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THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT
KAMPALA

CONSTITUTIONAL PETITION NO. 64 OF 2011

5 1. CENTRE FOR HEALTH, HUMAN RIGHTS AND
DEVELOPMENT (CEHURD)

2. IGA DANIEL.....PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

10 CORAM:

HONORABLE MR. JUSTICE REMMY KASULE JCC

HONORABLE MR. JUSTICE ELDAD MWANGUSYA JCC

HONORABLE LADY JUSTICE FAITH MWONDHA JCC

15 HONORABLE MR. JUSTICE RICHARD BUTEERA JCC

HONORABLE LADY JUSTICE SOLOMY BALUNGI BOSSA
JCC

JUDGMENT OF COURT

20 The Center for Health, Human Rights and Development (CEHURD)
(hereinafter referred to as the Center) is a Ugandan not-for-profit
company limited by guarantee. It works towards ensuring an effective,
equitable, people centered public health system that ensures the full
realization of the right to health and promotes respect for human rights.
CEHURD filed this petition contesting the constitutionality of laws,
25 practice and usage towards persons with mental disabilities in the

criminal justice system embodied in the provisions of *sections 45(5) and 86(2) of the Trial on Indictments Act (TIA) Cap 23* and *section 130 of the Penal Code Act (PCA) Cap 120*.

In their petition, the petitioners allege that Uganda has ratified a wide range of international and regional human rights treaties relating to protection of the rights of persons with mental disabilities, including the *United Nations Convention on the Rights of Persons with Disabilities* and the *African Charter on Human and People's Rights*. That notwithstanding, the provisions of *sections: 45(5), 82(6) of the Trial on Indictments Act* and *Section 130 of the Penal Act* regarding the procedure in case of insanity or other incapacity of an accused person or the victim and derogatory language used under *Section 130 of the Penal Act* are unconstitutional in as far as they run contrary and against *Articles 20, 21(1), (2) and (3), 23, 24, 28 and 35 of the Constitution* of the Republic of Uganda.

More specifically, the Petitioner alleges, inter alia that;

1. *Section 82(6) of the Trial on Indictments Act* is discriminatory in so far as it provides that if the accused is acquitted, he or she shall be immediately discharged from custody unless he or she is acquitted by reason of insanity thereby setting different treatment between other people and persons with mental disabilities contrary to *Article 21 of the Constitution*;
2. *Section 45(5) of the Trial on Indictments Act* adjudges a person who is not proven guilty as a criminal by referring to him as a criminal lunatic contrary to *Article 28(3) (a) of the Constitution*
3. *Section 130 of the Penal Code Act* is unconstitutional so far as it refers to persons with mental disabilities as **idiots** and **imbeciles** as the same discriminates on the ground of disability contrary to *Article 21 of the Constitution*.

4. *Section 130 of the Penal Code Act* is unconstitutional in so far as it refers to persons with mental disabilities as **idiots and imbeciles** and as such subjecting them to inhuman and degrading treatment contrary to *Articles 24 and 35 of the Constitution*.
- 5 5. To the extent that mental illness is a disability, the practice of detaining persons regarded as mentally ill as enumerated in section 82(6) of *the Trial on Indictments Act* and without due process constitutes discrimination by the section failing to meet the standards of anti-discrimination and equal protection of the law contrary to
- 10 *Article 21 of the Constitution*.
6. The implementation of the above sections of *the Trial on Indictments Act* and *the Penal Code Act*, and the conditions, under which persons with mental disabilities are detained under those Acts, together constitute violations of respect for human dignity of persons with
- 15 mental illness contrary to *Article 21 of the Constitution*.
7. The impugned sections referred to above are by virtue of *Articles 35 and 45 of the Constitution* contrary to and against the spirit of the international legal instruments which Uganda has ratified, particularly the *United Nations Convention on the Rights of Persons with*
- 20 *Disabilities* which guarantees the rights of persons with disabilities.
8. The above cited provisions of *the Trial on Indictments Act* and *the Penal Code Act* fail in themselves to promote the dignity, respect, autonomy and nondiscrimination of people with mental disabilities or to incorporate safeguards against abuses related to involuntary
- 25 admission and treatment.
9. The Constitution is the supreme law of the land under *Article 2(1)* and *sections 45(5) and 82(6) of the Trial on Indictments Act* are inconsistent with and in contravention of *the Constitution* and should be struck down.

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The parties filed a joint scheduling memorandum and asked this Court to resolve the following issues;

1. Whether *sections 45(5), 82(6) of the Trial on Indictments Act* contravene the right to liberty and freedom from discrimination of the persons with mental disabilities guaranteed under *Articles 23 and 21 of the Constitution*.
2. Whether *section 130 of the Penal Code Act* contravenes the right to dignity of persons with mental disabilities guaranteed under *Article 24 of the Constitution*.
3. Whether *section 130 of the Penal Code Act* contravenes the right to freedom from non-discrimination guaranteed under *Article 21 of the Constitution*

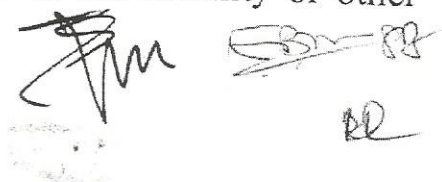
At the hearing, Counsel Kabanda David appeared for the Petitioners while Counsel Kosiya Katsibayo, a State Attorney, represented the Respondent. Counsel for the Respondent at the outset informed Court that he was not opposing the Petition.

Counsels argued issues 1 and 3 together and issue 2 separately. We have resolved issue no. 1 first and resolved issues 2 and 3 together.

Submissions of the parties

Counsel for the Petitioner submitted that;

The state has failed to protect the rights of persons with mental disabilities by maintaining *sections 45(5) and 81(6) of the Trial on Indictments Act (cap 23)* and *section 130 of the Penal Code Act (Cap 120)*, which violate the rights of persons with mental disabilities in respect of the procedure they prescribe in case of the insanity or other incapacity of an accused person.

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Uganda has ratified a wide range of international and regional human rights treaties related to the enjoyment of human rights on equal basis and without discrimination, particularly on the ground of disability. Equality and freedom from discrimination are guaranteed under *the*

5 *Constitution*.

Under *Article 35 of the Constitution*, the State and society are obliged to take appropriate measures to realize the full mental and physical potential of persons living with disabilities. Mental illness was a disability under *Section 2 of the Persons with Disabilities Act*.
10 *"Disability"* was also defined under the same section. Discrimination against persons with disabilities was prohibited by *Article 35 of the Constitution*.

Regarding *section 45(5) of the Trial on Indictments Act*, the letter and spirit of *section 45(5) of the Trial on Indictments Act* is that it presumes
15 criminality instead of innocence by using the words "criminal lunatic". *Article 28(3) (a) of the Constitution* enshrined the principle of presumption of innocence. *Section 45(5) of the Trial on Indictments Act* contravenes the presumption of innocence in this regard.

Furthermore, the word "lunatic" was dehumanizing, and devoid of any
20 form of dignity. Mentally ill persons have a right to human dignity.

Regarding *section 82(6) of the Trial on Indictments Act*, Counsel for the Petitioner submitted that it sets and gives different treatment to other persons and persons with mental illness by virtue of their disability contrary to *Article 21 of the Constitution*.

25 On the right to liberty, Counsel submitted that *section 82(6) of the Trial on Indictments Act* violates the right to liberty of an acquitted person because of insanity. He prayed for an order that the acquitted person

should not be kept in custody because of insanity. Such person should be referred to a mental health facility.

5 *Sections 45(5) and 82(6) of the Trial on Indictments Act* set a different standard in the criminal justice system and give different treatment to other people in contrast to persons with mental illness. This amounted to discriminating against persons with mental illness contrary to *Article 21 of the Constitution*.

10 Counsel called for an expert body to be set up to review persons with mental disability so that they are not put in jail. He also prayed that both sections be declared null and void.

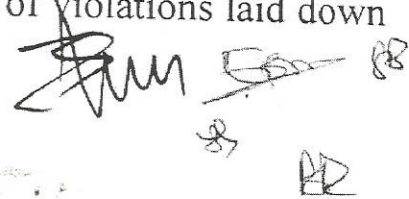
On *section 130* of the *Penal Code Act*, Counsel submitted that the words "idiot" and "imbecile" used in that section were derogatory in nature and should not be on the statute books. Counsel prayed that the section be found to contravene *Article 24 of the Constitution*.

15 He prayed that *section 130* of the *Penal Code Act* be found in contravention of *Article 24 of the Constitution* in as far as the language in it was derogatory.

Counsel for the Respondent on his part:-

20 Submitted that the Respondent concedes that Uganda has ratified a wide range of international and regional human rights treaties related to the protection of the right of persons with mental disabilities, including *the United Nations Convention on the Rights of Persons with disabilities* and *the African Charter on Human and People's Rights*.

25 Counsel also conceded to the various allegations of violations laid down in the Petition.

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He did not however agree that *section 82(6) of the Trial on Indictments Act*, violates the right to liberty of a person with a mental illness.

On setting up an expert body, he submitted that this was a huge and broad task. However, he prayed that court should order that the laws be
5 reviewed to create clarity on how people with insanity should be handled.

Preliminary observations

There is no dispute between the parties as to what is at stake in this petition. In fact, learned Counsel for the State concedes to the Petition.
10 In effect, this means that he agrees to what is stated in the Petition and supporting evidence in the accompanying affidavits of Mulumba Moses; that the impugned provisions are discriminatory against people with mental disabilities and do not afford them equal protection. The provisions simply prescribe detention of mentally disabled persons for
15 long and indefinite periods without subjecting such detention to due process. They also denigrate the personal integrity and dignity of mentally disabled persons by referring to them as "idiots" and "imbeciles". They therefore contravene the stated provisions of *the Constitution*.

20 *Constitutional principles*

In spite of the concessions made by learned Counsel for the Respondent on the alleged violations, it is incumbent upon this court to examine the language and substance of the impugned sections scrupulously, so as to determine whether they violate *the Constitution* and whether or not this
25 Court should grant the reliefs sought. In this task, Court is guided by the following constitutional principles;

1. Non -discrimination

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2. Equal protection of the law
3. Due process

The Court is also guided by the following applicable International Instruments namely; the Universal Declaration of Human Rights (UDHR) 1948, Article 1, the International Covenant on Civil and Political Rights (ICCPR) Article 14(1), the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), Article 2, 5, 14, 15, and 17, and the African Charter on Human and Peoples Rights Article 2, 3, 5 and 6. The same are set out here below:-

10 **Article 1 UDHR:**

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 14(1) ICCPR:

- 15 All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligation in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Articles of UNCRPD

20 **Article 2: Definitions**

- 25 "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

Article 5: Equality and non-discrimination

- 30 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

Article 14: Liberty and Security of the person

1. States Parties shall ensure that person with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principals of this Convention, including by provision of reasonable accommodation.

Article 15:

1. No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medial or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 17:

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Articles of the African Charter:

Article 2:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, or any other opinion, national or social origin, fortune, birth or other status.

Article 3:

1. Every individual shall be equal before the law
2. Every individual shall be entitled to equal protection of the law

Article 5:

5 Every individual shall have the right to the respect of dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman and degrading punishment and treatment is prohibited.

Article 6:

10 Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

15 We note that all the above international and regional instruments have as one of their core principles respect for human rights and fundamental freedoms without discrimination. The *UDHR* stipulates that all human beings are born free and equal in dignity and rights. The *ICCPR* and the *African Charter* provide for equality before the law and equal protection of the law and non-discrimination. The right to liberty and security of persons is guaranteed by both the *ICCPR*; the *UNCRPWD* and the *African Charter*.

25 *The Vienna Declaration and Program of Action 1993* captured it aptly when it declared that "all human rights are universal, indivisible, interdependent, and interrelated." Indeed, the above principles are enshrined in the various articles of *the 1995 Constitution* quoted throughout this judgment.

Specific protection is given to people with disabilities. We take particular note of *Article 35 of the Constitution*. It provides;

"35(1) Persons with disabilities have a right to respect and human dignity, and the State and society shall take appropriate measures to ensure that they realize their full mental and physical potential.

(2)..."

- 5 We also note that *section 2*, which is the interpretation section of *The Persons with Disabilities Act, 2006* defines a person with disability. It also defines "Disability". It provides:

Interpretation

In this Act, unless the context otherwise requires-

- 10 *"Person with disability" means a person having physical, intellectual, sensory or mental impairment which substantially limits one or more of the major life activities of that person.*

- 15 *"Disability" means a substantial functional limitation of daily life activities caused by physical mental or sensory impairment and environment barriers resulting in limited participation* (emphasis ours)

From the above definitions, we conclude that mental illness is a disability under *Section 2* of the *Persons with Disabilities Act of 2006*.

Resolution of issue 1

- 20 With the above observations in mind, we now move to resolve the issues. Counsel for the Petitioner challenged the provisions of *Section 45(5)* of the *Trial on Indictments Act* as being unconstitutional. It is important to appreciate the meaning and context of the entire *section 45*.

Section 45(1) of the *Trial on Indictments Act* provides;

Inquiry by the court as to the insanity of the accused

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- (1) *When in the course of a 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.*

We note that the subsection requires a court to conduct an inquiry as to the insanity of an accused person to establish whether he/she is of unsound mind and consequently incapable of making his/her defense. This in our view requires medical evidence, preferably from a psychiatrist, regarding the status of the mind of the accused. The accused on his/her part, if he/she is able, should also be given an opportunity to be heard. The issue of due process arises with the subsequent sub-sections of **Section 45**. But first, we need to address the meaning of due process.

Black's Law Dictionary, in its sixth edition, at page 500, defines "due process";

- 15 *"Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting by proof, every material fact which bears on the question of right in the matter involved. If any question of*
20 *fact or liability be presumed conclusively against him, this is not due process of law...*

An orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case...

- 25 *Fundamental requisite of due process is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision-making body the reasons for such choice."*

We understand this to mean that before any decision is made that affects a fundamental right or freedom of any person, such person must be

given an opportunity to be heard. We consider that the language of subsection (5) of *Section 45 of the Trial on Indictments Act* poses a problem in this regard. It provides as follows:

Inquiry by the court as to the insanity of the accused

- 5 (1) ...
- 10 (2) *Notwithstanding subsection (1), if the court is of the opinion that it is expedient so to do and in the interests of the accused person, the court may postpone the inquiry mentioned in that subsection until anytime up to the opening of the case for the defense; and if before the inquiry is made the court acquits the accused person on the count or each of the counts on which he or she is being tried, the inquiry shall not take place.*
- 15 (3) *If, as result of an 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 defense, it shall postpone further proceedings in the case.*
- 20 (4) *The court shall order the accused to be detained in safe custody in such place and manner as it may think fit and shall transmit the court record or a certified copy of it to the Minister.*
- 25 (5) *Upon consideration of the record, 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 the court shall give any directions necessary to carry out the order.*
- (6) *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 defense shall order him or her to be brought before it again in the manner provided by sections 46 and 47(emphasis ours).*

30 The import of *sub-sections 2, 3 and 4* is that the court is given latitude to postpone the inquiry until any time up to the opening of the case for the defense, if it is expedient to do so and it is in the interests of the

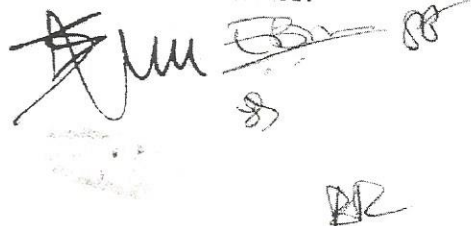
accused person. If the accused person is acquitted at that stage, the court need not go ahead with the inquiry. But if after the inquiry, the court is of the opinion that the accused is not capable of making his or her defense, the court is obliged to postpone the trial and order that he/she should be detained in safe custody in a designated place. The problem stems from the language of *sub-section (5)*, which empowers the Minister after considering the record, to order by warrant that the accused be confined as a "criminal lunatic".

The phrase "criminal lunatic" is unfortunate for various reasons, which we discuss below. First, we have already established that mental illness/impairment is a disability. The potential of persons living with disability cannot be realized if their dignity is not ensured. Therefore, the language used in all statutes must respect the dignity of such persons, and indeed of all individuals. It must also uphold their equality with other persons.

We further observe that under *Article 35 of the Constitution*, the State and society are obliged to take appropriate measures to realize the full mental and physical potential of persons living with disabilities; and that *Section 32 of the Persons with Disability Act* obliges all organs and agencies of government and all persons to respect, uphold and promote the constitutional rights and freedoms of persons with disabilities enshrined in *Chapter Four of the Constitution*. It provides;

"Section 32

The fundamental rights and freedoms, enshrined in Chapter Four of the Constitution shall be respected, upheld and promoted by all organs and agencies of government and by all persons in respect to persons with disabilities."

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The courts and all other persons mentioned in *Section 32 of the Persons with Disability Act* are obliged by national and international law to do likewise.

5 We also take cognizance of the provisions of *Article 24 of the Constitution*.

Article 24

No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.

10 This is one of the non-derogable rights under *Article 44* of the Constitution.

15 In conclusion, we find that the language of *sections 45(5) of the Trial on Indictments Act* is derogatory and thus contravenes *Article 24* of the *Constitution* that provides for respect for human dignity and protection from inhuman treatment. It strips mentally disabled/impaired persons of dignity.

20 In reaching this conclusion, we have drawn inspiration from the case of *Purohit and Moore v. The Gambia, African Commission on Human and Peoples' Rights, Communication No. 241/2001 (2003)*. The applicants in that case challenged the Lunatics Detention Act (LDA) of the Gambia. One of the grounds for their complaint was that the provisions of the LDA condemning any person described as a lunatic to automatic and indefinite institutionalization are incompatible with and violate Articles 2 and 3 of the African Charter. Section 2 of the LDA defines a "lunatic" as including "an idiot or person of unsound mind."

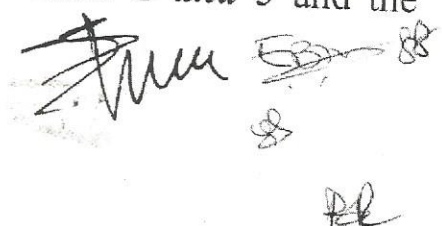
25 The complainants argued that to the extent that mental illness is a disability, the practice of detaining persons regarded as mentally ill indefinitely and without due process constitutes discrimination on the analogous ground of disability.

The African Commission held that human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities, as the case may be, are entitled to without discrimination. It reiterated its earlier decision in the case of *Media Rights Agenda v. Nigeria*, where it stated that "cruel, inhuman or degrading punishment and treatment" is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental. The Commission also relied on its earlier decision in the *John K. Modise Vs Botswana (2000) AHRLR 25 (ACHPR 1997)* where it held that exposing victims to personal suffering and indignity violates the right to human dignity.

The above case interpreted the provisions of a Gambian statute vis-à-vis the *African Charter* that is worded in a similar language to the Uganda *section 45(5) of the Trial on Indictments Act*. We consider it to be a persuasive authority. It is absolutely essential that before subjecting any person to a criminal trial, the trial court ascertains and establishes that he/she will follow and understand the proceedings. We thus come to the conclusion on this aspect, *section 45(5)* violates the letter and spirit of *Article 24* of the *Constitution* as it subjects persons living with mental illness/impairment to inhuman and degrading treatment in the language used to describe them, contrary to *Article 24 of the Constitution*.

Second, it prejudices an individual who is presumed to be mentally ill/impaired as a criminal lunatic before such person has been tried. This is not only discriminatory but also contravenes the principle of the presumption of innocence.

Non-discrimination is a constitutional principle embodied in all the cited international instruments reproduced above, namely the *UDHR Article 1*, the *ICCPR Article 14(1)*, the *UNCRC Articles 2 and 5* and the *African Charter Article 3*.

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Article 2 of the *UNCRPD* defines "discrimination on the basis of disability" to mean any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on equal basis with others, of all human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation. Uganda is signatory to this Convention. The *Persons with Disabilities Act* does not give a definition of discrimination on the basis of disability. Instead it provides in Section 32 as follows;

"The fundamental rights and freedoms enshrined in Chapter Four of the Constitution shall be respected, upheld and promoted by all organs and agencies of government and by all persons in respect of persons with disabilities."

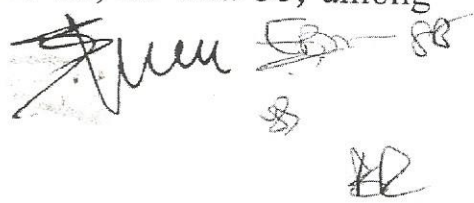
However, one of the freedoms guaranteed in Article 21 of the Constitution is nondiscrimination. It provides;

"21. All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."

(1) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

(2) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability."

The definition of discrimination in that Article specifically mentions disability. The *Constitution of Uganda Articles 20, 21 and 35*, among



others, incorporate this principle as well. We have reproduced the said Articles below;

"20 Fundamental rights and freedoms of the individual are inherent and not granted by the State.

- 5 (1) *The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.*

"35 Rights of persons with disabilities

- 10 (1) *Persons with disabilities have a right to respect and human dignity, and the State and society shall take appropriate measures to ensure that they realize their full mental and physical potential.*
- (2) *Parliament shall enact laws appropriate for the protection of persons with disabilities."*

15 Our view is that *Section 45(5) of the Trial on Indictments Act* gives different treatment to persons with mental illness/impairment from other people with or without disabilities in that it imputes criminality on the person of the mentally ill/impaired who has not been adjudged a criminal. This is discriminatory. Uganda, being a signatory to both the *UNCRPD* and the *African Charter* should have taken and ought to take

20 steps to align *section 45(5) of the Trial on Indictments Act* with the *Constitution* and with its international obligations. Our judgment is that the presumption of innocence should apply to all without discrimination.

25 Thirdly, at the stage where *section 45(5) of the Trial on Indictments Act* comes into play during criminal proceedings, the defense has not been heard and the trial has not been concluded. There is no judgment against the accused person convicting him/her of any offence. Nevertheless he/she is labeled a "criminal lunatic" by statute. The term "criminal lunatic" imputes to the mind of the accused guilt for an offence for which he/she may not have been fully tried. This contravenes the

constitutional principle of the presumption of innocence embodied in *Article 28(3) of the Constitution*. *Article 28* provides;

Right to a fair hearing

5 (1) *in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.*

(3) *Every person who is charged with a criminal offence shall-*

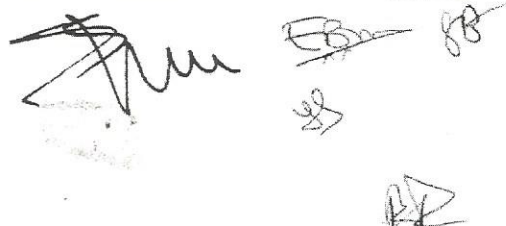
(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty. (The emphasis is ours)

10 We therefore consider that Counsel for the respondent has rightly conceded that the use of the words "criminal lunatic" in *section 45(1) of the Trial on Indictments Act* violates the presumption of innocence enshrined in *Article 28(3) (a) of the Constitution*.

15 We now revert to the issue of due process and whether the powers given to the Minister in *section 45(1) of the Trial on Indictments Act* to detain the accused accord with this principle. To establish whether the accused is fit to stand trial, a trial court is required to conduct an inquiry. But when it comes to determining whether a particular accused person should be detained, no guidance whatever is given to the court or the
20 Minister to determine whether the accused poses any risk. Yet the Constitution offers ample guidance in *Articles 23(1) (f)*. It provides;

(1) *No person shall be deprived of personal liberty except in any of the following cases_*

25 (f) *In the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of the care or treatment of that person or the protection of the community* (emphasis ours).

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The Trial on Indictments Act, predates *the 1995 Constitution*. Therefore, *section 45(1) of the Trial on Indictments Act* must be construed with such modifications, adaptations, among others, to bring it in conformity with the Constitution in accordance with *Article 274* reproduced below:

"Existing Law

- (1) *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.*
- (2) *For the purposes of this article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date."*

When *section 45(5) of The Trial on Indictments Act* is read subject to *Article 274* and the provisions of *Article 23(f)* are taken into account, it becomes clear that when it comes to the detention of the accused, a matter that involves denying him/her the right to liberty, whether directed by the Court or the Minister, there is no clear indication as to what standards the detention order of such accused should comply with before it is issued. After having found that the accused person is of unsound mind and consequently incapable of making her/his defense, the court is enjoined to order the detention of the accused in safe custody in such place or manner as it may deem fit. The purpose of such detention is not stated. It is also not stated how the court should go about establishing that such an accused is a person that deserves to be detained.

The problem is further compounded when *section 45(5)* of *The Trial on Indictments Act* grants powers to the Minister to act, where he/she deems it fit, by warrant under his/her hand directed to the court, to order that the accused be confined as a criminal lunatic in a mental hospital or other suitable place of custody. The Minister, by merely looking at the record, has power to label the accused a "criminal lunatic". He/she is not obliged to seek professional/ medical or other professional advice regarding the propriety of the detention nor the length of it. The court is then required to implement the Minister's decision by giving directions thereon.

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/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 Trial on Indictments Act* is silent on the purpose for 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 also determine when the accused is ready to stand trial or be released to the community, based on concrete medical evidence, provided by a psychiatrist. The entire procedure to declare a person unfit for trial, the duration and place of his detention, and the time when he should be released should be determined by the court, after full inquiry based on medical evidence, in full compliance with due process.

We have already found guidance in the case of *Purohit and Moore v. The Gambia, African Commission on Human and People's Rights*, (*supra*), to which we revert. In that case, the complainants also challenged the automatic detention of persons considered "lunatics"

under the provisions of the LDA and argued that this violates the right to personal liberty. The African Commission held and we quote;

5 "Article 6 of the African Charter guarantees every individual, be they disabled or not, the right to liberty and security of the person. Deprivation of such liberty is only acceptable if it is authorized by law and is compatible with the obligations of States Parties under the Charter...Article 6 of the African Charter further states that no one may be arbitrarily arrested or detained. Prohibition against arbitrariness requires among other things that deprivation of liberty shall be under the authority and supervision of persons procedurally and substantively competent to certify it."(Emphasis added)

10 We have found this jurisprudence persuasive, especially as the *African Charter* is similar to *Article 23* of the *Constitution*. Both protect the liberty of the individual. We therefore conclude that the Minister is procedurally and substantively not a competent person to certify the deprivation of the liberty of the alleged mentally ill accused person, without first seeking medical advice and without according the affected person a hearing.

15 The consequence of the current procedure is that it contains great potential for injustice as it may deprive an accused person of personal liberty for an indefinite period of time. There is a very real risk of mentally disabled persons disappearing in the criminal justice system without proper standards being set for involuntary confinement and procedures for review. This has already happened in the case of *Uganda v. Tesimana HC Criminal Revision Case No. MSK-00-CR-CV-0013 of 1999*, where Egonda J., as he then was, stayed the criminal proceedings after the accused had spent 8 years in the criminal justice system without being tried. The trial court in that case triggered this unfortunate state of affairs when it ordered that the accused should be taken to hospital for mental examination after she looked to be of unsound mind. This order was not followed up and she stayed in prison for 8 years, without being

tried and without receiving proper treatment. There is dire need to avoid a recurrence of such injustice.

We therefore find that *section 45(5) of the Trial on Indictments Act* contravenes *Articles 20, 21(1), (2) and (3), 23, 24, 28 and 35 of the Constitution* and we so declare.

Whether Section 82(6) of the Trial on Indictments Act contravenes the Constitution.

The section provides;

"Verdict and sentence

- 10 (1) *When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The judge shall take a note of his or her summing up to the assessors.*
- 15 (2) *The judge shall then give his or her judgment, but in so doing shall not be bound to conform with the opinions of the assessors.*
- (3) *Where the judge does not conform with the opinions of the majority of the assessors, he or she shall state his or her reasons for departing from their opinions in his or her judgment.*
- 20 (4) *The assessors may retire to consider their opinions if they so wish and during any such retirement or at any time during the trial, may consult with one another.*
- (5) *If the accused person is convicted, the judge shall pass sentence on him or her according to law.*
- 25 (6) *If the accused is acquitted, he or she shall be immediately discharged from custody unless he or she is acquitted by reason of insanity.*

We note that under *sub-section (6) of the above section*, an acquitted person should be freed, unless he/she is being detained on some other lawful charge. However, if such person is acquitted by reason of insanity, then the law provides that he/she should be detained.

We consider that the reason such person is detained is because he/she is found to have committed the act that would amount to an offence if he/she was of sound mind, but is only acquitted because he/she is deemed not to have known what he/she was doing or that it was wrong.

5 This is different from someone acquitted, for example, for lack of evidence. It is therefore not discrimination to detain such a person, as the purpose for the detention is not punishment for any offence but it is for the person's security, safety and health care as well as the security of the community. What needs to be put in place is a process of review of the

10 detention of such a person so that he/she is not detained ~~indiscriminately~~ ^{so independently}. We are therefore, constrained to construe *section 82(6)* of the *Trial on Indictments Act* in accordance with *Article 274* of the *Constitution* with such modifications, adaptations, and qualifications and exceptions as may be necessary to bring it in conformity with the

15 *Constitution*. We accordingly modify it to cater for the purpose of the detention, the duration of the detention, and for the place of detention. The details of the modifications to *section 82(6)* will appear below in the course of resolving issues 2 and 3.

Resolution of the Issues 2 and 3

20 2. *Whether section 130 of the Penal Code Act, contravenes the right to dignity of persons with mental disabilities, guaranteed under Article 24 of the Constitution.*

25 3. *Whether section 130 of the Penal Code Act contravenes the right to freedom from non-discrimination guaranteed under Article 21 of the Constitution*

For convenience, we have combined the resolution of these two issues together.

Section 130 of the Penal Code Act provides as follows;

Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, commits a felony and is liable to imprisonment for fourteen years.

Article 24 provides that:

No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.

Under Article 35 of the Constitution, the State and society are obliged to take appropriate measures to realize the full mental and physical potential of persons living with disabilities. This potential cannot be realized if their dignity is not ensured.

Furthermore, Section 32 of the Persons with Disability Act obliges all organs and agencies of Government and all persons to respect, uphold and promote the constitutional rights and freedoms of persons with disabilities enshrined in Chapter Four of the Constitution.

As a preliminary matter, we observe that the objective of the section is to safeguard women and girls who are mentally handicapped from being sexually abused. However, the language "idiot" and "imbecile" used to describe women and girls who are mentally handicapped is dehumanizing of these people.

One of the arguments of the complainants in the *Purohit and Moore v. The Gambia, African Commission on Human and People's Rights* case (supra), which we have found persuasive, was that under the LDA, persons with mental illness had been branded as "lunatics" and "idiots", terms which were dehumanizing and denied them any form of dignity. The African Commission decided that the terms were dehumanizing and

denied them any form of dignity in contravention of *Article 5 of the African Charter*.

Following the reasoning and decision in the above case, we find that the language of *section 130 of the Penal Code Act* is dehumanizing. The words "idiots" and "imbeciles" are derogatory and detract from the dignity that should be accorded to all disabled persons under *Article 24*. We find this is not permissible and justifiable as the language contravenes *Articles 20, 21(1), (2) and (3), 23, 24, 28 and 35 of the Constitution*.

We however find that striking out the section would leave mentally handicapped/disabled women and girls unprotected. Accordingly, and in accordance with *Article 274 of the Constitution*, we construe *section 130 of the Penal Code Act* with "*such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution*". The words "idiot" and "imbecile" are struck out from *section 130 of the Penal Code Act* and are replaced with the phrase "*woman and girl to be mentally ill or impaired*". For avoidance of doubt, the modified *section 130 of the Penal Code Act* the modified section is set out in full in the disposition.

Prayers for remedies

Counsel for the Petitioners made the following prayers.

- (a) A declaration that *section 45(5) of the Trial on Indictments Act* is unconstitutional in as far as it adjudges a person who is not proven guilty as a criminal by referring to him/her as a criminal lunatic contrary to *Article 28(3) (a) of the Constitution*.
- (b) A declaration that *section 82(6) of the Trial on Indictments Act* is unconstitutional in as far as it violates the right to liberty and

freedom from discrimination of the persons with mental illnesses contrary to *Article 23 of the Constitution*.

(c) A declaration that *section 130 of the Penal Code Act* as amended is unconstitutional in so far as it is contrary and violates the right to dignity guaranteed under *Article 24 of the Constitution*.

(d) A declaration that *section 130 of the Penal Code Act* violates the right to freedom from discrimination under *Article 21 of the Constitution*.

(e) An order that the provisions of *sections 45(5) and 82(6) of the Trial on Indictments Act* and *section 130 of the Penal Code Act* (as amended) be struck out for being in contravention of Articles 20, 21(1), (2) and (3), 23, 24, 28 and 35 of the Constitution and the Convention on the Rights of Persons with disabilities.

(f) Any other or further declaration that this Honorable Court may deem fit to grant.

Disposition

In light of the contraventions of *the Constitution* that we have found; we proceed to make the following declarations and orders;

1. *Section 45(5) of the Trial on Indictments Act* is unconstitutional in as far as it adjudges a person who is not proven guilty as a criminal by referring to him/her as a "criminal lunatic" contrary to *Article 28(3) (a) of the Constitution*.

2. *Section 82(6) of the Trial on Indictments Act* is modified in accordance with *Article 274 of the Constitution* to read as follows:

a. The trial Court is to order for the detention of such a person for a specific period, for purposes of care or treatment of that person by

a qualified psychiatrist or other qualified medical officer, in accordance with *Article 23(1) of the Constitution*.

b. The period of detention is to be specified in the order of detention and is to be periodically reviewed by Court to ascertain the mental status of the detained person based on medical evidence from a psychiatrist or other qualified medical officer.

c. When the court is satisfied that such a detained person is mentally fit and is no longer a danger to him/herself and/or to the community, it may order for his/her release.

3. *The words "idiot" and "imbecile" that appear in Section 130 of the Penal Code Act*, are declared to contravene articles 20, 21(1), (2), and (3), 23, 24 and 35 of the Constitution by reason of their being derogatory, dehumanizing and degrading. They are accordingly struck out from *section 130 of the Penal Code Act*. The *section* is modified in accordance with *Article 274 of the Constitution* to read as follows:

Any person who, knowing a woman or girl to be mentally ill or mentally impaired, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was mentally disabled or mentally handicapped, commits a felony and is liable to imprisonment for fourteen years

4. *Section 130 of the Penal Code Act* does not violate the right to freedom from discrimination under *Article 21 of the Constitution*.

5. The State is hereby directed, as a matter of urgency;

a. To Review the status of persons with mental disabilities so that they are removed from jails and prisons and are instead taken for care and treatment in appropriate places.

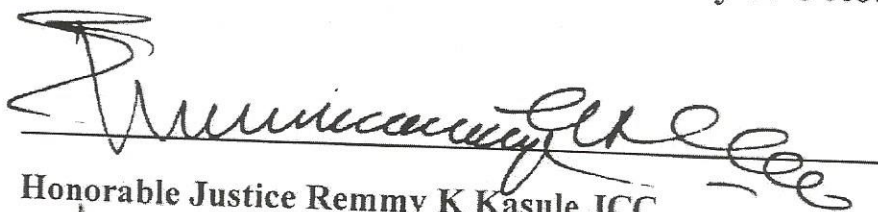
b. To review and amend the *Trial on Indictments Act* and the *Penal Code Act* with a view to providing clarity on how people with mental disabilities amounting to insanity should be handled

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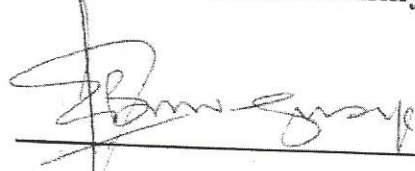
through the criminal justice system, in accordance with and in compliance with the Constitution and this judgment.

6. This being a matter of public importance, and the State having conceded to the violations of *the Constitution* alleged by the Petitioner, we make no order as to costs. It is so ordered.

Dated and signed at Kampala this ...day of October 2015



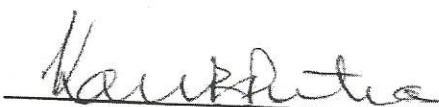
10 Honorable Justice Remmy K Kasule JCC



Honorable Justice Eldad Mwangusya JCC

15 

Honorable Lady Justice Faith Mwendha JCC



Honorable Justice Richard Buteera JCC

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Honorable Justice Solomy Balungi Bossa JCC