

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CV-MC-0011 OF 2015

BUSHOBOROZI ERIC.....APPLICANT

VS.

UGANDA.....RESPONDENT

BEFORE HIS LORDSHIP HON. JUSTICE BATEMA N.D.A, JUDGE

RULING

Background and Application

This is an application brought under Section 33 and 39 of the Judicature Act and Article 139 (1) of the Constitution of the Republic of Uganda. The Applicant, Bushoborozi Eric, was first detained at Katojo Government Prison, Fort Portal in 2002 for the murder of his child whose head he cut off from the neck claiming that he was killing a snake. He was tried in the High Court before Justice Rugadya Atwooki. Court found that he was insane and therefore returned a special finding of Not guilty by virtue of section 48 (1) of the Trial on Indictment Act (T.I.A). He was then remanded on December 1, 2006 pending the minister's orders as to where should be taken for mental treatment or otherwise be dealt with.

It was submitted by Senior Counsel Cosma Kateeba for the applicant that since December 2006, the minister has never made any orders in respect of the applicant. That the name of the applicant with others is submitted to the Minister every year but he has taken no action. Counsel made reference to a letter (Annexure B2) from the Commissioner General of Prisons dated 17th August, 2012 which shows that efforts are made regularly submitting the names of all inmates remanded pending minister's orders.

Counsel also referred to a letter he wrote to the Chief Registrar on 17th June, 2014 bringing the applicant's case to his attention. He got no remedy. Counsel further submitted that it has become routine for the prison authorities to bring to the attention of every Chief Justice, Principal Judge and resident Judge the many cases pending the Minister's orders including the instant case. He noted that all the judicial officers have always promised to handle the matter but their promises have turned out to be empty promises.

The special case for this application is that much as he was later treated and became normal, having gained all mental stability, he cannot be released by the prison authorities without a Minister's order.

Counsel submitted that there is no specific provision in any law or procedure to apply for the release of prisoners pending the Minister's order. That when the Minister fails to issue his orders the prison remains stuck with the prisoner and the prisoner cannot lawfully regain his freedom. That is why he moved this court under Article 139 of the Constitution and the general provisions under S. 33 and S. 39 of the Judicature Act.

Mr. Wasswa Adam, the Senior State Attorney, conceded that it was a complex case without an express procedure or solution. He admitted the fact that he had filed no affidavit in reply

but prayed that he be granted audience due to the importance of the matter. Court granted him that prayer.

Mr. Wasswa Adam submitted that much as the prisoner had been on remand since his arrest in 2002, court cannot release such a dangerous mental case to the unsuspecting public. He advised that the best procedure is for the applicant to apply for orders of Mandamus to force the minister to make the orders. He further submitted that if the applicant is released court will have set a bad precedent where ministers and public officers who disobey court orders are not forced to obey and will continue to disobey with impunity.

In final reply Senior Counsel Kateeba submitted that his client is no longer a mental case or a danger to society. He relied on the letter from the In-Charge Katojo Prison (Annexure B1) showing that his client has been in a stable mental state off the treatment since 2012. Counsel said that there is no medical evidence adduced by the state to rebut this report.

Senior Counsel Kateeba further submitted that an applicant who comes to court is like a mendicant who has come to the temple of justice. He is entitled to a just remedy and cannot go away empty handed. That this court has got unlimited inherent powers to grant him a remedy even if he has not applied for orders of mandamus. He prayed that this matter be treated as a special case to grant the applicant the freedom he is entitled to.

Senior Counsel Kateeba made very little reference to the affidavit of the applicant made in support of the application. But it is on record and it stands uncontested. The applicant swears that he committed the murder when he was insane. That he has been on remand since July 2002. He was tried and found not guilty by reason of his insanity. That since his acquittal in

December 2006, he has been on remand at Katojo prison pending the minister's order. That he underwent mental treatment and has been declared mentally stable by the relevant doctors. He attached a report of his stable mental status to his affidavit.

The Old Law

This case demonstrates the ills in our criminal Justice system which we must work so hard to eliminate. It also points at the weakness of the law giving politicians (ministers) judicial powers without a procedure of monitoring and evaluating execution of their orders. Subsection (3) of Section 48 of the T.I.A gives such judicial powers to the Minister to determine whether an insane prisoner may be confined in a mental hospital, prison or other suitable place of custody or be discharged.

Subsection (4) of Section 48 provides that the superintendent of a mental hospital, prison or other place in which any criminal lunatic is detained by 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 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.

It was conceded by the state that in the instant case and many other cases the prison authorities have been making regular reports to the Minister but he has made no orders to either discharge or otherwise deal with the criminal lunatics. The court is being asked to give justice to such criminal lunatics and in this particular case to give freedom to a former lunatic who has been treated and declared mentally stable. This is a special case where upon receiving the report that the prisoner is no longer a threat or danger to the general public, the Minister should have ordered that he be discharged from custody forthwith.

Judicial Activism

It is true that no procedure is provided for returning the prisoner to court for appropriate orders where the Minister has failed or ignored to issue the necessary orders. But Section 39 of the Judicature Act deals with the jurisdiction of the High Court in the absence of procedures.

Section 39 (2) provides;

“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.”

The learned State Attorney submitted that the best option should have been to sue and apply for orders of Mandamus to force the Minister to make the appropriate orders. No. I do not agree. Suing the Attorney General for orders of Mandamus will unnecessarily increase litigation costs when the court can actually still act on the same criminal case file. The orders sought are not civil orders. This is a criminal matter whose file has never been closed. Whatever orders are to be given, after the trial of a prisoner, must be judicial orders relating to the execution of the treatment, continued detention of the criminal lunatic or discharge of that prisoner. The question is whether the minister is the most proper person to issue such judicial orders.

Judicial power belongs to the people of Uganda and the people have, through the constitution, vested their judicial power with the Courts of law and not the minister. Article 126 of the Constitution of the Republic of Uganda reads in part:

“(1) Judicial power is derived from the people and shall be exercised by the courts established under the constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people”

Read together with Article 274 clause (1), this law requiring the Minister to exercise judicial power to determine the fate of a prisoner in criminal proceedings would be inappropriate or outdated. Article 274 (1) provides;

“ Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.”

The law on Minister’s orders under S. 48 of the Trial on Indictment Act is such a law that should be construed with modifications, adaptations, qualifications and exceptions to bring it in conformity with the constitutional provisions on judicial powers and the right to a fair and speedy trial before an independent and impartial court established by law. (Refer to article 28 of the Constitution). This is a case which calls for judicial activism on the part of judicial officers to breathe life into the law in articles 126, 128 and 274 of our Constitution. The Constitution allows our courts to be innovative and introduce changes that will give the law the most correct interpretation and effect that serves the ends of substantive justice. Our hands are not tied by the existing law. I want to borrow the words of Lord Denning in **PARKER vs. PARKER** [1954] ALL E.R. 22 and say; what is the argument on the other

side? Only this, that no other case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both. Thus the winds of change are upon us. We have a duty to give the law a persuasive and liberal legal interpretation.

Delayed Justice

In the case of **Uganda v. Tesimana Rosemary**, Criminal Revision Cause No. 0013 of 1999 at Masaka, Justice Egonda–Ntende, as he then was, handled an almost similar case. He stopped the prosecution and dismissed the charges against an accused who had been kept on remand for 9 years because she was mentally ill at the time. He ruled that where there is uncertainty of the law in this area, the state would have sought guidance from the Director of Public Prosecution or from the Courts. He concluded that failure to prosecute on the part of the state Attorney within a period of three and half years after committal of the accused was gross inaction and oppressive conduct violating the human rights of the accused.

In **Uganda v. Shabahuria Matia**, Criminal Revision No. 05 of 1999 at Masaka, the same Justice Engonda Ntende had ruled that the High Court had inherent powers to prevent abuse of the process of the court by curtailing delays as may be necessary for achieving the ends of Justice. I agree. Under International law, including the UN principles on the protection of persons with mental illness, such individuals as the applicant, are legally entitled to an impartial and expeditious resolution of their cases and appropriate psychological assistance. Dumping them in prison for years without resolution of their cases is cruel, inhuman and degrading treatment contrary to article 24 of our Constitution.

It is unjustified for the Minister to fail to issue a discharge order for a prisoner who was acquitted of charges of Murder by reason of his or her insanity and more so where, after treatment, he is declared to be no longer insane.

The main purpose for the Minister's orders would be for ensuring proper medical and other treatment of the criminal lunatic. A Judge of the High Court can ably and legally exercise inherent powers of the court to order for the proper medical and other treatment of the criminal lunatic. The High court, instead of the Minister, can receive and act upon periodic reports from the prison or mental hospital keeping and treating the prisoner and act upon them. The provisions of the law that gave the Minister such powers can safely and constitutionally be construed to be the powers of court under articles 126 and 274 of the Constitution.

I am of the strong belief that the trial court retains the power to issue special orders for the confinement, discharge, treatment or otherwise deal with the prisoner that is insane or has ceased to be insane. That criminal file remains open pending the Judge's special orders. It is not done with until all is done with the prisoner.

Any court waiting for the minister's orders is giving away the independence of the Judiciary and is in one way or another accepting to be ordered around by the Minister who, as experience has shown, is too busy to issue the orders. Courts should not allow any law or practice that ousts the jurisdiction of court and hold the courts at ransom in judicial matters. I stand to be corrected.

I would recommend for the adoption of the following procedure:

- a) Where the trial court makes a special finding that the criminal lunatic is not guilty by reason of being insane, the judge must make special orders as to the discharge or continued incarceration of the prisoner in an appropriate place.
- b) The trial court must order, in line with Subsection (4) of Section 48 of the T.I.A that the superintendent of the mental hospital, prison or other place detaining the prisoner makes periodic reports to the court which may issue appropriate special orders for the discharge of the Criminal lunatic or otherwise deal with him or her.
- c) The Registrar of the Court shall periodically, and in any case not later than three years from the date of the last court order or report from the institution keeping the prisoner, make a production warrant for the prisoner and present the case file before the High Court or any other Court of competent jurisdiction for appropriate special orders.
- d) The Registrar may appoint Counsel on State briefs to assist court in revisiting the cases pending the judge's special orders.

The need for law reform in the law relating to criminal lunatics remanded pending the Minister's orders has been made by so many Judges in their reports on Criminal Sessions and decisions. We need not lament more than that. The Deputy Registrar sitting at Fort Portal is hereby directed to serve a copy of my ruling to the Rules Committee and the Principal Judge with a view of prompting the development of some rules and or Practice Directions along what I have recommended in this ruling.

The applicant has been kept on remand for an unjustified period of 14 years in clear violation of his human rights and should be set free forthwith unconditionally.

The application is granted setting free the prisoner.

Hon. Justice Batema N.D.A

Judge

10/07/2015

Other orders

The Deputy Registrar of the High Court at Fort Portal is ordered to liase with the Officers in Charge of the various prisons in this circuit to resurrect all case files pending the Minister's orders and present them before me or any other Court of competent Jurisdiction for discharge or other appropriate orders.

Hon. Justice Batema N.D.A

Judge

10/07/2015