**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**HCT-01-CR-SC-0588 OF 2023**

**UGANDA================================================PROSECUTOR**

**VERSUS**

**N.E========================================================ACCUSED**

**BEFORE: JUSTICE DAVID S.L. MAKUMBI**

**RULING**

**BACKGROUND:**

The matter for the determination of this Court concerns N.E, a juvenile indicted before this Court for the offence of Aggravated Defilement contrary to Section 129(3) and 129(4)(a) of the Penal Code Act.

The juvenile in question was produced before the Court for plea taking on the 20th day of December 2023. However, prior to taking plea the Court observed that according to Police Form 24A which is the Medical Examination Report of the juvenile it was noted under Item 6 concerning mental status that,

*“N.E is mentally unstable, not oriented in speech, time and place; with impaired hearing and speech.”*

It was also noted in the same report under Item 11 for other relevant observations that,

*“N.E speaks uncoordinated words and needs psycho-social support from a social worker.”*

The report also disclosed his age as 16 and was prepared by one Nankunda Rose, a Nursing Officer with a Diploma in Nursing.

On the basis of the observations seen in the report this Court declined to allow N.E plead to the offence and instead ordered that the juvenile examined by a mental specialist by virtue of Section 45(1) of the Trial on Indictments Act.

The juvenile was subsequently referred to Fort Portal Regional Referral Hospital on 5th March 2024 and was examined by one Martin Ibanda, a Principal Psychiatric Clinical Officer (PPCO). A report was then prepared and sent to this Court on the same day. The conclusion of the PPCO was as follows.

*“ … N.E has a mental health problem called mild mental retardation with hearing impairment. Such a mental disorder tend (sic) to interfere with one’s cognition especially reasoning and judgment.”*

In light of the background above the following issues need to be resolved.

1. Whether in light of the findings of the PPCO N.E is capable of standing trial.
2. If the issue above is resolved in the negative then whether N.E’s Constitutional rights were violated and if so by whom.

**RESOLUTION OF ISSUES:**

1. **Whether N.E is capable of standing trial.**

In any criminal trial one of the key considerations for the determination of guilt of any person charged with an offence is the *mens rea.* In Elliot and Wood’s Cases and Materials on Criminal Law, 12th Edition at Page 72, *mens rea* is described as referring to the mental element necessary for the particular crime, and this mental element may be either the intention to the immediate act or bring about the consequence. *Mens rea* is further described more precisely to mean intention or recklessness as to the elements constituting the *actus reus*.

On the basis of the foregoing description the mental element of a person accused of a crime is central part of determining whether or not a person is guilty of a crime. Section 8(1) of the Penal Code Act embeds *mens rea* in our criminal law by providing that,

“*Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will or for an event which occurs by accident.”*

In the case of N.E the question of whether or not he is criminally responsible as indicted is determined by looking at whether or not he is capable of forming the mental element or *mens rea* for the offence. This can only happen if he meets the very basic criteria of Section 11 of the Penal Code Act which pertains to the presumption of sanity. It is provided thereunder that,

*“Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”*

In this case N.E was subjected to medical examination at the time of his arrest and it was clearly indicated in Police Form 24A that he was mentally unstable. This finding alone warranted further investigation as a bare minimum. The reason for this came out clearly from the inquiry initiated by this Court under Section 45(1) of the Trial on Indictments Act. The results of the inquiry revealed that putting N.E on trial would be an academic exercise at best or a miscarriage of justice at worst. The findings evident in Police Form 24A and the Court ordered medical examination effectively mean that N.E ‘s *mens rea* for the offence can no longer be presumed.

It is my conclusion therefore that on the basis of the available evidence N.E is incapable of standing trial.

1. **Whether N.E ‘s constitutional rights were violated and if so by whom:**

Article 28(1) of the Constitution stipulates that in the determination of criminal matters a person shall be entitled to a fair and expeditious public trial before an independent and impartial court.

The right to fair trial starts before the trial and includes the process via which a person arrested is treated prior to being brought before court. One of the requirements upon arrest of a suspect is to fill out Police Form 24A which constitutes Medical Examination of an arrested suspect. The medical examination serves to ascertain the medical condition of a suspect upon arrest. However, it is especially critical when it comes to the mental state as it is a key determinant of whether the suspect in question is capable of understanding and participating in their own trial.

In this instance the juvenile was simply remanded and brought before court without thorough medical examination despite a clear preliminary finding that he was not mentally stable. The abuse of his rights came into play the moment he was produced to take plea and he immediately expressed the desire to plead guilty. The fact that both the Prosecution and even his own lawyer on state brief allowed the matter to reach that point was an egregious oversight which if it had gone unnoticed by this Court would have resulted in an illegal conviction.

The preceding facts are in my view a violation of the juvenile’s right to a fair trial contrary to Article 28(1) of the Constitution. No person whether adult or juvenile should ever be produced in court when there is preliminary evidence that they may not be mentally capable of participation in their own trial. A fair trial presumes that the person on trial is mentally capable of following the proceedings and willfully accepting responsibility or putting up a defence if they should so choose.

In this matter the juvenile N.E was medically examined for purposes of Police Form 24A on 30th August 2023 and then the record shows that he was produced in the lower Court and committed to the High Court on 12th December 2023. At point of committal it is indicated on the record that the indictment and summary of the charges were read out to the juvenile in Rukiga. This begs the question as to why trouble was taken to ensure that the juvenile heard and understood the charges and yet Police Form 24A which was part of the committal papers was showing that he may not have the mental capacity to even understand the indictment when it was being read out at the committal hearing.

The committal hearing as a prelude to trial before the High Court should never be treated as an academic exercise. Due care must always be taken to ensure that whatever matter is being committed for trial to the High Court meets all the expected legal standards and more so with regard to the non-derogable rights of the Accused.

This is not to say that there can be no situations where unforeseen issues come up during trial in the High Court. This is why provisions like Section 45 of the Trial on Indictments Act exist. However, where at the committal stage the committal papers highlight an issue as serious as mental capacity, the lower court is duty bound to inquire into the matter and cause a thorough medical examination and not simply rubber-stamp and pass along the matter to the High Court. The issue of the duty of the lower Courts in committal proceedings was ably expounded upon by my Learned Sister the Honourable Lady Justice Margaret Mutonyi in the case of **Uganda v S.F (The Juvenile) – HCT-00-CR-JSC-0270-2021** where she held that,

*“The function of Magistrates who are the very first persons before whom suspects appear in our Courts of Judicature whether they are charged with minor or capital cases is more than acting as mere arbiter or umpires in a game where they have to ensure that no side, that is the prosecution or defence, commits fouls. They must be in direct control and direction of the trial while applying recognized rules and procedures and ensure that justice is not only done, but it is manifestly seen to be done.”*

Going by the reasoning of my Learned Sister above, I cannot see how the committal of N.E could have met the basic requirement of control and direction of the proceedings when N.E was committed for trial with so glaring a concern about his mental capacity.

With regard to the above, it is also the duty of the State Prosecutor not to simply produce a suspect for committal or commencement of trial without due regard for certain basics like mental capacity of the suspect. Article 120(5) of the Constitution requires the Director of Public Prosecutions to have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process in the exercise of his or her powers. The fact that the State sanctioned the committal and prosecution of N.E despite clear evidence on record that his mental capacity was in doubt could not by any measure be deemed adherence to Articles 28 and 120(5) of the Constitution.

I also note that in as much as Section 4(1)(a) of the Police Act stipulates the protection of the rights of the individual as one of the functions of the Police, the Police also shares the blame in this matter because this whole issue started with the Police requesting that the juvenile be subjected to medical examination. I reiterate what I have already said about the committal process and say that even for the Police medical examination is not an academic exercise. A competent police investigator should always take active interest in the findings of any medical examination whether that of a suspect or a victim of crime as the failure to do so may have adverse implications in terms of the non-derogable right to a fair and expeditious trial. It should be an automatic requirement for any police investigator to cause the appropriate steps to be taken once any issue presents itself at the stage of a medical examination. These steps may include requiring further specialized examination for matters such as mental capacity. This ultimately helps to save time when the matter comes to trial as the Court need not call for medical examinations that could have been done before trial.

Aside from the right to fair trial which is guaranteed to all, it should also be noted that children and the disabled fall in the category of marginalized persons in society entitled to special protection by virtue of Articles 32, 34 and 35 of the Constitution. By virtue of both his age and his apparent mental condition, the juvenile N.E was entitled to not just equal treatment but also special consideration in line with the laws governing both categories of persons. These additional considerations become irrelevant if the steps that identify them as deserving of special consideration are not respected or taken seriously.

For the avoidance of doubt, Article 32(1) of the Constitution states,

*“Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.”*

Article 34(7) of the Constitution states,

*“The law shall accord special protection to orphans and other vulnerable children.”*

Article 35(1) of the Constitution states,

*“Persons with disabilities have a right to respect and human dignity, and the State and society shall take appropriate measures to ensure they realize their full mental and physical potential.”*

N.E being a juvenile of the apparent age of 16 at the time he was committed for trial was therefore deserving of special protection and assistance in terms of his age and mental status which protection was woefully overlooked at all stages until his production before this court.

I have had the benefit of hearing also from Ms. Jamie Kakunguru the Probation and Social Welfare Officer in this matter and by her account, the juvenile has indeed had a history of failing to meet development milestones. He dropped out of Primary Four at the age of 14 having failed to keep up with the academic requirements and his mother had been advised to put him into vocational training. This serves to confirm the medical findings that he is in fact living with a form of mental handicap.

It is therefore my finding in this matter that the Uganda Police Force, the Office of the Director of Public Prosecutions and the Chief Magistrate Court were all complicit by way of omission in their respective functions in this matter. These omissions amounted violation of N.E s right to a fair trial contrary to Article 28 of the Constitution and Section 11(2)(a) of the Human Rights (Enforcement) Act.

Section 11(2)(a) of the Human Rights (Enforcement) Act provides that,

*“Whenever, in any criminal proceeding it appears to the judge or magistrate presiding over a trial that any of the accused’s non-derogable rights and freedoms have been infringed upon, the judge or magistrate presiding over the trial shall declare the trial a nullity and acquit the accused person.”*

**ORDERS:**

To the extent that the commencement of this trial constituted a violation of N.E ‘s non-derogable right to a fair trial contrary to Article 28 of the Constitution, I hereby declare the trial a nullity in accordance with Section 11(2)(a) of the Human Rights (Enforcement) Act and acquit N.E.

I do further order as follows:

1. In light of his apparent mental disability he be released into the custody of a responsible family member or members.
2. The responsible family member(s) present themselves to the Registrar and sign a formal commitment to ensure that N.E is provided with the appropriate psycho-social care as is necessary for his well-being and for the protection of other members of society around him.
3. The family members should also undertake to have N.E produced for whatever treatment or psycho-social support as may be required until such time as it is determined by the appropriate psycho-social professional that he is able to take responsibility for his own wellbeing.

So ordered.

Before I take leave of this matter, I also note from the juvenile’s court record that there is no indication on record that the police ever involved a Probation and Social Welfare Officer even after the findings made in Police Form 24A. This to me suggests possible laxity or even complete disregard of procedures related to the arrest and charging of children under Section 89 of the Children Act. The Director of Public Prosecutions should therefore make every effort to ensure that there is sufficient evidence of compliance with Section 89 on the record of any juvenile charged with a criminal offence. This should particularly be the case with regard to the requirement for the presence of a parent or Probation and Social Welfare Officer during the processing of juvenile suspects in police custody. There should also be sufficient time for disclosure to Counsels on State brief in order to allow adequate preparation to defend juveniles.

**David S.L. Makumbi**

**JUDGE**

**21/03/24**