

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT FORT PORTAL  
HCT-01-CR-SC-0588 OF 2023**

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

**VERSUS**

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

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

**RULING**

**BACKGROUND:**

15 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 20<sup>th</sup> day of December 2023. However, prior to taking plea the Court observed that  
20 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  
25 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.

30 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 5<sup>th</sup> March 2024 and was examined by one Martin Ibanda, a Principal  
35 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.”*

40 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:**

45 **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, 12<sup>th</sup> Edition at Page 72, *mens rea* is described as referring to the mental element necessary for the

50 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  
55 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*  
60 *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  
65 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  
70 *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

75 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  
80 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.

**2) Whether N.E 's constitutional rights were violated and if so by whom:**

85 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  
90 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  
95 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

100 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  
105 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  
110 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 30<sup>th</sup> August 2023 and then the record shows that he  
was produced in the lower Court and committed to the High Court on 12<sup>th</sup>  
December 2023. At point of committal it is indicated on the record that the  
115 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  
120 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

125 Court meets all the expected legal standards and more so with regard to  
the non-derogable rights of the Accused.

130 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**  
135 **Juvenile) - HCT-00-CR-JSC-0270-2021** where she held that,

140 *“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.”*

145 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.

150 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  
155 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  
160 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  
165 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  
170 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

175 need not call for medical examinations that could have been done before trial.

180 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.

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

190 *“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,

195 *“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.”*

200 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.

205 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.

210 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.

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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  
225 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:

- 230 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.
- 235 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.

240 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  
245 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  
250 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**

255 **JUDGE**

**21/03/24**