

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

[CORAM: ENGWAU, JA]

MISCELLANEOUS CRIMINAL APPLICATION NO.37 OF 2009

[Arising from Court of Appeal Criminal Appeal No.105 of 2009]

BETWEEN

TEDDY SSEEZI CHEEYEAPPLICANT

AND

UGANDA RESPONDENT

RULING OF ENGWAU, JA.

This is an application for orders that:

- a) ***the applicant, Teddy Szezi Cheeye, be granted bail pending the hearing and determination of his appeal No.105 of 2009.***
- b) ***the conditions regulating bail pending appeal be imposed.***

The application is brought by virtue of section 132(4) of the Trial on Indictments Act (CAP 23) read together with section 40 of the Criminal Procedure Act (CA) 116). It is supported by the affidavit of the applicant based on the following grounds:

- a) ***That the applicant has filed an appeal against his conviction vide Criminal Appeal No.105 of 2009.***
- b) ***That the applicant was previously granted bail during the trial which is the subject of appeal which he fully honoured.***
- c) ***That the applicant has a fixed place of abode within the jurisdiction of this honourable Court.***
- d) ***That the offences for which the applicant was convicted do not carry the death sentence.***

- e) ***That the applicant is a first time offender and has never previously been convicted of a criminal offence.***

The background to his application is that, the applicant was tried by the Anti-Corruption Court sitting at Kampala and he was convicted for the offence of embezzlement and was sentenced to 10 years imprisonment. He was also convicted on 8 counts of forgery, and was sentenced to 3 years imprisonment on each count. The sentences are to run concurrently.

During the hearing of this application, Mr. Peter Kabatsi being assisted by Brenda Ntambirweki represented the applicant and Mr. Charles Richard Kaamuli, Principal State Attorney represented the Director of Public Prosecutions (DPP) respectively.

Mr. Kabatsi submitted that since his conviction, the applicant has lodged an appeal in this Court against all the convictions and sentences vide Criminal appeal No.105 of 2009. Counsel pointed out that the provisions of sections 132(4) of the trial on Indictments Act and 40 of the Criminal Procedure Code empower this Court to release a convicted person on bail pending the hearing and determination of his or her appeal.

Section 132(4) of the trial on Indictments Act provides:-

“Except in a case where the appellant has been sentenced to death, a judge of the High Court or the Court of Appeal may, in his or her or its discretion, in any case in which an appeal to the Court of Appeal is lodged under this section, grant bail, pending the hearing and determination of the appeal”.

Section 40(2) of the Criminal Procedure Code reads:

“The appellate court may, if it sees fit, admit an appellant to bail pending the determination of his or her appeal; but when a magistrate’s court refuses to release a person on bail, that person may apply for bail to the appellate court”.

In addition to the above provisions, Mr. Kabatsi relied on the guidelines laid down in ***Arvind Patel vs. Uganda, Supreme Court Criminal Application No.1 of 2003.*** In that case,

considerations which should generally apply to an application for bail pending appeal may be summarized as follows:

- (i) ***the character of the applicant;***
- (ii) ***whether he or she is a first offender or not;***
- (iii) ***whether the offence of which the applicant was convicted involved personal violence;***
- (iv) ***the appeal is not frivolous and has a reasonable possibility of success;***
- (v) ***the possibility of substantial delay in the determination of the appeal and***
- (vi) ***whether the applicant has complied with bail conditions granted before the applicant's conviction and during the pendency of the appeal.***

Mr. Kabatsi pointed out that the above guidelines have been followed by the High Court and Court of Appeal before, especially in ***Kilanda and others vs. Uganda [1984] HCB 18, Nalukenge Mildred vs. Uganda, Court of Appeal Misc. Application No.56 of 2008, Ntambi Kayongo John and Another vs. Uganda Court of Appeal Misc. Application No.10 of 2008 and Nsubuga Gerald and Another vs. Uganda, Court of Appeal Misc. Application No.37 of 2008.*** He, therefore, asked this Court to follow the same.

Regarding the character of the applicant, Mr. Kabatsi pointed out that he is a well seasoned journalist of 20 years experience. He further pointed out that the applicant is an accomplished economist. Before his conviction, the applicant was a director of economic affairs in the office of H.E. the President. He is married and has a large family to look after. The applicant was convicted at the age of 51 years. In counsel's opinion, the applicant has substantial and respectable character.

Mr. Kabatsi further submitted that the applicant is a first time offender who is convicted of offences not involving personal violence.

Mr. Kabatsi conceded that the applicant was one of the directors in a company known as ***“Uganda Centre for Accountability”***. The company got money from global fund but did not give satisfactory accountability of how the money was used. According to counsel, the applicant did not receive the money personally but the company did. The applicant never audited any document but officials of the company did. In counsel’s view, the applicant’s conviction was based on the doctrine of vicarious liability, which does not extend or apply to criminal law.

Learned counsel further contended that the conviction of the applicant was based on the evidence of a single witness who was an accomplice whose evidence was not corroborated. The accomplice in question was one Jeffery Nkurunziza Banga, PW2. Counsel pointed out that PW2 was in charge of that company though the applicant was one of the directors. According to counsel, PW2 is charged with the offences with which the applicant is convicted and results are unknown yet.

In counsel’s view, basing a conviction on vicarious liability in criminal law and on the evidence of an accomplice whose evidence is not corroborated, is wrong in law. In the circumstances, counsel is of the view that the appeal of the applicant is not frivolous and it has chances of success.

Mr. Kabatsi submitted that, according to his knowledge, the possibility of a substantial delay in hearing the appeal is real. In the premises, since the applicant was on bail at the trial and strictly honoured the conditions of his bail, and by the nature of his antecedent, he will not abscond if released on bail.

Learned counsel also brought to the attention of court that the applicant is not healthy. He is a known case of Diabetes Mellitus for the last 10 years and Hypertensive heart Disease for 5 years. According to counsel, the applicant is on specialized drugs which are in short supply and the situation is worse in prison. In the circumstances, Mr. Kabatsi prays that this is a proper case for grant of bail. The applicant has substantial sureties whom counsel introduced as:

- (1) ***Mr. John Ndyabagye, residing on Plot No.4156, Kisugu South C Zone Road. He is a retired civil servant who was Chief Librarian in the High Court of Uganda, Kampala. He is also a retired Chairman of National Insurance corporation. He is now a businessman holding passport No.D30370441. Currently, he is Director of Uganda Export Promotion Board.***
- (2) ***Mrs. Allison Kantarama Emiribe. She is Ag. Assistant Commissioner, Support Services in the Ministry of Health deployed at Mulago Hospital. She is a Nigerian national.***
- (3) ***Mr. Edward Ulayenzeza, holder of Passport No.B0561068. He is a businessman resident of Bugolobi, Plot No.14 Hanlon road.***

Mr. Kaamuli opposed the application. However, he associated himself with points to consider when granting bail. Learned Principal State Attorney, submitted that the applicant is not a proper person to be granted bail. In his view, the applicant's appeal has no chance of success. He pointed out that although the applicant was one of the directors in that company, the evidence adduced was that the applicant was a sole signatory. The company received the money from global fund but the applicant withdrew it from the company account single-handed. In counsel's opinion, this was a case of fraud hidden under the veil of incorporation. The issue of vicarious liability does not arise.

Regarding the evidence of an accomplice, PW2, against the applicant, Mr. Kaamuli submitted that his evidence was admissible because it was corroborated by documentary evidence. In the premises, the conviction of the applicant allegedly based on the doctrine of vicarious liability and on the evidence of an accomplice whose evidence is not corroborated does not have any possibility of this appeal to succeed. The appeal is frivolous, according to Mr. Kaamuli.

On the issue of having a substantial delay in hearing the applicant's appeal, Mr. Kaamuli submitted that this is a mere speculation because counsel for the applicant or the applicant himself has not made an attempt to have the appeal fixed for hearing. Had they done so, the appeal would have been disposed of on time. This is because from his personal knowledge, Court of Appeal disposes appeals on time.

Regarding bail previously granted to the applicant who honoured all the terms and conditions, Mr. Kaamuli submitted that conditions have now changed. While in the High Court, there was a presumption that the applicant was innocent until proved guilty. Counsel pointed out that the situation has changed since then because the applicant is now a convict who is ordered to pay ug.Shs.100 million. In counsel's view, a possibility of jumping bail is very high.

On the issue of medical report, Mr. Kaamuli observed that the applicant was being treated in prison and has made marked improvement. In his opinion, medical ground should not be the basis for grant of bail. In conclusion, counsel prayed for dismissal of the application.

This court has jurisdiction to grant bail to any convicted person, who has lodged a criminal appeal to court before the appeal is determined. This, however, is a discretionary jurisdiction, which should be exercised judiciously. In the instant case, the application is brought by notice of motion under section 132(4) of the Trial on Indictments Act and section 40 of the Criminal Procedure Code. I have already reproduced the provisions of the sections under reference in this ruling. The application is supported by the affidavit of the applicant. The DPP, though served, did not put in any affidavit in reply.

It is to be noted that once the trial of an accused person is completed and he has been convicted, his situation with respect to his release, changes significantly. The principles governing the release of a convict on bail pending the hearing and determination of appeal are different from those of an accused person who is still under trial because, the latter is presumed innocent until proved guilty. The presumption of innocence and the right to participate in the preparation of a defense to ensure a fair trial are not present where an accused person has already been tried and convicted.

Both counsel have referred this court to the Supreme Court case of ***Arvind Patel vs. Uganda, criminal Application No.1 of 2003*** in which Oder JSC (RIP) laid down guiding considerations in an application of this nature. I have already reproduced those considerations in this ruling.

It is to be noted, however, that each case must be considered on its own facts and circumstances. In the instant case, one of the grounds put forward by counsel for the applicant is that there is a possibility of success of the applicant's appeal. It is based on points of law, which are: First, the applicant's conviction was based on the doctrine of vicarious liability, which does not apply in criminal law. Secondly, the applicant was convicted on the evidence of a single witness, who was an accomplice whose evidence was not corroborated. In counsel's view, therefore, the appeal is not frivolous.

It is contended that at his trial the applicant was granted bail by the High Court and that he honoured all the terms and conditions. He never absconded. In the premises, Mr. Kabatsi asked court that conditions regulating bail pending appeal be imposed. The learned counsel then introduced to the Court prospective sureties for the applicant if he were granted bail. According to counsel, the 3 sureties are willing to ensure the applicant's presence in Court as and when he is required to do so.

It is further contended that the applicant's poor health is an important consideration in the instant application. Counsel Kabatsi pointed out that the applicant is a known case of diabetes and hypertensive heart disease. According to counsel, the applicant cannot readily get the drugs while in prison. The applicant produced a medical report, dated 1st June, 2009 to support his argument. Looking at the medical report closely, the applicant has been maintained from prison with medications which resulted into his marked improvement. It appears it is an exaggeration to say that drugs for his ailments are in short supply at the prison.

It is contended further that the applicant's character is an important consideration in this application. He is a first offender aged 51 years old. The offences of which has was convicted did not involve personal violence. He is a married man with a large family to look after. In my view, the alleged hardship to his dependants perse does not justify a grant of bail.

Further, that due to the busy schedule of work in the Court of Appeal, there is a possibility of substantial delay in hearing the appeal.

The Supreme Court made it clear that all those conditions stated *in Arvind Patel case (supra)* need not be present in every case. A combination of two or more may be sufficient for a grant of bail. In the instant application, the following factors favour the applicant:

- (i) ***that he is a man of good character and counsel for the respondent never addressed court on this issue;***
- (ii) ***that he is a first offender, not disputed;***
- (iii) ***that the offences of which he was convicted did not involve personal violence;***
- (iv) ***that his appeal is not frivolous and has reasonable possibility of success;***
- (v) ***that due to heavy schedule of work in this court, the hearing of his appeal might delay, and***
- (vi) ***that when he was released on bail by the High Court, he complied with the bail conditions.***

In view of the above, as laid down in the Supreme Court case of *Arvind Patel (supra)*, I grant the application. The applicant will be released on bail on the following terms:

- (a) ***To pay cash bail of Ug.Shs.60,000,000/= (Sixty Million Shillings).***
- (b) ***To surrender to the Registrar of this Court his passport.***
- (c) ***He should report to the Registrar of this Court every fortnight at 9:00a.m, beginning on 3rd August, 2009.***
- (d) ***Mr. John Ndyabagye, Mrs. Allison Kantarama Emirembe and Mr. Edward Wayeneza should be the applicant's sureties, to secure his attendance in Court whenever he is required to do so.***
- (e) ***The sureties will each execute a bail bond of Shs.50,000,000/= (Fifty Million Shillings not cash).***
- (f) ***The Registrar is hereby directed to fix the applicant's appeal within the coming criminal session.***

I so order.

Dated at Kampala this 24th day of July 2009.

S.G. Engwau

JUSTICE OF APPEAL