THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT NEBBI

MISCELLANEOUS CRIMINAL APPLICATION No. 0009 OF 2017

(Arising from H.C. Cr. Case. No. 0063 of 2010)

OMAKA GEOFREY …… APPLICANT

VERSUS

UGANDA ……..…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

This is an application brought under Article 139 (1) if *The Constitution of the Republic of Uganda, 1995,* Section 33 and 39 of *The Judicature Act* and Regulation 2 of *The Judicature (Criminal Procedure) (Applications) Rules*. The Applicant was on 20th August, 2009 arrested for aggravated defilement, charged and remanded in Paidha Prison until 23rd September when he was committed to the High Court for trial. During his trial, the court having reason to believe that the applicant was of unsound mind, directed that he be subjected to a psychiatric examination. On 21st October, 2011 he was taken for medical examination at the Arua Regional Referral Hospital where it was established that he was a person of unsound mind. Consequently, the trial Judge on 2nd November, 2011made a finding that the applicant was incapable of making his defence and directed that a report the case be made for the order of the Minister, and meanwhile the accused be kept in custody as a criminal lunatic in Arua Prison, within the terms of section 45 (4) of *The Trial on Indictments Act*. To-date the Minister is yet to make the requisite order despite the fact that by a psychiatric review of the applicant done on 13th July, 2017, it was established that he had regained his sanity.

It was submitted by counsel for the applicant Mr. Ronald Onencan that the gist of the application is that the applicant has over-stayed in prison under an order of detention made in 2011 awaiting an order of the Minister. Since then no further action has been taken despite the fact that he was committed to the High court in 2009 and has been on remand since then. He prayed court to

invoke its inherent jurisdiction and find that section 45 of *The Trial on Indictments Act* is no longer good law and is an injustice to the applicant. He cited the decision of Justice Batema in *Bushoborozi Eric v. Uganda, H. C. Misc. Criminal Application No. 011 of 2015* at Fort Portal where he held that vesting power of justice in Ministers is not a good law. It is courts that are supposed to exercise such powers as are given to them by *The Constitution*. He submitted that the facts of the case were similar to the one at hand. In that case the applicant had stayed in prison for over 15 years after a special finding. The court released the applicant and ordered that all prisoners under that jurisdiction pending an order of the Minister should be brought before court for release.

The applicant has been in custody for 8 years and medical evidence dated 13th July, 2017 upon a request by the court to ascertain his mental status. He was found to be of normal mental capacity. The court then has jurisdiction to deal with the applicant who is now mentally sound. The court has power to release him or set him for full hearing. The over-stay in prison is no longer justifiable. The *Constitution* provides for expeditious hearing. In *Shabahuria Matia v. Uganda, Criminal Revisional Cause No. MSK 0005 of 1999,* Justice Egonda Ntende ruled that the High Court had inherent powers to prevent abuse of process. The position is that under section 12 of *The Penal Code Act* an insane person is not criminally responsible. Insanity was established in 2011 and the Court used a procedure which is no longer good law to retain the applicant in prison. Nine years is enough suffering and he prayed that the applicant be released because the offence was committed while the applicant was labouring under insanity and it was established as a fact.

In response, the learned Senior Resident State Attorney Mr. Muzige Amuza submitted that the accused in this case was never remanded as a lunatic but as a person charged of aggravated defilement. At the time of being charged he had been medically examined on P.F 24. As regards the decision of the High Court cited by counsel for the applicant, the court did not have the power to nullify that section of *The Trial on Indictments Act*. As regards the Constitutional Court decision cited by counsel for the applicant, even if the provision is contrary to the Constitution, a court decision does not amend the provisions of the Act. The Court pronounced itself but the Act has never been amended. Power to amend an Act lies solely with Parliament.

He submitted further that although the order by the Minister has not been made to-date, but the Judge's Order is subject to the mandatory approval of the Minister. Courts cannot work in isolation of the Executive and the Legislature. Not until the Minister approves the order can it be valid. The allegation that the accused is insane only came up at the time of trial. Now he claims to be normal, and he can stand the trial. In his own affidavit he says he is normal. He therefore be tried and his application dismissed. In reply, counsel for the applicant stated that the High Court decision is persuasive but that of the Constitutional court is binding.

This application arises from the fact that whereas section 45 (5) of *The Trial on Indictments Act*, empowers the Minister, upon consideration of the record, by warrant under his or her hand directed to the court, order that the accused be confined as a criminal lunatic in a mental hospital or other suitable place of custody, no order of this nature has been made to-date. As a result, unless the court takes action, the applicant is doomed to remain in the prison for an indefinite period of time, hence this application.

Section 45 (1) of *The Trial on Indictments Act*, empowers the High Court when it has reason to believe that the accused is of unsound mind and consequently incapable of making his or her defence, to inquire into the fact of such unsoundness. When the court is of the opinion that the accused person is of unsound mind and consequently incapable of making his or her defence, it is required to postpone further proceedings in the case. The Minister may then order his or her detention until the Minister makes a further order in the matter or until the court orders him or her to be brought before it again. Involvement of the Minister in that process was designed for the determination of the question whether the person remains unfit and is considered a danger to the public such that the Minister decides that they require ongoing detention. If such person recovers to the point where the Minister is satisfied, after consultation with the responsible medical officer, that he can properly be tried, remit him either to the court of trial or to prison awaiting trial.

That power of the Minister was questioned in *Bushoborozi Eric v. Uganda, H. C. Misc. Criminal Application No. 011 of 2015*, where the High Court sitting at Fort Portal noted with concern provisions in the law that confer upon politicians (ministers) judicial powers without a procedure

of monitoring and evaluating execution of their orders, to determine whether an insane prisoner may be confined in a mental hospital, prison or other suitable place of custody or be discharged. The court in that application noted 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. Invoking section 39 of *The Judicature Act* the Court was of the opinion that *The Constitution* allows 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. The court found it unjustifiable 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 court then decided that 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.

That decision is distinguishable from the current case. In that case, the criminal lunatic had been kept in custody pursuant to a special finding of not guilty by reason of insanity under section 48 of *The Trial on Indictments Act*, whereas in the instant case the applicant is in custody pursuant to a finding of inability of making his defence under section 45 (1) of *The Trial on Indictments Act*. Whereas a special finding of not guilty by reason of insanity discharges the accused of all criminal liability and precludes a re-trial, a finding of unfitness is not conclusive and does not preclude a full trial of the accused if he becomes fit to be tried. In the latter case, for the period the accused remains unfit to stand trial, he will remain under the supervision of the Court and the Minister for as long as the State maintains the criminal charge against him save where it can no longer prove its case, or decides not to continue with the case.

Releasing an accused kept in custody pursuant to a finding of inability of making his defence only on account of the Minister's failure to discharge his or her duties under the Act undoubtedly

fails to protect the interests of society and undermines overall public confidence in the criminal justice system, as it greatly enhances the possibility that guilty persons may be set free in the absence of a completed trial on the merits. The logical approach would be that the Court should step into the shoes of the Minister and conduct an inquiry into the mental status of the accused by making a fitness assessment with the aid of a psychiatric report. This would certainly reduce the possibility that accused persons, who in all probability may be guilty of the offence(s) charged, could be released from the jurisdiction of the courts without further prosecution.

On the other hand, in the case of an accused who remains unfit to stand trial for an unduly prolonged period of time, rather than making the accused stay under the authority of the Minister indefinitely, the court can issue an order of "stay of proceedings," whereupon the accused will be allowed to live in the community without restrictions. This can only happen if all the following criteria are met: (i) the accused is not likely to ever become fit to stand trial; (ii) the accused person does not pose a significant threat to the public; and (iii) a stay is in the interests of the proper administration of justice. I find that on the circumstances of this case that despite the delay, the applicant does not meet any of that criteria. The question that remains before court then is whether the applicant is now capable of making his defence. Under section 47 of the Act, if the court considers him capable of making his defence, the trial will proceed, or begin *de novo*, as appears expedient. All that is required is a medical enquiry into his current mental state.

A person will be found capable of standing trial where he is able to do one or more of the following: (i) understand the nature or object of the proceedings in the sense that he is able to understand that he is in a courtroom, recognize the people in the courtroom are (i.e., the judge, the State Attorney, his advocate) and why they are there; (ii) understand the possible consequences of the proceedings, i.e. to understand what he is charged with, what kinds of pleas he can enter (i.e., guilty or not guilty), what can happen to him if he pleads guilty, or what can happen if he doesn’t tell the truth in court; (iii) communicate with his advocate in the sense that he is able to take part in his own defence and tell his advocate, even in basic terms, what he wants to do with his case.

Submitting in support of the application, counsel for the applicant sought to advance the argument that the applicant is exonerated from being tried by section 12 of *The Penal Code Act*. Fitness to stand trial and criminal responsibility are two different concepts. One does not affect the other. This means that even if the applicant is found mentally fit to stand trial, a later assessment may still show that, when the crime was committed, he was not well enough to understand the nature and consequences of his act and should be found not criminally responsible within the meaning of section 12 of *The Penal Code Act* and section 48 of *The Trial on Indictments Act*. The applicant could have been found unfit to stand trial in the year 2011, but evidence at the trial might show that he knew what he doing at the time of the act and therefore, may be held criminally responsible for it.

The test for fitness to stand trial only requires that the person has a basic understanding of their legal problem. The test is not whether they actually know their legal situation, but whether they are able to understand the concepts involved and to communicate the basic facts about their case (see *Rex v. Pritchard, 173 ER 135*; *Regina v. H, [2003] 1 WLR 411, [2003] 2 Cr App R 2*; *R v. Taylor, [2014] 2 S.C.R. 495; R v. Antoine [2001] 1 AC 340*). Capacity is the central concern, which means that the bar for determining fitness is actually set quite low. There are two separate questions; whether the accused is able to understand and plead to the indictment against him, and whether he would be able to take an effective part in the trial. It is for the court to decide this, not the doctors: "the medical evidence should be considered as part of the evidence in the case and not as the sole evidence on a freestanding application" (see *Crown Prosecution Service v P; Director of Public Prosecutions v P, [2007] 4 All ER 628, [2008] 1 WLR 1005*).

Annexed to the applicant's affidavit in support of this application is a report of a psychiatric review of the applicant done on 13th July, 2017, where it was established that he had regained his sanity. In *Shabahuria Matia v. Uganda, Criminal Revisional Cause No. MSK 0005 of 1999*, it was held that for the determination of whether or not delayed prosecution constitutes an abuse of process, the court should consider three factors: the length of delay, the reason for the delay and the prejudice to the accused. In that case, the court was satisfied that the unexplained delay of three years and nine months, without the accused being committed for trial, while bearing the very grave charge of murder on his head, was so oppressive as to amount to an abuse of court

process, warranting the extreme step of ordering a stay of prosecution. In the instant case, the delay in commencement of the trial is attributable to the mental condition of the applicant. He was not certified as fit to stand trial until the psychiatric assessment of 13th July, 2017.

I have had the opportunity to discern the applicant's mental status from his responses to questions put to him prior to and during the hearing of the application. Although it is unsafe to determine that he is fit to plead, forming that view of him exclusively from watching him during the proceedings so far, in which he has taken no active part, the observations made are supported by the psychiatric assessment of 13th July, 2017. The combined effect is that I find him to have a basic understanding of his legal problem. He is currently able to understand the concepts involved and to communicate the basic facts about his case. He is possessed of sufficient intellect to comprehend the course of the proceedings in the trial and to comprehend the details of the evidence so as to make a proper defence. He is accordingly fit to stand trial. Consequently, this application is dismissed and the trial shall proceed.

Dated at Nebbi this 13th day of April, 2018.

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Stephen Mubiru
Judge.
13th April, 2018.