

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL MISCELLANEOUS APPLICATION NO. 007 OF 2024

( Arising from the Chief Magistrates Court of Mengo at Natete/ Rubaga criminal case No. 033/2023)

KIGONGO FARUQ.....APPLICANT

-VS-

UGANDA.....RESPONDENT

Before: Hon Lady Justice Rosette Comfort Kania.

**Ruling**

**Background**

Kigongo Faruq (hereinafter referred to as "the applicant") was charged with the offence of Aggravated Robbery contrary to sections 285 and 286(2) of the Penal Code Act.

**Legal basis of this application**

The applicant brought this application by Notice of Motion under Articles 23 (6) (c), and 28(3)(a) of the Constitution of the Republic of Uganda, 1995 as amended and sections 14 and 15 (4) of the Trial on Indictments Act, Cap 23 for orders that;

The applicant be released on bail pending the hearing of Criminal Case NO. 033 of 2023.

**Representation**

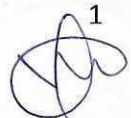
The applicant who was unrepresented was assisted by counsel Nshemerirwe Peruth to present his sureties and while the respondent was represented by Senior State Attorney Twesiime Maureen. The applicant submitted orally and counsel for the respondent filed written submissions which have been duly considered where necessary.

**Grounds of the application**

The grounds of this application as briefly stated in the notice of motion and further detailed in the affidavit in support of the application as deposed by the applicant are that;

- (i) The Applicant has a constitutional right to apply for bail.
- (ii) The Applicant is presumed innocent until he pleads or is proven guilty.
- (iii) There is uncertainty as to when the substantive trial of the case would start.
- (iv) The Applicant has a fixed place of abode within the jurisdiction of this court.
- (v) The Applicant has substantial sureties also living in areas within the jurisdiction of this Court.

**Objection to the application**

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This application was objected on the following grounds; failure to prove exceptional circumstances as provided under Section 15 of the Trial on Indictments Act, Cap23, likelihood of the applicant to abscond given the nature of the sentence that the offence with which the applicant is charged attracts, failure to prove fixed place of abode, that the introduction letter from the LCI was signed by only one member of the committee, Lady Justice Jane Alvidza in the case of **Aganyira Albert-vs- Uganda, Criminal Miscellaneous Application NO. 0071 of 2013**, observed that, " Local Council officials are usually among the most important and/or respected members of the community and their evidence of a fact should be treated as very credible. " However evidence of a letter from the LC confirming the fact that the applicant has a fixed place of abode within this court's jurisdiction would be of higher evidential value if it had been endorsed by at least another member of the LC that includes, the vice chairperson, secretary, defence among others.

### **Law Applicable**

Article 23 (6) (c) of the Constitution of the Republic of Uganda as amended provides as follows " where a person is arrested in respect of a criminal offence;

"In the case of an offence triable only by the High Court, if that person has been remanded in custody for one hundred and eighty days before the case is committed to the High Court, that person shall be released on bail on such conditions as the court considers reasonable."

Paragraph 5 of The Constitution (Bail Guidelines for Courts of Judicature) Practice Directions, Legal Notice NO.8 of 2022, reinforces the above legal positions by providing the general principles which a court shall take into account while considering a bail application while being guided by the relevant constitutional principles;

- (a). The right of an applicant to be presumed innocent as provided for in Article 28 (3) of the Constitution;
- (b).The applicant's right to liberty as provided for in Article 23 of the Constitution;
- (c). The applicant's obligation to attend the trial;
- (d). The discretion of the court to grant bail on such terms and conditions as the court considers reasonable; and
- (e). The need to balance the rights of the applicants and the interest of justice.

Paragraph 10 of The Constitution (Bail Guidelines for Courts of Judicature) Practice Directions, Legal Notice NO.8 of 2022, which provides for mandatory bail is to the effect that;

- (1) where an offence is triable only by the High Court, if a person has been remanded in custody in respect of the offence for one hundred and eighty days before the case is committed to the High Court, that person shall be released on bail on such conditions as the court considers reasonable.
- (2) in the case of a person who has been on remand for one hundred and eighty days in accordance with Article 23(6)(a) of the Constitution, the Magistrate's Court shall immediately refer the file to the High Court.

Article 28 (3) (a) of the Constitution provides for the presumption of innocence.





Section 14 (1) of the Trial on Indictments Act, cap 23 the provisions outlined in Article 23 (6) (a) of the Constitution are articulated and it clothes the High Court with the discretion to release an accused person on bail at any stage of the proceedings, on taking from him or hear a recognizance consisting of a bond with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the Court on such a date and at such a time as is named in the bond.

Section 14 of the Trial on Indictments Act (TIA), empowers the High Court to, at any stage of the proceedings release an accused person on bail on such conditions as court deems meet.

Section 15(4) of the Trial on Indictments Act, provides that in considering whether or not an accused person is likely to abscond, court may take into account the following;

- (a) whether the accused has a fixed place of abode with court's jurisdiction,
- (b) whether the accused has sound sureties within court's jurisdiction;
- (c) whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and
- (d) whether there are other charges pending against the accused person.

Arising from all the above, an accused person may be granted bail if he/she fulfils the set conditions for his or her release, has a fixed place of abode, and has sound sureties capable of guaranteeing that he will comply with the conditions of his or her bail, and is willing to abide by all other conditions set by the court.

Having examined the applicable law on bail, I will now turn to the merits of the application. In so doing, I will adopt the order of argument used by the applicant's counsel in their submissions.

### **Grounds of the application**

#### ***Right to apply for mandatory bail and court's discretion to grant bail***

The application was brought under Article 23 (6) (c) of the Constitution which provides for mandatory bail. The purpose of Article 23 (6) (c) was to guard against the continued stay of the accused persons on remand for extended periods without being committed to the High Court for Trial. It is clear from a reading of the lower court record that, was remanded on 24th April 2023 and he has been on remand to date, a period more than the statutory 180 days.

In the case of **Attorney General –vs- Uganda Law Society, Supreme Court, Constitutional Appeal NO. 1 Of 2006** where court upheld the principle that a constitutional provision which relates to a fundamental right must be given an interpretation that realizes the full benefit of the guaranteed right, thus making it a duty of the Court to which a bail application is presented to give an interpretation to the constitutional provisions that relate to bail that realizes the full benefit of the guaranteed right." In this case, the interpretation that would ensure realization of the full benefit of the right enshrined in Article 23 (6) (c) is that the accused person is entitled to mandatory bail.



The only action required of a magistrate's court where a person has been on remand for more than one hundred and eighty days is to, as directed by Paragraph 10(2) of The Constitution (Bail Guidelines for Courts of Judicature) Practice Directions, Legal Notice NO.8 of 2022 forward the file to High Court for trial.

### **Right to liberty**

Releasing accused persons on bail comes from the need to safeguard the fundamental right to liberty provided under Article 23 of the Constitution of the Republic of Uganda, 1995. In relation to the right to personal liberty, the position of the law which has been judicially noticed is that, an accused person must not be deprived of his freedom unnecessarily or as a mere punishment if he has not been proved guilty by a competent court of law or he has not pleaded guilty **Tumwirukire Grace-vs Uganda, Miscellaneous Criminal Application No. 94 of 2019(2020)**. The key consideration for granting or refusing to grant bail is to strike a balance between individual rights and the interest of society. In other words, bail is devised as a technique for affecting the synthesis of two basic concepts of human values, namely the right of an accused person to enjoy his personal freedom and the public interest, subject to which, the release is conditional on the surety to produce the accused person in court to stand his or her trial.

Counsel for the respondent contends that the applicant is likely to abscond given the gravity of the maximum sentence that the offence the applicant is charged with attracts and cited the case of **Tigawalana Bakali Ikoba v Uganda Criminal Application No. 23 of 2003**, Justice Rwamisazi Kajaba as he was then held that in considering a bail application court may address its mind to the facts and circumstances namely; nature of the accusation, gravity of the offence charged and the severity of the punishment which the conviction might attract. Counsel added that accordingly, the applicant should not be released on bail.

Article 23 (6) of the Constitution which guarantees the right to bail provides that right to a person arrested in respect of a criminal offence and does not restrict the right to only offences that are not grave. It is my view that bail should not be rejected only on the basis of the fears of the State and as was held in the case of **Kayongo Bashir-vs- Uganda Miscellaneous Application NO.158 of 2019** Lady Justice Flavia Senoga Anglin quoted the case of **Matthew Kanyamunyu Muyogoma -vs-Uganda Criminal Application NO. 0177/2017** ; " if courts are simply to act on allegations, fears or suspicions, then the sky is the limit and one can envisage no occasion when bail would be granted whenever such allegations are made." Moreover, having clocked the period for mandatory bail, the court is obliged to release the applicant on bail, the gravity of the offence notwithstanding. Indeed, the provision of the, Article 23 (6) (c) of the Constitution guaranteeing the right to mandatory bail relates to offences triable only by the High Court, which by their very nature are offences classified as grave or capital. Article 23 (6) (c) provides that those persons who have been on remand for one hundred and eighty days, that person "shall" be released on bail on such terms as the court considers reasonable.

### **Presumption of Innocence**





The primary consideration for which a court may release an accused person on bail pending trial is the presumption of innocence. This presumption is enshrined in Article 28 (3) (a) of the Constitution which when read together with Article 23 which guarantees the right to personal liberty creates the premise that given that the applicant/accused is presumed innocent, he has a right to apply for bail. This means that an accused person should not be kept on remand unnecessarily before trial. It should be noted that this provision applies to all accused persons irrespective of the gravity of the offence, the right is not qualified.

Furthermore, Paragraph 5 of **The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice NO. 8 of 2022** which provides the general principles which a court may take into account while considering a bail application, includes taking into account the right of an applicant to be presumed innocent until proven guilty or until he pleads guilty as provided in Article 28 (3) (a) of the Constitution.

The presumption of innocence enshrined in Article 28 (3) which dictates that an accused person is presumed innocent until proven guilty or until he pleads guilty, implies that an accused person should not be kept on remand unnecessarily before trial.

**Uncertainty as to when the substantive trial of the case would start**

Counsel for the applicant submitted that the applicant has not been committed for trial to the high court, no hearing date has been fixed and that owing to the busy schedule of the court, the case may take long without being fixed.

The fact of daily hearings notwithstanding, in determining this bail application, court will proceed to pronounce itself on the other matters to be considered in determining applications of this nature; fixed place of abode, substantiality of sureties and whether the applicant has a criminal record or other charges pending against him.

**Fixed place of abode**

Section 15 (4) (a) of the Trial on Indictments Act provides that in considering whether an accused is likely to abscond, court may take into consideration whether the applicant has a fixed place of abode within the jurisdiction of the court. This provision is amplified by Paragraph 13 (1) (k) of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice NO.8 of 2022 details the considerations for bail by the court and includes; whether the applicant has a fixed place of abode within Uganda.

In the case of **Foundation for Human Rights Initiatives-vs- Attorney General Constitutional Petition NO.020 of 2006**, it was held that the nature of the offence, antecedents of the applicants and whether the applicants have a fixed place of abode in the Court's jurisdiction should be strongly considered by the court in an application for bail.

In respect of this application, states that he has a fixed place of abode within the jurisdiction of this court, at Corner Village, Urban Council Kazo, Angola ward, Kawempe Division, Kampala city Council. He attached a copy of an introduction letter endorsed by the LCI Chairperson



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Counsel for the respondent objects to the proof of residence that applicant has provided and contends that the LC letter was signed by only one member of the committee which lowers the credibility and evidential value of the said introduction letter. She further submitted that evidence of a letter from the LC confirming the fact that the applicant has a fixed place within this court's jurisdiction would be of higher evidential value if it had been endorsed by at least another member of the LC that includes, the vice person, secretary, defence, finance, information among others. She cited the case of **Aganyira Albert vs Uganda Criminal Misc Application No.0071 of 2013**, where Lady Justice Alvidza Jane Elizabeth observed that, "Local Council officials are usually among the most important and/or respected members of the community and their evidence of a fact should be treated as very credible.

Paragraph 12 (b) of The Constitution (Bail Guidelines For Courts of Judicature) (Practice) Directions, does not specify the form or content of the LC I introduction letter, all it says is that the application shall contain an introduction letter from the LC I chairperson of the area where the applicant resides. Further, In the case of **Kayongo Bashir-vs-Uganda Miscellaneous Application NO. 158 of 2019** he Lady Justice Flavia Senoga Anglin held that, the contention that the Applicant has no fixed place of abode is belied by the letter of introduction from the LC and his national ID". However, in this instance, the applicant stated in court that he used his original national ID as security for loan (attached a photo copy), he as well attached his copy of a passport and a driving permit. I therefore find that the applicant has satisfied the requirement to prove his place of abode.

#### **Substantiality of sureties**

The term "surety" is defined by Paragraph 4 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions Legal Notice NO. 8 of 2022 to mean; "A person who undertakes to ensure that the applicant will appear in court and abide by the bail conditions and who furnishes security which may be forfeited to the State if the applicant fails to appear in court." Therein lies the main duty of a surety.

Section 15 (4) (b) of the Trial on Indictments Act and paragraph 12 (i) of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) (Directions), provide that in considering whether an accused is likely to abscond, the court shall consider whether the accused has sound sureties within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail.

Further Paragraph 15 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions provides for determinants on the suitability of a surety thus;

- (1) When considering the suitability of a surety, the court shall take into account the following factors;
  - (a) The age of the surety
  - (b) Work and residence address of the surety
  - (c) Character and antecedents of the surety
  - (d) Relationship to the accused person; and
  - (e) Any other factor as the court may deem fit.
- (2) Subject to sub-paragraph (1) the proposed surety shall provide documentary proof including-
  - (a) A copy of his or her national identity card , passport or alien identification card
  - (b) An introduction letter from the Local Council I Chairperson of the area where the surety is ordinarily resident; or



(c) Asylum seeker or refugee registration documents issued by the Office of the Prime Minister.

**The applicant presented two sureties;**

(a) Asaba Margaret

Female adult 51 years old Ugandan, she is the mother of the applicant. She is a resident of Corner Village, Urban Council, Kazo, Angola ward, Kawempe Division. She presented an introduction letter endorsed by the LCI Chairperson, a copy of her national ID and a receipt indicating payment of rent, she presented the original national ID in court for inspection.

(b) Najingo Edisa

Female adult 81 years old Ugandan, she is a grandmother of the applicant. She is a resident of Corner Village, Urban Council, Kazo, Angola ward, Kawempe Division. She presented an introduction letter endorsed by the LCI Chairperson, a copy of her national ID and a sale agreement in respect of a piece of land that she owns. She presented the original national ID in court for inspection.

Counsel for the respondent argued that the sureties are not substantial because no evidence has been adduced of their ability to forfeit the bond in the event that the applicant absconds. She cited the case of **Aganyira Albert –vs- Uganda Criminal Miscellaneous Application NO. 71 of 2013**, where it was observed that proving that an Applicant's sureties are substantial calls for documentary evidence of facts to prove the capacity of the sureties to meet monetary obligations in case ordered to forfeit the bond and proof of surety particulars that can be easily verified to the satisfaction of court.

I firmly believe that, this court in making its decision must be cognizant of the socio-economic environment in which justice is dispensed particularly the informal nature of the employment of majority of Ugandans which makes it difficult to possess documentary evidence of capacity to meet monetary obligations. To insist on documentary evidence of capacity to meet monetary obligations in the event that the surety is called upon to forfeit the bond is to exclude swathes of the population of Uganda from the opportunity to stand surety for relatives and friends. This would tantamount to discriminating against a section of the society on the basis of their socio-economic class contrary to Article 21 of the Constitution of the Republic of Uganda which provides that;

(1) all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) without prejudice to clause (1) of this Article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

(3) For the purposes of this Article, "discriminate", means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

It is my considered view that, the role of a surety goes beyond the ability to forfeit the bond, bail is not designed as an income generating avenue for courts with the view of collecting upon sureties forfeiting the bond. What is pertinent about sureties is that there must be indication that they have been advised of their roles as sureties, they identified themselves properly and have shown and proved their

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authoritative relationships in respect to the applicant showing that they are able to exercise their authority and command appearance of the applicant in court when needed. Counsel who was assisting the applicant informed court that the sureties had been informed of their duties in respect of bail, which duties they understood well and committed to executing. In **Angura Paul Francis & Others-vs-Uganda Miscellaneous Application NO.0031 of 2022**- Justice Dr. Henry Peter Adonyo held that; "... the sureties presented by each of the Applicants are each considered substantial given the fact that they are all residents of the same village of Akanyuko Village where each of the Applicants come from and are indeed close to the Applicant as blood relatives, which fact implies that each of them have a measure of authority over the applicants and thus should be able to supervise the applicants to ensure that each of them does not abscond from their trial." Accordingly, the declared blood ties between the 1<sup>st</sup> surety who is the mother of the applicant augments her substantiality. The 2<sup>nd</sup> surety is a grandmother the applicant, much older and is able to compel the applicant to attend court whenever required. Accordingly, I find the sureties substantial.

Lastly, it has not been proved that there is a previous occasion when the applicant released on bail failed to comply with the conditions of his bail, neither are there other charges pending against him. Consequently, having found that the applicant has satisfied all the relevant requirements for the grant of bail such as; proving that he has a fixed place of abode and providing substantial sureties, the application for bail is allowed on the following terms;

- That the Applicant shall pay a bond of UGX. 5,000,000 (five million Uganda shillings only) not cash.
- That the sureties shall be bound in the amount of UGX. 10,000,000 (ten million Uganda shillings only) each not cash.
- That the Applicant shall report to the Deputy Registrar of this Court every 3<sup>rd</sup> Tuesday of the month starting from 19<sup>th</sup> March 2024.
- The sureties shall submit to the Deputy Registrar of this Court a passport size photograph and photocopies of their valid national identity cards.



**Rosette Comfort Kania**

**Judge**

**20th February 2024**