to demonstrate exceptional circumstances. The paragraph is confined to the presentation of exceptional circumstances already stated in the application which the applicant and her counsel are aware of. It's within the knowledge of counsel that the applicant obtained medical reports to prove exceptional circumstances and it does not require him to disclose his source of information.

The same applies to the other paragraphs of the affidavit referred to by the respondent. The averments made by counsel for the applicant are relevant for purposes of pleading and are sufficient to inform court of what the applicants have already pleaded in their affidavits in support of the application. In these circumstances I find that the affidavit does not offend Order 19 of the Civil Procedure Rules.

I now turn to the merits of the application.

Article 23(6) of the Constitution vests this court with the power to grant or decline a bail application made before it. The same provision requires that the grant of bail should be on such terms as the court considers reasonable. Article 23(6) (a) does not give guidance on how courts are to determine the reasonableness. It has been held that the reasonableness test is the need for court to weigh all relevant factors before granting bail to an accused person. **See: Foundation for Human Rights Initiative V Attorney General SCCA No.03 of 2009**

The relevant factors in my considered view are the like hood of the accused attending his or her trial, the risk that if released on bail an accused person will interfere with the witnesses or the likelihood of committing another offence, seriousness of the charge and the need to protect the society against lawlessness. The court will also consider whether it is in the interests of justice to grant the application. The burden to demonstrate how prejudicial it is to the interests of justice that an accused must not be granted bail rests with the state.

The 1st and 2nd applicant herein referred to as Kakwanzi Patricia and Nkwanzi Martha Katanga are charged with destroying evidence contrary to section 102 of the Penal Code Act while the 3rd and 4th applicants herein

referred to as the Otai Charles and Amanyire George are charged with the offence of being an accessory after the fact of murder contrary to sections 393(1) of the Penal Code Act.

The 1st applicant contended that she suffers from fluctuating severe hypertension heart diseases, chronic clinical gastris which requires regular access to specialized medical treatment and monitoring not accessible in the women's prison. She presented a medical report from the Uganda Prisons Medical Superintendent marked as Annexure B3. It is noted that the health conditions referred to therein are risky in prison conditions. Under Rule 14(2)(a) of the Bail Guidelines exceptional circumstance include grave illness certified by a medical officer of prison. I find that the medical report presented by the 1st applicant demonstrates exceptional circumstances for courts consideration.

The 2nd applicant contended that she's a nursing mother and suffers from post-partum complications. She presented evidence from Roswell Womens & Childrens Hospital. In the report it is stated that she has elevated blood pressure and suffers from post-partum pre-eclampsia. There is no doubt that post-partum complications require frequent attention.

In **Kagyenda Steven and Others Uganda HCMA No.01 of 2020,** this court noted that a newly born child and the mother may require care and attention which may not be provided for in prison facilities given the circumstances where the mother is incarcerated and the child is not with her. I find that her condition constitutes an exceptional ground for courts consideration. The exceptional circumstances referred to in rule 14(2) are

not exhaustive and the court may infer other exceptional circumstances on a case by case basis depending on the circumstance of each case.

The respondent argued that the applicants are jointly charged on charge sheet with a murder count. It was their contention that the charges are grave and that the applicants may abscond if released on bail. There is no doubt that the seriousness of the offence has a clear bearing on the court when considering a bail application. Seriousness of the charge and the possible outcome of a conviction and the temptation to jump bail if released or interfere with witnesses should be a key consideration.

The respondent clearly informed this court that the applicants have already been committed for trial in the High Court and are only awaiting hearing, so the possibility of interfering with witnesses at this stage maybe speculative as the applicants still enjoy the presumption of innocence. The question of the possibility interfering with witnesses requires proof and not mere speculation.

I will now deal with the sureties presented by the applicants. In considering the suitability of a surety, the court shall take into account the following factors; the age of the surety; work and residence address of the surety; character and antecedents of the surety; relationship to the accused person; and any other factor as the court may deem fit. **See: Rule 15 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022** .

The 1st applicant presented her husband Mwine Mukuru, her mother in law Zakye Merian Kyamanianga, and her father in law Kamugisha Herbert. They appeared able to make good of the recognizance set by this court if the need arose. I would therefore accept all the sureties presented by the

1st applicant. Furthermore, I am satisfied that the relationship between applicant and their sureties is such as would ensure the 1st applicant's appearance for her trial.

The 2nd applicant presented her husband Kivuna Christian, her aunt Harriet Mucunguzi and Bashasha Willis a close family friend. They were all known to the 2nd applicant and with their close social ties, they appeared substantial to guarantee the 2nd applicants attendance in court. It is worth noting that the respondent did not have any specific objection to the sureties presented by the 1st and 2nd applicant.

The 3rd applicant presented his brother Opio Godfrey,his sister Alamo Christine ,his wife Nakasujja Shamimu and his mother in law Kaaya Hasifah Bukenya .

The respondent objected to the 4th surety of the 3rd applicant on ground that she did not avail her original identification. They also argued that the 2nd surety did not know where she works and invited court to consider her demeanor. With regard to the 1st surety, respondent argued that the surety being a serving UPDF officer did not have clearance from his superiors to stand surety and did not avail any document such as his warrant card or movement card. The prosecution also argued that the fact that soldiers are deployed outside the boundaries without prior notice makes it difficult to access him.

With regard to 4th surety of the 3rd applicant, she presented a letter from NIRA with a verifiable NIN Number which was not disputed by the respondent. The failure to avail her original identification is explainable and this court takes note of the fact that the surety stated that her original National Identity Card is lost and has undertaken a legal process to replace

it. The documentary proof of the letter from NIRA confirming her particulars is sufficient.

As for the 2nd surety of the 3rd applicant I have considered her relationship with the 3rd applicant and not her demeanor as demeanor can be misleading given the tense atmosphere that maybe associated with court hearing of which the surety may not be accustomed to. Demeanor alone cannot be enough to impugn the suitability of a surety. All factors with regard to suitability of a surety must be considered as a whole.

As for the UPDF officer, there is no specific law that bars a UPDF officer from standing as a surety for an accused person. There is also no specific law that requires a UPDF officer to first seek clearance from his superiors before he or she stands surety for an accused person. The most important consideration should be whether they can prevail over, control and where necessary compel the accused person to abide by the terms and conditions of bail. This therefore calls for persons of proven influence or authority over of the applicant and no better person than the soldier who's his brother.

Requiring the surety in this case a UPDF officer to first seek clearance from his superiors in order to stand surety for an accused person in court may in one way or the other impact on the accused's right to apply for bail enshrined in Article 23(6)(a) of the Constitution. It is therefore upon the accused person applying for bail to choose which sureties to present to court for its consideration. Whether they are substantial or not is another matter that the court has to consider. I find that there no requirement for 1st surety of the 3rd applicant the to seek clearance from his superiors before he agreed to stand surety of the 3rd applicant. The

sureties presented by the 3rd applicant therefore appeared substantial to guarantee his attendance.

In respect of the 4th applicant, the respondent argued that there is no proof that he has a fixed place of abode, that the LC1 letter presented to court recommends him as a surety for someone and not proof of his residence. In response, counsel for the 4th applicant argued that the court must consider the substance of the letter which states that the 4th applicant is a resident of Mbuya II Parish and it should be taken by court as his place of abode. The omission referred to by the respondent in the LC letter is not fatal as the letter states that the 4th applicant is a resident of Mbuya II Parish and the same is contained in his affidavit in support.

The sureties presented by the 4th applicant were Tushabe Joab a friend,Murungi Shallon a sister in law and Atwijukire Anthony a cousin. The respondent had argued that they are not known to the applicant and suggested that they could be professional sureties. I have considered their answers when interviewed by this court and the respondent and I find that they were known to him and appeared to have authority over him and had knowledge of his antecedents. I do not find them as professional sureties as suggested by the respondent.

I also wish to address the issue raised by counsel for the applicants who stated that the applicants qualify for release on mandatory bail provided for under Article 23 (6) (b) of the Constitution. I perused the submissions of the respondent I did not find a specific response to this issue of mandatory bail raised by the counsel for the applicants.

Article 23 (6) (b) of the Constitution provides that;

Where an offence is triable by the High Court as well as by a subordinate Court, if a person has been remanded in custody in respect of that offence for 60 days and trial has not commenced, that person shall be released on bail on such conditions as the court considers reasonable.

My understanding of this provision is that where an applicant has been on remand in respect of an offence triable by the High Court and a subordinate court such as the Magistrates court for more than 60 days, there is an obligation on the court to release such accused person on bail. The provision only imposes on the court a duty to set the terms or conditions it considers appropriate and reasonable in the circumstance of the case.

It follows therefore that the offences with which the applicants are charged with are triable by the High Court and the subordinate courts and they have been on remand since the 21st of November, 2023 save for the 2nd applicant who has been on remand since 10th January 2024.For the 1st,3rd,4th, applicants, more than 60days and their trial has not commenced and they qualify for mandatory bail under Rule 9 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022 . This being the case therefore, court is therefore obliged to release the accused and is only required to set appropriate terms.

Lastly, the prosecution prayed for punitive terms in case the applicants are released on bail. It is my considered view that bail terms should not constitute punishment and the fact that the accused persons are not convicts should be reflected in their treatment and management and in the way the courts sets the terms of the bail. Bail terms or conditions must

not be set so high as to be out of reach or appear punitive. They should not be so low as to be outrageous or ridiculous. They must fit the circumstances of the case with the primary condition being whether they will oblige the accused persons to be in court whenever required. **See: Dr. Kizza Besigye V Uganda Crim.Misc Application No.18 of 2022.**

In light of the above, the court has been persuaded and is satisfied that the applicants have made out their case for the grant of bail, I shall accordingly grant them bail on the following terms.

1. **Each of the accused persons/applicants shall deposit shs. 2,000,000/=cash bail.**
2. **Each of the sureties shall execute a bond of shs. 20,000,000/= not cash.**
3. **The accused persons/applicants shall not travel outside the country without the express permission of this court and if any of the them is holding a valid passport, they should deposit it with the Deputy Registrar of this court.**
4. **Each applicant shall report to the Deputy Registrar of the Criminal Division every 1st Monday of each month beginning on the 4th of March 2024.**

I so order.

JUDGE

21/02/2024