THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CRIMINAL DIVISION)

MISCELLANEOUS APPLICATION No. 118 of 2025

(Arising from Criminal Appeal No. 31 of 2025)

(Arising from Court Martial Appeals Case No. 1 of 2025 which arose from Criminal Case No. UPDF/GCM/040/2024)

KIIZA ERON ..... **APPLICANT**

VERSUS

UGANDA ..... **RESPONDENT**

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

RULING

This is an application for bail pending the hearing and determination of ***Criminal Appeal No. 31 of 2025.*** The Applicant is **Kiiza Eron**. The laws under which this application was lodged include Articles 20, 23, 28 (1), 43, 44 (c), 129 (1) (d), 132 (4), 139 (1) of **the Constitution of the Republic of Uganda**; Section 40 (1) and (2) of **the Criminal Procedure Code Act**; Sections 14, and 37 of **the Judicature Act**; and Section 15 of **the Trial on Indictments Act**.

The grounds of the application are set out in the Notice of Motion and further particularized in the affidavit deposed by the Applicant.

Those Grounds are:

That the Applicant is a 42 year old Advocate in private practice and was one of the lawyers in Criminal Case No UPDF/GCM/040/2024 which was before the General Court Martial from which his conviction and sentence stem. That on the 7th of January 2025 when the matter was called, he together with other defence counsel were cleared to enter court. However, he was blocked as he approached the bar. That he was violently pushed away when he protested. It was then that he was set upon by military police court orderlies who hit him with blows, fists, kicks and batons. They then dragged him from the Court hall into the dock before placing him in the holding cells. That he was returned to the dock where he was summarily convicted of contempt of court, and sentenced to 9 (nine) months imprisonment. Consequently, he was sent to Kitalya mini Max Prison where he is serving his sentence. That he was never formally charged, tried or heard, all contrary to the principles of natural justice. The applicant asserts that failure to follow due process, and denial of access, his unlawful arrest, assault, and arbitrary conviction violates the Constitution, the laws of Uganda and international human rights standards. That he has challenged his conviction by filing Criminal Appeal No 31 of 2025 in this Court. That he is a first offender who has a constitutional right to apply for bail in this matter. That his appeal enjoys a high likelihood of success as it raises substantial legal and constitutional matters, particularly the jurisdiction of the General Court Martial over civilians, following the finding of the Supreme Court of Uganda in *Attorney General vs Michael Kabaziguruka (constitutional appeal No 2 of 2021.* That he is married with three young children and is the sole bread winner for his family. That he has no criminal record and the offence he was charged with did not involve personal

violence. That there is a likelihood of substantial delay in hearing his appeal given the challenges of the procedural transition following the decision in the *Kabaziguruka* case. He states that he has a fixed place of abode in Central Zone Kiwatule, Nakawa Division in Kampala City. That he has three substantial sureties who able and willing to stand for him. The applicant affirms that he will comply with any and all conditions if released on bail.

The state opposes this application. In an affidavit deposed by Kyomuhendo Joseph, a Chief State Attorney, it is stated that the applicant was found guilty of the contempt of court and sentenced to nine (9) months imprisonment in accordance with Sections 169 (1) (g) and 212 (9) of the **Uganda Peoples Defence Forces Act (UPDF) Cap 330.** That as an advocate of the courts of law, he ought to have acted with decorum and in a manner expected of his standing. That his conviction reflects the need to protect the court process and underscores the need for a restrictive stance on bail in order to protect the integrity and decorum in court processes. That the applicant expressed grave misconduct which was found contemptuous and was subsequently sentenced to nine (9) months imprisonment. That the applicant has no right of appeal and this court has no jurisdiction to entertain this application. His right of appeal is prescribed by statute and it is before the Court Martial Appeals Court and not before the High Court. That *Supreme Court Appeal No 2 of 2021 AG vs Hon Michael Kabaziguruka* is only in respect of civilians tried under Section 119 (1) (g), now 117 (1) (g) and not advocates found in contempt of court under Section 169 (1) (g) and 212 (9) of the **UPDF Act.** That the applicant has not shown any special circumstances warranting a release on bail pending appeal. That the persons proposed as sureties live in different locations with no direct control over the applicant and cannot compel his presence in court whenever required. That it is not true that the determination of the applicant's appeal is likely to delay because this court has a good record of disposing of cases. That the circumstances here militate

against the granting of bail pending appeal and the balance of convenience lies with the maintenance of court decorum. That it is in the public interest for this application to be denied.

In the alternative, but without prejudice, the respondent states that should this court be inclined to grant the applicant bail, then stringent conditions should be imposed.

Representation

The Applicant was represented by Mr Nicholas Opiyo and Mr Kenneth Muhangi while the Respondent was represented by Mr. Amerit Timothy, Senior State Attorney with the Office of the Director of Public Prosecutions.

Submissions

The Applicants written submissions

The parties filed written submission which they adopted at the hearing of the application.

It was argued for the applicant that his application is made pursuant to the orders of the Supreme Court in *Kabaziguruka* (Supra) which nullified the trial of civilians in the courts martial. Additionally, that the Supreme Court directed that all trials pending before the courts martial were nullified and ordered that matters pending before the courts martial be transferred to civilian courts with competent jurisdiction. That since the applicant's appeal was pending before the Court Martial Appeal, then this court is the competent civilian court envisaged by the Supreme Court in its decision.

The applicant also relies on an observation made by the learned Justice Douglas Singiza in MC No. 37 of 2025 Kiiza Eron vs AG (HC Civil Division), where the applicant had sought an order of habeas corpus.

The learned judge held,

> While I do agree with the proposition put forward by the learned AG that the applicant could have first challenged the convictions and sentence before an appellate court, it is probably not correct to argue that in light of the Supreme Court decision, such an appellate court would be the Court Martial Appeals Court in fact.

The contention by the applicant is that the Judge in the Habeas Corpus application agreed that the appeal against conviction and sentence by the applicant, lies not to the Court Martial Appeal Court, but to the Criminal Division of the High Court.

There has been no transfer of files from the Courts martial to the ordinary civilian courts as ordered by the Supreme Court. That this delay has also affected the applicant whose challenge against the application remains in limbo. That this poses the risk of substantial delay and a real likelihood that the applicant may serve out his sentence before the appeal is determined.

The Respondents Reply to the Applicant

The respondent contends that this court is not vested with the jurisdiction to handle this matter or the appeal from which it springs. That an appeal is a creature of statute and in this case, Section 197 (1) of **the UPDF Act** stipulates that all appeals from decisions of The General Court Martial lie to The Court Martial Appeal Court and not to the High Court.

Additionally, that the Decree in *Kabaziguruka* (supra) was only in respect of civilians tried under Section 119 (1) (g) [which is now Section 117 (1) (g)] of **the UPDF Act** and not advocates found in contempt of court under Section 169 (1) (g) and 212 (9) of **the UPDF Act.** That it is therefore misguided to rely on *Kabaziguruka* (supra) as a basis for imputing jurisdiction on this Honourable court.

The Applicant's Submissions in Rejoinder

The applicant made a rejoinder to the respondent's submissions.

On the question of jurisdiction, the respondent had argued that an appeal is a creature of statute and this Court is not vested with the jurisdiction to handle either this application or the appeal.

The applicant contends that contrary to the respondent's submission, an appeal is not only a creature of statute, but a creature of law as envisaged in Section 14 and Section 16 of **the Judicature Act**.

These provisions state as follows,

> Section 14: Jurisdiction of High Court
>
> (1) The High Court shall, subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law.
>
> Section 16: Appellate jurisdiction of High Court
>
> (1) Subject to the Constitution, this Act and any other law, the High Court shall have jurisdiction to hear and determine appeals which lie to it by virtue of any enactment from decisions of Magistrates courts and other subordinate courts in the exercise of their original or appellate jurisdiction.

It is submitted that these two provisions require the court to re-examine the various sources of law in Uganda including the Constitution, statutory law, judicial precedents, common law, and delegated legislation and the court will find that they confer jurisdiction on it to handle this application.

The applicant argues further, that initially, jurisdiction in this matter lay with the Court Martial Appeal Court as stipulated in Section 197 (1) of **the UPDF Act**. For that reason, the applicant filed Criminal Appeal No. 1 of 2025, in the Court Martial Appeal Court, thereby fully complying with the requirements of the appellate process in the Court Martial Appeal Court.

That appeal, however, was filed in the Court Martial Appeal Court before the Supreme Court decision in *Kabaziguruka,* which declared Section 197 (1) of **the UPDF Act** unconstitutional when it stated,

> "The provisions of the UPDF Act constituting and providing for the trial procedure of the GCM, the Division Court Martial, and the Court Martial Appeal Court, do not contain any or sufficient constitutional guarantees and safeguards for them to exercise their judicial functions with independence and impartiality, which is a prerequisite for fair hearing provided for under Arts. 21, 28 (1), 44 (c), and 128 (1) of the Constitution."

The applicant argues therefore that this court's jurisdiction to entertain this appeal is by virtue of the Supreme Court decision in *Kabaziguruka* that ordered a cessation and transfer of all criminal trials involving civilians from the courts martial to civilian courts with competent jurisdiction.

It is also submitted that the facts before this court present a unique case, where there is no express law on the matter, following the nullification of Section 197 (1) of the UPDF Act by *Kabaziguruka (*supra). It is for this reason that the applicant implores the court to invoke its powers under Section 14 (2) (c) of **the Judicature Act** to entertain this application.

Background

The applicant was one of several counsels appearing in UPDF/GCM/040/2024 before the General Court Martial sitting at Makindye. On the 7th of January 2025 the General Court Martial convicted him of the offence of contempt of court. He was thereafter sentenced to nine (9) months in prison, to be served in the Kitalya government prison. On the 13th of January 2025, the applicant filed a Notice of Appeal in the Court Martial Appeal Court sitting at Makindye. On the 31st of January 2025, the Supreme Court of the Republic of Uganda rendered its decision in *AG vs Hon. Michael A Kabaziguruka*, in which it ordered, inter alia, that all criminal trials pending before the courts martial cease and be transferred to ordinary courts of law. Following the *Kabaziguruka* decision, the applicant lodged Criminal Appeal No. 31 of 2025 in the Criminal Division of the High Court of Uganda, challenging both his conviction and sentence by the General Court Martial. It was following the filing of the appeal in the Criminal Division, that the applicant made this application for bail pending appeal.

Determination

Bail pending appeal is provided for in Section 40 (2) of **the Criminal Procedure Code Act** which stipulates,

> 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.

An appellate Court therefore has the jurisdiction to exercise a discretion whether to refuse or to grant an application made for bail pending the determination of an appeal.

Appellate jurisdiction

In this case however, the respondent has challenged the applicant's right of appeal and consequently, mandate to apply for bail pending the determination of his appeal. The respondent submitted that appeal is a creature of statute, and that in this case, it was Section 197 (1) of the **UPDF Act** that created the right to appeal against the decisions of the General Court Martial to the Court Martial Appeals Court. The provision stipulates that,

> There shall be a Court Martial Appeal Court for the Defence forces which shall hear and determine all appeals referred to it under the Act from decisions of the General Court Martial

The respondent's contention is that because the applicant was convicted by the General Court Martial, then it is the cited provision that should regulate his appeal.

The settled position of the law regarding the right of appeal has been crystallised in several decisions of the superior courts and is that,

> … the right of appeal is a creature of statute and must be given expressly by statute. There is nothing such as an inherent right of appeal.
>
> (see **Uganda People Congress and Anor vs Prof Edward Kakonge SCCA 19 of 2020**)

There is no such thing as an inherent or automatic right of appeal. It must be expressly provided for, granted, created or stated by a specific statute.

What, then, is the position in a situation such as the present one, where the Supreme Court, in its decision in *Kabaziguruka* (supra), struck down the mandate of Courts under the **UPDF Act** to handle civilians, when it held that those courts do not contain any or sufficient constitutional guarantees and safeguards for them to exercise their

judicial functions with independence and impartiality, which is a prerequisite for fair hearing provided for under Arts. 21, 28 (1), 44 (c), and 128 (1) of **the Constitution**.

The Supreme Court subsequently declared that all charges, or ongoing criminal trials, or pending trials, before the courts martial involving civilians must immediately cease and be transferred to the ordinary courts of law with competent jurisdiction.

The contention of the applicant is that by virtue of the above holding, the courts martial ceased to have jurisdiction over him as a civilian. This court is in full agreement with this assertion. The purport and intent of the order by the Supreme Court was to terminate any proceedings involving civilians in the Courts Martial.

It was for that reason, that the applicant despite have filed an appeal before the Court Martial Appeal Court, lodged a fresh appeal in the Criminal Division of the High Court.

The applicant argued that because the Supreme Court in *Kabazigruka,* directed for the transfer of all civilian cases to civilian courts, then that order that partly conferred jurisdiction on this court to handle his appeal and this application. This submission asserts that the Supreme Court conferred jurisdiction on the High Court to handle the applicants appeal and application for bail pending appeal.

Can a court decision, even one from the highest court in the land, however precisely expressed or wonderfully crafted, grant another court jurisdiction? This query is partly answered in **Kawooya v Bangu and Another SCCA 4 of 2007** where it was held that jurisdiction of the court is not a matter for implication but must be prescribed by law.

Jurisdiction of the courts in this country stems from foundational law, from the Constitution. Article 129 of **the Constitution** stipulates that subject to the provisions

of this Constitution, Parliament may make provision for the jurisdiction and procedure of the courts.

By constitutional edict therefore, jurisdiction can only be granted by an Act of Parliament. The legislature must explicitly and expressly grant a court the mandate to determine specific matters.

In the case of the High Court, the appellate jurisdiction is legislated for in Article 139 of the Constitution which states,

> (1) The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.
>
> (2) Subject to the provisions of this Constitution and any other law, the decisions of any court lower than the High Court shall be appealable to the High Court.

This constitutional provision is operationalised by Section 16 of **the Judicature Act** which provides for the appellate jurisdiction of the High Court. It stipulates as follows,

> Subject to the Constitution, this Act and any other law, the High Court shall have jurisdiction to hear and determine appeals which lie to it **by virtue of any enactment** from decisions of magistrates courts and other subordinate courts in the exercise of their original or appellate jurisdiction.

The High Court can therefore only exercise such appellate jurisdiction as is conferred on it by **the Constitution**, or any other law. The law referred to in the provision must be read to mean legislated law. It is for this reason that the settled position is that the right of appeal must, as stated in **Uganda People Congress case (supra),** be expressly and precisely granted by statute.

In Kasibante Moses Vs Katongole Singh Marwa & Anor E/P No. 23/11 it was held that,

> The term jurisdiction is not a term of art. It is a term of law. It is a term of very expensive legal import. It embraces every kind of judicial actions. It confers upon the Court the power to decide any matter in controversy … it is trite law that no court can confer jurisdiction upon itself. It is equally trite law that no court can assign or delegate jurisdiction vested in it.

Because a court cannot confer jurisdiction on itself it certainly has no authority to assign jurisdiction to another court. As stated earlier, the mandate to grant jurisdiction is a legislative preserve. Consequently, the applicant's contention that the decision in *Kabaziguruka* (supra) conferred jurisdiction on High Court, to handle appeals from the General Court Martial, is misplaced. A court of law has no power to confer jurisdiction on another court.

The term Jurisdiction is defined as *a court's power to decide a case or issue a decree* (the 9th Edition of Black's Law Dictionary).

Similarly, in **Owners of The Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd C.A. 50 of 1989** it was held,

> By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means.

Interrogation of whether a court has jurisdiction to determine any particular case placed before it is paramount. It is a question that goes to the very root of the

competence of the court. In **Owners of The Motor Vessel "Lillian S" (supra)** it was articulated in this way,

> Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

It is now settled that a decision of a court without jurisdiction is a nullity and as such is something which a person affected by it was entitled to have set aside *ex debito justitiae (*see in **Mubiru vs Edmond Kayiwa [1979] H.C.B. 212)**.

In this instant application therefore, the position is that the Supreme Court struck down the mandate of the Courts Martial over civilians. Originally, appeals from the General Court Martial lay to the Court Martial Appeal Court. The Supreme directed that all matters involving civilians should be transferred from the courts martial to civilian courts. At that point the courts martial ceased to have any mandate of civilians.

It means therefore, that the legislature had to enact legislation for the regulation of all matters transferred from the courts martial to civilian courts. The said enactments should also prescribe the jurisdiction and procedure regulating appeals of cases originally before the general court martial.

The Parliament of Uganda has not legislated, at least not as of the 25th of March 2025, when this matter was heard, any law stipulating what right of appeal is open to civilians convicted by the General Court Martial, and secondly, which court or tribunal has the jurisdiction to hear those appeals.

In view of all the above, it is the finding of this court, that there is no law prescribing the right of appeal in the applicant's case. It is such a law that would ordinarily give the court the mandate to handle the appeal and this application. Where no such jurisdiction has been granted by law, the court cannot assign itself the jurisdiction. If it did, the decision would be a nullity.

Jurisdiction in general

The unique circumstances of this case nevertheless constrain this court to make inquiry into the question of jurisdiction. I am acutely cognisant of the fact that it would not otherwise be appropriate to determine the question of jurisdiction, in this application for bail pending appeal, when it will inevitably arise in the substantive appeal. However, the appeal and this application are inextricably linked and this application cannot be resolved without disposing of the question.

It is true, as I have held above, that jurisdiction is prescribed by the Constitution and legislative enactment. This court has held that there is no law prescribing the right of appeal for the applicant.

What then is to happen to this application? The convict is serving a sentence and yet there is a lacuna or a gap in the legislative framework regarding his ambiguous right of appeal. It is in these circumstances that the appellant seeks redress from this court.

Now that this court is faced with this situation, it cannot wring its hands helplessly. Litigants, like the applicant, seek resolution of legal questions when they come to court.

The Supreme Court in *Kabaziguruka* made the following observation,

> The judiciary's primary function as one of the three arms or branches of government in a typical democratic system, alongside the executive and

> legislative arms or branches, is to ensure that laws are applied fairly and consistently, uphold individual rights, and settle legal disputes according to established legal principles and procedures.

Such a dispute now presents itself to this court with the limitation that it is not clear which law will apply.

The applicant is poised in an indeterminate legal state. In a legal limbo. The respondent did not state anywhere to this court what steps have been taken to remedy the jurisdictional lacuna that the applicant finds himself in. It serves the interest of justice for a party to test the propriety of his conviction through a re-assessment by a superior court on appeal. That way the appellant will ascertain whether conviction will be confirmed or over turned. In the same way, he should know whether the sentence will be confirmed, varied or set aside. There should be no uncertainty in the manner of the law. Rather, it should be predictable and inspire confidence. Uncertainty is an injustice that may result in oppression. The courts should remedy such a situation by providing certainty of trial.

In *Equity and Trust* by David Bakibinga *Law Africa* it is stated at page 2 that,

> Equity in a general juridical sense means liberal and humane interpretation of law in general so far as that is possible without antagonism to the law itself.
>
> Effectively, therefore, equity in the general juristic sense refers to a judicial body's power to administer the law, justly taking into account the special facts of a particular case. The conception is recognised by our constitution in Article 126 (2) (e) where it states that,
>
> In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles—

(e) substantive justice shall be administered without undue regard to technicalities.

The court is faced with a scenario where the legal framework regulating the legal questions in this case is indistinct. In these circumstances it is fair and just, to apply Equity in a general juridical sense because the statutory law does not offer a direct remedy. The equitable maxim *Equity will not suffer a wrong to be without a remedy* applies with full force here.

The Supreme Court in Nigeria had this to say in ***Amaechi v. INEC (2008) 5 N.W.L.R. (pt. 1080) 227 at p.451*** *(per Aderemi, J.S.C.),* about the use of equitable principles to address cases where the court was faced with a lacuna:

> ...the primary duty of the court is to do justice to all manner of men who are
>
> in all matters before it. It then seems to me clear, that when the court sets out to do justice so as to cover new conditions or situations placed before it, there is always that temptation, a compelling one, to have recourse to equitable principles. A court, in the exercise of its equitable jurisdiction must be seen as a court of conscience. And Judges who dispense justice in this court of law and equity must always be ready to address new problems and even create new doctrines where the justice of the matter so requires

In the same way, this court has recourse under Article 126 (2) (e) of the Constitution to exercise its wide judicial mandate, including its equitable jurisdiction, to do justice in these unique circumstances.

Hon. Justice A. Aboki Judge of the Court of Appeal in Nigeria in his paper captioned: "***The Doctrine of Stare*** Decisis: The need for certainty of Judicial Decisions" had this to say:

> "A Judge that is confronted with a legal problem does not have to resign helplessly where the established laws are inadequate in resolving the problem. It is a cardinal maxim of law that where there is a wrong, there must be a remedy - Ubi Jus Ubi Remedium.

In light of all the above, this court will apply the existing corpus of the law to remedy the wrong which unique to this case.

The right of appeal and the court to which such appeals lie is what is at stake here. However, the general appellate jurisdiction of the High Court is well stated in Article 139 (2) of **the Constitution** which stipulates,

> Subject to the provisions of this Constitution and any other law, the decisions of any court lower than the High Court shall be appealable to the High Court.

The Supreme Court in *Kabazigiruka* (supra) had occasion to address the question of the hierarchy of the Courts Martial and the hierarchy of the Courts of Judicature. It also examined their parallel structures and their equivalence in jurisdiction, that is of Courts of Judicature vis-a-vis the Courts Martial.

The Supreme Court reaffirmed that pursuant to previous decisions of the Court, the General Court Martial, created under Section 197 (now Section 195) of the **UPDF Act**, is a subordinate court of law but with specialized jurisdiction. It stated specifically that the General Court Martial is a court subordinate to the High Court.

Therefore, in line with Article 139 (2) of **the Constitution**, and the order transferring all pending civilian matters in the Courts Martial to the civil courts, any decision of the General Court Martial against a civilian should ordinarily be appealed to the

High Court, because the General Court Martial is a court subordinate to the High Court.

Additionally, Section 14 (1) of **the Judicature Act**, prescribes the general and appellate Jurisdiction of the High Court.

It states,

> The High Court shall, subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law.

In sum, there is no specific Act of Parliament that has conferred Jurisdiction on the High Court to handle appeals from the General Court Martial. However, **the Judicature Act** allows the High Court to exercise appellate jurisdiction conferred on it by the Constitution. The Constitution, by virtue of Article 139 (2), bestows a wide appellate jurisdiction on the high court to handle appeals from any court lower than the High Court in the hierarchy of courts. Therefore, because the High Court is a Court superior to the General Court Martial, it is seized with a broad appellate mandate over the General Court Martial.

It is also noteworthy that in the current constitutional order, the High Court is the only civilian court that lies immediately superior to the General Court Martial in the hierarchy of the courts of judicature.

The order to transfer civilian cases includes the transfer of pending appeals such as the applicant's appeal which had originally been filed in the Court Martial Appeals Court but which the applicant has now lodged in this court.

In view of all the foregoing, it is the High Court that would use its equitable inherent jurisdiction to determine this bail application. It is imperative to reiterate here, that

a court cannot confer jurisdiction on itself. Secondly, courts of law have no mandate to legislate and it is only a statute that can confer jurisdiction on a court.

All the above notwithstanding, the lack of appellate jurisdiction does not limit the inherent powers of court in this particular case. A court will ordinarily only invoke its inherent powers in very limited unique circumstances determined on a case by case basis.

It is therefore imperative for this court to determine whether it can invoke its inherent power to resolve this bail application.

There several factors which compel this action.

Firstly, the present case is one where there is no specific legal framework governing or regulating the applicant's appeal. There is also a dearth of statutory law and judicial precedent on the matter.

Secondly, there is a real likelihood as it stands today, that the applicant may serve out his sentence, without having an opportunity to test the legality of the conviction handed down by the General Court Martial sitting at Makindye. This is because the respondent has not provided any information regarding what modalities are in place to enact a legislative framework regulating pending appeals by civilians convicted by the General Court Martial.

Under Article 28 (1) of **the Constitution**, the applicant is entitled to a fair and speedy trial. In the current circumstances, because there is no specific legislative framework regulating appeals against decisions handed down by the General Court Martial against civilians, the applicant's inalienable human right to a speedy trial is in danger of infringement.

Additionally, again under Article 28 (1) of **the Constitution**, the applicant is entitled to a trial before an independent and impartial court or tribunal established by law. In

light of the legislative lacuna, the specific court or tribunal, that is to handle the applicant's appeal remains indeterminate for purposes of his appeal. It is partly the danger of the infringement of these fundamental human rights compels this court to take action.

Thirdly, the balance of justice tilts in favour of making a determination whether the applicant should be granted bail. If he is released, and it is eventually established that his appeal should be dismissed, then he can be directed to serve out the remainder of his sentence. On the other hand, if he remains in detention for the length of his sentence, and then his appeal eventually succeeds, then it would have been the height of an injustice for him to have remained in detention.

In view of these circumstances, equity and justice demand that this court, exercise its inherent judicial powers and discretion, to consider the merits of an application for bail pending the determination of the applicant's appeal.

The inherent powers of this court in the conduct of criminal proceedings are saved in Section 17 (2) of **the Judicature Act (Cap 16)** which stipulates,

With regard to its own procedures and those of the magistrates courts, the High Court shall exercise its inherent powers-

(a) to prevent abuse of process of the court by curtailing delays in trials and delivery of judgment, including the power to limit and discontinue delayed prosecutions;

(b) to make orders for expeditious trials; and

(c) to ensure that substantive justice shall be administered without undue regard to technicalities.

This inroad to apply Section 17 (2) of **the Judicature Act** is opened, as stated before, by the broad jurisdiction granted by Article 139 (2) of the Constitution. Some of the

reasons that compel a court to exercise its inherent jurisdiction are cited in **Shabahuria Matia vs Uganda Criminal Revision Cause No. 05 Of 1999 (Masaka).** It was a matter where the high court invoked its inherent jurisdiction to order a stay of prosecution of the charge against the accused, dismiss the said charges and discharge the accused, after he had been kept on remand without committal for more than four years. The Court stated,

> It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the court's processes are used fairly by the state and citizen alike. And that due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of Law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice.

Indeed, the court should not be an instrument perpetuating inaction resulting from a gap in the law. That would result in oppression and injustice. Rather as repeatedly stated here the court should work towards resolving the legal impasse. The equitable use of the inherent jurisdiction enables the court to ensure that the equitable wrong here will not be left without a remedy.

The best definition of the Inherent Jurisdiction that suits the particular circumstances in this matter is,

> The inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." (Jacob, *The Inherent Jurisdiction of the Court*, (1970) 23 Current Legal Problems, 23) (see **Good African Foundation Ltd & Anor vs Agricultural Business Initiative Trust HCMA 1592 of 2021).**

The inherent powers of the court are invoked only in very rare and exceptional cases. They will be resorted to where there is no statutory law and yet a legal dispute between parties presents itself. In such situations the inherent powers of court are resorted to in order to fill whatever gap or lacuna that lack of statute or common law has created. By implication therefore, a court cannot invoke its inherent jurisdiction where there is specific legislation or law to redress the legal grievance.

In such circumstances, the court is always mindful not to exercise its discretion in a manner that would result in a miscarriage of justice or abuse of the court process. Therefore, even where inherent jurisdiction is exercised, the court applies its discretion judiciously based on sound legal principles.

In sum therefore, it is only the High Court, pursuant to the broad constitutional cloak provided by Article 139 (2) and Article 126 (2) (e) of **the Constitution**, and Sections 14 (1) and 17 (2) of **the Judicature Act,** which can utilize its inherent powers to determine this application for bail.

For the reasons cited in this part, this court will now examine the merits of the application for bail pending appeal.

Determination of the bail application

Bail encompasses the release from detention, by Court, of a person during trial, or during the pendency of an appeal against conviction. It involves taking a recognisance from the person, consisting of conditions binding the person to appear in court whenever required. It affords the person an opportunity to attend trial without being detained in prison. The effect of bail is therefore a temporary release from custody pending conclusion of the trial or appeal.

This instant matter is an application for bail pending appeal. The onus is on the applicant to satisfy the court why, in spite of being a convict in custody, he should be released on bail. As a convict, whatever factors are presented for the Court's consideration must be exceptional because the applicant has, at this stage, lost the presumption of innocence. Otherwise it would be against public policy to release such a convict as it is assumed that the court that convicted him acted judiciously when it sentenced the him to a prison term (see **Lamba vs R 1958 EA 337).**

The right to apply for bail is subject to the discretion of Court. Ordinarily judicial discretion is exercised within given parameters.

Judicial discretion is also defined in the 8th Edition of **Black's Law Dictionary** as the exercise of judgment based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right.

It was observed in the English case of **R vs Board of Education [1990] 2 KB 165** that,

> Judicial Discretion is a matter for Court to consider all that is before it and reach a decision without taking into account a reason which is not a legal one.

> The Court acts within the rules of reason, justice and the law especially the objects and limits intended by the particular legislation.

The court must therefore apply its judicial mind to determine what, in line with the law, would be fair in the circumstances. It will not do anything that would defeat the ends of justice, nor act capriciously, illogically or arbitrarily.

Needless to say each an application is considered on its own unique circumstances and merits.

The Supreme Court has also consistently reaffirmed what may constitute considerations by a court determining an application for bail pending appeal as stated in **Arvind Patel vs Uganda Supreme Court Criminal Application No. 001 of 2003** the Court held,

> ... considerations which should generally apply to an application for bail pending appeal ... may be summarized as follows:
>
> i. the character of the applicant;
>
> ii. whether he/she is a first offender or not;
>
> iii. whether the offence of which the applicant was convicted involved personal violence;
>
> iv. the appeal is not frivolous and has a reasonable possibility of success;
>
> v. the possibility of substantial delay in the determination of the appeal;
>
> vi. whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any).

The court added that it is not necessary that all these conditions should be present in every case. A combination of two or more criteria may be sufficient. Each case must be considered on its own facts and circumstances.

It would also be pertinent at this stage to refer to **The Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022** where Clause 19 practically reproduces the above decision as guidelines in cases of applications for bail pending appeal.

This court is mindful that all these guidelines are not set in stone. Each case shall be weighed on its unique circumstances.

I note, additionally, that it would serve no benefit to utilise the provisions of Section 15 of **the Trial On Indictments Act** which is cited by the applicant in his Notice of Motion. That is because that section relates to applications for bail in trials on indictment and sets out the conditions for consideration when an application for admission to bail before determination of the trial.

The paramount consideration in regard to any application for bail, is whether if released, the applicant will report back to court for the hearing of his matter. In **Nakiwuge Racheal Muleke v Uganda S.C. Criminal Reference No. 12 of 2020**, it was held that:

> The main criteria for granting bail pending appeal is that the Court must be satisfied that the applicant shall not abscond but will comply with the Bail conditions and will be available to attend hearing of the Appeal.

The applicant has stated that following his conviction for contempt of court he filed a memorandum of appeal. The applicant's memorandum challenges his conviction and sentence by the General Court Martial. The applicant asserts that his appeal enjoys a reasonable possibility of success. Indeed, both under the **bail guidelines**

(supra) and in **Arvind Patel** (supra) where an appeal enjoys a likelihood of success then that would be a factor in favour of the application.

The respondent invited this court to disregard any argument about the success of the appeal because, as argued earlier, this court had no jurisdiction to entertain this application.

The question of jurisdiction has been resolved and will not be revisited here.

Turning now to the likelihood of success, I have already observed that it would not otherwise be proper to make a finding about the probability of success of the appeal while resolving this application for bail. It is inappropriate and pre-empts the resolution of the appeal. That notwithstanding, the appeal's chances of success is an essential factor when determining whether or not to grant bail pending appeal. The only means a court can employ to assess the possibility of success of the appeal is by perusing the relevant record of proceedings, the judgment of the Court from which the appeal has emanated, and the memorandum of the appeal in question (see **Arvind Patel** [supra]).

It is therefore imperative that a perfunctory assessment of the merits of appeal is made.

The ruling of the GCM indicates that the Applicant was Counsel representing one Col (Rtd) Dr Kiiza Besigye in General Court Martial Case No. **UPDF/GCM/040/2024**. That he became confrontational and was warned of misconduct but did not take heed. Consequently, that the GCM found him in contempt of the court and sentenced him to 9 months in prison.

This account appears to be the only available record of the court proceedings that day. It is clear that the General Court Martial cited the applicant for contempt in the face of the court. It is a type of contempt of court that has been defined in essence as

conduct that denotes willful defiance of, or disrespect towards, the court or that willfully challenges or affronts the authority of the court or the supremacy of the law itself (see B J Cavanaugh, "Civil Liberties and the Criminal Contempt Power" [1976 – 1977] 19 *Criminal Law Quarterly. pg* 349, 350).

It is also what is described as direct contempt which the 9th Edition of **Black's Law Dictionary** defines as contempt committed in the immediate vicinity of a court; especially a contempt committed in a judge's presence. A direct contempt is usually immediately punishable when the transgression occurs.

As part of the definition for contempt, Black's Law dictionary cites the following example,

> Contempt is a disregard of, … a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.

The **UPDF Act** provides for contempt of court. Section 171 regulates civil and criminal contempt generally. However, Section 171 (2) speaks to direct contempt by persons before or in the presence of the court martial which would include advocates.

It states,

> Where an offence under this section is committed at or in relation to a court martial that court martial may, by an order signed by a member of that court, order that the offender shall undergo a term of imprisonment or detention for a period not exceeding thirty days.

This is the penal section that sanctions or punishes violations or offences committed in the face of the court martial. Such violations include contempt of court by an advocate, an offence created under Section 214 (9) of **the UPDF Act.** The section

defines contempt by an advocate, as any conduct of an advocate before a court martial, that would be contempt of court, if it took place before a civil court. From the facts given and the finding in the ruling of the General Court Martial dated 7th January 2025, the applicant was cited for misconduct during the proceedings and in the sight of the General Court Martial.

In light of Section 171 (2) of **the UPDF Act**, it may be argued that when the applicant was sentenced to nine (9) months in prison, he was given an illegal sentence, namely, one that exceeds the maximum prescribed by Section 171 (2) of the **UPDF Act**. In light of this interpretation of Sections 171 (2) and 214 (9) of **the UPDF Act,** the applicant's appeal may enjoy a reasonable possibility of success.

It is also the contention of the applicant that the appeal raises fundamental and substantial questions of law including the legal status of the General Court Martial with regard to civilians in light of the *Kagazigruka* decision. The respondent disputes this stating that the decision in *Kabaziguruka* was in respect of civilians detained under Section 119 (1) (g) and not advocates found in contempt of court. Whatever the case, it is a broader question, one apparently settled by the court extinguishing jurisdiction of the Courts Martial over civilians. This means that aside from the possibility of the appeal being successful, it is not frivolous.

The second ground argued is that there is a possibility of substantial delay in the determination of the appeal. This aspect has already been dealt with extensively in this ruling and pivots around the formal legal transfer of matters involving civilians from the courts martial to the civil courts. As observed earlier, this includes enactment of legislation providing for jurisdiction. This court has not been favoured with any information regarding what steps have or have not been taken on this aspect. It is the reason why the applicant's situation is described as a legal limbo. Additionally, it is pertinent that the applicant has already served out a third of the

sentence. In the event bail is denied, there is a distinct possibility that he could serve out his sentence before the formal transfer of his case from the court martial to the civilian court is concluded. This is a factor that counts in the applicant's favour.

The Supreme Court held in **Henry Bamutura SCCA No 19 of 2019** found that delay is assessed in light of whether there is a risk of the applicant serving a substantial part of the whole of his sentence before the appeal is heard. This was considered to be a factor that favoured the admission of an applicant to bail.

In **Hassan Kagende vs Uganda Court of Appeal Miscellaneous Application No 77 of 2019,**

> Some of the exceptional circumstances or unusual reasons that the Court considers in an application for bail pending appeal are: where an appeal raises an important point of law as to the legality of the conviction of the appellant; or where the sentence is manifestly contestable as to whether or not it is a sentence known to the law; or where the applicant is likely to serve the entire or a substantial part of the sentence before the appeal is determined; or where, on the face of the record, there is a likelihood of the success of the appeal.

The other factor raised is that the applicant is of good character. That he is a law abiding citizen, a person of high moral standing and that he has no history of criminal activity aside from this conviction.

The respondent notes that the very fact that the applicant was convicted and sentenced means he cannot be a person of good character. It is argued farther, that good character, in itself cannot be a ground for release because there is nothing exceptional or unusual about having a good character. The respondent relied on **John Muhanguzi Kashaka vs Uganda Supreme Court Miscellaneous Application No. 18 of 2019.**

Although it may be argued that good character points to a likelihood of obedience of court orders, contemptuous behaviour in itself is emblematic of a propensity to disobey. Farther still, this court will examine the submission on good character, together with submissions that the applicant is a first offender and that his conviction was for an offence that did not involve personal violence.

The learned Justice Eldard Mwangusya **Kyeyune Mitala Julius vs Uganda Supreme Court Miscellaneous Application No 9 of 2016** observed that,

> In the first place, I do not see the relevance of the character of the applicant, whether he is a first time offender or not and whether the offence for which he is convicted involved personal violence because if his appeal was to fail, he would still serve the sentences imposed …

This court notes that the observations by the supreme court properly capture the nature of bail pending appeal.

The above notwithstanding, the applicant has shown exceptional grounds in his application regarding the nature of his sentence and the danger of substantive delay to resolve his appeal.

I note that it was these two factors that compelled this court to invoke its inherent powers to examine the merits of this application for bail pending appeal.

As stated earlier, the paramount question in any application for bail, is a determination whether the applicant will abscond or return for trial in the event he is released on bail. The court considers several factors to verify this.

The first is whether an applicant has a fixed place of abode. This is essential in an application for bail. In my view, a fixed abode within the context of an application for bail signifies a dwelling place, residence or address, to which the applicant can be traced with certainty, in the event the court requires it. Whether he has such a

dwelling is a question of fact and the burden is on the applicant to produce evidence to prove it.

Ordinarily, the evidence relied on is the production of proof of residence using Local Council letters, national identity cards or land titles. The applicant stated that he has a fixed place of abode at Central Kiwatule Zone in Kiwatule ward which is located in Nakawa division, Kampala City. He has produced a letter from the Local Council authorities of the area who certify that he is indeed a resident of Central Zone in Kiwatule. The applicant's national identity card, also names this location as his residence. The respondent has not rebutted this assertion in any way.

This court therefore finds that the applicant has a fixed place of abode.

The other requirement is production of sound sureties. Sureties are deemed to be sound if it is established that they are capable of ensuring or guaranteeing the applicant's appearance in court whenever required. It is the capacity to execute this requirement which renders a surety substantial.

There are three persons produced as sureties. The first is Tumwebaze Sylvia, the applicant's wife; the second is Dr Busingye Kabumba, an advocate and lecturer of law at Makerere University. He is also the applicant's cousin; and lastly is Primah Kwagala, an advocate and friend of the applicant.

Clause 15 (1) of the **Bail Guidelines** (supra) lays out factors a court should take into account when determining suitability of sureties. It is this suitability that enables the court to determine whether the person named would be a substantial surety. They include: (a) the age of the surety; (b) work and residence address of the surety; (c) the character and antecedents of the surety; (d) relationship to the accused person (e) any other factor as the court may deem fit.

The respondent challenged the suitability of the sureties in that they are not substantial. That it was not shown that they have any level of control over the applicant to enable them compel or guarantee his appearance in court. That none of them has stated whether they are tenants or landlords in the places where they live.

The applicant's rejoinder is that these persons all enjoy a close personal relationship with him and are all in a position to compel him to attend court. That they all have the financial capacity to comply with bond terms and that they have presented their particulars and LC letters in proof that they have fixed places of abode.

Challenging the suitability of sureties should be based on factual grounds. For example, each surety has produced LC letters proving they each have a fixed place of abode. They can be traced to execute their bonds or explain the whereabouts of the applicant if required. This is not rebutted by the respondent.

Secondly they all enjoy a close personal relationship with the applicant. Two are lawyers who would have a deep appreciation of their duties as sureties. Their professional integrity is at stake if they do not perform this duty satisfactorily. The other is the applicant's wife. It is in her personal interest to ensure that the applicant attends court and resolves his legal challenges.

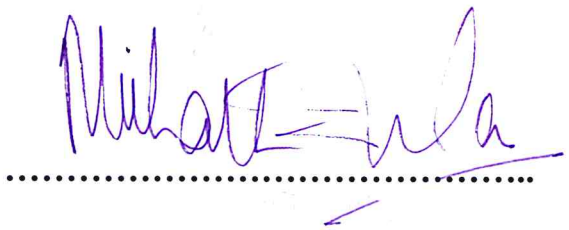
In my view all these sureties are substantial.

In the result, I find that the applicant, Kiiza Eron, qualifies for an admission to bail pending appeal on the following terms:

1. The applicant shall execute a cash bond of 20,000,000/- (twenty million shillings).
2. Each surety is bound in the sum of 50,000,000/- (fifty million shillings) not cash

3. It is directed that the applicant will report for the extension of his bail, to the Registrar of the Criminal Division of the High Court, on the first Monday of every month.
4. The applicant shall be required to deposit his passport with this court. In the event he requires it for travel, an application to that effect will be made before this court.

It is so ordered.



.....

Michael Elubu

Judge

04.04.2025