

**AN ANALYSIS OF THE CONSTITUTIONALITY OF BAIL PENDING APPEAL IN LIGHT OF  
THE SUPREME COURT DECISION IN THE CASE OF ARVIND PATEL VERSUS UGANDA**

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**DECLARATION**

**I TAREMWA REGAN, do hereby declare that this research report is my original work which has not been submitted for a similar or any other award.**

**Signed:**

.....

**Dated this.....day of.....2023**

**CERTIFICATION**

I..... being the research supervisor of the author of this report hereby declare that I have read through the student's report and recommends it for acceptance by the school of law Uganda Christian University.

.....

**SIGNATURE**

.....

**DATE**

## **ACKNOWLEDGEMENT.**

Foremost, I want to offer this research paper to God Almighty for the wisdom bestowed upon me, the courage and the good health in order to finish this work. Without His Grace this work couldn't have been a success. For that reason, I thank you God for being my guide as you have always been.

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My hope and prayer is that this research will open a more critical dialogue on how the grant of bail pending appeal can be harmonized with Constitution of the Republic of Uganda, 1995 as Amended.

## **LIST OF AUTHORITIES**

### **DOMESTIC LAWS**

- 1.The Constitution of the Republic of Uganda,1995 as Amended.
2. The Judicature Act Cap 13, Laws of Uganda
3. The Trial on Indictment Act Cap 134, Laws of Uganda
4. The Magistrates Court's Act Cap 16, Laws of Uganda
5. The Judicature (Supreme Court Rules) Directions SI 13- 10
6. The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022

### **REGIONAL AND INTERNATIONAL INSTRUMENTS**

- 1.Universal Declaration of Human Rights, (UFHR),1949
- 2.The International Covenant on Civil and Political Rights (ICCPR),1966
3. The African Charter on Human and People's Rights (ACHPR),1986.

### **CASE LAW**

- 1.Arvind Patel v Uganda SCCA No.1 of 2003
- 2.Joshua Magombe v Uganda Criminal Miscellaneous Application No.11 of 2019
3. Chimambhai v Republic (No.2) (1971) 1 EA 343 (HCK)
4. Dakota v North Carolina, US 268 (1940) L.E.D,448
5. Dennis Obua Otima vs Uganda HC. Crim Application No.18 of 2005
6. Bogere and Another v Uganda, SCCA No.1 of 1997: [1998] KALR
7. Capt.Wilberforce Serunkuma v Uganda [1995] I KALR 32
8. Col (Rtd) Dr. Kizza Besigye v Uganda Criminal Application No.83 of 2016
- 9.Charles Onyango Obbo & Andrew Mwenda v Uganda (1997) 5 KALR 25
- 10.Dr. Alex Kamugisha v Uganda High court Kampala Misc. Cause No.94 of 2007
- 11.Kyeyune Mitala Julius v Uganda Miscellaneous Application No.4 of 2017

## ASBTRACT

**Article 23(6) of the Constitution of Uganda 1995, as Amended** provides that an arrested person is entitled to apply to court for bail. However, it is silent on the issue of bail pending appeal. Bail pending appeal is provided for in the Magistrates Courts Act, the Judicature Act and the Criminal Procedure Code Act. Although the Supreme Court in **Arvind Patel vs Uganda SCCA No.1 of 2003**, provided criteria for the granting bail pending appeal, some high court and Court of Appeal judges, who are bound by the decisions of the Supreme Court, have ignored these criteria. There are conflicting Court of Appeal and Supreme Court judgements on the question of whether **Article 23(6)** is applicable to bail pending appeal and whether the right to be presumed innocent is applicable to a person who is applying for bail pending appeal. There are notable controversies in the rich jurisprudence of the Supreme Court on bail pending appeal as set in **Arvind Patel vs Uganda**. Take for instance, In October 2020, one of the justices of the Supreme Court held that the Supreme Court does not have jurisdiction to grant bail pending appeal and that **Rule 6(2)(a)**, which empowers the Supreme Court to grant bail pending appeal, is unconstitutional thus noted that the decision in *Arvind Patel vs Uganda* was wrongly decided. In November 2020, another Supreme Court justice granted an applicant bail pending appeal affirming the decision in **Arvind Patel vs Uganda**. This paper seeks to examine the jurisprudence developed by the courts of Uganda on the grant of bail pending appeal with a look at **Arvind Patel vs Uganda** by focusing on the courts with jurisdiction to grant bail pending appeal; the right to bail pending appeal; the presumption of innocence and bail pending appeal; and conditions for granting bail pending appeal.

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## CHAPTER 1

### 1.0 GENERAL INTRODUCTION

Within a free and democratic society, liberty is fundamental to the subjects. Liberty lost is never regained and cannot be fully compensated for; therefore, where there is loss of freedom for even a day, we as democratic society must place the highest emphasis on ensuring that the system of justice minimizes the chances of unwarranted denial of liberty.

<sup>1</sup>**Article 28(3)(a) of Uganda's Constitution** does provide that everyone is presumed innocent until proven guilty thus guaranteeing one the right to apply for the grant of bail.<sup>2</sup> Clearly as per Uganda's Constitution, by express implication, the grant of bail is solely hinged on the presumption of innocence and thus silent on the grant of bail pending appeal. This very silence has left controversy in Uganda's legal jurisprudence as some judicial decisions have declined to grant bail pending appeal on grounds of it being unknown to the Constitution and others upholding the grant of bail on the basis that the even on conviction, the presumption of innocence still subsists for as long as the applicant can satisfy the exceptional grounds as laid down in the case of *Arvind Patel versus Uganda*.<sup>3</sup> Whereas this decision remains good law, there are inconsistencies as to whether these grounds fit the Constitutional threshold test justifying this research as it serves to examine the constitutionality of the principle of bail-pending appeal in light of the supreme court decision in the case of *Arvind Patel versus Uganda*.

### 1.1 BACKGROUND OF THE STUDY.

According to **Justice B. Odoki, in his book, A Guide to Criminal Procedure** defines bail;<sup>4</sup> as an agreement between the Court and the accused that the accused person will pay certain sum of money fixed by the court, should he fail to appear to attend his trial on a hearing date fixed by the court. This right stems from the presumption of innocence enshrined in **Article 28(3) (a)**. The essence and true meaning of the presumption of

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<sup>1</sup> John Cantius Mubangizi; 'The Protection of Human Rights in Uganda: Public Awareness and Perceptions' [2005] Afr.J. Legal Stud.166- 186.Lacobucci J in *R versus Hall* (2012) SCR 309

<sup>2</sup> Article 23(6) (c) and Article 28(3) (a) of the Constitution of the Republic of Uganda,1995 as Amended

<sup>3</sup> *Arvind Patel versus Uganda* Supreme Court Criminal Appeal No.1 of 2003.

<sup>4</sup> Odoki Benjamin, J. *A Guide to Criminal Procedure in Uganda, (Latest Edition 2012, L.D.C Publishers )72, Regulation 4 of The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions,2022*

innocence enshrined in the Constitution as regards bail is that an accused person need not suffer incarceration unreasonably as he or she is not yet a convict.<sup>5</sup> This spirit behind this suggests that the right to apply for bail only refers to a person arrested of a criminal offence and not a person already convicted of an offence.

However, in 2003 the Supreme Court decision in *Arvind Patel versus Uganda (supra)* introduced concept of grant of bail pending Appeal. In this case, court relying on foreign decisions in the cases of ***Chimanbhai versus Republic and Girdhar Dhanji Masrani versus R (1960) E.A 320***, respectively adopted the grant of bail pending appeal by borrowing the grounds the applicant has to satisfy as stated therein amongst which include, the character of the applicant, whether he or she is a first offender, whether the offence for which the applicant was convicted involved personal violence amongst others. This decision has since then been applied in a number of Supreme Court decisions.<sup>6</sup>MM Whereas this concept has been upheld, the controversy still remains as to whether these grounds meet the Constitutional threshold test as regards the presumption of innocence since the accused is already convicted take for example in the case of ***Magombe Joshua vs Uganda***,<sup>7</sup> where *Justice Esther Kisakye*, held that notwithstanding the statutory provisions on the grant of bail pending Appeal, this doctrine is unknown to the 1995 Constitutional thus declared it unconstitutional. Therefore, as guided by that setting this research paper serves to examine the grounds for the grant of bail pending Appeal in *Arvind Patel versus Uganda (supra)* and its implications on the Constitution particularly in light of the presumption of innocence.

## 1.2 STATEMENT OF THE PROBLEM

In as much as every individual is entitled to apply to court for the grant of bail pursuant to **Article 23(6) of the Constitution of the Republic of Uganda**.<sup>8</sup> This right stems from the presumption of innocence enshrined in **Article 28(3) (a) of the Constitution**.<sup>9</sup> This legal provision suggests that bail is only granted on presumption of innocence and that

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<sup>5</sup> Honorable Justice Apio Aweri, *Kyeyune Mitala Julius versus Uganda* Miscellaneous Application No.4 of 2017

<sup>6</sup> *Bireete Sarah versus Uganda*, SCCA No.04 of 2016

<sup>7</sup> *Magombe Joshua versus Uganda* Miscellaneous Application No.11 of 2019

<sup>8</sup> The Constitution of the Republic of Uganda 1995, as Amended

<sup>9</sup> The Constitution of the Republic of Uganda 1995, as Amended

upon conviction, the right to apply for grant of bail ceases thereby rendering bail pending appeal ancient to the 1995 Constitution of Uganda, 1995 as Amended. Whereas the legal position so stands, there still remains controversy between the law and the Courts as the courts have gone ahead to grant bail pending Appeal taking a look at the *Supreme Court Decision in Arvind Patel versus Patel SCCA No.1 of 2003*. For this controversy serves as the exact problem this research intends to address by particularly examining the constitutionality of the grounds as mentioned in *Arvind Patel versus Uganda (supra)* in light of the presumption of innocence.

### **1.3 OBJECTIVES OF THE STUDY**

#### **1.3.1 General Objective**

To analyze the Constitutionality of bail pending appeal in light of the Supreme Court of the decision in the case of Arvind Patel versus Uganda

#### **1.3.2 Specific Objectives**

- i. To assess the law on grant of bail pending appeal in Uganda
- ii. To examine the grounds and principles governing the grant of bail pending appeal
- iii. To harmonize the controversy between the presumption of innocence and the grant of bail pending Appeal
- iv. To give recommendations streamlining the law on grant of bail pending appeal

### **1.4 RESEARCH QUESTIONS.**

- i. What is the law on grant of Bail pending Appeal in Uganda?
- ii. What are the grounds and principles governing grant of bail pending appeal?
- iii. What is the nexus between the presumption of innocence and the grant of bail pending Appeal?
- iv. What recommendations are necessary in streamlining the law on bail pending appeal?

### **1.5 SIGNIFICANCE OF THE STUDY**

There still stands a controversy as to whether the grant of bail pending appeal is constitutional with some court decisions upholding the grant and others declining to grant. Therefore, this research paper seeks to harmonize this controversy by critically analyzing the constitutionality of bail pending appeal in light of the Supreme Court Decision of Arvind

Patel vs Uganda. This will be conducted using qualitative method such as desk review of relevant literature through focusing on the primary sources such as statutes, regulations, case law and secondary sources such as text books and journals.

## **1.6 CONCEPTUAL FRAMEWORK**

The independent variable in this study is constitutionality based on the **1995 Ugandan Constitution** which sets the litmus test for the grant of bail as enshrined in **Article 28(3)(a)**. The dependent variable is the grant of bail pending appeal by the courts that must be dependent on what the Constitution dictates. This study therefore attempts to establish a nexus between the two variables.

## **1.7 RESEARCH METHODOLOGY**

The research will be conducted using qualitative methods. This is because those methods offer a more flexible approach. The researcher will conduct desk review of relevant literature. When collecting data, both primary and secondary sources will be used. The primary sources include; statutes, regulations, case law and common law. The secondary sources include; journal articles, text books and annual reports.

## **1.8 SCOPE OF STUDY**

### **1.8.1 Content scope**

This study will place focus on the case Arvind Patel vs Uganda and any other court decisions as regards the law on grant of bail pending appeal.

### **1.8.2 Geographical scope**

This study will be carried out in the context of Uganda. Specifically, how the Supreme court has dealt with grant of bail pending appeal with a look at Arvind Patel vs Uganda

### **1.8.3 Time scope**

This study will consider the period between 2003 and 2022 by looking at the decision in Arvind Patel vs Uganda and subsequent court decisions as regards bail pending appeal.

## **1.9 LIMITATIONS OF THE STUDY**

The researcher envisages limited access of online materials such as journals and websites on bail pending appeal as most require subscription served a hindrance.

## **1.10 LITERATURE REVIEW**

My research will take into account different views, perspectives and opinions of different scholars both within and outside Uganda's jurisdiction as regards grant of bail pending Appeal, this will help in ascertaining the gaps and loopholes as regards this law thereby fulfilling such gap.

### **(i) THE LAW ON GRANT OF BAIL PENDING APPEAL IN UGANDA**

**Francis Ayume**<sup>10</sup> argues that bail pending appeal should only be granted in exceptional and unusual circumstances. Reasoning that "When a person has been convicted, the onus is on him to show cause why as convicted person he should be released on bail. If that is so, it follows that the reasons must be exceptional, otherwise but would be granted in the majority of cases which would clearly offend against the principle."<sup>11</sup> Whereas Francis Ayume clearly agrees with grounds of bail pending Appeal in *Arvind Patel versus Uganda*, he lives out the question as whether the grant of bail pending Appeal is constitutional which this research paper serves to answer.

### **(ii) THE GROUNDS AND PRINCIPLES GOVERNING THE GRANT OF BAIL PENDING APPEAL**

**Musa Ssekaana**<sup>12</sup> argues on the importance of bail pending appeal where he stated that bail pending appeal is particularly important in magistrate's court because any custodial sentence imposed is necessarily short, so if not granted bail the appellant may have served much of his/her sentence by the time the appeal is heard. He also highlighted the exceptional circumstances under which bail pending Appeal may be granted which include that there is likelihood of success of the appeal,<sup>13</sup> the likelihood of a delay in hearing the appeal, the length of the sentence imposed amongst others.

### **(iii) THE NEXUS BETWEEN THE PRESUMPTION OF INNOCENCE AND THE GRANT OF BAIL PENDING APPEAL.**

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<sup>10</sup> Ayume F, *Criminal Procedure and Law in Uganda*, (Longman, 1986, Latest Edition, 2010) page 64- 65

<sup>11</sup> *Lamba versus R* [1958] EA 337, *Christopher Kabenge vs Uganda* M.B.2/72

<sup>12</sup> Musa Ssekaana, *Criminal Procedure and Practice in Uganda* at page 192

<sup>13</sup> *Christopher Lubale vs Uganda HCMSA 2/95* [1995] IV KALR 48,

He gave the essential difference in that in the former, there exists a prima facie presumption in favor of bail, whereas between bail prior to conviction and bail pending appeal in the latter the accused /convict must show why he/she should be released. Clearly, he suggests that an application for grant of bail is premised on the presumption of innocence and that upon conviction, the onus extends onto the accused to prove the exceptional grounds. However, he doesn't put into account the fact that presumption of innocence would still subsist on conviction on grounds of the lower court's procedural errors.

**Justice Odoki Benjamin**<sup>14</sup> also holds that the presumption of innocence continues as long as someone decides to exercise his right of appeal and does not stop at trial level. That the presumption as enshrined in the Constitution is a rail guard to fair trial and premised on the notion that courts make errors. Clearly, he suggests that the presumption of innocence subsists even on appeal process citing procedural errors by the lower court as a ground to warrant grant of bail pending appeal since the applicant may be presumed innocent upon conviction due to the procedural improprieties made by court of first instance. However, there still seems controversy in judicial decisions as to whether procedural errors constitute a substantial ground for the presumption of innocence to subsist upon conviction. Take for instance, **Justice Esther Kisaakye in Joshua Magombe versus Uganda**<sup>15</sup> deviated from the decision in *Arvind Patel versus Uganda on grounds that bail pending appeal is unconstitutional*. It's this very controversy that this research paper serves to examine.

#### **(iv)RECOMMENDATIONS ARE NECESSARY IN STREAMLINING THE LAW ON BAIL PENDING APPEAL**

**Kusaasira**,<sup>16</sup> also notes that the grant of bail pending Appeal squarely falls within the discretion of the court but that the applicant must at times prove the exceptional circumstances and considerations for the grant of bail." He noted that the presumption of innocence is premised on the principles of fair hearing and as such the applicant upon

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<sup>14</sup> Odoki, Benjamin J. *A Guide to Criminal Procedure in Uganda*, (Latest Edition 2012, L.D.C Publishers) 128.

<sup>15</sup> *Magombe Joshua versus Uganda* Criminal Miscellaneous Application No. 11 of 2019

<sup>16</sup> Kusaasira," Do courts have power to grant bail pending appeal? Available at [www.monitor.co.ug/uganda/special-reports/do-courts-have-power-grant-bail-pending-appeal-2727292?view=htmlamp&twitter-impression=true](http://www.monitor.co.ug/uganda/special-reports/do-courts-have-power-grant-bail-pending-appeal-2727292?view=htmlamp&twitter-impression=true)(assessed December, 18<sup>th</sup> 2022).

conviction is entitled to apply for the grant of bail pending appeal. This author stands in concert with Justice Odoki Benjamin who intends to extend the presumption of innocence upon conviction. These two opinions ought to be adopted for a deeper understanding on presumption of innocence as regards bail pending appeal in Uganda.

## CHAPTER 2.

### The Existing legislative and Policy Framework of laws on bail pending Appeal.

#### 2. 0 INTRODUCTION

Bail is defined as an agreement between the accused and his/her sureties with the court that the accused will appear and attend his trial whenever summoned to do so and the surety gives security to guaranteeing the attendance of the accused will attend.<sup>17</sup>

The purpose of bail is not to free an accused person from any charges that he may be facing, but rather to allow the person to stand trial without being necessarily detained in custody during that time.<sup>18</sup> The Constitution of the Republic of Uganda guarantees the right to apply for bail in **Article 23(6) (a)**.<sup>19</sup> This right stems from the presumption of innocence enshrined in **Article 28(3)(a)**.<sup>20</sup> The essence and true meaning of the presumption of innocence enshrined in our Constitution as regards bail is that an accused person need not suffer incarceration unreasonably as he or she is not yet a convict and on the other hand that the only person capable of building up his/her defense may be the accused and so if released on bail, it must be on the understanding he will turn up for his trial.<sup>21</sup> Therefore, bail symbolizes the country's bedrock concern for personal freedom and the idea incorporated from English common law that "only those incarcerations which arise from absolute necessity are just."<sup>22</sup>

Ordinarily, the power to grant or refuse bail in a court of law is discretionary as the accused person has no automatic right to the same. Article 23(6) confers discretion on Court to decide whether to grant the bail or not.<sup>23</sup> This discretion is exercised to determine whether the foregoing conditions have been fulfilled and hence grant bail.<sup>24</sup> The power to

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<sup>17</sup> *Charles Onyango Obbo & Andrew Mwenda vs Uganda* (1997) 5 KALR 25

<sup>18</sup> *Justice Musalu Musene, Col (Rtd) Dr. Kizza Besigye v Uganda* Criminal Application No.83 of 2016.

<sup>19</sup> The Constitution of the Republic of Uganda, 1995 as Amended.

<sup>20</sup> Ibid.

<sup>21</sup> Francis Ayume, *Criminal Procedure and Law in Uganda*, (Latest Edition, Longman 1986, 2010) 54.

<sup>22</sup> William F. Duker, "The Right to Bail: A Historical Inquiry", [1978] 42 ALB.L.REV. 33-34

<sup>23</sup> *Florence Byabazaire vs Uganda* H.C.Misc. Criminal Application No.284 of 2006

<sup>24</sup> Article 23(6) (b) and (c) of the Constitution of the Republic of Uganda, 1995 as Amended.

grant bail also clothes the courts with the capacity to set conditions to ensure that the accused person attends court whenever required.

Whereas, the **Constitution of the Republic of Uganda, 1995 as Amended**<sup>25</sup> provides for the right to apply for bail, it is silent on grant of bail pending Appeal. This silence has left some judicial decisions holding that the whole concept of courts granting bail-pending appeal is unconstitutional. Take for instance the decision in **Magombe Joshua vs Uganda**,<sup>26</sup> **Justice Esther Kisaakye** noted that the decision in *Arvind Patel* was not correctly decided and that the whole concept of Courts granting bail pending appeal is unknown to the 1995 Constitution human rights regime on grounds that the right of presumption of innocence is extinguished upon conviction thus the grant of bail pending appeal as held in *Arvind Patel vs Uganda* is illegal.

**2.1** Therefore, this Chapter seeks to examine the existing laws on the grant of bail pending appeal in regard to Uganda notwithstanding the silence of the Constitution and further address the non-legal issues arising from the grant of bail pending. In addressing the legal framework, this Chapter will place into account Uganda's statutes on grant of bail pending appeal and on the non-legal aspects will address the society considerations on the grant of bail pending appeal.

2.1.1 Criminal Procedure Code Act. **Section 40(2) of the CPCA**<sup>27</sup> states that "*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.*"

2. 1.2 The Trial on Indictment Act. **Section 132(4) and (5)**<sup>28</sup> state that "*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 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 132(5) states that "Section 40 of the Criminal Procedure Code Act other than subsection (2) of that section shall apply to a convicted appellant appealing under this section."*

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<sup>25</sup> Ibid.

<sup>26</sup> *Magombe Joshua vs Uganda* Miscellaneous Application No.11 of 2019.

<sup>27</sup> Criminal Procedure Code Act Cap 116, Laws of Uganda

<sup>28</sup> Trial on Indictments Act Cap 23

2.2.3 The Judicature Act. **Section 40 of the Judicature Act Cap.13**<sup>29</sup> provides for the Rules Committee which includes the Chief Justice. The following Section of the same Act stipulates the functions of the Rules Committee which among others including making rules for regulating the practice and procedure of the Supreme Court, Court of Appeal and High Court. The Rules Committee chaired by the Chief Justice therefore has the mandate to make rules by way of Statutory Instruments regulating procedure and practice in all courts and thus the genesis of the Supreme Court Rules that govern the practice and procedure for the grant of bail pending appeal. *Consequently, the Supreme Court enacted the Supreme (Judicature)(Practice) (Directions) regulating the grant of bail pending appeal.*

2.2.4 **Rule 2(1) of the Judicature (Supreme Court) (Rules)**<sup>30</sup> states that *“The practice and procedure of the court in connection with appeals and intended appeals from the Court of Appeal and the practice and procedure of the Court of Appeal in connection with appeals to the court shall be as set out in these Rules.”*

**Rule 6(2)(a) of the Supreme Court Rules** provides:

*“6. Suspension of sentence, stay of execution*

*(2) Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may-*

*(a) In any criminal proceedings, where notice of appeal has been given in accordance with rules 56 and 57 of these Rules, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;”*

*Guideline 19 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions,2022 provides for the grant of bail pending appeal as it sets out the considerations the court has to put into account in handling an application for bail pending appeal to include the character of the applicant amongst other.*

### **3.0 NON-LEGAL ASPECTS;**

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<sup>29</sup> Judicature Act Cap 13, 1996

<sup>30</sup> Judicature (Supreme Court Rules) Directions Legal Notice 13 of 1996.

Looking at the decision in the case of *Arvind Patel vs Uganda*,<sup>31</sup> the grant on bail pending appeal has been criticized in some court decisions such as the *Joshua Magombe vs Uganda*, wherein Lady Justice Kisakye<sup>32</sup> wherein she asserted on the fact that law abiding citizens should enjoy their liberty which should not be deprived of them, while on the other hand, non-law abiding citizens should not enjoy their being locked up while serving a sentence cannot rise to constitutional violation of **Article 23(1) of the Constitution** since it's in favor of protecting the public or community from such persons for they are dangerous by nature.<sup>33</sup> Clearly, the aforesaid case brings into perspective non-legal aspects to wit; society considerations / perspectives on the grant of bail pending appeal thereby disagreeing with the decision in *Arvind Patel vs Uganda* on the basis, failure to grant bail pending is a mechanism aimed at protecting the society from the dangerous acts that may be committed by the convict. This reason was also evident in the earlier decision of *Busiku Thomas v Uganda*,<sup>34</sup> wherein the *Supreme Court* observed that “*It should also be further noted that the presumption of innocence guaranteed to a person accused of a crime, ends when the accused person is found by an impartial court guilty of the offence he or she was charged with. From this point onward, the interests of justice demand that the courts should not only take into the account the rights of the convicted person but also the interests of the victim and the society as a whole*”

**Owing to the above cases**, they suggest that an applicant in an application for bail pending appeal no longer enjoys the presumption of innocence guaranteed to every accused under **Article 28(3)(a) of the Constitution**,<sup>35</sup> as such applicant is now a Criminal Convict serving sentence. He/she is such a one whom the Criminal Justice System, after the due process of law, has identified as being one who has wronged against society and his/her life needs to be subjected to restriction, as the law prescribes, so that such a one as a convict does not do further damage to society. Clearly, this demands that the non-legal aspects to wit; the victim's feelings, the general perspective of the society must be put into account before the grant of bail pending appeal.

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<sup>31</sup> *Arvind Patel vs Uganda* SCCA No.1 of 2003

<sup>32</sup> *Joshua Magombe vs Uganda* Miscellaneous Application No. 1 of 2020

<sup>33</sup> The Constitution of the Republic of Uganda, 1995 as Amended.

<sup>34</sup> *Busiku Thomas vs Uganda* Criminal Appeal No.33 of 2011 (Quorum of Tumwesigye & Dr. Kisaakye JJSC; Tsekooko, Okello and Kitumba Ag. JJSC)

<sup>35</sup> The Constitution of the Republic of Uganda, 1995 as Amended.

However, I opine that the non-legal aspects must be a twofold, firstly, the character of the convict must be placed into account to protect the liberty of the convict, and also the need to protect the society from the dangerous acts which may be committed by the convict. In other words, the court must ascertain whether the convict is a first principal offender and further examine their criminal record and if they are found of good repute, then the applicant must be granted bail pending appeal. Further, the aforesaid cases don't place into consideration that the fact of the appellant appealing would be a substantive ground to show that the trial court must have erred either in law or fact in arriving at its decision thereby demonstrating that the convict may still be innocent post-conviction in the event the Appellate court quashes or sets aside the conviction.<sup>36</sup>

Therefore, the non-legal questions must be comprehensively addressed to cater for all the interests of the parties as opposed to giving preferential treatment to the victim and the society as the case of *Joshua Magombe vs Uganda*<sup>37</sup> fronts but rather all conditions and principles as laid out in the *Arvind vs Patel* must be given a broader interpretation to see to it justice which is the bedrock of the society has been partially served.<sup>38</sup>

#### **4.0 CONCLUSION**

Owing to the above discussion, the law on the grant of bail pending appeal has been further expounded in court decisions preceding the locus classicus case of *Arvind Patel vs. Uganda*<sup>39</sup> that set out the principles and conditions to be considered in the grant of bail pending appeal as will be discussed in the next Chapter 3.

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<sup>36</sup> *Kifamunte Henry vs Uganda* Criminal Appeal No.10 of 1997 wherein the Supreme Court of Uganda held *that duty of the first appellate court is to review the evidence of the case and to reconsider the materials before the trial judge*"

<sup>37</sup> *Majombe Josua vs Uganda* (Miscellaneous Criminal Application No.11 of 2019) [2020] UGSC 39

<sup>38</sup> William F. Duker, "The Right to Bail: A Historical Inquiry," [1978] 42 ALB.L.REV.33-34

<sup>39</sup> *Arvind Patel vs Uganda* S.C.C.A No.1 of 2003 The above principles have thereafter been applied in hundreds of applications handled by this Court to mention but a few. *Frank Iga v Uganda* Misc. Application No.099/2009, *Kifamunte Henry v Uganda* Application No.10/197, *Nalukenge Mildred v Uganda* Misc.Cr.Appl.No.56/2008, *Angelo Muwanga v Uganda* Misc.Cr.Appl.No.41/2008.

## CHAPTER 3.

### 3.0 INTRODUCTION

As denoted in the preceding Chapter, the legal provisions on the grant of bail pending appeal don't clearly envisage for what guides court when entertaining an application for grant of bail pending appeal thereby creating a gap. This gap is premised on the fact that different principles should apply to applications for bail pending appeal after conviction compared to applications for bail pending trial.<sup>40</sup> Consequently, this gap seems to have been settled following the locus classicus case of *Arvind Patel v. Uganda*,<sup>41</sup> that set out the conditions to be considered to grant bail to applicant. In *Arvind Patel vs Uganda*, the applicant's conviction having been upheld by the High Court and the Court of Appeal appealed to the Supreme Court as 3<sup>rd</sup> appeal on the matter of great national importance and thereafter applied for grant of bail pending his appeal. The Supreme Court in entertaining his application set the perimeters upon which court may grant or refuse to grant an application for bail pending appeal as will discussed in this Chapter and further examine their constitutionality in light of the decision of *Joshua Majombe vs Uganda* that seems to question these grounds as set out in *Arvind Patel vs Uganda*.

### 3.1 GROUNDS FOR BAIL PENDING APPEAL

In *Arvind Patel vs Uganda (Supra)*, the Supreme Court relying on the Tanzanian court decision of *Raghibir Singh Lamba vs R*<sup>42</sup> and the Kenyan case of *Chimambhai vs Republic*.<sup>43</sup> persuasively applied the same grounds and conditions to grant bail to the applicant pending his appeal and these included; :

- (i) The character of the applicant
- (ii) Whether or not he/she is a first-time offender
- (iii) Whether the offence of which the applicant was convicted involved personal violence;
- (iv) There is a pending Appeal which is not frivolous and with a reasonable possibility of success;

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<sup>40</sup> *Girdhar Dhanji Masrani v R* [1960] 1 EA 320 Sheridah J

<sup>41</sup> *Arvind Patel vs Uganda* Supreme Court Criminal Application No. 1 of 2001

<sup>42</sup> *Raghibir Singh Lamba vs R* (1985) E.A 337

<sup>43</sup> *Chimambhai vs Republic* (No2) (1971) E.A 343

- (v) The possibility of substantial delay in the determination of the appeal; and
- (vi) Whether the applicant has complied with bail conditions granted after conviction and during the pendency of the appeal if any.

*The aforesaid grounds have also been adopted under Guideline 19 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022 to support the grant of bail pending appeal.*

These conditions were restated in **David Chandi Jamwa vs Uganda**<sup>44</sup> wherein Lady Justice Arachi Amoko stated that it cannot be over emphasized that bail pending appeal is not a right but it is granted at the discretion of Court which should be exercised judiciously and each case must be determined on its own merit and circumstances. Therein, it was further stated that a person applying for bail pending appeal must be subjected to a more stringent test than one who is not yet convicted.

The burden thus lays on the applicant to satisfy court that the application warrants the grant of bail pending appeal by satisfying the grounds as already laid out in *Arvind Patel vs Uganda*<sup>45</sup> with the approval of *Spry Ag J in the case of Raghbir Singh Lamba v R*, at page 138,<sup>46</sup> and these include;

(a) The character of the applicant. In the case of *Arvind Patel vs Uganda (Supra)*, the Supreme Court noted that the applicant's character is an important consideration in the grant of bail pending appeal wherein in that case, the Supreme Court noted that the applicant having complied with the bail terms and conditions of the lower court and based on the fact that there was no evidence of previous conviction on the record of lower court was enough to prove that the character of the applicant was unquestioned. The position was also evident in the case of *Chandi Jamwa*,<sup>47</sup>

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<sup>44</sup> *David Chandi Jamwa vs Uganda* SC. Miscellaneous Application No.9 of 2018

<sup>45</sup> *Arvind Patel vs Uganda* SCCA No.1 of 2003

<sup>46</sup> *Ragbbir Singh Lamba v R* [1958] 1 EA 339 (High Court of Tanganyika and he stated that the burden is on the prosecution pending trial why the accused should not be released on bail. The onus shifts to the accused to show why the accused to show why he or she be released on bail pending appeal after his or her conviction and sentence.

<sup>47</sup> *David Chandi Jamwa vs Uganda* (Miscellaneous Application No.09 of 2018) (Arising from Court of Appeal Criminal Appeal No.2 of 20-18)

However, *Lady Justice Kisakye in Majombe Joshua vs Uganda*,<sup>48</sup> held that the good character as ground for the grant of bail pending appeal was unconstitutional on the basis that one's innocence is extinguished upon conviction thus one's good character ceases upon conviction thus unconstitutional. However, her assertion was overruled in the case of *Magombe Joshua vs Uganda, SC Criminal Ref No.13 13/ 2020 (Bench of four)*<sup>49</sup> wherein the Justices of Supreme court noted that whereas the Applicant is no longer shielded by the presumption of innocence as espoused in **Article 28(3) of the Constitution of Uganda**, the appellate court is often times more concerned with the question as to whether or not the applicant was properly convicted or not, herein the presumption of innocence can still be taken to submit thus rendering the grant of bail pending Appeal is Constitutional in my view.

b) That the Appeal has been filled by the Applicant is not frivolous and has a high possibility of success. It was held in the case of **Arvind Patel (supra)**<sup>50</sup> that- "*the only means by which court can access the possibility of success of the appeal is by perusing the relevant record of proceedings, the judgement of the court from which the appeal has emanated and the Memorandum of Appeal in question,*" In *Kaguma v Republic*,<sup>51</sup> court reiterating the position by the High Court of Kenya at Mombasa,<sup>52</sup> noted that the most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant his right to liberty.

The reasoning in the aforesaid is in alignment with that in the **case of Kyeyune Mitala Julius vs Uganda**<sup>53</sup> wherein the Supreme Court stated that whereas it may be argued that the presumption of innocence ceases on conviction, that position especially in circumstances where there is pending appeal with a possibility of success. I opine with the reasoning in the aforesaid cases that indeed the fact that there is an existing appeal with a possibility of success is enough to prove that the appellant contests his/her conviction as given by the Trial court which perhaps is enough to grant the appellant's his/her right of liberty that vests in him/her the right to apply for the grant of bail pending

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<sup>48</sup> Ibid.

<sup>49</sup> *Magombe Joshua vs Uganda*, Supreme Court, Criminal Reference NO.13/2020

<sup>50</sup> *Arvind Patel vs Uganda* Criminal Application No.1 of 2013

<sup>51</sup> *Kaguma v Republic* [2004] 1 EA 68

<sup>52</sup> *Harris J in Chimambhai vs Republic* (No.2) [1971] 1 EA 343 (High Court of Kenya at Mombasa)

<sup>53</sup> *Kyeyune Mitala Julius vs Uganda* Supreme Court Criminal Applications No.09 of 2016

appeal until the Appellate court makes a verdict on his appeal. However, *Justice Kisakye in Magombe Joshua vs Uganda*,<sup>54</sup> seemed to have to restricted his interpretation as regards the grant of bail at trial disregarding the fact that the convict's right to apply for bail subsists even on appeal especially in the circumstances where the appeal prima facie would be a success thereby granting the right to a convict to apply for bail pending appeal.

(c). That there is a possibility of substantial delay in the determination of the appeal. The aspect of substantial delay in the hearing and determination of the appeal is premised on the constraints in the criminal justice system. In *David Chandi Jawa vs Uganda*,<sup>55</sup> *Miscellaneous Application No.9 of 2018*, court accepted the position that a risk of substantial delay due to administrative and structural constraints in this court and the policy of first come first serve as well as issues of funding and there are several pending appeals that were filled in this court before the one of the applicants. The basis is premised on **Article 28(3)(a)** on the speedy and fair hearing required to be given at an individual notwithstanding the being convicted thereby legalizing the grant of bail pending Appeal.

However, *Justice Esther Kisakye in Majombe Joshua vs Uganda* goes at length to discuss that the possible delay in hearing the matter as a ground for bail pending appeal is an entitlement mindset by convicts seeking to jump the queue,<sup>56</sup> I disagree with the Justice's view on the basis that considering the practice of appellate courts in Uganda in regard to the organization of sessions in which appeals are cause listed for trial. Given the backlog and the shortage of judges, often times appeals remain pending until an accused person completes his sentences and a decision is made posthumously thereby occasioning a miscarriage of justice justifying substantial delay as laid out in *Arvind Patel vs Uganda*, a substantive ground for the grant of bail pending appeal. This was also elucidated in the case of *Mellan Mareere vs Uganda*,<sup>57</sup> wherein court relying on *Arvind Patel* as cited in *Sheikh Yunus Kamoga vs Uganda*,<sup>58</sup> noted that bail pending appeal would be granted

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<sup>54</sup> *Magombe Joshua vs Uganda*, Supreme Court, Criminal Reference No. 13 of 2020.

<sup>55</sup> *David Chandi Jawa vs Uganda* Miscellaneous Application No. 9 of 2018

<sup>56</sup> Wadada ibid (n39)

<sup>57</sup> *Mellan Mareere vs Uganda* (Miscellaneous Application No.52 of 2017)

<sup>58</sup> *Sheikh Yunus Kamoga vs Uganda* Criminal Appeal No.321 of 2017

if it is unlikely that the appeal would be heard until the end or after the expiration of the sentence appealed against.

(d) That the applicant has complied with bail conditions granted after conviction and during the pendency of the appeal if any. In the case of *Kato Kajubi vs Uganda*<sup>59</sup> Criminal the Supreme Court reaffirmed its position that the main purpose for bail pending appeal is that the court must be satisfied that the applicant will comply with bail conditions and be available to attend trial or the appeal". Mr. Mpanga counsel for the applicant in the aforementioned case contended that the applicant was granted bail on the 24<sup>th</sup> June 2011 by the Court of Appeal thus he complied with the bail terms until 2018 when judgement was finally delivered on appeal which commends the applicant to this court as a law-abiding citizen who complies with court orders thus adequate to warrant the grant of bail pending appeal. This was also discussed in the case of *Igamu Joanita vs Uganda*,<sup>60</sup> wherein, it was held that the main criteria for granting bail pending appeal is that the appeal is that the court must be satisfied that the appellant shall in compliance with the bail conditions be available to attend the appeal.

(e) That the applicant has substantial sureties of sound characters. **Paragraph 4 of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022**<sup>61</sup> defines a surety 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. Sureties must be produced in the Court and guarantee that the Applicant will not abscond if released on bail pending appeal. On the aspect of substantial surety, reference is made to the Bail guidelines and the Case of *Henry Tumukunde vs. Uganda, HC, Misc.App.No.489 of 2020 [2020] UGHCCD 191*. **Guideline 15 of the Bail Guidelines**, provides that a suitable surety is determined by court taking into account the following factors

- (a) The age of the surety
- (b) Work and residence address of the surety
- (c) Character and antecedents

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<sup>59</sup> *Kato Kajubi vs Uganda* Criminal Appeal No. 39 of 2010

<sup>60</sup> *Igamu Joanita vs Uganda*, Criminal Appeal No.107/2013.

<sup>61</sup> Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022

- (d) Relationship to the accused person
- (e) Any other factor court may deem fit

**Guideline 15(2) of the Bail Guidelines** requires that the proposed surety to provide documentary proof including;

- (a) A Copy of his or her National Identity card, passport or aliens' identification card
- (b) An introduction letter from the Local Council 1 chairperson of the area where the surety is ordinary resident.
- (c) Asylum seeker or refugee registration documents issued by the Office of the Prime Minister

It is just and fair that the applicant be granted bail pending appeal.

Whereas *Arvind Patel vs Uganda*<sup>62</sup> (supra) lays down the conditions for grant of bail pending appeal, with the evolution of legal jurisprudence on the principles of bail pending appeal in Uganda's Courts of Judicature since 2003 to date.<sup>63</sup> Court decisions post the decision in *Arvind Patel vs Uganda*, hold the conditions as laid out in *Arvind Patel* are not sufficient to warrant the grant of bail pending appeal as the is need for the applicant to prove the exceptional circumstances along those as were stated in *Arvind Patel vs Uganda* in order to persuade the court to grant him/her bail pending appeal especially for those the applicant charged with capital offences.<sup>64</sup>The exceptional circumstances include grave illness as certified by the medical officer and the infancy or advanced age of the accused.<sup>65</sup>

## CONCLUSION

Owing to the discussion above, it's very clear that the conditions and grounds for the grant of bail pending appeal as were set out in *Arvind Patel vs Uganda* have overtime been modified with a number of court decisions developing new conditions to supplement those

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<sup>62</sup> *Arvind Patel vs Uganda* Criminal Application No.1 of 2003

<sup>63</sup> *Arvind Patel vs Uganda* Criminal Application No.1 of 2003

<sup>64</sup> Section 15 of the Trial on Indictment Act Cap, 23 and the decision in *Kairu Arajab and Kange Patrick vs Uganda* Court of Appeal Miscellaneous Application No.34 of 4014 wherein Hon.Mr. Justice Kenneth Kakuru held that a convict can be granted bail pending appeal subject to the exceptional circumstances being proved.

<sup>65</sup> In *David Chandi Jawa vs Uganda* Miscellaneous Application No.9 of 2018 court noted that given the potential risk of the applicant health that may require constant checking and monitoring, the judge was of the opinion that the applicant is granted bail pending appeal.

laid out in the Arvind Patel vs Uganda when entertaining an application for bail pending Appeal.

## CHAPTER 4.

### INTRODUCTION

Following the precedent on the grant of bail pending Appeal as laid out in the case of *Arvind Patel vs Uganda* wherein all the principles and conditions for the grant of bail pending appeal were laid out as been discussed in *Chapter 3*. A number of court decisions still contend that the decision as laid out in *Arvind Patel vs Uganda* on grant of Bail pending appeal was wrongly decided thus unconstitutional as it contravenes the provisions of **Article 28(3)(a) of the Constitution**. This reason is founded on the fact that the grant of bail is premised on one's innocence and upon conviction, the presumption of innocence is extinguished and therefore the grant of bail pending appeal conflicts with the presumption of innocence.

This was evident in *the case of Magombe Joshua vs Uganda*,<sup>66</sup> In this case, the appellant filed an application seeking an order to be granted bail pending appeal in the *Supreme Court*. *Lady Justice Esther Kisaakye*, sitting as a single justice, in her decision, made a critical review of **Article 23(6)(a) of the constitution** which provides for the right to apply for bail and **Article 28(3)(a)** which accords the presumption of innocence to a person charged with an offence. And taking the literal understanding of **Article 137**<sup>67</sup> in regard to the constitutionality of the right to bail pending appeal, she asserted that at appeal level, a person is already a convict and does not enjoy the presumption of innocence.<sup>68</sup> And held that the whole concept of courts on grant of bail-pending appeal is unknown to the human rights regime in the Constitution of Uganda thus making it unconstitutional<sup>69</sup> This decision and the other decisions have created uncertainty and controversy as to whether the courts have the jurisdiction to grant bail-pending appeal.

This very uncertainty on whether or not the grant of bail pending appeal creates an impediment on the presumption of innocence as per the decision in *Magombe Joshua vs*

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<sup>66</sup> *Majombe Joshua vs Uganda* (Misc. Criminal Application No.11 of 2019) [2020] UGSC 39 (14 October 2020)

<sup>67</sup> The Constitution of the Republic of Uganda, 1995 as Amended.

<sup>68</sup> *Majombe Joshua vs Uganda* (Misc. Criminal Application No.11 of 2019) [2020] UGSC 39 (14 October 2020)

<sup>69</sup> *Arvind Patel vs Uganda* Miscellaneous Application No. 1 of 2003

*Uganda (SUPRA)* and other court decisions is what this Chapter seeks to find and thereafter harmonize the controversy between the grant of bail pending appeal and the presumption of innocence. In finding out how best to harmonize this conflict, three questions ought to be asked, Firstly, what is the presumption of innocence? Secondly, does the presumption of innocence extinguish upon conviction as held in *Magombe Joshua vs Uganda*<sup>70</sup> and thirdly does there exist any conflict between the grant of bail post-conviction and the presumption of innocence set out in the **Constitution of Uganda of the Republic of Uganda, 1995 as Amended** and how best can that be harmonized and resolved? These are the questions this Chapter seeks to answer.

### **(1) WHAT IS THE PRESUMPTION OF INNOCENCE?**

Many constitutions that contain bill of rights attempt to provide for some level of protection for those suspected as well as convicted of criminal acts. In this regard, **Article 23 of the Uganda Constitution**<sup>71</sup> deals with the protection of personal liberty, which includes rights for arrested, detained or restricted persons. Furthermore, **Article 28 of the Constitution**<sup>72</sup> deals with the right to a fair hearing which as per **Article 44 of the Constitution**<sup>73</sup> is non-derogable hence inferring that the presumption of innocence stands as an important component to the right of a fair hearing.<sup>74</sup>

The presumption of innocence means the burden of proof lies on the presumption to prove their case beyond reasonable doubt.<sup>75</sup> **Dickson CJC**<sup>76</sup> describes that the importance of the presumption of innocence is to protect the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. The relevance of the same was discussed in the *Canadian case of R vs Oakes*,<sup>77</sup> in regard to the constitutional validity of *s.8 of the Narcotic Control Act*, and court held that

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<sup>70</sup> *Majombe Joshua vs Uganda* Criminal Application No.11 of 2019

<sup>71</sup> The Constitution of the Republic of Uganda, 1995 as Amended.

<sup>72</sup> *Ibidi*.

<sup>73</sup> *Ibidi*.

<sup>74</sup> John Cantius Mubangizi; "The Protection of Human Rights in Uganda: Public Awareness and Perceptions" [2005] 1 Afr.J. Legal Stud, 166-186.

<sup>75</sup> Odoki, Benjamin. *A Guide to Criminal Procedure in Uganda*, (latest Edition 2012, L.D.C Publishers )128.

<sup>77</sup> *R vs Oakes* [1987] LRC (const) 477 (Canada SC)

“...the presumption of innocence is a hallowed principle lying at the very heart of criminal law. The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. It ensures that until the State proves an accused’s guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise”

**(b) IS THE PRESUMPTION OF INNOCENCE EXQUISISHED UPON CONVICTION?**

In answering this question, I intend to look at the different cases and by way of comparison ascertain whether or not the decision in *Arvind Patel vs Uganda*<sup>78</sup> on the grant of bail pending appeal conflicts with the **Constitution of the Republic of Uganda, 1995 as Amended**<sup>79</sup> on the presumption of the innocence as was asserted to in the case of *Magombe Josua vs Uganda*.<sup>80</sup>

Looking at *the case of Kyeyune Mitala Julius v. Uganda*,<sup>81</sup> Hon. Justice Opio-Aweri, JSC (as he then was) stated the presumption of innocence continues as long as someone decides to exercise his or her right of appeal. The presumption of innocence does not stop at the trial level. That it continues as long as someone decides to exercise his right of appeal and does not stop at the trial level. In his holding, the Justice stated that the presumption of innocence as enshrined in the Constitution is a rail guard to the protect one’s personal liberty and the right to a fair and is based on the notion that courts make errors because they are manned by human beings.<sup>82</sup> Based on the aforesaid, I assert that indeed the accused person maintains their presumption of innocence post-conviction. The notion that the trial courts make errors casting doubt on the Appellant’s conviction warranting the grant of bail pending appeal was also discussed in *the case of Mugisha Gregory vs. Uganda*<sup>83</sup> wherein court observed; “the appellate system embedded in this country’s criminal justice system therefore recognizes the possibility of errors being committed during judicial process at various levels until the final appellate court in the

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<sup>78</sup> *Arvind Patel vs Uganda* Miscellaneous Application No.1 of 2003

<sup>79</sup> The Constitution of the Republic of Uganda, 1995 as Amended.

<sup>80</sup> *Magombe Joshua vs Uganda*, Criminal Application No.11 of 2019

<sup>81</sup> *Kyeyune Mitala Julius vs Uganda* Miscellaneous Application No.4 of 2017

<sup>82</sup> *Ibidi*.

<sup>83</sup> *Mugisha Gregory vs Uganda* Criminal Reference NO.179 of 2017

*matter before court finally determines the same and the judicial process is sealed until then in our view it cannot be said that the rights of the appellant including the presumption of innocence are completely extinguished to a certain extent therefore the appellant's rights to the presumption of innocence remains until the appropriate final appellate in the matter has conclusively determined the appeal."*

Owing to the above cases, the presumption of innocence must be given a broader interpretation looking at the decision in ***Mugisha Gregory vs Uganda*** which was later approved by ***Justice Opio Ayeri in the case of Kyeyune Julius vs Uganda*** wherein, the two cases contend that for as long as one exercises his/her right of appeal, then the presumption of innocence subsists. The rationale as stated in the aforesaid cases, is premised on the fact that errors made by the trial court in arriving at its decision evident in either a misapplication of the law or the fact justifying an appeal which perhaps would prove the convict's innocence until the Appellate Court upholds or reverses the conviction. I agree with the analysis in the aforesaid cases, in my view **Article 28(3)(a) of the Constitution** on presumption of innocence must be applied in a restrictive manner as to only be applied at trial but must be read in line with **Article 23(6)(a) of the Constitution** to extend to post conviction specifically in stances where the convict appeals based on errors that may have been made by the trial court in arriving at its decision thereby rendering the appellant in this case innocent which in turn entitles them the right to apply for the grant of bail pending appeal so as to protect their liberty.<sup>84</sup>

Looking at the *case of Magombe Joshua vs Uganda*, the learned Justice in the case concluded that *Article 23(6)(a)*, which provides for the right to apply for bail only refers to a person arrested in respect of a criminal offence and not to a person already convicted of a criminal offence and not a person already convicted of a criminal offence.<sup>85</sup>

However, I disagree with this stance and assert that the presumption of innocence requires that he who alleges must prove and it is not the courts duty to render a person innocent for they are from the start specifically where there is a pending appeal. Furthermore, the presumption of innocence must be maintained from the court of first instance to the very last court provided they did not plead guilty to the charges as brought

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<sup>84</sup>Article 23(1) (a) of the Constitution of the Republic of Uganda.1995 as Amended

<sup>85</sup> Kisaakye ibid(n3)

against them. This is based on the law of plea taking.<sup>86</sup> Which principles the decision in **Magombe Joshua vs Uganda** tends to overlook and yet pertinent.

It is now a well-established principle of law that the moment an accused person pleads not guilty to a charge, everything in the charge becomes in issue and the prosecution has a burden to prove each element of the offence and the standard of proof is beyond reasonable doubt.<sup>87</sup> This therefore means that a decision to appeal as will be issued in the next section puts all facts on appeal back in issue including the accused's presumption of innocence.<sup>88</sup>

The presumption of innocence under **Article 28(3) of the Constitution** only becomes extinguished when an accused person accepts the outcome of court,<sup>89</sup> for as William Blackstone asserted; "it is better that ten guilty persons escape than one innocent suffers".<sup>90</sup> Thus, an accused person must be treated as a non-criminal until he has been duly found to be so justifying the grant of bail pending Appeal just like it was seen in the case of *Arvind Patel vs Uganda*.<sup>91</sup>

**b) An appeal pending determination as a substantive ground to warrant subsistence of the presumption of innocence post-conviction.**

In *Arvind Patel vs Uganda (supra)*,<sup>92</sup> the appellant, Arvind Patel and another were convicted to murder, contrary to section 201 of the Penal Code by the Chief Magistrate's court in Kampala, and sentenced to five years imprisonment. The appellate at trial did plead not guilty, however the defense evidence was rejected and relied on the prosecution evidence thereby convicting the accused. The convict appealed to the High Court and Court of Appeal were dismissed. Hence the appeal which came to this Court

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<sup>86</sup> *Adan v Republic* [1993] EA 445

<sup>87</sup> Rogers Wadada, 'Justice Kisakye Decision on bail pending appeal, if left unchallenged could have far reaching consequences on the criminal system' (PM Daily) Available at [www.pm1daily.com/oped/2020/11/rogers-wadada-justice-kisakye-decision-on-bail-pending-appeal-if-left-unchallenged-could-have-far-reaching-consequences-on-criminal-system.htm1](http://www.pm1daily.com/oped/2020/11/rogers-wadada-justice-kisakye-decision-on-bail-pending-appeal-if-left-unchallenged-could-have-far-reaching-consequences-on-criminal-system.htm1) (accessed September 12, 2023) and the case of *Woolmington vs DPP*

<sup>88</sup> A decision to appeal means the person is not satisfied with the verdict of the lower court and as such the accused person still maintains his/her earlier plea of not guilty as if he has just been arrested and therefore must maintain his innocence within the meaning of Article 28(3)(a) of the Constitution from court of first instance to the Supreme Court of the land.

<sup>89</sup> Wadada ibid (n39)

<sup>90</sup> William Blackstone, *Commentaries on the Laws of England* in Four Books, Vol.2 (Philadelphia J.B Lippincott Co., 1893)

<sup>91</sup> *Arvind Patel vs Uganda* Miscellaneous Application No.1 of 2003

<sup>92</sup> Ibid

on a certificate of the Court of Appeal on grounds the matter raises a number of questions of law of great public or general importance.<sup>93</sup> Pending his appeal, the appellant applied for bail.

An appeal is a proceeding undertaken to have a decision reconsidered by a higher authority especially the submission of the lower courts or agency's decision to a higher court for review and possible reversal.<sup>94</sup> The appellate jurisdiction of Courts stems from statute.<sup>95</sup> This means that there is no such thing as inherent appellate jurisdiction. According to the Constitution of Uganda Judicial officers are not to be questioned by any kind of proceeding civil or criminal for the decision they make in their official capacity during the course of their work.<sup>96</sup> Therefore, the only way a person dissatisfied with a decision of a judicial officer made in his or her official capacity can challenge such decision is by appealing to a higher court to have that decision reviewed.

In the case of ***Kifamunte Henry vs Uganda, the Supreme Court***<sup>97</sup> the Supreme Court of Uganda noted that an appeal is based on a question of law or fact. Meaning that the possibility of having an erroneous conviction or the possibility of having an erroneous conviction or the punishment being excessive informs the need to have an appeal process.<sup>98</sup> In ***Kaguma v Republic***,<sup>99</sup> court reiterating the position by the *High Court of Kenya at Mombasa*,<sup>100</sup> noted that the most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant his right to liberty.

Clearly, the appeal process implies that the convict is dissatisfied with the findings of the trial court which findings might have been arrived at in error on either a question of law or fact to presume his innocence on appeal. In my view, the mere looking at the Memorandum of Appeal with possible and substantive grounds would support grant of bail pending appeal since it leaves doubt in the conviction as granted by the trial court.

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<sup>93</sup> Ibid

<sup>94</sup> Bryan A. Garner (2014) *Black's Law Dictionary*, 10 Edition Thompson Reuters Publication New York At page 117

<sup>95</sup> *Uganda vs Lule* [1973] 1 EA 362, Also see *Shah vs Ag*

<sup>96</sup> The Constitution of the Republic of Uganda, 1995 as Amended.

<sup>97</sup> *Kifamunte Henry vs Uganda* Supreme Appeal No.1 of 1997

<sup>98</sup> *Chimambhai vs Republic* (No.2) [1971] 1 EA 343 (HCK)

<sup>99</sup> *Kaguma v Republic* [2004] 1 EA 68

<sup>100</sup> *Harris J in Chimambhai vs Republic* (No.2) [1971] 1 EA 343 (High Court of Kenya at Mombasa)

Further, looking at the duty of the 1<sup>st</sup> appellate court which is to subject the evidence presented before the trial court to a fresh scrutiny while making allowance for the facts that it has either seen nor heard the witnesses to come to its own conclusion is enough to cast doubt on the evidence adduced by the state in proving the accused's guilt beyond reasonable doubt at trial court forming the view that the convict may be still innocent until the state rebuts presumption on appeal.<sup>101</sup>

Looking at the case of *Joshua Magombe vs Uganda*, the Learned Justice stated that **Article 132(2)**,<sup>102</sup> vests jurisdiction in the Supreme Court to hear criminal appeals and to deal with matters incidental to hearing of criminal appeals, but does not give powers to the Supreme Court to consider the release of a convicted person before the disposal of his/her appeal. By this reasoning the justice found Rule 6(2)(a) of the Supreme Court Rules null and void. This reasoning is however not sound in law because;

**Firstly, Article 132(2) of the Constitution**, applies to the Supreme Court by virtue of **section 5(11) of the Judicature Act**,<sup>103</sup> which was enacted by Parliament to prescribe how the Supreme Court will exercise the jurisdiction vested in it, under Article 132(2).<sup>104</sup> Through this power, **Rule 6(2) of the Supreme Court rules** was enacted to operationalize **Section 5(11) of the Judicature Act**. Therefore, **reading Article 132(2) of the Constitution together with Section 5(11)** would lead to a conclusion that the Supreme Court may, while exercising the jurisdiction vested in it under the Constitution, grant bail to the appellant, pending the determination of his or her appeal thereby affirming the decision in *Arvind Patel vs Uganda* on grant of bail pending appeal as good law.

**Secondly**, based on the fact the appellate court has a duty to evaluate the evidence and come to its own conclusions independent of the trial court. The court is obliged to rehear the case by subjecting the evidence to a fresh and exhaustive scrutiny, weighing conflicting evidence and drawing its own inferences and conclusions from it. Of course, an appellate court should bear in mind that it has neither seen nor heard the witnesses

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<sup>101</sup> *Father Narenso Begumisa and others vs Eric Tibebaga* SCCA No.17 of 2002.

<sup>102</sup> The Constitution of the Republic of Uganda, 1995 as Amended.

<sup>103</sup> Cap 13. This section provides that Section 132(4) & (5) of the Trial on Indictments Act shall, with necessary modifications, apply to the Supreme Court.

<sup>104</sup> Kusasira, 'Do courts have power to grant bail pending appeal?' (Daily Monitor) Available at [www.monitor.co.ug/uganda/special-reports/do-courts-have-power-grant-bail-pending-appeal-2727292?view=htmlamp&twitter\\_impression=true](http://www.monitor.co.ug/uganda/special-reports/do-courts-have-power-grant-bail-pending-appeal-2727292?view=htmlamp&twitter_impression=true) (assessed September, 14, 2023)

and should therefore make due allowances in this respect.<sup>105</sup> is enough to infer the presumption of innocence on appeal.

Owing to the above discussion, the interpretation of **Article 28(3)(a) of the Constitution** on the presumption of innocence as was stated in *Joshua Magombe* seems to have been applied restrictively putting into account of other facts such as procedural errors and the appeal process which indeed infer the presumption of innocence even on applying justifying the grant of bail on appeal. procedural errors

***C) WHETHER OR NOT THE GRANT OF BAIL PENDING APPEAL IS UNCONSTITUTIONAL CREATING AN IMPEDIMENT ON THE PRESUMPTION OF INNOCENCE.***

The constitution is not meant to be a lifeless museum piece'.<sup>106</sup> It is an elementary rule of constitutional construction that no one provision of the constitution should be segregated from all the others and to be considered alone but all the provisions bearing upon a particular subject are to be brought into view and interpreted as to effectuate the great purposes of the instrument. <sup>107</sup> The broad and purposive interpretation of the constitution is to give effect to its spirit,<sup>108</sup> and to enable it to grow and embrace new values and aspirations that emerge with the changing times.<sup>109</sup>

**Article 45 of the Constitution** is henceforth crucial in the enforcement of people's rights as it guarantees the individual all the rights, they are entitled to regardless of whether or not they are mentioned in the Constitution. This comports with the declaration in **Article 20(1)** to the effect that the fundamental rights and freedoms of the individual are inherent and not granted by the state.<sup>110</sup> This provision has therefore been widely used by the constitutional court exercising its interpretive mandate to read in new rights into the constitutional discourse of Uganda as well as ensuring that the laws in Uganda conform to the international standards as set out in international treaties.

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<sup>105</sup> *Pandya v.R* [1957] 1EA 336, also see *Bogere and Another v. Uganda* Supreme Court Criminal Appeal No.1 of 1997 [ 1998] KALR 1.

<sup>106</sup> *Unity Dow vs AG*, [1992] LRC (Const.) 623

<sup>107</sup> *Dakota v. North Carolina*, US 268 (1940) L.E.D.448

<sup>108</sup> Walubiri, P.M, (ed) 'Uganda: Constitutionalism at Crossroads, Uganda Law Watch, Kampala,1998.

<sup>109</sup> J. Oloka-Onyango, 'Judicial Power and Constitutionalism in Uganda' in M. Mamdani & J Oloka-Onyango, *Uganda: Studies in Constitutionalism*.

<sup>110</sup> *Ibid*.

**Article 28 of the Constitution** was never intended to be an exhaustive definition of the right to fair hearing,<sup>111</sup> hence making room for other aspects of the right to a fair hearing. The aforesaid informs why an analysis of the constitutional or legal basis of the right to bail pending appeal cannot be complete without considering firstly, **section 40 of the Criminal Procedure Code Act**,<sup>112</sup> that allows a person to apply to an appellate court in case of a magistrate court refuses to grant the same. Secondly, **Section 132(4) of the Trial on Indictment Act** that provides for bail pending appeal granted by the Court of Appeal if the high court refuses to do so.<sup>113</sup> These provisions have the same effect as **section 5(11) of the Judicature Act**<sup>114</sup> operationalized by **Rule 6(2)(a) of the Judicature (Supreme Court) Rules**.<sup>115</sup>

The two provisions therefore, discuss the import of bail pending appeal as granted by the appellate courts, a circumstance that differs with Justice Kisakye's finding,<sup>116</sup> to effect that indeed grant bail pending appeal is founded in law. The fact that the right to apply for bail pending appeal is not specifically mentioned in the Bill of Rights of the Constitution does not mean such a right is excluded.<sup>117</sup>

In the case of *Nakiwuge Racheal Muleke vs Uganda, Criminal Reference No.12 of 2020*, wherein *the coram of three Justices of the Supreme Court handling a reference from the ruling of Hon.Dr. Esther Kisaakye, JSC, in Criminal Application No.15 of 2019*, the Supreme Court noted that whereas we agree that there is no express provision in the 1995 Constitution that provides for the right for bail pending appeal. Similarly, it is apparent that no provision expressly prohibits the right to bail pending appeal. However, we note that the Constitution empowers the Parliament of Uganda to enact laws on any matter for the peace, order, development and good governance of Uganda. We also note that the Constitution empowers Parliament to make laws providing the structures,

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<sup>111</sup> *Uganda Law Society and Anor v. Attorney General* Constitutional Petitions Nos.02 of 2002 And 08 of 2002.

<sup>112</sup> Criminal Procedure Code Act Cap 116, Laws of Uganda

<sup>113</sup> Obviously, neither the CPCA nor the TIA makes reference to the jurisdiction of the Supreme Court to grant bail pending appeal. This is due to the fact that the Supreme Court was established in 1995 by Article 130 of the Constitution, yet the CPCA was enacted in 1951 and the TIA was enacted in 1971.

<sup>114</sup> Judicature Act Cap 13, Laws of Uganda

<sup>115</sup> Judicature (Supreme) (Court) Rules

<sup>116</sup> *Magombe Joshua vs Uganda*

<sup>117</sup> Rule 6(2) of the Judicature

procedures and functions of the judiciary. *Articles 79(1) and 150(1) of the Constitution as they state as follows:*

*“79 Functions of Parliament.*

*(1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.”*

*“150 Power to make laws relating to the Judiciary.*

*(1) Subject to the provisions of this Constitution, Parliament may make laws providing for the structures, procedures and functions of the judiciary.”*

*The Justices further held that a clear analysis of the Two Articles of the Constitution indicate that much as the Constitution provides for most of the fundamental rights of the people under Chapter 4, it did not conclusively provide for all the rights. The framers of the Constitution bore in mind that need may arise to provide for other rights hence the provisions under *Articles 79 and 150* cited above empowering Parliament to make provisions for such rights through Acts of Parliament. It would therefore be a misdirection in law to say that since certain rights are expressly not provided for in the Constitution, they are as good as not in existence.*

As denoted above, the presumption of innocence as set out in **Article 28 of the Constitution** must be given a broader interpretation by reading into line with the other provisions of the Constitution. From the above discussion, the grant of bail pending appeal though not expressly provided for in the Constitution seems to form of the fundamental rights entitled to the convict on interpreting **Article 28 together with Article 23(6) (a), 79(1) and 140 of the Constitution** which justifies it as part of the presumption of innocence thus constitutional.

## **CHAPTER 5.**

### **INTRODUCTION**

As evident from the preceding Chapters, the decision in Arvind Patel vs Uganda on the grant of bail pending appeal remains constitutional taking a broader interpretation of the various Articles 23(3),28,79 and 150 of the Constitution. It must also be noted that the controversy in the judicial decisions on the grant of bail pending has been primarily caused by the absence of an express provision in the Constitution on the grant of bail pending Appeal, though it is apparent that no provision expressly prohibits the right to bail pending appeal as has been discussed. Guided by that setting, this Chapter seeks to provide the conclusions, findings on the recommendations the decision in Arvind Patel vs Uganda can be aligned to avoid controversy on the grant of bail pending appeal.

### **FINDINGS;**

1. I found out that in much as the Constitution does not expressly provide for the right to apply for bail pending appeal, the Supreme Court Rules do provide for that right under Rule 6(2)(a) and further based on the fact the Rules are enacted by the Chief Justice with power bestowed him/her under section 40 of the Judicature Act Cap.13 which Act was enacted by Parliament pursuant to Article 79 of the Constitution confirms the grant of bail pending appeal Notwithstanding the absence of an express provision.
2. I found out that Rule 6(2) of the Judicature (Supreme Court) Rules is not inconsistent with the Constitution as it simply makes provision for the right to apply for bail pending appeal whose grant is discretionary and differs from case to case because every case presents its own facts and circumstances.
3. I found out the grant of bail pending appeal is complemented by the presumption of innocence as enshrined in Article 28(3)(a) of the Constitution if read together with Articles 23(6) (a),79 and 150 of the Constitution with a broader interpretation given thus there existed no conflict between the provisions as has been discussed.
4. I found out that the case of Arvind Patel, considered several cases to come up with the general considerations for bail pending appeal applications and since there was no express provision referring to the same in the Constitution, there is no way

its constitutionality would have been brought in question since the practice has been that whereas there is no written law on the matter before court, case law provides guidance.

## **CONCLUSION**

In much as the Constitution does not expressly provide for the right to apply for bail pending appeal, the Supreme Court Rules do provide for that right under **Rule 6(2)(a)** that ought to be relied on whenever such applications are made to the court since these rules are enacted to regulate the practice and procedure in all courts pursuant to **section 40 of the Judicature Act Cap.13** which is an Act of Parliament made under **Article 79(1) of the Constitution** ultimately affirming its consistency with the Constitution.

Further, the absence of an express provision on bail pending appeal in the Constitution justifies why the case of Arvind Patel remains good law since the practice has been that whereas there is no written law on the matter before court, case law provides guidance.

## **RECOMMENDATIONS**

1. **Article 259 of the Constitution** envisages the Parliament with the mandate to amend the Constitution in case there exists a gap within the Constitution, therefore there is need to amend the Constitution and provide for the express provision on grant of bail pending appeal to avoid judicial confusion.
2. There is need to sensitize judicial officers on the grant of bail pending appeal applications by highlighting a proper basis of the principles and circumstances upon which it may be granted to promote consistency in the judicial decisions.

## **GAPS OR AREAS FOR FURTHER RESEARCH**

1. the impact of bail pending appeal on reducing pretrial detention rates in Uganda
2. the criteria and process for determining eligibility for bail pending appeal in Uganda
3. the effectiveness of bail conditions in ensuring compliance with court orders
4. the role of judiciary in ensuring a fair and timely review of bail pending appeal
5. comparative analysis of bail pending appeal practices in Uganda with other jurisdictions in Africa and globally.

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