

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT-01-CR-SC-0261-2022**

UGANDA .....PROSECUTOR

5

**VERSUS**

KACHOPE DAVID.....ACCUSED

**BEFORE HON. DAVID S.L. MAKUMBI**

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**RULING:**

**BACKGROUND:**

This is a ruling made pursuant to Sections 17(2)(c) and 39(2) of the Judicature Act on the Court's own motion.

15 The Accused, Kachope David, is indicted for the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act. He is further indicted on two additional counts of Attempted Murder contrary to Section 204 of the Penal Code Act.

It is alleged that in the indictment that on the 27<sup>th</sup> of December 2021 at Kidukuru "A" Cell. Karambi Ward, North Division in Fort Portal Tourism City, the Accused unlawfully caused the death of Angel Faustine.

20 It is further alleged that on the 27<sup>th</sup> of December 2021 at Kidukuru "A" Cell. Karambi Ward, North Division in Fort Portal Tourism City, the Accused unlawfully attempted to cause the death of Nsereko Elijah and Namara Irene.

25 According to the Summary of the Case in the Indictment, the accused had a quarrel with a neighbour which resulted in him attacking his neighbour's child and two other children (of which Court later learnt that one was or both were his own children) with a panga which resulted in the death of one of the children.

On the 30<sup>th</sup> of November 2023, the Accused was produced in Court for plea.

The Indictment was read out and translated for the Accused in his language of preference Rutooro and upon being asked to plead to the first Count of Murder of  
30 Angel Faustine, the Accused stated that he understood the first count and went on to state that he did the act but he was mentally disturbed and that after the act he came to his senses when he found himself at the Police Station. A Plea of Not Guilty was subsequently entered by Court.

The Indictment for the second Count of Attempted Murder of Nsereko Elijah was  
35 read out and translated for the Accused in his language of preference as above and upon being asked to plead to the second Count the Accused stated that, "I do not know it but by the time I was mad. I was attempting to injure my own children."

A Plea of Not Guilty was also subsequently entered by Court for the second Count.

The Indictment for the third Count of Attempted Murder of Namara Irene was read  
40 out and translated for the Accused in Rutooro and upon being asked to plead to the second Count the Accused stated that the Count was true but that he was mad. A Plea of Not Guilty was then entered by Court for this Count as well.

The Court then went on to identify and appoint the Assessors in the case and the matter was adjourned to 7<sup>th</sup> December 2023 for hearing of the Prosecution case.

45 On 7<sup>th</sup> December 2023, when the matter came up commencement of the Prosecution case, Chief State Attorney Ms. Harriet Adubango informed the Court that the Defence wished to explore a plea bargain and accordingly sought an adjournment to that end. The Accused's assigned Counsel on State Brief Ms. Julian Nyaketcho confirmed this development to court but also brought it to the Court's attention that  
50 upon perusal of the police file and interaction with relatives of the Accused, she had learnt that the Accused has "on and off mental illness". She subsequently prayed for Court to ascertain his mental condition before any Plea Bargain Agreement could be entered.

Based on the information received from Counsel for the Accused and the manner in  
55 which the Accused had taken his plea, I deemed it prudent that the Accused undergo  
a mental examination before entering a Plea Bargain Agreement. The matter was  
then adjourned to 10<sup>th</sup> January 2024 pending receipt of a medical report about the  
Accused's mental state.

On 10<sup>th</sup> January 2024 the State tendered in a Medical Report communicating findings  
60 about the mental state of the Accused done at Fort Portal Regional Referral Hospital  
on 4<sup>th</sup> January 2024. The findings in the report authored by Ibanda Martin, a Principal  
Psychiatric Clinical Officer were as follows:

- 1) The Accused was a known mental patient previously treated for Psychiatric  
Disorder in 2019 under File Ref. No. 384/19 in the names Kachope David  
65 Gabriel.
- 2) According to the Hospital File Ref. No. 384/19, the Accused presented 3  
episodes of *"such acute mental conjusional [sic] (Delirious) whereby he ended  
in harming brothers and also destroying property. No H/O during abuse but  
genetic predisposition (two brothers have even suffered from mental disorder)  
70 reported."*
- 3) Current MSE (presumably Mental State Examination) was that the Accused  
was of clear consciousness and able to follow Court proceedings but it was  
also reported that *"such mental disorder is episodic which require regular  
reviews and medications in the hospital."*

75 From the findings communicated in the Medical Report, I observed that,

- 1) The Accused had previously been treated for a psychiatric disorder in 2019.
- 2) The Accused had a recorded history of mental breakdowns that resulted in  
violence and destruction of property.
- 3) The Accused, while appearing lucid and able to follow Court proceedings,  
80 could suffer unpredictable relapses as it had been pointed out in the report  
that his disorder was episodic.

Based on the above, I determined that due to the unpredictability of the Accused's mental state, it was not possible to determine whether the Accused would be lucid and mentally alert for the whole duration of the trial. To that extent, I invoked  
85 Section 45(3) of the Trial on Indictments Act to postpone further proceedings in the case. I further invoked Section 45(4) of the Trial on Indictments Act to order the Accused to continue on remand pending transmission of the Court Record to the Minister who would, in turn, take action in accordance with the provisions of Section 45(5) and 45(6) of the said Act. I gave a time limit of 60 days for the Prosecution to  
90 report to Court about the progress of the Minister in acting on the matter and I adjourned the matter accordingly.

However, prior to the expiry of the 60 days, it came to my attention that in the case of **Centre for Health, Human Rights and Development (CEHURD) and Another v Attorney General - Constitutional Court Petition No. 64 of 2011**, the Constitutional  
95 Court declared that Section 45(5) of the Trial on Indictments Act contravened Articles 20, 21(1), (2) and (3), 23, 24, 28 and 33 of the Constitution. The Constitutional Court subsequently declared in its disposition that Section 45(5) of the Trial on Indictments Act is unconstitutional in as far as it adjudges a person who is not proven guilty as a criminal by referring to him/her as a "criminal lunatic" contrary to Article 28(3)(a) of  
100 the Constitution.

In light of the decision of the Constitutional Court, I immediately suspended the transmission of the court record to the Minister under Section 45(4) of the Trial on Indictments Act. I did so because it was clear that any action taken by the Minister concerning the Accused in this matter would be unconstitutional.

105 I further observed that the Constitutional Court having declared Section 45(5) of the Trial on Indictments Act unconstitutional had also invoked Article 274 of the Constitution to modify Section 82(6) of the Trial on Indictments Act in order to bring it into conformity with the Constitution.

Section 82(6) of the Trial on Indictments Act provides that if the accused is acquitted,  
110 he or she shall be immediately discharged from custody unless he or she is acquitted  
by reason of insanity. In the **CEHURD** case cited above, Constitutional Court modified  
the said provision to read as follows.

(a) *The trial Court is to order for the detention of such a person for a specific  
period, for purposes of care and treatment of that person by a qualified  
115 psychiatrist or other qualified medical officer, in accordance with Article 23(1)  
of the Constitution.*

(b) *The period of detention is to be specified in the order of detention and is to be  
periodically reviewed by Court to ascertain the mental status of the detained  
person based on medical evidence from a psychiatrist or other qualified medical  
120 officer.*

(c) *When the Court is satisfied that such a detained person is mentally fit and is no  
longer a danger to himself/herself and/or to the community, it may order for  
his/her release.*

The modification above effectively cured the Constitutional challenge inherent in  
125 handling of an Accused acquitted because of insanity but remains in need of some  
form of mental treatment. However, in my observation, there still remained the  
question of how to handle an Accused person determined to be mentally  
incapacitated prior to taking plea or after taking plea but before starting their  
defence or even during the process of making their defence.

130 The declaration of Section 45(5) of the Trial on Indictments Act as unconstitutional  
the High Court was left without a remedial process for persons found to be mentally  
incapacitated either before or during the trial process. It is against this background  
that I deemed it necessary to invoke Section 17(2)(c) of the Judicature Act and fall  
back on the High Court's inherent power to seek substantive justice and avoid  
135 leaving the matter in limbo.

**ISSUE:**

The sole issue for the determination of this court in this matter is to determine what remedy there is for the Accused in this matter who had already made an equivocal plea of guilt (entered as Not Guilty) and was also subsequently medically determined to have a history of mental disorder for which continued trial would be legally risky.

**RESOLUTION:**

The rights of persons with mental disability or illness in Uganda are partly determined in accordance with International Instruments to wit the Universal Declaration of Human Rights; International Convention on Civil and Political Rights; United Nations Convention on the Rights of Persons with Disabilities; and, the African Charter on Human and People's Rights.

Furthermore, in the specific national context, these rights are further enshrined in the following laws:

- 1) Constitution of Uganda
- 2) Persons with Disability Act
- 3) Mental Health Act

In the **CEHURD** matter cited above, the Constitutional Court observed that under Article 35 of the Constitution, the State and society are obliged to take appropriate measures to realize the full mental and physical potential of persons living with disabilities; and that Section 32 of the Persons with Disability Act obliges all organs and agencies of government and all persons to respect, uphold and promote the constitutional rights and freedoms of persons with disabilities enshrined in Chapter Four of the Constitution. To that extent, the Constitutional Court held that in particular that Courts alongside other persons mentioned in Section 32 of the aforementioned Act were obliged under international law to protect and uphold the rights of persons with disabilities.

Identification and handling of persons with mental illness or disability in the context of criminal justice is a critical first step towards upholding and protecting the rights of

accused persons or suspects. In that regard, both the Mental Health Act and Persons  
165 with Disability Act make specific provision which Courts and other key stakeholders  
in the criminal justice system should bear in mind especially given the implications of  
the **CEHURD** decision on the application of Section 45 of the Trial on Indictments Act.

Section 2 of the Persons with Disability Act provides that,

170 *“Whenever a question arises whether a person has a disability or not or  
where court so requires, a medical doctor with the relevant expertise or an  
expert appointed by the Council, shall carry out an examination to confirm  
the disability.”*

Section 1(1) of the Persons with Disabilities Act provides that,

175 *“Disability means a substantial functional limitation of a person’s daily life  
activities caused by physical, mental or sensory impairment and  
environment barriers, resulting in limited participation on equal basis with  
others and includes an impairment specified in Schedule 3 to this Act.”.*

Item 5 of Schedule 3 of the aforementioned Act lists Mental Disability including  
psychiatric disability and learning disability.

180 Notwithstanding the aforementioned provisions of the Persons with Disability Act,  
there is also the Mental Health Act, which Act is specific to mental health. The Object  
of the Act is provided under Section 3(e) and one of the objects of the Act is to  
ensure the safety and protection of persons with mental illness and the protection of  
their rights and the safety and protection of people who come into contact with  
185 them.

Section 3(e) therefore establishes the Mental Health Act as the primary source of  
legislative direction and guidance when it comes to matters of criminal justice and  
mental health.

In the context of this matter Section 55 of the Mental Health Act provides that,

190           “(1) A determination of the mental health status of a person shall be carried out where it is required for proceedings before a court of law or for any other official purpose.

                  (2) A determination under subsection (1) shall only be carried out by a psychiatrist or where a psychiatrist is not available, be a senior  
195           mental health practitioner.”

Section 2 of the Mental Health Act defines “Mental Health Practitioner” to mean a psychiatrist, a registered psychiatry nurse, psychiatry clinical officer, a mental health social worker and a clinical psychologist.

From the above it is clear that the Persons with Disability Act restricts determination  
200 of mental disability to medical doctors but the Mental Health Act is more broad in the range of professionals who can make a determination of mental health status. In this regard the more appropriate legal application for purposes of ascertaining mental health status in criminal matters would be the Mental Health Act because in criminal matters it is not so much a disability that is sought to be established but  
205 rather the mental state in relation to the alleged crime. The establishment of a mental state under the Mental Health Act could form the basis for determination of whether or not the affected person is operating under a curable condition or one of a more permanent nature warranting lifelong special care. Conversely, the restriction of determination of mental disability under the Persons with Disability Act to medical  
210 doctors would prove problematic in criminal matters as Medical Doctors in the field of psychiatry may not be as easily accessible in matters of criminal justice which are often time-bound.

In the context of this matter the medical report concerning the Accused was prepared by a Principal Psychiatric Clinical Officer at Fort Portal Referral Hospital. It  
215 would be good practice though for persons who prepare such reports to routinely state in the body of the report the capacity in which they are making the report and include their relevant qualifications for purposes of ensuring that the report is easily



determined to meet the requirements of Section 55 of the Mental Health Act. It is also advisable that it is stated in the body of the report that it is done in accordance  
220 with Section 55 of the Mental Health Act for purposes.

However, even more importantly this Court notes that Counsel for the Accused discovered possible facts in the police file pointing towards the likelihood that whatever the Accused was indicted for was the result of mental health issues. In that regard, I find that there was either negligence or laxity on the part of the police in  
225 taking preliminary steps related to a suspect with what was likely to be a violent mental disposition. According to the medical report provided to Court, the Accused clearly had a history of violence linked to mental health issues which were also evident in members of the family.

To the extent of the information above, Section 25(2) of the Mental Health Act  
230 provides that,

*“Where a police officer who arrests a person for a criminal act of for causing public disorder has reasonable grounds to suspect that the person who is arrested has mental illness, the police officer shall within 24 hours of the arrest, take the person who is arrested to a health unit for  
235 assessment.”*

The circumstances of the arrest of the accused are such that it was extremely unlikely that the police would have failed on reasonable grounds to get initial information pointing toward mental issues in this matter. The aforementioned provision of the Mental Health Act makes it mandatory for the police upon  
240 reasonable suspicion of mental illness to immediately cause an assessment of an arrested suspect. A failure to do this not only violates the constitutional rights of the accused to a fair trial but is also ground for acquittal upon discovery by court.

In this particular case if it were not for the vigilance of Counsel for the Accused this critical issue may have gone unnoticed and the Accused would likely have been  
245 unfairly subjected to a plea-bargaining process for which he does not legally qualify.

However, given that the issue is now before this Court, it is my considered view that in the absence of an appropriate procedure spelt out under the Trial on Indictments Act, it is only just and proper that this Court adopt some form of procedure to resolve the situation currently affecting the Accused in this matter. The Medical  
250 Report tendered in Court concerning the Accused's mental state is in my considered view sufficient for determination of his Mental Health Status within the meaning of Section 55 of the Mental Health Act as it constitutes a report of the findings of a Principal Psychiatric Clinical Officer which designation is covered under Section 2 of the said Act.

255 The problem though is that the report stopped short of spelling out clearly what form of treatment the Accused required and whether the said treatment would enable him to effectively participate in his own trial and defend himself should he so choose.

To the extent of the allegations made in the indictment against the Accused and his  
260 medical history it is advisable that the Accused should be referred to a proper mental health unit for emergency admission and treatment in accordance with Section 22 of the Mental Health Act.

Section 22(1) of the Mental Health Act provides that,

265 *"A person qualifies for emergency admission and treatment where that person has mental illness and as a result of which her or she -*

*(a) Is likely to inflict serious harm on himself or herself or on another person; or*

*(b) Has behaviour which may lead to -*

*... (iv) damage to property."*

270 Section 22(3) of the Mental Health Act goes on to provide that,

*“A relative, concerned person or a police officer who has reasonable grounds to believe that a person has mental illness and requires immediate medical attention shall cause the person to be taken to a health unit or a mental health unit for emergency treatment.”*

275 Section 2 of the Mental Health Act defines "Concerned Person" as a person who, not being a relative of a person with mental illness, has reasonable and justifiable concern for the wellbeing of the person with mental illness.

**REMEDY:**

Section 39(2) of the Judicature Act provides that,

280 *“Where in any case no procedure is laid down for the High Court by any written law or by practice, the court may, in its discretion, adopt a procedure justifiable by the circumstances of the case.”*

To the extent of the provision above and in the absence of any procedure pertinent to the present situation this Court hereby guides as follows.

285 1) In this case given that the Accused is presently on remand, it follows that the Concerned Person in this matter should be the Officer in Charge (O/C) of the Prison where the accused is remanded, who on the basis of the medical report received and brought to his or her attention by Court will cause the Accused to be sent to Butabika National Referral Mental Hospital in accordance with  
290 Section 22 of the Mental Health Act.

2) The O/C of the Prison should also ideally notify the hospital authorities that the emergency admission is for purposes of further assessment and treatment and where necessary the Accused should continue under treatment as an  
295 Involuntary Patient for such duration as stipulated in the Act subject to review

and possible extension of the admission in accordance with the procedures stipulated in the Act due to the gravity of the allegations against the Accused and the need to protect both the Accused and members of the public. The final decision in this regard will rest with the relevant hospital authorities in accordance with the relevant provisions of the Mental Health Act.

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3) Upon the Accused successfully completing treatment, the Hospital should cause him to be returned to the custody of the O/C of the Prison who caused his admission along with a full report indicating whether the Accused is cured and/or capable of standing trial under medication or such conditions as the relevant medical practitioner deems fit.

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4) In the event that the Accused is found to be completely mentally incapable of standing trial then the same should be drawn to the attention of Court upon the Accused's return to remand so that the Court can proceed to make an appropriate decision on how to conclusively determine the matter.

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5) In the event of the Accused being deemed sufficiently capable of standing trial then the O/C of the Prison will inform Court accordingly through the Resident State Attorney and the Court shall then cause production of the Accused for resumption of trial in accordance with Section 47 of the Trial on Indictments Act.

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**ORDER:**

In light of the guidance above and in accordance with Section 17(2)(c) and 39(2) of the Judicature Act I accordingly order that the Accused is referred by the O/C of the Prison where he is remanded to Butabika National Referral Mental Hospital for emergency admission under Section 22 of the Mental Health Act.

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The order is to be implemented in accordance with the guidance of the Court outlined above subject to the relevant provisions of the Mental Health Act and any  
325 other relevant laws related to persons being held on remand.

The previous Orders of this Court in relation to Section 45(4) and (5) of the Trial on Indictments Act issued on 24<sup>th</sup> January 2024 are hereby vacated and accordingly substituted with the present Order.

However, the trial remains postponed in accordance with Section 45(3) of Trial on  
330 Indictments Act and the Accused shall continue to be on remand pending the execution of the Order of the Court concerning his treatment and further assessment.

Before I take leave of this matter, it bears noting that at the time of the decision of the Constitutional Court, the Mental Health Act had not yet been passed. As such any  
335 application of the modifications that the Constitutional Court made to Section 82(6) of the Trial on Indictments Act in the **CEHURD** case cited in this ruling needs to be done subject to the provisions of the Mental Health Act.

It is also recommended that the Director of Public Prosecutions require that any suspect in police custody reasonably believed to be suffering from some form of  
340 mental incapacity or illness undergoes an assessment by a mental health specialist and where necessary receive treatment in accordance with the relevant provisions of the Mental Health Act before being committed for trial. The production of a suspect known to be mentally handicapped or incapacitated is a violation of the right to a fair trial as such a person is deemed to be unable to effectively follow or participate in  
345 their own trial. The moment such a violation becomes apparent at trial then the Accused is automatically entitled to an acquittal under Section 11(2) of the Human Rights (Enforcement) Act.

This matter is accordingly adjourned until such time as the Accused has received  
350 proper treatment and a determination made by the relevant medical practitioner as  
to whether or not he is fit to continue with his trial.

**David S.L. Makumbi**

**JUDGE**

355 **28/03/24**