

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
MISCELLANEOUS APPLICATION No. 213 of 2013
(Arising out of Criminal Case NAB-CO-260-11 of 2013)**

KIWANUKA JOHN:..... APPLICANT

VERSUS

UGANDA:..... RESPONDENT

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHANYA

RULING

This Application was brought by Notice of Motion under Articles 23 and 28 of the 1995 Constitution of the Republic of Uganda, and Sections 14 and 15 of the Trial on Indictment Act, Cap 23 and Section 2 of the Judicature (Criminal Applications) Rules). It is for Orders that the Applicant be granted bail pending the hearing and disposal of the criminal charges against him. The grounds in support of the Application as contained in the affidavit are that: -

- a) The offence with which the Applicant is charged is bailable by this Honourable Court.
- b) Special circumstances exist for the award of bail given the fact that the Applicant suffers from HIV/AIDS and Ulcers.
- c) The Applicant has substantial sureties ready to abide by bail terms set.
- d) The Applicant has a fixed place of abode within the jurisdiction of this Honourable Court.
- e) The Applicant shall abide by the bail terms set by Court and shall attend his trial.
- f) It is in the interest of justice that this Honourable Court grants this bail.

Applicant was indicted with the offence of Aggravated Robbery contrary to Sections 285 (2) and 286 of the Penal Code Act (P.C.A) in Nabweru Chief Magistrates' Court and remanded to Luzira Upper Prisons till 25th May 2011. It is alleged that the accused and other still at large on the 3rd of May, 2011 at Kilolo- Galamba in Wakiso District robbed one Agaba Brian Andrew of Cash worth UGX 10,000,000/= (**Ten Million Uganda Shillings only**) and at immediately before or immediately after the time, threatened to use a deadly weapon *to wit* a pistol (gun) on the victim.

At the hearing, the Applicant was represented by Counsel Andrew Sebugwawo of Kayondo Omam & Co. Advocates whilst the Respondent was represented by Learned State Attorney Kwezi Asiimwe Fiona. And both Counsel made oral submissions.

In his submissions, Counsel for the Applicant reiterated the grounds set out in the Notice of Motion and Affidavit in support.

Counsel Sebugwawo then submitted that the Applicant had three (3) Sureties and asked Court to call them.

1st Surety : Joyce Nabaale; female adult, aged 26 years, a resident of Kawempe - Sebyggala Zone for two years now and wife of the applicant for 5years. She owns a restaurant which has no name but located in Kawempe Tula Road. [LC 1 Letter submitted dated 26th/02/2013. Residence ID issued on 15th/06/2013 and expiring on 15th/06/2016].

2nd Surety: Majambere Augustine; male adult, aged 29 years, a resident of Matugga – Mabendo LC.1 Wakiso District and a grandson of the applicant. He operates a business of selling chicken around his area of residence in

Kawempe. [LC 1 letter submitted dated 26th/02/2014 and Village ID No. 326 issued on 17th/12/2013].

3rd Surety: Luka Herbert Kintu; male adult, aged 53 years, a resident of Maganjo – Kijapan Zone “A” and a nephew of the applicant. He is an employee of the Us Embassy as a driver. [LC 1 letter submitted dated 5th /12/2013, Voters ID No. 09075032 D.O.B.26/1/1961 issued on the 11th/06/2002 and Work ID No. 15515 which expired five years ago].

Counsel for the Applicant Mr. Sebugwawo prayed that the Sureties be found substantial by this Honourable Court and cited the case of *Dennis Obua vs. Uganda Criminal Application No. 18 of 2005*, where Justice Remmy Kasule held that it would be unfair to keep an accused person in prison whose trial is still pending because the law does not compensate the period an accused spends on remand if he is found innocent.

In Reply, the State Attorney objected to the Application on the grounds that the Applicant failed to prove that his health condition cannot be handled by the prison clinic. She referred to paragraph 9 of the affidavit where the applicant stated that he was suffering from HIV/AIDS and Ulcers and contended that the evidence would be availed. Further, that Counsel of the applicant stated that he had made efforts to get records but no affidavit of the said efforts has been filed. The state Attorney in furtherance regarding the nature of the offence stated that the Applicant does not have a fixed place of abode therefore there are high chances that he will abscond if released on bail. She asked Court to find Ms. Joyce Nabaale (surety No. 1) not substantive to stand as surety on the basis that as a wife of the applicant for (Five) 5 years she was not able to tell Court his age.

Secondly, Sureties No.1 and 2 had contradicting information regarding the current residence of the children of the applicant which proved that she was untruthful and could not have understood her duties as a Surety. In furtherance the learned State Attorney submitted that surety No. 2's Residence ID submitted in Court had quite a number of variations compared to the Photocopy. She also asked Court to find surety No. 2 not substantive.

In addition, Ms. Asiimwe pertaining to Surety No. 3 submitted that he had contradicting information in regard to the existence of the applicant's wife as well as her name yet she claimed to have been married to the applicant for five years. She then asked Court not to find Mr. Luka Herbert a substantive surety since he was not convincing enough.

Lastly, the State Attorney submitted that under paragraph 4 of the applicant's affidavit, he stated that he has dependants under his care who depended on him for daily needs. However, he did not state that his wife could not take care of their children.

Learned State Attorney cited the case of *Uganda vs. Rtd. Col. Dr. Kiiza Besigye Constitutional Ref. No. 20/ 2005*, where Court held that Court may refuse to grant where the applicant fails to show exceptional circumstances. In furtherance, she cited the case of *Foundation for Human rights Initiative vs. Attorney General Constitutional Petition No. 020 of 2006*, where it was stated that the nature of the offence, antecedent of the applicant and whether the applicant has a fixed place of abode in Court's jurisdiction should be strongly considered by Court in an application for bail. She then prayed that the applicant be denied his application to be released on bail.

In his rejoinder, Counsel for the Applicant stated that it is not a mandatory requirement to prove exceptional circumstances under Section 15 T.I.A vis - a vis the Constitution. He maintained that pertaining to the gravity of the offence, the Applicant is presumed innocent until proved guilty and that bail is a human right.

Therefore, from the above, the issue for determination is whether the Applicant should be released on bail pending trial.

It should be noted that the Applicant is charged with the offence of Aggravated Robbery contrary to Sections 285 (2) and 286 of the Penal Code Act. The basic principle for release of an Applicant on bail is the presumption of innocence enshrined under Article 28(3) (a) Constitution of the Republic of Uganda.

I have already noted that this Application was brought under **Articles 23(6) (a) and 28** of the Constitution of the Republic of Uganda. It provides; *where a person is arrested in respect of a Criminal Offence, he is entitled to apply to the Court to be released on bail and Court may grant that person bail on such conditions as Court considers reasonable.* Further, **Article 28 (3) (a)** provides that, *'every person who is charged with a criminal offence shall be presumed innocent until proved guilty or until that person has pleaded guilty.'*

Under S. 15(2) of the T.I.A Court may refuse to grant bail if the Applicant fails to prove to its satisfaction *that exceptional circumstances exist justifying his release his release on bail; and (b) that he or she will not abscond when released on bail.* Also Section 14 of the same Act provides that *'Court may at any stage of the proceedings release the accused person on bail, on taking from him or her a recognisance 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.'

'**Exceptional circumstances**' under Section 14(3) of the T.I.A include among others 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 Accused is in custody. However, it is trite according to the case of ***Uganda vs. Rtd. Col. Dr. Kiiza Besigye Constitutional Ref. No. 20/ 2005***, that proof of exceptional circumstances in an application for bail is not Mandatory.

I have noted the submissions of the Learned State Attorney which I agree with. The Applicant should have furnished Court with a recent copy of his medical condition. I also agree with her submissions that lack of such proof on record does not satisfy the conditions in Section 15 (3) (a) T.I.A. under the proviso the Report must state that *'the Accused person is incapable of adequate medical treatment while the Accused is in custody'*.

In accordance with this Application, the Applicant deposed in paragraph 9 of his Affidavit in support that he suffers from HIV/AIDS and Ulcers which are making his stay in the prison difficult due to poor medication. However, there is no up to date document on record from the prison Clinic to prove his contentions. Therefore, it is my considered opinion depending on the circumstances of this case that although there is no updated document to prove the applicant's illness status, the fact that he is ill still stands. This ground succeeds.

The other condition that the Applicant raised is the fact that the Applicant has a permanent place of abode and it is unlikely that he will abscond if released on bail. Paragraph 5 of the Affidavit states that the Applicant is a

permanent resident of Mabanga Matugga Parish, Gombe Sub county Wakiso District. I agree with the State Attorney's submission on this ground that since Surety No. 2 stated that he had sold off his plot and house so as to raise funds to get the applicant out of prison. This means that he actually has no fixed place of abode at the moment. Secondly, in regard to the contradicting information provided to this Honourable Court by Sureties No. 1 and No. 2 as to the residence of the children, it is my considered opinion that the applicant has no place to call home since even his dependants are meandering from one place to another at the moment. Regardless of the above, the applicant's fixed place of abode for purposes of this application will be purported to be Ms. Joyce Nabaale's (wife) home in Kawempe - Sebagala Zone. Therefore, this ground succeeds as well.

The other ground that was raised during submissions is that this Court should make a finding that the sureties are substantial. I totally agree with the submission of Ms. Kwezi, the State Attorney that the Sureties were not truthful and convincing enough since surety No. 3 had quite a number of variations in the documents submitted in Court and also not knowing the wife of his uncle (the applicant) showed that there was something fishy going on. Secondly, in relation to sureties No. 2 and 1's contradicting information about the residence of the children could raise a lot of suspicions.

This Court is aware that the Applicant is indicted with a grave offence of Aggravated Robbery for which a convicted person is liable to suffer death. I have already noted the rationale for releasing an accused person on bail is majorly that he is presumed innocent until proved guilty. In the case of **Foundation for Human Rights Initiatives vs. Attorney General Constitutional Petition No. 020 of 2006, Leticia Kikonyongo Mukasa J.** held that: " *it is relevant, unless the offence is minor to take into account,*

certain matters like the gravity of offence, nature of accusation, antecedents of the accused person whether he has a fixed place of abode within the Court's jurisdiction."

I take note that whereas the Applicant herein has not proved Exceptional Circumstances, which I have already noted is not mandatory as per Section 15 T.I.A see **Foundation for Human Rights Initiatives vs. Attorney General (supra)**, I have put into consideration the period spent by the Applicant on remand that is from the time of his committal to the High Court on 9th/11/2011 to date and noticed that his detention was unduly prolonged given his condition of ailments. In the given circumstances, I take cognizance of the International Human rights treaties to which Uganda is a signatory where emphasis has been put on the distinction between people who have been found guilty, those convicted by a Court of law and sentenced to imprisonment and those who have not. Furthermore, I find that although the applicant's sureties in this are not very convincing, they will be able to execute their duties with some form of monitory. I am therefore inclined to release the Accused on bail as his own cognizance together with sureties;

- 1) Ms. Joyce Nabaale
- 2) Mr. Majambere Augustine
- 3) Mr. Luka Herbert Kintu

On these premises, and in view of what I have outlined herein, I grant this Application.

Finally, I make the following Orders;

1. That the Applicant be released on bail by taking from him a recognizance consisting of a CASH bond of **UGX. 5,000,000/=** (Five Million Uganda shillings only).

2. (a) Ms. Joyce Nabaale must make a written pledge to Court that she will keep the Accused/ Applicant at her residence in Kawempe - Sebagaala Zone;
3. (b) Ms. Joyce Nabaale shall adduce a recent Introduction letter and deposit a copy of valid Identification Card;
4. The Prison Official in charge of Nakawa Court, the Senior State Attorney, (RSA) and Counsel Andrew Sebugwawo will visit Ms. Joyce Nabaale's residence to ascertain where the location is and provide a map thereof.
5. If Ms. Joyce Nabaale cannot keep the Applicant, he will be returned to custody;
6. The Applicant will also deposit 2 Passport size photographs.
7. The Applicant shall report to my Chambers in person every fortnight commencing on 18th March 2014 at 10:00 am. If I am not present, there will be a Journal to be filled by my Personal Secretary as a confirmation of his fulfillment of this condition;
8. Each of the Sureties whose names appear above,
 - a) Shall deposit a pair of passport size photographs with the Nakawa High Court Circuit, DPP Nakawa.
 - b) Shall sign a non cash bond of UGX 5,000,000/= (Five Million Uganda Shillings Only).
9. Failure to adhere to these conditions will cause this Court to issue a Warrant of Arrest to return the Applicant to Luzira Upper Prisons.

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HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA.

JUDGE

04th March, 2014