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THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

COSTITUTIONAL APPLICATION NO.25 OF 2012

(ARISING OUT OF CONSTITUTIONAL PETITION NO.24 OF 2012)

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(ALSO ARISING OUT OF CONSTITUTIONAL APPLICATION NO.29 OF 2012)

LT.COL.JOHN KAYE.....APPLICANT/PETITIONER

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VERSUS

ATTORNEY GENERAL.....RESPONDENT

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CORAM: HON.JUSTICE S.B.K.KAVUMA, JA

RULING OF THE COURT

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Introduction

This is an application for an order of temporary release of the applicant/petitioner from custody at the Military Police Headquarters Makindye until the hearing and final determination of Constitutional Application No.29 of 2012 pending before this Court.

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It is brought under **Articles 126** and **137** of the Constitution of Uganda, S.98 of the Civil Procedure Act, Cap 71 of the Laws of Uganda, Rule 23 of the Constitutional Court (Petitions and References) Rules, S.I 91 of 2005; Rules 2(2) and 43 of the Judicature (Court of Appeal Rules) Directions, S.I 13-10 and all enabling laws. It is supported by the affidavit of the applicant sworn to on the 20th day of June 2012.

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Background

5 The background to the application is that the applicant, a Lieutenant Conel in the Uganda
People's Defense Forces,(UPDF), was, on the 12th day of November 2011, charged with the
offence of Murder c/ss 188 and 189 of the Penal Code Act. He is currently facing trial before the
General Court Martial, (GCM) at Makindye. He filed Constitutional Petition No.24 of 2012
challenging the constitutionality of the proceedings at the GCM and certain rulings of that court.
10 The petition is pending before this court. The applicant further filed Constitutional Application
No.25 of 2012 seeking a temporary injunction to restrain the GCM from further trying him until
the Petition is heard and to obtain an order of release from custody until the determination of the
Petition.

15 **Grounds of the application**

The grounds of the application are briefly stated in the Notice of Motion and amplified in detail
in the affidavit in support. The applicant avers, *among other things*, that;

- he was informed by his counsel/s Kiyemba & Matovu Advocates, that the offence of
murder is bailable and the GCM is empowered to grant bail in deserving circumstances,
- 20 • in furtherance of the above mentioned belief, on three separate occasions he applied for
bail pending his trial in order to consult with specialized doctors over his ailments of
diabetes, high blood pressure and difficulty in breathing which were not being adequately
handled in prison,
- in respect of his first bail application and despite the fact that the prosecution did not raise
25 objections to it, the same was denied on the grounds that he would interfere with the
witnesses and that his sureties were not properly before court because their gate passes
from Bombo military barracks did not specifically indicate that they were coming to
court to stand surety for him,
- his second bail application was also denied on the ground that the court wanted to listen
30 to some more witnesses in order to have a picture of what transpired to lead to his
arraignment in court. Court further faulted the medical reports he had submitted alleging
that they exhibited forgeries without specifically indicating what those forgeries were,
- his third application was summarily dismissed without giving due consideration to the
grounds he advanced when applying for it when court pronounced that they were not
35 satisfied with those grounds without substantiation,

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- his counsel informed him that the reasons for faulting his applications on the three occasions were insufficient to deny him bail and that court abrogated its duty to consider the grounds he advanced and further that his rights under **Articles 20(2),28(3)(a) and (c) and 44(c)** of the 1995 Constitution of Uganda were contravened,
 - being dissatisfied with the rulings of the court, he, on the 12th day of April 2012 through
10 his counsel, objected to Brigadier Charles Angina chairing the court proceedings on grounds that he was not impartial given their past bad working relationship, prejudicial statements he made earlier which had a direct bearing on his plea of not guilty in addition to the inadequate way the previous bail applications were handled,
 - the objections he raised were erroneously overruled and he was advised by his counsel
15 that court should have given due consideration to the provisions of **Articles 28(1) and 44(c)** of the Constitution of Uganda in making the ruling,
 - he has filed Constitutional Petition No.24 of 2012 challenging the impartiality and fairness of his trial and the Petition is pending hearing before this court,
 - he has also filed Constitutional Application No.25 of 2012 in this court seeking a
20 temporary injunction to stop his trial by the GCM until the Petition and the Application are heard and finally determined.

Representation

At the hearing of the application, Mr.Kiyemba Mutale (counsel for the applicant), represented
25 the applicant. There was no representation for the respondent, despite proof of proper service of court process on them.

The case for the applicant

Counsel for the applicant submitted that because the applicant's three applications for bail were
30 dismissed without good reason, that made him believe that he would not get justice in that court hence this application to this court.

He stated that under **Article 23 (a)** of the Constitution, the applicant is entitled to apply to court for bail. He noted that court has the discretion to grant or refuse bail but it looks at certain circumstances. It was also argued that it is on record and it is undenied, that the applicant has
35 serious ailments which are not well attended to at his detention facility.

5 Counsel pointed out that the applicant is aged 52 years, a serving Army Officer for over 30 years and that in his career, he has never had any matters of indiscipline, breach of the law or bad behavior.

Counsel argued that this court, in exercising its discretion, can grant bail at the applicant's own cognizance although he has two Army Officers who are willing to stand surety for him if court
10 so orders. Counsel submitted that he had explained to the two army officers the duties of sureties. He submitted that they were ready to produce the applicant if and when he is required by court.

Counsel prayed that the court be pleased to exercise its discretion to grant the applicant, in the interim, temporary release pending the hearing and disposal of Constitutional Application No.29
15 of 2012 and Constitutional Petition No.24 of 2012.

Court's consideration of the application

The issue in this application is whether the applicant should be temporarily released from detention pending the determination of his substantive application No. 29 of 2012 and pending
20 the hearing of his Constitutional Petition No. 24 of 2012 also pending in this court.

Section 98 of the Civil Procedure Act, Cap 71, provides courts with inherent powers to make orders necessary for the ends of justice. Rule 2(2) of the Judicature (Court Of Appeal Rules) Direction S.I.13-10, has the same effect. It provides:

25 2(2) **“Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been
30 passed, and shall be exercised to prevent abuse of the process of any court caused by delay.”**

I hasten to point out right at the outset of my consideration of the matter before me that first the nature of the release order sought by the applicant herein, taken within the context of the pleadings of the applicant, the applicants affidavit evidence and the submissions of his counsel
35 on record have a striking similarity with pleadings, evidence and the arguments that would be

5 advanced by an applicant seeking court orders for release through traditional bail applications and bail release orders.

Secondly, while the applicant bases his application on **Articles 126 and 137** of the Constitution among others, he also relies on **Articles 23, 28 and 44(c)** of the Constitution. As a consequence of the above, I have found it useful to appreciate the fact that basically the two aspects of this application are rooted in that part of the Constitution dealing with fundamental human and other rights enshrined in its Chapter Four. It is no surprise therefore that that nature of this application is reflected in my consideration of and the decision over the same.

In the case of **Uganda v Col (Rtd) Dr.Kiiza Besigye Constitutional Reference No.20 of 2005**, court laid out some general observations on the reasonable conditions the court should keep in mind when deciding to grant or to refuse to grant bail. It held:

“While considering bail, the court would need to balance the constitutional rights of the applicant, the needs of society to be protected from lawlessness and the considerations which flow from people being remanded in prison custody which adversely affects their welfare and that of their families and not least the effect on prison conditions if large numbers of unconvicted people are remanded in custody. In this respect various factors have to be born in mind such as the risk of absconding and interference with the course of justice...While the seriousness of the offence and the possible penalty which could be meted out are considerations to be taken into account in deciding whether or not to grant bail, the applicants must be presumed innocent until proven guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant will appear for trial and would not abscond. The applicant should not be denied of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the applicant the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially. Bail should not be refused mechanically simply because the state wants such orders. The refusal to grant bail should not be based on mere allegations. The grounds must be substantiated. Remanding a person in custody is a judicial act and as such

5 **the court should summon its judicial mind to bear on the matter before
depriving the applicant of their liberty.”** (sic)

I find the above quotation very pertinent and relevant to the instant case given the nature and effect of the temporary/interim release order the applicant seeks from court as explained above.

10 I am aware however, that the applicant has been charged with the very serious offence of murder. This calls for caution in granting such a release order.

I also note that in the instant application, there is no affidavit filed in opposition to the application. It is settled law that where certain facts are sworn to in an affidavit, the burden to deny them is on the other party. Failure to do that, they are presumed to have been accepted. See
15 **H.G.Gandesha and another v G.J.Lutaya SCCA No.14 of 1989.**

Basing on the applicant’s averment in his affidavit that he suffers from illness that is not being adequately attended to in his detention facility, his counsel vehemently argued that in fact that condition as stated in the applicant’s affidavit amounted to grave illness as known in law.

20 I have carefully considered counsel’s said submission and I have perused the applicant’s affidavit in support of his application in this regard. However, I note that all that is before me are photocopies of Form 5 from the Ministry of Health, Mulago Hospital, Out Patients Department, OP No. 1197939 dated the 15thDecember 2011 and UPDF Medical Services Patient’s Cards dated between the 15th Jan 2012 and 21st Feb 2012. These in my view, are mere
25 treatment notes which are not accompanied by or reduced into a medical report of any of the medical doctors that treated the applicant during the period in issue. Indeed there is nothing to show, apart from the applicant’s averments aforesaid, that his condition cannot be adequately attended to from the medical unit in his detention facility. Further, there is no evidence to that effect from any of the doctors who treated him. The applicant’s averments in his affidavit on this
30 aspect of his application can only indicate his concern about his treatment at his current detention facility. Sight must not also be lost of the fact that the applicant is not a professional medical doctor.

In these circumstances, I reject counsel for the applicant’s submission that a case has been made out that the applicant suffers from grave illness as understood in law. See **Capt. Wilberforce**

5 **Serunkuma vs Uganda HC Misc.CR. App.No 129 /94** per Hon. Lady Justice L.E.M.Mukasa Kikonyogo, as she then was. Though a High Court decision, I nevertheless, cite it with approval.

I have given careful consideration to the age of the applicant as a factor relevant to the instant application. There appears to be some inconsistency in the documents on record concerning the age of the applicant. While the medical form from Mulago Hospital gives the applicant's age as 10 49 years, the UPDF Medical Services Patients Cards give it as 52 years. However, the Medical Form from Mulago Hospital is dated the 15th Dec 2011. If the applicant was 49 years then, today he is about 50years old. Both these documents are incorporated in the applicant's affidavit in support of his application as annexure 'C'. My own observation of the applicant when he 15 appeared before me left no doubt in my mind that he was of the age of 50years and above. I therefore treat the inconsistency in those documents concerning the age of the applicant as minor and inconsequential.

There are numerous authorities to the effect that in Uganda, a person of 50years old is one of 20 advanced age. See **Francis Ogwang vs Uganda Cr. Misc. App. No.25 of 2003**, **Andrew Adomora vs Uganda Cr. Misc. Appn No 9 of 1992**. **Hon. Vicent Nyanzi vs Uganda Kamanyire CR. Misc. Appn No. 7 of 2001****John vs Uganda Cr. Misc. Appn No. 07 of 2001 H.C.MA No 31 of 2004**, all of which, though High Court decisions, I cite with approval.

Advanced age is recognized as a special circumstance in terms of granting bail by our courts. I 25 hold that the same should apply with equal force, in appropriate cases, to applications for temporary release, as is the instant case. Further, the applicant has a permanent place of abode at Kawempe within the jurisdiction of court. Investigations in the case against him were complete and therefore there is no fear of his interfering with the prosecution witness. He has sureties that have been introduced to court and to its satisfaction they are substantial and counsel 30 has explained the duties and responsibilities of sureties to them. The applicant has had unquestioned discipline in service with the UPDF for over 30 years rising to the high and respectable rank of Lieutenant Colonel. I would, for these reasons, grant him the temporary release he has applied for.

I have, further, carefully considered the applicant's complaints and contention that his human 35 rights under **Articles 23(8) (a) and (c)**, **28(1)** and **44(c)** have been and continue to be violated by

5 the ongoing trial at the G CM. **Article 28(1)** is underogable and sacrosanct. Its infringement can never be adequately compensated with any amount of damages. See **Hon. Jim Muhwezi v The Attorney General and the Inspector General of Government Miscellaneous Application No.18 of 2007**

10 My perusal of the applicant's affidavit and the annexures thereto, as regards the violation of his rights complained of has, without going into the merits and detailed consideration of evidence and the law, these being matters for another occasion in a differently constituted court for the purpose, satisfied me that this is a proper case for this court to exercise its discretion by granting the order of temporary release to the applicant.

15 For the reasons I have given above, I grant this application in the following terms:

1. **An interim order doth issue temporarily releasing the applicant/petitioner from custody at Military Police Headquarters, Makindye, until the hearing and final determination of Constitutional Application No.29 of 2012.**
2. **The applicant shall report to the Registrar of this Court once every two weeks before mid-day on each due date beginning from the date hereof until the hearing and disposal of the said substantive application No. 29 of 2012 or until such other or further orders of this Court.**
3. **The Applicant shall deposit with the Registrar of this court Shs 5.000.000/= (Five million shillings).**
4. **The Applicant shall deposit his passport with the Registrar of this court.**
5. **Col.Mathias Sewankambo, Service No.RO/00101 and Lt.Col.James Male, Service No.RO/0025 shall stand surety to the applicant and shall ensure his attendance in court for the hearing of his application and/ or whenever he is required to do so.**
6. **Each of the sureties shall bind himself by signing a bond of Shs 20, 000,000/= (twenty million) only, (not cash).**
7. **A breach of the above conditions or any of them shall render the temporary release order herein granted to the applicant liable to automatic cancellation.**
8. **The Costs of this application shall abide the outcome of the abovementioned application No. 29 of 2012 pending before this court.**

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5 **I so order**

Dated at Kampala this...**13th** ...day of ...**December**...2012

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S.B.K.Kavuma
Justice of Appeal

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