THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISC. CRIMINAL APPLICATION NO 38 OF 2017

(ARISING FROM COURT OF APPEAL CRIMINAL APPEAL NO 318 OF 2010)

AND

(ARISING FROM CRIMINAL COURT CASE NO 146 OF 2001 OF THE HIGH COURT OF UGANDA AT MBARARA)

JUMA MUWONGE}..... APPLICANT

VERSUS

UGANDA}..... RESPONDENT

"CORAM: HON. LADY JUSTICE HELLEN OBURA, HON. MR. JUSTICE STEPHEN MUSOTA, HON. MR. JUSTICE CHRITOPHER MADRAMA, JJA"

COURT RULING

Introduction and Background

The Applicant filed this application under the provisions of section 36 of the Criminal Procedure Code Act Cap 116, Rule 43 (2) of The Judicature (Court of Appeal) Rules and all enabling laws of Uganda, for orders firstly, that the Applicant be heard that the circumstances under which the order of placing him in custody pending Minister's order have since changed to warrant a reversal of such an order. Secondly, orders and directions should be issued to reverse and substitute the conviction of placing the Applicant under custody pending Minister's order.

The grounds in support of the application are contained in the Notice of Motion as follows:

1. The Applicant's fundamental right to apply to this honourable court before which the Justices of the Court of Appeal placed him under custody pending Minister's order on formal application that the circumstances under which the order was made have since changed to warrant reversal of such an order.

2. The Applicant is aware that he is in prison as a convict, placed in custody by the Justices of the Court of Appeal pending Minister's order by virtue of court order.

3. The Applicant was arrested on 28th day of August and on 22nd of December, 2003, a High Court Judge presided over the case in Mbarara and found him guilty of murder contrary to sections 188 and 189 of the Penal Code Act Cap 120 and was sentenced to death by hanging. On 23rd November, 2010 he appeared in the Court of Appeal Mbarara during the criminal court session in the Criminal Court Session No 318 of 2010 to have his appeal heard on 1st February, 2011 at Kampala Court of Appeal presided over by 3 Justices of the same court passed judgment and an order placing the Applicant under custody pending the Minister's order on medical grounds.

4. The Applicant aware that sometime back in the month of February 2011 through the Prisons administration he was referred for medical check-up according to the Court of Appeal order and the Senior Psychiatric Experts from Butabika Mental Hospital carried out an examination on the state of the Applicant's mental stage and a medical examination report is attached on the affidavit in support of the application and marked "...".

5. The Applicant further became aware that the prison administration had also been in position to recommend on the state of his mental health and character since 1999 to 2017 for the period of time they had been with him.

6. The Applicant believes that the issue of holding him a convict under custody pending Minister's order came up during his first appeal on the first day of February 2011 having been on the death row since 22nd November, 2003 which brings it to approximately 17 years and 7 months (up to 10th May 2018).

7. He further averred that it is in the interest of justice that the Court of Appeal grants the fundamental rights of the Applicant/convict who is placed in custody pending Minister's order or a chance to reverse or substitute the order having satisfied on formal application that the circumstances under which the order was made have since changed.

The application is supported by the affidavit of the Applicant which supplements the facts contained in the Notice of Motion and in brief he deposed that he is a male Ugandan aged 42 years and of sound mind. He was placed in custody pending Minister's order. Sometime in or around 1986 – 1999, before his arrest and subsequent incarceration, he was a motor car mechanic at the age of 22 years in Mbarara district. He was arrested around 28th August 1999 and charged with murder contrary to sections 188 and 189 of the Penal Code Act. The High Court in a criminal session found him guilty of the offence and convicted him of murder and he was sentenced to death by hanging on 22nd December, 2003. Sometime back on or around 23rd November, 2010, he had appeared before the Court of Appeal sitting at Mbarara for hearing his appeal. On 1st February, 2011 the Prisons administration produced him before the Court of Appeal Holden at Kampala and on 1st February, 2011 the Court of Appeal set aside the death sentence and substituted it with an order placing him in the custody pending Minister's order for medical check-up of his mental state. It was further established that at the time of the commission of the offence the Applicant had consumed marijuana and excessive alcohol. He believes that it is his duty to satisfy the Court which placed him in custody pending Minister's order, on formal application, that the circumstances under which the order was made have since changed. He deposed that it is approximately 7 years since 1st February 2010 when he was placed in custody pending Minister's order. The rest of the depositions are about his medical check-up at Butabika mental hospital which shows that he is mentally stable and normal and we need not consider that for purposes of this ruling.

This application first came up for hearing on 30th April 2018 when Counsel Wakabala Susan Sylvia appearing on State Brief represented the Applicant while Counsel Barbara Kawuma Principal State Attorney represented the Respondent. The application was adjourned to enable the Applicant's counsel avail relevant documents on the mental health status of the Applicant to the court. On 24th May 2018, being the next date the application was adjourned for hearing, the court could not proceed because the judgment placing the Applicant in custody pending Minister's orders was not on record and the matter was further adjourned to avail court decision. The application finally proceeded on the 24th of July 2018 in the absence of the Respondent's counsel with leave of Court and Counsel Wakabala Susan Sylvia was granted leave to address the Court on the application ex parte since that matter had been adjourned to that date in the presence of Counsel for the Respondent.

At the hearing, we were of the view that the application was filed in the wrong forum in the sense that the matter was supposed to be handled by the Minister who ought to be moved to perform his or her functions under section 48 of the TIA by a court exercising original jurisdiction if need be but we reserved a final and considered decision on the issue to address the matter exhaustively as it is of public concern. We note that inmates such as the Applicant who has waited for an uncommonly long period of time for Minister's orders seem to be groping in the dark for a proper remedy due to unconscionable delays hence the application filed in this court for reversal of the orders issued by this court. We also note that it may not be clear to the officials concerned what ought to be done in the circumstances and it was necessary for the court to examine the law before finally issuing a considered ruling on our conclusion that the matter ought to be resolved at another forum.

Decision of Court

We have duly considered the Applicant's application which is for orders firstly that the Applicant be heard for orders that the circumstances under which the order placing him in custody pending Minister's order have since changed to warrant a reversal of such an order. Secondly, for orders and directions to issue to reverse and substitute the conviction of placing him under custody pending Minister's order.

The order placing the Applicant pending Minister's order was issued by this court in the judgment on appeal from the judgment of the High Court which had convicted the Applicant of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced him to suffer death by hanging. This Court allowed the Applicant's appeal and quashed his conviction and set aside the sentence of the trial court. This Court further made a special finding of not guilty by reason of insanity in respect of the appellant under section 48 (1) of the Trial on Indictment Act. Secondly, this Court ordered that the Applicant should be kept in custody by Uganda Prison Authorities as a criminal lunatic in a prison facility of their choice. Thirdly, it was ordered that the case be reported to the Minister for his handling under section 48 of the Trial on Indictment Act.

Apparently since the order of this Court was issued on 1st February, 2010, no further action was taken to have the Applicant's circumstances and history considered by the Minister. In any case, we have no adequate information as to whether this Court even notified the Minister of its interim order placing the Applicant in the custody of the Prisons Authorities pending Minister's orders. We note that the applicant has been in

custody for a long time because he was found guilty after trial on 22nd December, 2003. According to paragraph 4 of the affidavit in support of the application, the applicant was arrested by police on the 28th of August 1999. He has therefore been in custody for a period of about 19 years.

We have carefully considered the provisions under which this Court placed the Applicant in custody pending Minister's orders namely, section 48 of the TIA which provides as follows:

> "48. Special finding of not guilty by reason of insanity.
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> (1) Where any act or omission is charged against any person as an offence, and it is given in evidence on the trial of that person for that offence that he or she was insane so as not to be responsible for his or her action at the time when the act was done or omission made, then if it appears to the High Court that that person did the act or made the omission charged but was insane as aforesaid at the time when he or she did the Act or made the omission, the court shall make a special finding to the effect that the accused is not guilty of the act or omission charged by reason of insanity.
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> (2) When a special finding is made under subsection (1), the court shall report the case for the order of the Minister, and shall meanwhile order the accused to be kept in custody as a criminal lunatic in such place and in such manner as the court shall direct.
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> (3) The Minister may order a person in respect of whom a special finding has been made to be confined in a mental hospital, prison or other suitable place of safe custody.
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> (4) The superintendent of a mental hospital, prison or other place which any criminal lunatic is detained by an order of the Minister under subsection (3) shall make a report to the Minister of the condition, history and circumstances of every such lunatic at the expiration of a period of three years from the date of the Minister's order and thereafter at the expiration of periods of two years from the date of the last report.
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> (5) On the consideration of any such report, the Minister may order that the criminal lunatic be discharged or otherwise dealt with.

(6) Notwithstanding subsections (4) and (5), the Commissioner of Prisons or the chief medical officer may, at any time after a criminal lunatic has been detained in any place by an order of the Minister, make a special report to the Minister on the condition, circumstances and history of any such criminal lunatic, and the Minister, on consideration of any such report, may order that the criminal lunatic be discharged or otherwise dealt with.

(7) The Minister may at any time order that a criminal lunatic be transferred from a mental hospital to a prison, or from a prison to a mental hospital, or from any place in which he or she is detained to either a prison or a mental hospital."

This Court having acquitted the appellant and made a special finding placing him under Ministers orders under the provisions quoted above has left the matter in the hands of the Minister and does not have power or jurisdiction to review the findings on appeal. This Court enjoys appellate jurisdiction and in the most can deal only with the order it issued for execution purposes. The applicant is not a convict but was acquitted of the offence of murder. It is our considered opinion that the problem faced by the Applicant of being kept in custody when there is an alleged finding by the designate medical officer that he is of sound mind, is a matter within the quasi judicial powers of the Minister with which the court should not interfere without any evidence of grounds for judicial review. There is even no evidence before this court as to whether the Minister is aware and took no action in the applicant's matter. The fact that no action has been taken is an administrative problem and particularly failure to implement the provisions of section 48 of the TIA. We have therefore deemed it necessary to give the detailed grounds of our decision that the application does not fall within our powers. The problem faced by the applicant was administrative inaction and this court is not the proper forum to address the grievances of the Applicant.

Where a special finding has been made of the accused not being guilty of the act or omission charged by reason of insanity under section 48 (1) and (2) of the Trial on Indictment Act, the trial court issues an interim order placing the applicant in custody pending Minister's orders. In this case the order was issued by this Court after reversing a conviction of the Applicant for the offence of murder and making a special finding of not guilty on account of insanity. Section 48 (2) of the Trial on Indictment Act, provides that the court shall report its special finding for the order of the Minister and shall meanwhile order the prison inmate concerned to be kept in custody as a criminal lunatic in such place and in such manner as the court shall direct. The provision explicitly puts

the burden on the court which issues the order to report its special finding for the order of the Minister. It follows that an order should have been extracted indicating that there is a special finding to the effect that the accused is not guilty of the act or omission charged by reason of insanity and that he be placed in custody pending Minister's order. Secondly, it is apparent that the court order placing the criminal lunatic in custody is an interim order and its issuance is mandatory because it follows a special finding under subsection 1 of section 48 of the Trial on Indictment Act. It is therefore incumbent upon Registrar of this Court whether moved by the Applicant's Counsel or not to draw up an order reflecting the court decision and bring it to the attention of the Minister in terms of section 48 (2) of the Trial on Indictment Act. The office of the Minister ought to be served with the order and in the Applicant's situation the order should be accompanied with an explanatory letter due to the extreme delay.

Thereafter, the duty of the Minister is stipulated by section 48 (3) of the Trial on Indictment Act. That subsection gives the Minister discretionary power to make an order in respect of whom a special finding has been made whether he or she should be confined in a mental hospital, prison or other suitable place of safe custody. In other words, it is the decision of the Minister by "Minister's Order" to specify whether the person should be confined in a mental hospital, prison or other suitable place of safe custody. There is no evidence before court whether these procedural steps have been taken in respect of the Applicant and the system of administration of justice failed him to the extent that he now purports that he has been medically examined and found to be of sound mind and the orders should be reversed in respect of the special finding. We find this very absurd for the reasons we give below.

After the Minister has pursuant to the interim order of the court placing the Applicant in a prison facility pending Minister's orders made his decision under subsection 3 of section 48 of the TIA, the Superintendent of the mental hospital, prison or other place of safe custody where the person is being kept is required to make a report to the Minister on the condition, history and circumstances of every such person after the expiration of three years from the date of the Minister's order and thereafter at expiration of two years from the date of the last report. Obviously the purpose of such a report is to keep the Minister informed about the circumstances of the prisoner to enable the Minister exercise his or her further powers whether to order the person to be discharged from safe custody or put in another facility. Secondly, it is obvious that the purpose of the enactment is to ensure that a mental lunatic who may be dangerous is not released and

becomes a potential danger to the public. The reports will ensure that by the time the person who has been found not guilty at the time of commission of the offence is released; he or she is no longer a danger to the public. The requirement to file the periodic reports with the Minister is contained in section 48 (4) of the TIA. If this is not done, and in fact if the Minister has not been engaged immediately after the court has made an interim order of confinement of such a person who has been found innocent of the commission of the offence, then grave injustice will occur or ensue if the person is subsequently found to be of sound mind but is now kept in custody as if he is a convict for a serious offence. The person has been found not guilty by reason of insanity and he or she is therefore not responsible for the commission of the offence. What is left is for the authorities to manage his mental state to establish whether he or she can be safely released back to society.

We have further considered the provisions of section 48 (5) of the TIA which provides that on the consideration of any such report, the Minister may order that the criminal lunatic be discharged or otherwise dealt with. For instance the person confined for his own good and that of the society can be dealt with through placing him under medical treatment. The provision gives the Minister discretionary powers and this Court having placed the Applicant only in the interim period awaiting Ministers orders, has exhausted its jurisdiction to deal with the issue. The interim order was made pending Minister's orders. If the prison authorities under whom the prisoner was placed do not take further action after the court has reported the order to the Minister, then the problem is not with the Minister, any Applicant or interested person can move the court having original jurisdiction by way of judicial review to compel the Minister to exercise his powers whether to have the person placed in a suitable place or in a place of safe custody or have him or her discharged. Such an application will be founded on any grounds for judicial review. The appellate court discharged its duties by placing the person with the prison authorities for confinement pending Minister's orders. However, we note that it is the primary duty of the court which issues the interim order of placement in custody pending Minister's order to immediately inform the Minister about it.

We also note that though the Minister responsible is not mentioned in the Trial on Indictment Act, the Interpretation Act Cap 3 defines the expression "Minister" under section 2 (pp) to mean Minister of the Government of Uganda. We note that this should be the Minister under whose mandate the Prisons Authorities fall and it is the Minister for Internal Affairs rather than of Justice and Constitutional Affairs. The confinement of

persons having mental disability by courts of law should be handled by internal affairs as they are concerned with peace and stability. We have not ruled out the fact that it may be any Minister under whose ministry the issue of the mental health of the prisoner may fall and the matter can be resolved administratively.

Notwithstanding the powers of the Minister, the Commissioner of Prisons or the Chief Medical Officer may at any time after a criminal lunatic has been detained in any place under order of the Minister, make a special report to the Minister about the conditions and circumstances and history of the criminal lunatic and the Minister may on consideration of the report order that the person be discharged or otherwise dealt with. The question to be answered in the Applicant's case is therefore whether the court pursuant to the special finding and issuance of the interim order placing the Applicant in confinement did notify the Minister of the order. Our finding as discussed above is that the Minister was not notified.

In the premises, we direct that the Registrar of this Court should rectify the problem by writing to the Minister notifying him or her of the orders issued by this court on 1st February 2010 placing the Applicant under the administrative supervision of the Minister. Secondly, the Commissioner of Prisons shall cause to be made a special report in terms of section 48 (5) of the TIA specifying the circumstances, conditions and history of the Applicant for consideration of the Minister. This is in light of our finding that there has been undue delay leading to a possible infringement of the fundamental rights and freedoms of the Applicant who could have been found to be of sound mind several years ago had the requisite procedural steps under the law been taken by the court and the prison authorities or the chief medical officer in charge of the place where the Applicant has been confined since the order of this Court in February 2010.

The above directions are issued pursuant to the inherent powers of this Court under rule 2 (2) of the Judicature (Court of Appeal) Rules which empowers this Court to make such orders as may be expedient in the interest of justice. Otherwise, the orders sought by the Applicant in this application that orders and directions are issued to reverse and substitute the conviction of placing the Applicant under safe custody pending Minister's order are incompetent and cannot be granted. The Applicant is not a convict and his conviction by the High Court was quashed though he has been confined in custody by an interim order of court pending Minister's order for a long time as if he were a convict serving a custodial sentence. If evidence emerges that the Applicant is indeed a fit and proper person, it would unveil grave injustice and breach of the fundamental rights of

the Applicant. Such a conclusion should be left to those charged with assessing the prisoner's condition and Minister's orders after consideration of the professional assessment of the Applicant. In the premises, we decline to issue the orders prayed for in the Applicant's Notice of Motion save for the directions we have deemed expedient and in the interest of justice to uphold the fundamental rights and freedoms of the Applicant to issue to the registrar of this court and to the Commissioner of Prisons.

Dated at Kampala this 3rd day of August 2018

Hellen Obura

Justice of Appeal

Stephen Musota

Justice of Appeal

Christopher Izama Madrama

Justice of Appeal