

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

INTERNATIONAL CRIMES DIVISION (ICD) SITTING AT GULU HIGH COURT CIRCUIT

MISCELLANEOUS CAUSE No. 20 of 2018

*(arising from HCT – 00 – ICD – CR – SC – No – 02 of 2010)*

**KWOYELO THOMAS alias LATONI ::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**UGANDA ::::::::::::::::::::::::::::::::::: RESPONDENT**

**Before: Hon. Lady Justice Kiggundu Jane F.B.**

**RULING**

**Background:** In brief the applicant, Kwoyelo Thomas alias Latoni, applied to this court to be released on bail during the trial of the criminal charges against him. At the time the miscellaneous application was filed, the hearing of the case had not commenced.

The applicant was charged with 93 counts of war crimes, crimes against humanity, murder, rape and other related charges and has been in incarceration in Luzira Maximum Prison for more than nine (9) years.

**Representation:** At the hearing of this application the applicant was represented by the following team of Counsel: Charles Dalton Opwonya, Caleb Alaka, Evans Ochieng and Boris Anyuru.



The State (respondent) was represented by a team of prosecution Counsel as follows: Byansi William, Charles Kaamuli, Florence Akello and Lilian Omara.

The victims were represented by the following Counsel: Henry Komakech Kilama and Amooti Jane Magdalene.

**Grounds:** This application was supported by an affidavit sworn by the applicant dated 3<sup>rd</sup> October, 2018, and a supplementary affidavit dated 2<sup>nd</sup> November, 2018.

Prosecution opposed this application in an affidavit in reply sworn by *D/IP Ogen - Mungu Lawrence* of Criminal Investigation Directorate, Kibuli, dated 2<sup>nd</sup> November, 2018.

The grounds of this application which were listed in the body of the motion went as follows:

1. The applicant was charged with many counts of War Crimes and related charges.
2. The applicant has a right to apply for bail under *Article 23(6)(a) of the Constitution* and this honorable court has jurisdiction and discretion to grant bail.
3. The said offences are bail-able under our laws.
4. The applicant shall abide by the bail conditions set by this honorable court if granted.
5. The applicant has fixed places of abode at residences of his benefactors at the home of Bishop Odama in Gulu Municipality, as well as at the home of Hon. Olanya Gilbert Gulu Municipality, M.P. Kilak South in Gulu and at the home of Olanya Lubel in Gulu Municipality.



6. The applicant will produce substantial sureties within the jurisdiction of this Honorable Court who shall ensure that he appears and answers the charges against him as and when required by this court from amongst the following persons, among others, in the names of: Bishop John Baptist Odama, Hon. Olanya Gilbert M.P. Kilak South, Hon. Akol Anthony, M.P. Kilak North, Hon. Akello Lucy, Woman M.P., Amuru and Mr. Olanya Lubel.
7. There are no other charges pending against him and this honorable court has the jurisdiction and discretion to release the accused on bail at any stage during the proceedings before judgment.
8. It is just and equitable that this application for bail be granted.

In the supplementary affidavit the applicant stated in para. 4 *'that I am informed by my advocate Mr. Charles Dalton Opwonya whose information I verily believe to be true that judgment was given in my favor from the Africa Commission on Human and Peoples Rights of the African Union during the Extraordinary Session from the 25<sup>th</sup> day of April to the 9<sup>th</sup> day of July 2018, in which the violations of my rights were specified throughout the judgment especially in paragraphs 233 to 293 thereof and Declarations and Orders made in paragraphs 294 and 295 thereof'*.

**Reply:** The respondent filed an affidavit in reply, dated 2<sup>nd</sup> November, 2018. In the affidavit in reply **D/IP Ogen – Mungu Lawrence** detailed as follows:

In para 3: *'that I joined the investigations team in the year 2009, following the arrest and repatriation of the accused person from the Democratic Republic of Congo to Kampala'*.

In para 4: *'that as an investigator, I participated in interview and recording of the witness statements and other related matters'*.

In para 5: *'that this case was initially investigated under a single police file **CIID HQTS GEF 258/2009** but later separated into 8 police files because of the incidents having taken place at different times and locations. That the 8 police files are incidents **A, B, C, D, E, F, G** and **H** as itemized in the witness index'*.

In para 6: *'that most of these incidents happened in Pabbo which is the home area of the accused, thereby creating close proximity between the witnesses, the accused's relatives and even some former combatants who were under the command of the accused but now re-integrated into the community after securing amnesty'*.

In para 7: *'the Lord's Resistance Army (hereinafter referred to as the LRA) collaborators are still living with the civilian community, although most of them got amnesty'*.

In para 8: *'that until his arrest in 2009, the accused was an active member of the LRA and was arrested in active combat after sustaining serious injuries and thereafter repatriated to Uganda'*.

*Before his arrest, the accused was being pursued by both the police and military for various offences masterminded by him.*

In para 9: *'that the accused is indicted with 93 counts of capital offences under the Penal Code Act, Crimes against Humanity, War Crimes, which are all grave and serious offences involving mass deaths, rape, robberies, injuries and untold suffering to a large section of the population, particularly in Amuru, his home area'*.

In para 10: *'that the offences referred to herein above include capital offences of murder, rape, robbery, kidnap with intent to murder, attempted murder under the Penal Code Act; War Crimes under the Common Article 3 to the Geneva Conventions Act and Crimes against Humanity that*



*attract serious punishment should the accused be found guilty and convicted. Therefore, the likelihood of the accused escaping if granted bail is very high'.*

*In para 11: 'that I have participated in several Community Outreach and interfaced with victims and witnesses in this case who are seriously aggrieved with the accused and have threatened to lynch him should he be released'.*

*In para 12: 'that the accused is a high profile suspect, given the positions held in the LRA. He held high level positions, which included Director of Operations, Director of Intelligence and In-Charge all sick-bays. If released, he can easily interfere with witnesses given the fact that the case is now at hearing stage. None of the proposed sureties has demonstrated the ability to keep safely and securely a suspect of that caliber'.*

*In para 13: 'that disclosure of evidence has been made to the defense and given the high profile nature of the accused, he can sufficiently identify some of them and likely to cause harm to them'.*

*In para 14: 'that some of the witnesses in this case were victims of Sexual and Gender Based Violence (SGBV). That some of these victims of SGBV were kidnapped while still minors and subjected to rape and forced marriages'.*

*The SGBV witnesses live in fear and are traumatized. The accused has good knowledge that some of these 'wives' of his are now prosecution witnesses. That some of them even produced children as a result of this sexual violence. If released on bail, there is a great danger of killing or hurting and or interfering with these vulnerable witnesses'.*

In para 15: *'that these SGBV witnesses are traumatized and need protection from this court'.*

In para 16: *'that we dispute the allegation by the accused that he is married as alleged in paragraph 8 of his affidavit. All of his alleged 'wives' are actually victims of rape who were abducted while still juveniles and forcefully converted into wives while in the bush and never consented to the alleged marriages. That most of the wives are actually traumatized SGBV witnesses in the main case against accused and need protection'.*

In para 17: *'that throughout the investigations, I established and maintained contact with most of the witnesses mentioned in the eight incidents and some of them informed me that they would appear in court to testify if their identity remained un-identified as a protective measure. Releasing the accused on bail is likely to deter such witnesses from attending court'.*

In para 18: *'that some of the proposed sureties are not suitable. One **Olanya Lubel Alfred** is not a suitable surety because he was indicted for treason with eleven other suspects most of whom were former LRA combatants in **CIID HDQTRS E/22/2009**. In the course of the investigations, several exhibits including walkie-talkies were recovered from his home at Wii-Aworanga in Gulu District. Although he was acquitted, that kind of background puts his suitability in issue'.*

In para 19: *'that I know Bishop John Baptist Odama and I respect his work for the church and the country. However, I have interfaced with Bishop Odama in several meetings and workshops and he is opposed to the prosecution of all the LRA rebels. He has been preaching a message for reconciliation and forgiveness. That his messages defer from what the prosecution is seeking in this case. Being a Church Leader of the caliber*



he is, if left to be a surety, it will cause polarity between the church and the government’.

In para 20: ‘that the accused was deployed in his home area of Amuru and all the attacks that he is linked to were meted on his own home people who knew him very well. The accused knows all the incidents he participated in and the locations and is likely to revenge and hurt the already traumatized victims who have been waiting for justice for a long period of time’.

In para 21: ‘that this case has now reached the hearing stage and all preparations are in advance to commence trial this month of November in Gulu. That I have seen a translated indictment into Lamogi dialect which has been availed to the accused and his counsel to ease plea taking. These are all steps to show that the case is ready for hearing. It is just and fair that the accused is not granted bail and an expeditious trial of the case ordered’.

In para 22: ‘that the accused has not pleaded any exceptional circumstances to warrant his release on bail. **Article 23(6)(a) of the Constitution** gives the accused the right to apply for bail but not release on bail’.

In para 23: ‘that the accused has not proved any exceptional circumstances to warrant his release on bail as required by **S.15 of Trial on Indictments Act**’.

In para 24: ‘that the accused has no Identity Card, no letter of LC1, National Identity Card, no family and if released and absconds, will be difficult to trace’.

In para 25: *'that there is no known relationship between the accused and his sureties. The alleged relationship appears to be a relationship of convenience without actual interface'*.

In para 26: *'as an investigator in this case, I established that there are many sympathizers to the accused in the region who could hurt and pose threats to witnesses if he is granted bail'*.

**Sureties:** On 9 November, 2018, this Court received a letter from Ojok Advocates acting for and on behalf of His Grace Rev. Dr. John Baptist Odama of Gulu Archdiocese, briefly stating that he as Head of the catholic flock was not in position to be a surety and was also unable to house the applicant in the event that he was released on bail.

This application was called for hearing on 11th March, 2019. The applicant through his team of lawyers assembled before Court four sureties:

- **Hon. Gilbert Olanya**, Member of Parliament representing Kilak South County, Amuru District. Court was informed that Hon. Olanya has a home in Toro Parish, Amuru District and also another home in Gulu Town, Pece Division and he will provide the accommodation of the applicant once released on bail.
- **Olanya Alfred Lubel** aged 65 years a retired Civil Servant
- **Omony Bosco** aged 34 years, a maternal nephew to the applicant, a farmer, resident of Aywee Parish, Pece Sub-County, Gulu district; and
- **Awuma Margaret** aged 40, resident of Godown Village, Layibi Sub-County, Gulu Municipality, Gulu District, a trader in Gulu Main Market, a blood sister to the applicant and last born in the family.



The team of Learned Counsel for the applicant led by Counsel Opwonya prayed that Court finds the sureties above substantial reason being that these sureties collectively would ensure that the applicant meets bail conditions or terms.

On his part, Counsel Alaka submitted that under **Art. 23 (6) (a) of The Constitution of Republic of Uganda**, a person is entitled to apply to Court for bail and Court may grant the same on set conditions. That this discretion is further buttressed in **Section 14 of Trial on Indictments Act** where the High Court may at any stage in the proceedings release an accused person on bail.

Counsel went ahead to point out that specifically **rule 54 of the Judicature (High Court) (International Crimes Division) Rules, S.I. No. 4 of 2016** states in accordance with **Section 14 of Trial on Indictments Act**, that court may at any stage of the proceedings exercise its discretion and grant bail. Further that under **Article 28** of the Constitution, the applicant is presumed innocent until proved otherwise. He submitted that indeed the applicant would observe the courts' conditions even if it went as far as restricting the applicant to Gulu.

**State/Respondent's reply:** Counsel Kaamuli for the State/Respondent in reply submitted that prosecution was objecting to the sureties presented to court. Alfred Olanya was objectionable reason being that he was indicted with treason in 2009 with other suspects. He enumerated the other suspects. They went through the trial but they were acquitted and that though acquitted, the fact of being linked to rebel groups put his character in issue.

Prosecution informed court that this case was now for hearing; they had summoned six witnesses and the copies of summons were on court record. That there was no doubt that the case was set for hearing.

He also submitted that counts indicted were serious offences and should the applicant be found guilty; the likelihood of absconding was very high. He further submitted that the applicant did not prove a fixed place of abode, since he was arrested from DRC in 2009. Between 1988 - 2009, the applicant had no links to his community, he had no home, no family, no social ties but a fighter caught in battle. He had no identification documents, no passport, no identity card of even the last school attended; it would be risky to set such a person on the loose. It would be hard to track such a person. He also informed court that he had a wife and children in his para 8 of his affidavit but the so called wives are victims of rape (now traumatized) in the bush.

On the issue of the constitutional guarantees when it comes to the right to apply for bail, prosecution submitted that the constitution sets up the right while the Trial on Indictments Act sets out procedures to be followed and sets out exceptional circumstances to be proved in capital offences. Such exceptional circumstances include; advanced age, serious illness etc. that the applicant made no effort to prove exceptional circumstances as stated in the law.

**Victims' Counsel:** Learned Counsel for the victims had on 15<sup>th</sup> November 2018 expressed interest to address court on the views of the victims on the matter. The matter was adjourned to 18<sup>th</sup> January 2019 to enable all parties better prepare. On 18<sup>th</sup> January 2019, Learned Counsel for the victims informed court that they had not yet reached out to the victims for their views because of the Christmas break. Another adjournment was sought and granted. It would look like when the application came up for



hearing on 11<sup>th</sup> March 2019, counsel for the victims had not yet sought the views of the victims hence waiving their right of participation.

**Court:** I carefully listened to the submissions of counsel. It is not in doubt that the applicant is charged with 93 counts of war crimes, crimes against humanity and other related charges and that he has been in incarceration in Luzira maximum prison for more than nine (9) years. These charges were confirmed in accordance with **rule 7 of the Judicature (High Court) (International Crimes Division) Rules, S.I. No. 4 of 2016.**

Learned Counsel for the applicant tended to focus on the constitutional guarantees; the presumption of innocence of the applicant and the right to apply for bail. They did not refer to any authorities to support their arguments.

Under **S.15 (1) of the T.I.A.**, the applicant must prove that he deserves to be released on bail. The main issue is whether he will abscond, which can be determined by looking at the following:

**Whether he will interfere with the course of justice/witnesses.** The investigating officer averred that the atrocities allegedly committed by the applicant happened in Pabbo, Amuru and brought untold suffering to a large section of the population. This happened to be the home area of the applicant and hence there was a likelihood of interfering with witnesses. Further, the disclosure of the evidence has been made to the defence and given the high profile nature of the accused, he can sufficiently identify some of them and likely cause harm to them. In addition, the trial commenced and the applicant has seen the witnesses whom he knows very well testifying against him. This has increased the chances of interference.

**Public interest** - Under **Article 126 of the Constitution**, courts are to exercise judicial power in the name of the people, in conformity with the law, the values, norms and aspirations of the people. The court notes that this is a case of great public interest at the national, regional and international level.

**Nature of the offences** - the applicant is indicted with grave breaches; 93 counts of capital offences under the Penal Code Act, Crimes against Humanity, War Crimes, which are all severe and serious offences involving mass deaths, rape, robberies, injuries and untold suffering to a large section of the population, particularly in Amuru, his home area.

**Sureties** - Some of the sureties have suspicious histories looming in the background bringing their substantiality into question. They live far apart and the submission by counsel for the applicant that the sureties collectively would ensure that the applicant meets bail conditions or terms sounds untenable. They are therefore not substantial because they may not be in position to compel him to attend trial once released on bail.

It appears that the overriding principle in an application for bail is set out in **Uganda vs Kiiiza Besigye Cons. Ref. No. 20/05**. In that case, Court emphasized that in the exercise of its discretion to grant or refuse bail, the court should in principle address the all-embracing issue, which is whether the interests of justice will be prejudiced if the accused is granted bail.

Four subsidiary questions arise. If released on bail, will the accused turn up for his trial? Will he interfere with State witnesses? Will he commit further crimes? Will his release be in public interest?

Whether the accused will stand his trial if released on bail is a function of a number of factors which include the gravity of the offences, the likely penalty in the event of conviction, whether or not the applicant has a



known address and tangible interests within the courts' jurisdiction and the quality of sureties furnished.

There can be no doubt, going by the likely penalties in the event of conviction, the offences are grave. The applicant seems to have no permanent place of abode since the first surety was offering his residence/place to accommodate him. And no tangible interests of the applicant in the area were brought to the attention of court.

It should be remembered that bail proceedings are *sui generis* (unique or of their own kind). The State is not obliged to produce evidence in the true sense and is not bound by formality. The court may take into account whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must predict for that matter. To do this it must necessarily have regard to whatever is placed before it in order to decide the matter.

On the issue of Public interest, Article 126 of the Constitution is clear that judicial power shall be exercised in conformity with law and with the values, norms and aspirations of the people. This can only mean that public interest is a relevant consideration in judicial decisions.

In **Besigye case (supra)** the Court's guidance was that while considering bail, the court would need to balance the Constitutional rights of the applicant and the needs of society to be protected from lawlessness. This clearly shows that public interest is a valid and key consideration.

This court looked at two cases with a regional dimension for further guidance:

In the International Criminal Tribunal for Rwanda in the case of the **Prosecutor vs Elie Ndayambaje Case No. ICTR - 98 - 42 - T**, the

defence sought provisional release of the accused because it argued that the accused had been in provisional detention for over seven years.

The Trial Chamber noted that the lengthy detention did not constitute in itself good cause for release. Having regard to the general complexity of the proceedings and the gravity of the offences with which the accused was charged, the chamber concluded that the accused's detention remained within acceptable limits.

Further in **Prosecutor vs Nahimana Case No. ICTR - 99 - 52 - T**, the trial chamber observed that a decision to provisionally release an accused charged with serious violations of international law, must weigh the request of the accused against community interests and the need to complete trial proceedings in an orderly manner.

The interest of the public and that of the administration of justice is to protect the integrity of the justice system so that it may duly execute its role of dispensing justice. Considering the seriousness of the case, the severity of the offences and the antecedents of the applicant, it will neither be in the interest of the public nor of the administration of justice for the applicant to be allowed bail.

In respect to the case in hand, while the court remains alive to the need to protect and preserve constitutional rights and guarantees of the applicant which include the presumption of innocence, the right to apply for bail and the right to be tried without undue delay, the court notes that the trial of the accused commenced on the 11<sup>th</sup> of March 2019 and the testimony of two witnesses has already been heard. In view of the complexity of the trial, the gravity of the offences with which the accused is charged and the history of the case (the trial having commenced and having gone to the constitutional court and eventually to the supreme



court of the land), I find that the nine years the applicant has been in custody remain within acceptable limits.

Further, now that the trial has commenced and is proceeding steadily and in an orderly manner, granting the applicant bail at this point in time may go against community interests and hence disrupt the trial proceedings. Therefore, to grant bail of the applicant in the circumstances of this case set out above would indeed not be justified. Bail is therefore denied. It is so ordered.

*Kiggundu Jane F.B. 26th March 2019*

Kiggundu Jane F.B.

**JUDGE.**