

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(ANTI CORRUPTION DIVISION)
HCT-00-AC-SC-0017 OF 2023

UGANDA..... **PROSECUTOR**

VERSUS

- 1. MATSIKO MUTUNGWIRE**
- 2. NUWAGIRA TOM**
- 3. BAMYA FRANCIS**.....**ACCUSED**

RULING

Introduction:

The applicant in this matter, Bamya Francis (A3) is indicted jointly with A1 and A2 who are alleged to have irregularly entered into a memorandum of understanding with Rukokoma Mixed Farmers Cooperative Society exchanging part of Ibanda Local Government Forest Reserve for an alternative piece of land without following established procedures. The specific charge against A3 is Conflict of interest c/s 9 (1) and (2) of the same Act. It is alleged that while he was a Councillor representing Ibanda Town Council and a member of the said Cooperative Society, in the course of his duties as councillor, attended a District Council meeting which resolved to exchange part of the Forest reserve with land belonging to the Society and knowingly failed to disclose his interest in the cooperative's land.

When the matter came up for plea on the indictment, Counsel Sembuya Douglas, raised a preliminary issue pertaining to the mental capacity of his client to stand trial and ably defend himself against the preferred charges.



He presented two medical reports, one from Butabika hospital dated 24/10/2023 and a previous one from Mengo hospital dated 24/7/2023. He prayed that the court considers the findings in both reports, and discharge A3 on the ground that he had no mental ability to stand trial, and defer the same until such a time when he is mentally capable. He notified the court that he had raised this issue before the Magistrate prior to committal, and she had opted to defer the matter for the decision of this court.

The prosecutor, Safina Bireke from the Office of the DPP objected to the prayer for discharge on grounds that the reports do not confirm that A3 is of unsound mind and incapable of following the proceedings. She submitted that the report from Butabika showed that it was preliminary in nature, based on a one-off initial assessment which was insufficient to draw sound conclusions from. Further, that Section 45 of the TIA provides for enquiry by court on the sanity of the accused. She prayed that this court makes further inquiries and determine the issue.

This court then considered both reports presented and noted that they differ in material particulars with the 1st report making a conclusive diagnosis of bipolar disorder and the 2nd report attributing mental unwellness or incapacity only to immediate recall. I found it odd that the first hospital would make a conclusive finding on bipolar disorder which the 2nd examiner would miss in their analysis. I noted that the DPP's concerns on the latter report being a preliminary finding was correct, and directed for a second assessment by the same officer from Butabika hospital.

This report was furnished to court and now forms the basis of this decision.

Finding of Court

The medical report from Butabika dated 9th Feb 2024, prepared by Dr Leticia Kyohangirwe shows that the accused suffers a bipolar disorder, currently in full remission with the most recent episode of mania in 2022. He has Neurocognitive impairment in the form of dementia due to



multiple etiologies. His five minutes recall is impaired. It was observed that dementia is a chronic and progressively worsening condition despite treatment. It impairs the patient's ability to register, learn, recall information, and make rational decisions.

It was recommended that he attends a mental health clinic for treatment with the care and support of family members.

The **Mental Health Act, 2018** defines mental capacity as the independent and informed cognitive ability to understand the nature and effects of one's decisions and actions. Mental illness means a diagnosis of a mental health condition in terms of accepted diagnostic criteria made by a mental health practitioner authorized to make such a diagnosis. Mental health conditions include but are not limited to depression, bipolar, anxiety disorders, schizophrenia and addictive behaviour.

In view of the foregoing provisions and the broad spectrum of mental illness given, the court's focus should be on whether, in the specific circumstances of a case, the mental illness diagnosed affects the capacity of the accused to stand trial.

The relevant law is the section 45(1) of the Trial on Indictments Act which provides that when in the course of the trial the High Court has reason to believe that the accused is of unsound mind and consequently incapable of making his or her defence, it shall inquire into the fact of such unsoundness.

Under **Section 45(3)** of the TIA; if as a result of the inquiry made under this section, the court is of the opinion that the accused person is of unsound mind and consequently incapable of making his or her defence, it shall postpone further proceedings in the case.

Under **Section 45 (4) of the TIA**, the Court shall order the accused to be detained in safe custody in such place and manner as it may think fit and it shall transmit the court record or certified copy of it to the Minister.



Further in **Section 45(5)**, upon consideration, the Minister may, 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; and court shall give directions necessary to carry out the order.

Section 45(6) of the TIA additionally provides that any such Warrant of the Minister shall be sufficient authority for the detention of the accused person until the Minister shall make a further order in the matter or until the court finding him or her incapable of making his or her defence shall order him or her to be brought before it again in the manner provided

The application of Section 45, specifically subsections 45 (5) and by necessary implication Subsection (4) were affected by the decision of the Constitutional Court in the case of **Centre for Health, Human Rights and Development (CEHURD) and Another Vs Attorney General Constitutional Petition No 64 of 2011**. The procedure under Section 45(5) of the TIA was declared unconstitutional as it required detaining an accused with a mental disability as a criminal lunatic. The rationale in that case was that a person cannot be detained as a criminal yet they are presumed innocent.

It was held that;

"Article 23(1)(f) of the constitution, stipulates that such an accused who is or is reasonably suspected to be, of unsound mind, should be deprived of his or her liberty only for the purpose of the care or treatment of that person or the protection of the community generally. Section 45(5) of the TIA is silent on the purpose of detaining a mentally ill person and as such contravenes Article 23(1)(f) of the constitution in this regard. The process of determining whether or not an accused person should be detained should be left to the trial court only. Such detention should be strictly for medical treatment. It is the Court that should determine when an accused person is ready to stand trial or be released to the community, based

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on concrete medical evidence, provided by a psychiatrist. The entire procedure to declare a person un fit for trial, the duration and place of his detention, and the time when he should be released should be determined by court, after full inquiry based on medical evidence in full compliance with due process. "

In that case court further held that such accused persons should be only detained in a mental hospital for a specific period of time set by court for purpose of treatment until they are able to stand trial.

The State was further directed to amend the law and provide for a clear procedure of dealing with accused persons with mental disabilities. To date there is no specific procedure that has been put in place.

Justice Muwata when faced with a similar situation in the case of **Uganda Vs Nakalema Harriet and Anor Criminal Session Case No 237 of 2019** found that there was indeed a lacuna in the law and discharged an accused person who was found unfit to stand trial upon presentation of concrete medical evidence. He cited with approval, the case of **Kasozi Stephen Vs Uganda HCSC No 0829 of 2019** where it was held that it would be unjust to continue trying an accused where there is no hope of the accused ever understanding the proceedings of Court.

It is trite that under **Section 10 of the Penal Code Act**, a person is presumed of sound mind, until the contrary is proven. In the instant case, a concrete medical report by a mental health professional which I have no reason to disregard has been presented proving the accused's mental disability. The prosecution has presented no evidence to the contrary. I will therefore rely on it.

Article 28 of the Constitution provides for a right to a fair trial which is non-derogable under **Article 44** of the Constitution. This right entails an accused having a right to be heard, having a right to prepare his defense and call witnesses. This in my view cannot be achieved if the accused is unable to follow proceedings. The nature of offense brought against him

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would require capacity to recall, understand and comprehend the evidence. He is clearly challenged in that regard.


In the instant case, if the condition the accused is suffering from were reversible the option of ordering that the accused be detained to a mental hospital for treatment would be available. The accused suffers a condition that just gets worse and as recommended by the psychiatrist he needs to be surrounded by family members for support.

I therefore find that in the circumstances it is only just and reasonable that A3 is discharged and proceedings against him be discontinued under the authority of Section 17 (2) (a) of the Judicature Act which gives the court power to prevent abuse of court process including discontinuation of proceedings to ensure administration of substantive justice. Under Section 39, where no procedure is laid down, the court may in its discretion adopt a procedure justifiable in the circumstances of the case.

I accordingly discontinue the proceedings against A3 and discharge him.

Count 2 of the chargesheet is accordingly struck out. The proceedings shall continue against A1 and A2 on Count 1 of the indictment.

Bail money that he deposited in court should be refunded.


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Okuo Jane Kajuga, J

Judge

20.02.2024