

# Access to Courts and Reasonable Accommodations for People with Mental Disabilities in Uganda



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# Chapter 1: Introduction

Research conducted by the Mental Disability Advocacy Centre (MDAC) and Mental Health Uganda (MHU) during 2013 and 2014 uncovered a number of human rights violations against people with mental disabilities in Ugandan psychiatric facilities and communities. The forms of abuse uncovered included ill-treatment and torture, the denial of property rights, and social isolation.

The reports paint a picture of the wider forms of prejudice and discrimination prevalent against people with mental disabilities in Ugandan society, and show that many are denied their rights through both formal legal processes. As a result, many Ugandans with mental disabilities live highly restricted lives, experience high levels of poverty, and are denied numerous rights including the right to inherit and manage property.<sup>1</sup> Many find themselves placed in under-resourced and overstretched psychiatric facilities without any legal safeguards, where they are subjected to seclusion, restraint, forced medication and no mechanisms to challenge their detention.<sup>2</sup>

Unfortunately, people with mental disabilities in Uganda (as elsewhere) face significant challenges and barriers in accessing justice to stop or obtain redress for these human rights violations. Some of these barriers are inherent in the judicial system itself and embedded in the procedural rules and processes of the courts. The complexity of these rules cannot be understated: the presence of different parties, formal codes of behaviour, professional vocabulary and a rigid code of conduct can be challenging for any person who is a party to legal proceedings.<sup>3</sup> These present additional barriers to people with mental disabilities, and render them vulnerable to further abuses.

The aim of the present study is to provide a detailed analysis of these barriers to accessing justice through the lens of international human rights law. The specific objectives are threefold: first, to provide an evidence-base of the specific legal and procedural barriers to accessing justice; second, to provide targeted recommendations for change, in particular to ensure that people with mental disabilities can benefit from reasonable and procedural accommodations as set out in the UN Convention on the Rights of Persons with Disabilities (CRPD); and third, to provide detailed technical information to inform MDAC's strategic litigation in the country.

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<sup>1</sup> MDAC and MHU, *They don't consider me as a person: Mental health and human rights in Ugandan communities* (Budapest and Kampala: MDAC, 2014), p. 11, available online at [www.mdac.org/uganda](http://www.mdac.org/uganda). (accessed 10 June 2015).

<sup>2</sup> MDAC and MHU, *Psychiatric hospitals in Uganda: A human rights investigation* (Budapest and Kampala: MDAC, 2014), available online at [www.mdac.org/uganda](http://www.mdac.org/uganda) (accessed 10 June 2015).

<sup>3</sup> Bizchut, the Israel Human Rights Center for People with Disabilities, *The right of persons with intellectual, psychosocial and communication disabilities to access to justice: Accommodations in the criminal process* (2015), p. 4, available online at <http://bizchut.org.il/he/wp-content/uploads/2015/01/Booklet-The-right-of-persons-with-disabilities-to-access-to-justice.pdf> (accessed 10 June 2015).

The project was made possible through research conducted by Simon Odongoi, a Ugandan lawyer, who was supported to undertake an internship with MDAC through the Open Society Foundation's Disability Rights Scholars Internship Programme.

This report is divided into three sections. The present chapter sets out descriptive information about the Ugandan legal system, and provides an overview of the key international standards relating to access to justice in general, and in relation to persons with disabilities in particular. It also sets out the methodology of the research, provides a set of key definitions, and summarises key recommendations flowing from the report.

Chapters Two and Three set out findings and recommendations in relation to civil and criminal legal matters respectively. Each of the chapters provides an analysis of the specific barriers faced by people with mental disabilities, and goes on to set out a number of recommendations. The types of recommendations provided broadly relate to three distinct but interrelated obligations under international disability law:

1. the general obligation of states to ensure accessibility of public services to people with disabilities;
2. the provision of individualised reasonable accommodations to specific individuals with mental disabilities; and
3. the requirement to make procedural accommodations (or adjustments) to judicial procedures.<sup>4</sup>

A brief conclusion is provided in Chapter 4.

## A. People with mental disabilities in Uganda

Uganda signed and ratified the CRPD and its Optional Protocol in 2008,<sup>5</sup> and therefore has undertaken a binding obligation under international law to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."<sup>6</sup> Article 31 of the CRPD obliges States Parties to collect information including statistical and research data to enable them to formulate and implement policies that give effect to rights enshrined in the CRPD.<sup>7</sup> The information must be disaggregated as appropriate and used to help assess the implementation of States Parties' obligations and to identify and address the barriers faced by people with disabilities – including people with mental disabilities – in exercising their rights.<sup>8</sup>

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<sup>4</sup> See 1.D. for a detailed description of these obligations.

<sup>5</sup> Office of the High Commissioner for Human Rights, *Uganda's ratification status*, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en) (accessed 13 July 2015).

<sup>6</sup> United Nations Convention on the Rights of Persons with Disabilities (hereafter "CRPD"), Article 1.

<sup>7</sup> CRPD, Article 31(1).

<sup>8</sup> CRPD, Article 31(2).

According to the 2014 population census, Uganda's population is estimated at 36 million people.<sup>9</sup> Statistics relating to people with mental disabilities in Uganda, however, are unclear. MDAC and MHU's previous research in the country found that there is a significant variance in the estimates provided of the proportion of the population with mental disabilities, ranging from 3.6% to 20% and up to 35%.<sup>10</sup> The Mental Health Foundation estimates that one in every four people is likely to experience mental health problems at a given time.<sup>11</sup> Therefore, it is likely that a significant number of people in Uganda have a mental disability. There are no statistics on the number of people with mental disabilities who have accessed the courts in Uganda.

## B. Court structure

The administration of justice in Uganda is a constitutional mandate of judicial and quasi-judicial bodies. Judicial power is exercised by courts of judicature which consist of the Supreme Court, Court of Appeal/Constitutional Court, High Court and subordinate courts including *Qhadis'* courts,<sup>12</sup> which deal with matters including marriage, divorce, inheritance of property and guardianship.<sup>13</sup> Subordinate courts include Magistrates Courts<sup>14</sup> and Local Council Courts,<sup>15</sup> with both civil and criminal jurisdictions. In addition, there are specialised courts which include the Family and Children Court,<sup>16</sup> Military Courts<sup>17</sup> and the Industrial Court.<sup>18</sup> Quasi-judicial bodies include commissions and tribunals such as the Uganda Human Rights Commission<sup>19</sup> and the Tax Appeals Tribunal,<sup>20</sup>

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<sup>9</sup> Uganda Bureau of Statistics (UBOS), "National Population and Housing Census" (2014), available at <http://www.ubos.org/publications/population-census/> (accessed 27 June 2015).

<sup>10</sup> MDAC and MHU, *They don't consider me as a person*, *supra* note 1, p. 11.

<sup>11</sup> Uganda Bureau of Statistics, *Household survey* 2010, available at <http://www.ubos.org/publications/population-census/> (accessed 27 June 2015).

<sup>12</sup> These courts are named but not defined in the Constitution. However, *Qadhis'* courts refer to Islamic courts which adjudicate cases based on the Islamic creed. Although the Constitution makes provision for the establishment of these courts, none had been established at the time of writing this report.

<sup>13</sup> The Constitution of Uganda, 1995, Article 129. The Supreme Court, Court of Appeal/Constitutional Court and High Court are superior courts of record. In terms of hierarchy, the Supreme Court is the highest appellate Court followed by the Court of Appeal, High Court and subordinate courts, in that order, from highest to lowest.

<sup>14</sup> Magistrates Courts are established under s. 3 of the Magistrates Courts Act, Chapter 16, Laws of Uganda (2000) with power to hear and determine cases of civil and criminal nature.

<sup>15</sup> These are established under s. 3 of the Local Council Courts Act, 2006, at every village, parish, town, division and sub-county level. These courts have power to hear and determine limited cases of civil and criminal nature.

<sup>16</sup> The Family and Children Court is established under s. 13 of the Children Act, Chapter 59, Laws of Uganda (2000). Its power is to hear and determine criminal charges against a child and applications relating to child care and protection.

<sup>17</sup> These are established under Part VIII of the Uganda Peoples' Defence Forces Act, 2005, to hear and determine criminal cases committed by persons subject to military law.

<sup>18</sup> The Industrial Court is established under s. 7 of the Labour Disputes (Arbitration and Settlement) Act, 2006. The functions of the court are spelt out in s. 8 of the Act to include arbitration on labour disputes referred to it and to adjudicate upon questions of law and fact arising from references to the court by any other law.

<sup>19</sup> This is established under Article 51 of the Constitution. The mandate of the Human Rights Commission

among others. It is equally important to note that Uganda has increasingly established alternative dispute resolution mechanisms including arbitration, reconciliation and mediation aimed at administering justice without recourse to courts.<sup>21</sup>

Each of these courts, commissions and tribunals have established procedures relating to the institution and conduct of cases which must be complied with by all parties involved therein. These procedural rules relate to a number of matters, including framing and filing of claims or charges, the layout of courts, rules on the appearance of parties in court, hearings of claims or charges, the handling of testimony, drawing and pronouncement of judgments, decrees, orders, convictions, sentences and appeals, etc. Some of these procedures are common to all courts and tribunals while others are specific. For the purposes of this report, findings are limited to the Rules of Procedure in Magistrates Courts, the High Court, the Court of Appeal/Constitutional Court and the Supreme Court.

## C. Definitions

### i. Persons with disabilities

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) defines “persons with disabilities” to include “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>22</sup>

### ii. People with mental disabilities

By people with mental disabilities, MDAC means people with intellectual, developmental, cognitive, and/or psychosocial disabilities. People with intellectual disabilities generally have greater difficulty than most people with intellectual and adaptive functioning due to a long term condition that is present at birth or before the age of eighteen. Developmental disability includes intellectual disability, and also people identified as having developmental challenges including cerebral palsy, autism, spectrum disorder and foetal alcohol spectrum disorder.

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includes the ability to investigate violations of human rights alleged to have taken place on or after the coming in to force of the Constitution.

<sup>20</sup> Tribunals are established under s. 2 of the Tax Appeals Tribunals Act, Chapter 345, Laws of Uganda (2000) to review taxation decisions.

<sup>21</sup> In civil matters, the Judicature (Mediation) Rules, SI No. 10 of 2013 requires that before any suit is instituted in court, the parties must appear before a mediator to try to reach an out of court settlement.

<sup>22</sup> CRPD, Article 1.

Cognitive disability refers to difficulties with learning and processing information and can be associated with acquired brain injury, stroke and dementias including Alzheimer's disease.

People with psycho-social disabilities are those who experience mental health issues or mental illness, and/or who identify as mental health consumers, users of mental health services, survivors of psychiatry, or mad.

These are not mutually exclusive groups. People with intellectual, developmental or cognitive disabilities may also identify, or be identified as, having psycho-social disabilities, or vice versa.

### **iii. Discrimination on the basis of disability**

Article 2 of the CRPD defines discrimination on the basis of disability as:

[A]ny 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.

### **iv. Reasonable accommodation**

Article 2 of the CRPD defines reasonable accommodation to mean:

[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

### **v. Procedural accommodations**

This is set out in Article 13(1) of the CRPD which requires States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others including through the provision of "procedural and age appropriate accommodations" in order to facilitate their effective role as direct and indirect participants including as witnesses in all legal proceedings.<sup>23</sup>

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<sup>23</sup> CRPD, Article 13(1).



## vi. Reasonable accommodation distinguished from accessibility

The Committee on the Rights of Persons with Disabilities has stated that:

“Accessibility” is related to groups, whereas “reasonable accommodation” is related to an individual. This means that the duty to provide accessibility is an *ex ante* duty. States parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service.<sup>24</sup>

The provision of accessibility, procedural and reasonable accommodations are vital in removing the barriers of access to courts for people with mental disabilities. These are different concepts but are interrelated.

## D. Key aspects of access to justice

### i. Equality before the law and non-discrimination

Both international and domestic laws require that all people must be treated equally before and under the law in all aspects of life. Discrimination is thus prohibited on all grounds including disability and other status. The relevant provisions for the purposes of this report can be found in Articles 21 and 126(2)(a) of the Ugandan Constitution,<sup>25</sup> and Articles 5, 12 and 13 of the CRPD.<sup>26</sup>

A prerequisite for this is the recognition of legal capacity. Thus in its General Comment No. 1, the Committee on the Rights of Persons with Disabilities (CRPD Committee) has stated that:

The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is

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<sup>24</sup> Committee on the Rights of Persons with Disabilities (hereafter “CRPD Committee”), *General Comment No. 2 – Article 9: Accessibility*, CRPD/C/GC/2, 22 May 2014, para. 25.

<sup>25</sup> Constitution of the Republic of Uganda, 1995, Article 21(1), states: “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.” The prohibited grounds of discrimination are listed in para. 2 and include sex, religion, race, colour, ethnic origin, tribe, birth, social or economic standing, political opinion or disability. In Article 126(2)(a) of the Constitution, “justice shall be done to all irrespective of their social or economic status.”

<sup>26</sup> Article 5(1) of the CRPD provides that “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 12(1) states that “States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law”. Article 13(1) says “States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”

indispensable for the exercise of civil, political, economic, social and cultural rights. [...] The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. [...] Legal capacity consists of two strands. The first is the legal standing to have rights, to be recognized as a legal person before the law. [...] The second is the legal agency to act on those rights, and to have those actions recognized by the law. It is this component that is frequently denied or diminished for persons with disabilities.<sup>27</sup>

## ii. Right to a fair hearing

The right to a fair hearing is commonly regarded as one of the core components of the rule of law. It can be conceptualised as a bundle of individual and interlinked process rights which have the overall purpose of ensuring that justice is both done and seen to be done. Elements include that justice should take place before independent and impartial tribunals (Article 10, Universal Declaration of Human Rights (UDHR)), the right to be heard within a reasonable time, the presumption of innocence in criminal procedures, and the right to counsel (Articles 14 and 16, International Covenant on Civil and Political Rights (ICCPR)), among others.

These international standards are also reflected in the African Charter on Human and Peoples' Rights (ACHPR). Article 3 sets out the right to equality and equal protection before the law, and Article 7 sets out the right to a fair trial in relation to criminal matters.

At the domestic level, Article 28 of the Ugandan Constitution states that 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.<sup>28</sup> This provision is further reinforced by Article 126(2)(b) of the Constitution which requires that justice shall not be delayed.

The right to a fair hearing includes the right to be heard, that is to say, a person should be given an opportunity to express or defend himself or herself in person before the court or tribunal. The courts have interpreted the right to a fair hearing to mean the following:

A fair trial, or a fair hearing under Art. 28 [of the Constitution], means that a party should be afforded the opportunity to, inter alia, hear the witnesses of the other side testify openly; that he should, if he chooses, challenge those witnesses by way of cross examination; that he should be given an opportunity to give his own evidence, if he

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<sup>27</sup> CRPD Committee, *General Comment No. 1 – Article 12: Equal recognition before the law*, CRPD/C/GC/1, 19 May 2014, paras. 8, 9 and 12.

<sup>28</sup> Constitution of the Republic of Uganda, 1995, Article 28(1).

chooses, in his defence; that he should, if he so wishes, call witnesses to support his case.<sup>29</sup>

### iii. Administration of justice without undue regard to technicalities

In the adjudication of cases of both civil and criminal nature, the Ugandan Constitution also sets out that courts should administer substantive justice without undue regard to technicalities.<sup>30</sup> In elucidating this principle, the courts have held that:

Article 126 of the Constitution enjoins Courts to administer substantive justice without undue regard to procedural technicalities. This law, however, did not intend to do away with the rules of Civil Procedure. [...] The Civil Procedure Rules are a guide to the orderly disposal of suits and a means of achieving justice between the parties. [...] While there is, on the one hand, the necessity for the rules to be followed, there is, on the other hand, the need for the Courts to control their proceedings and not to be unreasonably inhibited by the rules of procedure. The idea is that the administration of justice should normally require that the substance of all disputes be investigated and decided on their merits, and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights: This, of course, does not mean that rules of procedure should be ignored with impunity. Far from that. Each case must, of course, be decided on the basis of its own circumstances.<sup>31</sup>

### iv. Reasonable accommodation

The duty to provide reasonable accommodation is based on the human rights model of disability enshrined in the CRPD that requires States Parties to adjust their environments to accommodate the needs of people with disabilities. The object is not to ease the process for or favour people with mental disabilities during court proceedings. Rather, it is to enable them to participate fully in this process to the same extent as everyone else without having restrictions or limitations placed on their participation due to their impairment.<sup>32</sup> The CRPD Committee has described the duty to provide reasonable accommodation as “an *ex nunc* duty”, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation in order to enjoy her or his rights on an equal basis in a particular context.<sup>33</sup> Reasonable accommodation seeks to achieve individual

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<sup>29</sup> *Charles Harry Twagira v. Uganda*, Supreme Court Criminal Appeal No. 27 of 2003.

<sup>30</sup> Constitution of the Republic of Uganda, 1995, Article 126(2)(e).

<sup>31</sup> *Century Enterprises Ltd v. Greenland Bank (In Liquidation)*, MA No. 0916 OF 2004 Arising from HCT-00-CC-CS-0877-2004 (Judgment of Bamwine J); *Banco Arabe Espanol v. Bank of Uganda*, SCCA No. 8/1998; *Good man Agencies Ltd & Another v. Highland Agriculture Export Ltd*, HCT-00-CC-MA-364-2012, available at [www.ulii.org/ug/judgment/commercial-court/2013/43-0](http://www.ulii.org/ug/judgment/commercial-court/2013/43-0) (accessed 20 July 2015).

<sup>32</sup> Bizchut, *The right of persons with intellectual, psychosocial and communication disabilities to access to justice: Accommodations in the criminal process*, *supra* note 3, p. 7.

<sup>33</sup> CRPD Committee, General Comment No. 2, *supra* note 27, para. 26.

justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy and choices of the individual into account.<sup>34</sup>

The requirement to provide reasonable accommodation is emphasised in Article 5(3) of the CRPD which provides that in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided

## **v. Multiple discrimination**

In both civil and criminal cases, the Courts need to be mindful and consider how multiple forms of discrimination may affect an individual, creating additional barriers to accessing justice. For example, women and girls with disabilities are likely to face additional barriers in accessing justice resulting from the interaction between both disability-based and gender-based discrimination.<sup>35</sup>

## **E. Methodology**

The findings of this report are based on both desk and qualitative research. Desk research involved a review of substantive and procedural laws (both civil and criminal) in force in Uganda, decided cases and other available literature on the subject in order to identify promising practices in the provision of reasonable accommodation. Desk research was conducted in the first month of the project from 16 February to 13 March 2015. Qualitative research involved conducting semi-structured interviews with a variety of respondents and observing court proceedings of some ongoing cases. This was conducted in two and half months from 16 March to 4 June 2015. The study was limited to Kampala which is the central district in Uganda and has the densest population.<sup>36</sup> In addition, Kampala is where many of the higher and specialised courts are located.

Respondents targeted for the qualitative research included people with mental disabilities, parents and carers, lawyers, judges and magistrates. The aim was to interview people with mental disabilities who had engaged with courts as complainants, witnesses, accused persons, applicants, respondents or defendants. The researcher had an opportunity to follow and observe two court proceedings. The lawyers interviewed had direct experience representing clients with mental disabilities in court. Likewise, the Judges and Magistrates that were contacted had presided or were presiding over matters involving people with

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<sup>34</sup> *Ibid.*

<sup>35</sup> UN Committee on the Elimination of Discrimination against Women, *General Recommendation on women's access to justice*, 23 July 2015, CEDAW/C/GC/33.

<sup>36</sup> The population of Kampala City is estimated at 1.5million people according to the 2014 Population Census. See Uganda Bureau of Statistics (UBOS), "National Population and Housing Census" (2014), available at <http://www.ubos.org/publications/population-census/> (accessed 27 June 2015).

mental disabilities. The carers interviewed included parents, relatives and guardians<sup>37</sup> at the time of a court process.

The main focus of interviewing these respondents was to document their experiences with courts, establish what barriers they encountered in the process and identify various forms of accommodations which had been made available to them, as well as identifying other adjustments that they needed to be put in place in order to access justice.

To identify respondents, we contacted several non-governmental organisations including the National Union of Disabled Persons of Uganda (NUDIPU), Legal Action for Persons with Disabilities (LAPD), Mental Health Uganda (MHU), Uganda Law Society (ULS), Heartsounds Uganda, Public Interest Law Clinic at Makerere University (PILAC), FIDA Uganda and the Centre for Health Human Rights and Development (CEHURD). Very few of these respondents were able to identify people with mental disabilities who had actually been involved in court processes. Some potential interviewees who were identified lived outside Kampala and, therefore, fell outside the remit of the research.

We also submitted interview request letters to the following courts and Government departments: Magistrates Courts of Nakawa, Makindye, Buganda Road, Mengo; the High Court (criminal, civil and family divisions), Court of Appeal, Supreme Court, and General Court Martial; Uganda Prisons Service Headquarters and the Uganda Human Rights Commission. We received a response from seven of these institutions.

Out of the 50 targeted respondents, we managed to identify and interview 22 people in total. These included four people with mental disabilities, three carers, one magistrate, one judge, one registrar, two assistant registrars, six lawyers and four other key informants. Key informants included the Secretary and Prosecutor of the General Court Marshal, and the Director of complaints, investigations and legal services and the Registrar to the Tribunal of the Uganda Human Rights Commission.

At the General Court Marshal, we were informed by the Secretary and Prosecutor that for the time they had served in their respective capacities, they had not registered or received any case files involving people with mental disabilities. The Assistant Registrar of the Family Division of the High Court also informed us that the court did not have statistics on cases involving people with mental disabilities and was not aware of any judge in the court that had ever handled a case involving such a person. The Registrar to the Court of Appeal informed us that the Court does not deal directly with witnesses. Rather, the Court of Appeal reviews court proceedings in the lower court. The Registrar to the Court of Appeal also informed us that the court had not registered a case file involving a person with a mental disability and that most of the judges were not available since they were in criminal sessions.

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<sup>37</sup> Two of the guardians had been appointed by court while one was a relative/carer who informally referred to himself as a 'guardian'.

The courts did not have disaggregated statistics based on disability which would have facilitated the identification of Judges or Magistrates who had handled cases involving people with mental disabilities. This made it difficult even with the help of an Assistant Registrar or Chief Magistrate, to identify either the files or the judicial officer involved in these types of cases in order to conduct an interview.

We were unable to gain access to Luzira Prison where we intended to interview some of the inmates and those on remand with mental disabilities. We submitted a letter to the Commissioner General of Uganda Prisons Service on 20 April 2015 requesting access to Luzira Prison to interview inmates but received no reply by the time of writing this report in July 2015.

## **F. Recommendations**

Ensuring access to courts for people with mental disabilities will require concerted efforts from a variety of actors in the Ugandan Government and judiciary. The small number of people identified for interviews in the present research is likely due to a lack of awareness at many levels of the judiciary about identifying people with mental disabilities, and also reflects procedural barriers to them accessing the courts.

The following recommendations are targeted at key obligations-holders with the aim of prompting systemic change. More detailed recommendations are provided in Chapters Two and Three, directly flowing from the findings of the research.

### **Uganda Law Reform Commission (ULRC), Parliament, Ministry of Justice and Constitutional Affairs**

- 1.1. Domesticate the provisions of the UN Convention on the Rights of Persons with Disabilities (UN CRPD);
- 1.2. Review and amend both substantive and procedural laws that maintain archaic and discriminatory language that refer to people with mental disabilities as “criminal lunatics”, “idiots” and “persons of unsound mind”;
- 1.3. Repeal laws that deprive people with mental disabilities of legal capacity. These include the Mental Treatment Act, Administration of Estates of Persons of Unsound Mind Act and other guardianship laws.
- 1.4. Establish laws that cater for the provision of reasonable accommodation to people with disabilities taking into account the specific needs of each category of disability. In Kenya for example, the Sexual Offences Act caters for the provision of necessary accommodations to vulnerable witnesses in court trials.
- 1.5. Establish a policy and legislation on the provision of legal aid.

## **Law Council**

- 1.6. Introduce the study of mental health and disability law to law schools including the Law Development Centre as a compulsory subject to equip students with knowledge and skills relating to clients with mental disabilities.

## **Uganda Law Society**

- 1.7. Through its Continuous Legal Education clinics, the Uganda Law Society should include mental health and disability law sessions in its programmes, in order to create awareness and empower practicing lawyers in representing clients with mental disabilities. The purpose should be to promote a human rights-based approach to accessing justice.

## **Judicial Studies Institute:**

- 1.8. The Judicial Studies Institute (JSI) should introduce mental health and disability law in its programmes in order to equip judges, magistrates and all judicial officers with knowledge and skills in dealing with cases involving people with mental disabilities. The focus of courses should be on international human rights standards and their application in domestic courts.

## **Judicial Service Commission, Chief Justice, Principle Judge:**

- 1.9. The Chief Justice and Principle Judge should require all courts to generate data of cases filed in court disaggregated in terms of impairment-type; and
- 1.10. Initiate programs aimed at sensitising, training and empowering judicial officers and staff on the human rights-based approach to mental disability.

## **Director of Public Prosecutions:**

- 1.11. Initiate programs aimed at sensitising, training and empowering state attorneys in handling cases involving witnesses with mental disabilities.

## Chapter 2: Civil proceedings

### A. General overview of civil proceedings

The relevant rules of procedure that govern civil suits include the Local Council Courts Regulations,<sup>38</sup> Magistrates Courts Act,<sup>39</sup> Civil Procedure Rules,<sup>40</sup> Court of Appeal Rules<sup>41</sup> and Supreme Court Rules.<sup>42</sup> Initiation of civil suits may take one of two forms, an application or an ordinary suit. The process is commenced by filing a written claim in the form of an application or plaint in court upon payment of court fees. The applicant/plaintiff must also serve the application/plaint on the opposite party. The opposite party, referred to as the respondent/defendant may also file a reply to the application or defence to the plaint. The court determines an appropriate date and time for hearing both parties in respect of the claim, in which case both parties must be present in open court or in chambers.

Where the suit is initiated by way of an application, courts rely on affidavit evidence. However, a court may at their discretion also choose to call upon the deponent to clarify in oral testimony facts contained in the affidavit so that it can make its decision. Ordinary suits require that each party leads evidence by way of oral testimonies, documentary evidence and any other piece of evidence available to justify or disprove the claim. Upon consideration of all the evidence, the court prepares its judgment which is delivered in open court in the presence of all parties. Where the judgment is delivered by a Magistrates Court, a dissatisfied party may appeal to the High Court. Appeals against decisions of the High Court lie in the Court of Appeal and finally to the Supreme Court.

In this section, we examine some of the procedural and other barriers that people with mental disabilities face in civil proceedings.

### B. Access to justice barriers

#### i. Language of the law

##### *Problem analysis*

As mentioned above, the relevant rules of procedure that govern civil suits include Local Council Courts Regulations, Magistrates Courts Act, Civil Procedure Rules, Court of

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<sup>38</sup> Local Council Courts Regulations, SI No. 51 of 2007.

<sup>39</sup> Magistrate Courts Act, Cap 16 of Laws of Uganda (2000)

<sup>40</sup> Civil Procedure Rules, SI 71-1 of Laws of Uganda(2000)

<sup>41</sup> Judicature (Court of Appeal Rules) Directions, SI 13-10 of Laws of Uganda(2000).

<sup>42</sup> Judicature (Supreme Court Rules) Directions, SI 13-11 of Laws of Uganda(2000).



Appeal Rules and Supreme Court Rules. These substantive and procedural laws variedly use the words “person of unsound mind” without providing any definition. However, the Mental Treatment Act defines the phrase to mean “an idiot or person suffering from mental derangement”.<sup>43</sup> The law does not distinguish between people with mental health issues (psycho-social disabilities) and those with intellectual or developmental disabilities.<sup>44</sup> Human rights activists have described this kind of language as archaic, derogatory and no longer acceptable in the 21<sup>st</sup> century.<sup>45</sup>

The use of such words is reflected in the documents filed in court and throughout the judicial process. In drafting an application or plaint for example, it must be indicated in the first paragraph whether the applicant or plaintiff is a person of sound or unsound mind. This requirement is a procedural barrier to access to justice because it introduces and reinforces stereotypes about people with mental disabilities. One respondent, a user of psychiatric services, who was asked during court proceedings whether he was a person of unsound mind, said:

That question alone deters people with mental disability from going to court. You cannot access justice when such questions are asked in courts of law. [...] It means that your verdict has already been decided. [...] That question alone is a barrier to access to effective justice.

From the above testimony, it is clear that such language discourages some people with mental disabilities from accessing court as well as to effectively participate in court processes.

### *Recommendations*

- 2.1. Uganda Law Reform Commission in collaboration with the Ministry of Justice should initiate efforts to abolish the term “unsound mind” and other discriminatory terminology in all Ugandan laws and procedures.<sup>46</sup>
- 2.2. As a form of procedural accommodation, both the Chief Justice and the Principle Judge should ensure that Judges, Magistrates and all participants in the court process use human rights-compliant language in court and be provided with training on the appropriate use of language and concepts where necessary.

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<sup>43</sup> Mental Treatment Act 1938, Cap 279 of Laws of Uganda (2000), s. 1(f).

<sup>44</sup> MDAC has found this to be a similar problem in other jurisdictions. See, for example, MDAC, *The right to legal capacity in Kenya*, (Budapest: MDAC, March 2014), p. 6, available at [www.mdac.org/kenya](http://www.mdac.org/kenya) (accessed 24 June 2015).

<sup>45</sup> National Union of Disabled Persons of Uganda (NUDIPU), “Position paper on proposed amendments of the Trial on Indictments Act Cap 23 and the Magistrates Courts Act Cap 16”, October 2013, 11.

<sup>46</sup> Article 4(1)(b) of the CRPD requires States Parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.”

## ii. Drafting “pleadings”<sup>47</sup> in civil claims

### *Problem analysis*

In Uganda, civil claims are initiated (instituted at first instance) by filing a statement of claim, an application/plaint either in the Local Council Court, Magistrates Court, High Court or Constitutional Court depending on the nature of the claim.<sup>48</sup> An applicant/plaintiff must reduce his/her claim in writing based on the Rules of Procedure for the appropriate court, with the exception of claims brought before Local Council Courts which may be initiated either orally or in writing.<sup>49</sup> In addition, written applications to the courts shall be in English.<sup>50</sup> Courts adhere strictly to the Rules of Procedure and failure to satisfy them may lead to rejection of the application/plaint.<sup>51</sup>

The requirement of having a claim reduced in to writing based on the “prescribed forms”<sup>52</sup> and Rules of Procedure is a procedural barrier to access to courts because many people, including those with mental disabilities, face challenges in putting their claims in writing and following complex Rules of Procedure. This is likely to present a particular barrier to people with intellectual, cognitive or other developmental disabilities.

As a result of the complex and rigid Rules of Procedure, an intending applicant/plaintiff has to seek the services of a lawyer or someone with basic legal knowledge to help in drafting the application/plaint before it is filed in court. This comes at a cost and some respondents reported that private law firms do not take on cases of persons with mental disabilities because of negative attitudes and the fact that many people with mental disabilities lack means to pay for the services. Representation of people with mental disabilities in courts has therefore frequently become the responsibility of non-governmental organisations that have legal aid projects since Uganda as a country, does not provide legal aid in civil matters. According to the UN Human Rights Committee, the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.<sup>53</sup>

The lack of legal assistance for people with mental disabilities was confirmed by the following testimony from a legal officer at an organisation that advances disability rights.

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<sup>47</sup> According to s. 2(p) of the Civil Procedure Act, Cap 71, “pleading” includes any petition or summons, and also includes the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant to them, and the reply of the plaintiff to any defence or counterclaim of a defendant.

<sup>48</sup> Local Council Courts Regulations, SI No. 51 of 2007, Regulations 29 and 30; Magistrates Courts Act, Cap 16, Part XX; Civil Procedure Rules, SI 71-1 Laws of Uganda, Order IV.

<sup>49</sup> Regulation 29(1) of the Local Council Courts Regulations, SI No. 51 of 2007.

<sup>50</sup> Civil Procedure Act, Cap 71 Laws of Uganda, s. 88(3).

<sup>51</sup> See, for example, Order 6, Rule 30(1) and Order 7, Rule 11 of the Civil Procedure Rules, SI 71-1 of Laws of Uganda which provide for striking out pleadings and rejection of complaints for failing to disclose a reasonable cause of action or answer, or where pleadings are shown to be frivolous or vexatious.

<sup>52</sup> These forms are found in the schedules to the rules of procedure applicable to each court.

<sup>53</sup> Human Rights Committee, *General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, CCPR/C/GC/32, para. 10.

I have practiced as an advocate for the past six years. Our law firm never received any client with a mental disability because such cases are rare. It is even difficult to communicate with such clients and I don't think they would be able to pay instruction and professional fees. In fact the first time I represented a client with a mental disability was two years ago when I joined this organisation.

### *Recommendations*

- 2.3. As a form of procedural accommodation, the Judicial Service Commission/Public Service Commission should assign a court employee in every court who has the relevant skills to provide individual assistance to people with mental disabilities in reading, understanding and filling out the required paper work. A similar approach is reflected in section 14 of the Local Council Courts Act and Regulation 29 of the Local Council Courts Regulations which allow a person to institute a suit by filing a statement of claim either orally or in writing. The oral complaint is then reduced in to writing by one of the officers of court. This, however, does not currently apply to superior courts.
- 2.4. Both the Chief Justice and Principle Judge should ensure that the courts accept claims without strict adherence to the procedural rules of draftsmanship. This is also supported in Article 126 of the Constitution which requires courts to administer substantive justice without undue regard to technicalities.<sup>54</sup> In other words, courts should not rely on procedural errors to deny a litigant justice.
- 2.5. It is also recommended as a procedural accommodation that the Chief Justice in collaboration with the Rules Committee,<sup>55</sup> modify court forms to reflect appropriate and simpler language that can be understood by an average person and to make available "easy read" versions for people with mental disabilities who may require them.
- 2.6. The Chief Justice and Principle Judge should ensure that court clerks and all other judicial staff maintain records of people with disabilities who may require accommodations in the courts. This acts as notice to the court and gives the court ample time to determine the forms of accommodation which is within its means to provide. In the United States of America, a litigant or complainant with a disability may fill out a form disclosing the type of disability and the forms of reasonable

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<sup>54</sup> Constitution of the Republic of Uganda, 1995, Article 126(2)(e).

<sup>55</sup> The "Rules Committee" is established under s. 40 of the Judicature Act, Cap 13 of Laws of Uganda and includes the Chief Justice, Attorney General, Deputy Chief Justice, Principle Judge, two members of the Uganda Law Society and the Law Development Centre. The functions of the Rules Committee are listed in s. 41 of the Judicature Act and include: to "make rules for regulating the practice and procedure of the Supreme Court, Court of Appeal, High Court of Uganda and for all other courts in Uganda subordinate to the High Court."

accommodation that may be required during the course of proceedings.<sup>56</sup> A similar approach can be adopted by the courts of Uganda and is relatively cost-effective. This would facilitate the courts in generating data based on impairment-type as well as better administration of justice.

- 2.7. As an accessibility requirement, provision of legal aid by the State should be prioritised and extended in both civil and criminal cases. This course should be led by the Ministry of Justice and Constitutional Affairs in collaboration with relevant key stakeholders, including people with disabilities and their representative organisations.

### iii. Payment of court fees

#### *Problem analysis*

Another problematic procedural requirement relates to payment of court fees, including filing fees.<sup>57</sup> Before a pleading is filed in court, a party to the suit must pay filing fees which vary depending on the nature of the claim. Failure to pay court fees leads to rejection of pleadings (application/plaint). Whereas payment of court fees is an accessibility issue for many people, it is also a procedural barrier to access to courts for people with mental disabilities. Statistics show that people with disabilities, including those with mental disabilities, experience higher rates of material poverty because of the “bidirectional link between disability and poverty: disability may increase the risk of poverty, and poverty may increase the risk of disability.”<sup>58</sup> As such, people with mental disabilities are less likely to be able to afford court fees than others.

Whereas the procedural rules provide for waiver of court fees for persons with limited means, the procedure for obtaining this relief is not straightforward.<sup>59</sup> An application must be filed in court to seek for permission to sue as a “pauper”<sup>60</sup> and such application may be rejected where it is not framed or presented in the manner prescribed by the Rules of

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<sup>56</sup> Superior Court of California, “Accommodations for persons with disabilities using court facilities” available at [http://www.sdcourt.ca.gov/portal/page?\\_pageid=55,1406482&\\_dad=portal](http://www.sdcourt.ca.gov/portal/page?_pageid=55,1406482&_dad=portal) [accessed 20 February 2015]

<sup>57</sup> The court fees to be paid by the applicant, plaintiff, defendant, appellant or respondent vary depending on the nature of the claim. These court fees are prescribed by the Judicature (Court Fees) Rules, SI 13-1, of Laws of Uganda, the second schedule to the Judicature (Court of Appeal Rules) Directions SI 13-10 of Laws of Uganda and the second schedule to the Judicature (Supreme Court Rules) Directions SI 13-11 of Laws of Uganda.

<sup>58</sup> World Health Organization (WHO) and the World Bank (WB), *World Report on Disability*, (2011), p. 10.

<sup>59</sup> See Order XXXIII of the Civil Procedure Rules, SI 71-1 of Laws of Uganda; Rules 111 and 113 of the Judicature (Court of Appeal Rules) Directions SI 13-10 of Laws of Uganda; and Rules 107 and 109 of the Judicature (Supreme Court Rules) Directions SI 13-11 of Laws of Uganda.

<sup>60</sup> According to Order XXXIII, Rule 1(1) of the Civil Procedure Rules, SUI 71-1, of Laws of Uganda a person is a “pauper” when he or she is not possessed of sufficient means to enable him or her to pay the fee prescribed by law for the plaint in the suit.

Procedure.<sup>61</sup> As noted above, the rigidity of these procedural rules is a barrier to effective access to justice especially where a person with a mental disability may not be able to comply with the Rules of Procedure.

It must be noted that Uganda has neither a policy nor legislation on legal aid in the field of civil justice.<sup>62</sup> At the time of writing this report, there were efforts by the Ugandan Government to put in place a policy on the provision of legal aid.

### *Recommendations*

- 2.8. The Ministry of Justice and Constitutional Affairs should develop and ensure the implementation of a comprehensive policy and legislation on the provision of legal aid for civil cases.
- 2.9. The courts should exercise their discretion judiciously in waiving court fees for people with mental disabilities where necessary.
- 2.10. The courts should be flexible in accepting informal and oral applications for waiver of court fees without strict adherence to the Rules of Procedure.

## **iv. Institution of civil claims in courts of law by people with mental disabilities**

### *Problem analysis*

As a matter of law, civil claims can only be instituted and defended in courts of law by a “person of unsound mind” through a next friend or guardian *ad litem* respectively.<sup>63</sup> In Local Council Courts, every suit by a child, a “person of unsound mind” or any person suffering from any disability shall be instituted in the name of the child or the person with disability by a next of kin or next friend.<sup>64</sup> The Civil Procedure Rules provide that rules of court applicable to suits involving minors “shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of

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<sup>61</sup> See Order XXXIII, Rule 5(1)(a) of the Civil Procedure Rules, SI 71-1 of Laws of Uganda.

<sup>62</sup> In criminal matters however, legal aid is available in the form of legal representation for offences which carry a sentence of death or life imprisonment. See Article 28(3)(e) of the Constitution of the Republic of Uganda, 1995.

<sup>63</sup> See Local Councils Courts Regulations, SI No. 51 of 2007, Regulation 30; the Civil Procedure Rules, SI 71-1, of Laws of Uganda, Order 32 Rule 1-15; the Judicature (Fundamental Rights and Freedoms) (Enforcement) Procedure) Rules, SI No. 55 of 2008, Rule 7.

<sup>64</sup> Regulation 30 of the Local Council Courts Regulations, SI No. 51 of 2007.

protecting their interest when suing or being sued.”<sup>65</sup> These outdated rules are paternalistic, essentially equating people with disabilities and children.

The next friend or guardian *ad litem* assumes all the responsibility of prosecuting the case on behalf of a “person of unsound mind”. This provision by itself is discriminatory since it fails to accord people with mental disabilities equal status as adults and full recognition in the courts of law as required under Article 21 of the Ugandan Constitution and Articles 12 and 13 of the CRPD.

The process for appointing a next friend does not ensure the feelings, desires, will and preferences of a person with a mental disability are taken in to account even in cases where there is some consultation with them. In some cases, all that is required is for the proposed next friend/guardian *ad litem* to file in court his/her written consent to act in that capacity.<sup>66</sup> Thus, instead of protecting the interests of the person with a mental disability, courts may be used as a springboard for exploitation, especially in cases involving ownership of property.<sup>67</sup>

The requirement to sue or defend cases indirectly through a next friend or guardian *ad litem* is a *de facto* stripping away of the person’s legal capacity and denies them direct, equal access to courts of law. The following vignette highlights how deprivation of legal capacity and failure to make reasonable accommodations can result in complete disregard for the will and preferences of the person concerned.

An adult of about 35 years old was stripped of her legal capacity and denied the opportunity to inherit and manage the landed property of her late father. When her father died, she stayed with her uncle for over 10 years. Her biological mother later appeared and applied to court for custody and guardianship of her adult daughter. During the court proceedings, the daughter walked away from her mother and sat next to her uncle who also wanted custody and guardianship.

This conduct showed that there was already a strong bond created between the uncle and the daughter who was suffering from a mental disability. However, the court did not take this conduct into account but went ahead to grant the application (custody and guardianship) on the grounds that the applicant was her biological mother.

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<sup>65</sup> Civil Procedure Rules, SI 71-1, of Laws of Uganda, Order XXXII, Rule 15.

<sup>66</sup> Civil Procedure Rules, SI 71-1, of Laws of Uganda, Order XXXII, Rule 1(1). See the case of *Thomas A.K. Makumbi through next friend, Patrick Makumbi v. Josephine Katumba*, Miscellaneous Application No. 316 of 2014, arising from civil suit No. 24 of 2014, available at <http://www.ulii.org/ug/judgment/high-court/2014/24-2> (accessed 28 June 2015). Here, the court was of the opinion that under Order 32 Rule 15, there is no need for an inquiry as provided under the Mental Treatment Act 1938 in order to invoke the application of Rules 1 to 4 of the said Order.

<sup>67</sup> MDAC’s interview with an uncle of a person with a mental disability, May 2015, Kampala, Uganda.

## *Recommendations*

- 2.11. The Rules Committee should amend Rules of Procedure to recognise the right to legal capacity of people with mental disabilities to fully ensure their participation on an equal basis with others in all court processes.
- 2.12. All legislation and Rules of Procedure requiring people with mental disabilities to sue or defend cases through next friends and guardians *ad litem* should be abolished. This course should be led by Uganda Law Reform Commission in collaboration with the Rules Committee.
- 2.13. People with mental disabilities must be entitled and facilitated to appoint a support person of their choice where they believe this is necessary to ensure their full and equal participation in court proceedings. Rules of Procedure must require all courts to ensure that such support people consistently respect the will and preferences of the person whom they are supporting and that the person with a mental disability is free to refuse support at any time.
- 2.14. Judges and court staff should be sensitised about giving due regard to a variety of modes and methods of communication used by persons with disabilities, including non-verbal expressions of their will and preferences.

## **v. Signature of court documents**

### *Problem analysis*

The Rules of Procedure require that for any pleading<sup>68</sup> to be properly filed in court, it must be signed by an advocate or by the litigant if he or she is not represented.<sup>69</sup> In respect of suits involving “persons of unsound mind”, the Court of Appeal Rules<sup>70</sup> and Supreme Court Rules<sup>71</sup> require pleadings to be signed by an advocate, next friend, guardian *ad litem* or committee.<sup>72</sup> Commenting on this procedural barrier to accessing justice, a lawyer said that this means evidence given by a person with a mental disability is often disregarded:

Once it is disclosed in the first paragraph of the application/plaint [pleading] that the applicant/plaintiff is a “person of unsound mind”, it means that such applicant/plaintiff cannot depone or sign the application/plaint. If the applicant/plaintiff signs the application, the opposing party can apply to court to

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<sup>68</sup> *Supra* note 47.

<sup>69</sup> Order 6, Rule 26 of the Civil Procedure Rules, SI 71-1, of Laws of Uganda.

<sup>70</sup> Rules 16 and 23(3) of the Judicature (Court of Appeal Rules) Directions, SI 13-10 of Laws of Uganda.

<sup>71</sup> Rules 16 and 23(3) of the Judicature (Supreme Court Rules) Directions, SI 13-11.

<sup>72</sup> The Rules do not define what constitutes a committee.

have the application/plaint rejected and taken off court record. Evidence given by “persons of unsound mind” is considered to be unreliable and therefore, inadmissible in court.

Requiring pleadings of people with mental disabilities to be signed by a next friend, guardian *ad litem* or committee is a significant barrier to access to justice and the courts.

### ***Recommendations***

2.15. The Rules of Procedure that provide for substitute representation in deponing/swearing and signing pleadings in the case of people with mental disabilities should be abolished.

2.16. A support person should be provided where necessary to interpret the content and implication of signing pleadings for people with mental disabilities.

## **vi. Appearance for hearing of civil suits**

### ***Problem analysis***

In the Court of Appeal and Supreme Court, appearance in matters involving people with mental disabilities is by a next friend, guardian *ad litem* or committee.<sup>73</sup> The rules of procedure are not clear as to whether the person with a mental disability bears any responsibility in the conduct of his or her case, especially where a next friend or guardian *ad litem* has been appointed. This reinforces substitute representation and denies people with mental disabilities direct participation in civil proceedings.

### ***Recommendations***

2.17. The Chief Justice and Principle Judge should ensure that Judges and Magistrates seek the attendance of the person with a mental disability in court so that they are heard when the court is reaching a decision in matters affecting them.

2.18. The Chief Justice should ensure that Judges and Magistrates speak directly to the person concerned and interpret the conduct and body language of that person.

2.19. Where a person is unable to attend court on a particular hearing date due to issues connected with their disability, reasonable accommodations should be made to schedule

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<sup>73</sup> Rule 23 of the Judicature (Court of Appeal Rules) Directions, SI 13-10 of Laws of Uganda and Rule 23 of the Judicature (Supreme Court Rules) Directions, SI 13-11 of Laws of Uganda.



the hearing at a time when it is possible for them to attend. The Chief Justice should ensure that this form of accommodation is provided for in court proceedings.

## **vii. Competence of witnesses with mental disabilities**

### *Problem analysis*

The position of the law is found in section 117 of the Evidence Act which reads as follows:

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

*Explanation.*—A lunatic is not incompetent to testify, unless he or she is prevented by his or her lunacy from understanding the questions put to him or her and giving rational answers to them.<sup>74</sup>

In section 133 of the Evidence Act, it is the responsibility of the judge to decide whether a given piece of evidence is admissible or not. The import of these two provisions of the law show that someone with a mental disability will be competent to give evidence unless in the court's view, they are prevented from understanding the questions put to them or from giving rational answers to those questions. Evidence is given orally in open court and in the presence of all parties to the suit.<sup>75</sup>

This study has revealed that there are many factors embedded in court processes which negatively affect a person's understanding of questions and ability to engage in court proceedings. Some of these factors relate to the formal nature of legal processes, and others relate to conventions of behaviour or conduct in adversarial court proceedings, (layout of the court room, formal dress codes and seating arrangements, aggressive or complex styles of asking questions, etc.)

Failure to understand questions may equally result from a failed network or medium of communication between the witness and court. Where these factors, among others are not taken in to account by the court, it is likely that the person concerned will be denied effective access to justice.

### *Recommendations*

2.20. The Chief Justice should ensure that Judges and Magistrates inform witnesses of the possibility of evidence being taken or received in chambers or in a restricted

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<sup>74</sup> Evidence Act, Cap 6, of Laws of Uganda, s.117.

<sup>75</sup> Civil Procedure Rules, SI 71-1, of Laws of Uganda, Order XVIII, Rule 4.

environment in order to build confidence of the witness, facilitate a better understanding of the questions, and recall of events. This is already being practiced by the courts in matters involving “children”.<sup>76</sup> Similar accommodations can be extended to people with mental disabilities who request them.

- 2.21. Where necessary, an interpreter should be available to provide emotional support and facilitate communication between the witness and the court.
- 2.22. Various forms of reasonable accommodation may ensure that witnesses with mental disabilities can provide valid evidence in court. These could include (but are not limited to) providing drinking water or short breaks during the time of giving evidence; allowing the person to communicate with the assistance of a support person; ensuring that questions are asked sequentially and one at a time, etc. The Chief Justice should ensure that the courts ask witnesses whether they may need such accommodations, and facilitate their provision where possible.

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<sup>76</sup> See s. 16 of the Children Act, Cap 59, of Laws of Uganda, which provides among other things that proceedings in the Family and Children Court shall be held *in camera* and shall be as informal as possible, and shall be conducted as an inquiry rather than exposing the child to adversarial procedures.

## Chapter 3: Criminal proceedings

### A. General overview of a criminal trial

The relevant criminal court processes are found in the Magistrates Courts Act,<sup>77</sup> Trial on Indictments Act,<sup>78</sup> Criminal Procedure Code Act,<sup>79</sup> Penal Code Act,<sup>80</sup> Court of Appeal Rules<sup>81</sup> and Supreme Court Rules.<sup>82</sup> People with mental disabilities may become involved in criminal proceedings as victims, witnesses, suspects or defendants.

A criminal trial commences when an accused person is arraigned before a magistrate for the very first time to plead to the charges placed against him or her. The trial may either be in open court or in the Judge's chambers depending on the nature of the case.<sup>83</sup> The accused person may be represented either by a private lawyer or by a lawyer paid for by the State in respect of offences which carry a sentence of death or imprisonment for life.<sup>84</sup>

If the Magistrates Court does not have jurisdiction to try the accused person because the offence is only triable by the High Court, the Magistrate commits him or her to the High Court for trial. Where the Magistrates Court has jurisdiction to try the accused person, he or she is called upon to plead to the charges. Where the accused person pleads guilty, a conviction is entered against the accused and they are sentenced in accordance with the law. An accused person who pleads not guilty to the charges is informed of his or her right to bail. If bail cannot be granted on any consideration,<sup>85</sup> the accused person is remanded into custody and called upon to attend trial in accordance with the court's schedule.

The prosecution will lead its evidence by calling in each available witness to appear in the dock, swear and testify orally, and tender in court all relevant exhibits to prove the guilt of the accused. The accused person is given an opportunity to ask witnesses questions. The accused person is also allowed to produce witnesses to testify in court. The accused person has a right to remain silent; he or she may also choose to give unsworn evidence, in which case he or she is not cross-examined by the prosecution.

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<sup>77</sup> Magistrates Courts Act, Cap 16 of Laws of Uganda.

<sup>78</sup> Trial on Indictments Act, Cap 23 of Laws of Uganda.

<sup>79</sup> Criminal Procedure Code Act, Cap 116 of Laws of Uganda.

<sup>80</sup> Penal Code Act, Cap 20 of Laws of Uganda.

<sup>81</sup> Judicature (Court of Appeal Rules) Directions, SI 13-10, of Laws of Uganda.

<sup>82</sup> Judicature (Supreme Court Rules) Directions, SI 13-11, of Laws of Uganda.

<sup>83</sup> Practice demands that where in cases of sexual offences, the trial is conducted *in camera* or in the Judge's/Magistrate's chambers. In like terms, where one of the offenders is a minor, the trial is conducted in chambers with the view of protecting the privacy of the minor (see s. 16 of the Children Act, Cap 59, of Laws of Uganda).

<sup>84</sup> Article 28(3)(e) of the Constitution of the Republic of Uganda, 1995.

<sup>85</sup> Considerations for bail are found in s. 77 of the Magistrates Courts Act Cap 16, of Laws of Uganda; s. 15 of the Trial on Indictments Act Cap 23, of Laws of Uganda; and Article 23(6) of the Constitution of the Republic of Uganda, 1995. Some of these considerations include whether the accused person has a fixed place of abode, the gravity of the offence charged and exceptional circumstances such as advanced age and illness.

Upon conclusion of evidence, the court must either acquit or convict and sentence the accused person. Where either party is dissatisfied with the decision of the court, he or she can appeal to the High Court. Appeals against decisions of the High Court lie to the Court of Appeal and finally, to the Supreme Court. In some cases, an aggrieved party is required to apply for permission to appeal against the conviction or sentence. Appeal courts rely on the record of the proceedings in the lower court to come to their determination. They may, in exceptional circumstances, admit new evidence or call witnesses. The appeal courts have the power to reverse a conviction, vary sentences or order for a retrial.

## **B. Access to justice barriers**

### **i. Procedure in case of “insanity” or “other incapacity” of an accused person**

Special procedures are provided for in cases involving accused persons perceived to be of “unsound mind”. These can be found in Part VI of the Trial on Indictments Act,<sup>86</sup> and Part XIII of the Magistrate Courts Act,<sup>87</sup> as well as section 215 of the Uganda Peoples Defence Forces Act.<sup>88</sup>

In brief, when it comes to the attention of court that the accused may be a “person of unsound mind” and is incapable of making his or her defence, proceedings are halted and an inquiry is carried out into whether they are of “unsound mind”.<sup>89</sup> The accused may either be released on bail pending the determination or detained pending a Minister’s order requiring them to be confined as a “criminal lunatic” in a mental hospital or other place of custody. The use of Ministers orders was recently ruled by a Uganda Court in Fort Portal as constituting an infringement of the principle of judicial independence and should be stopped.<sup>90</sup>

When it is found that the accused is capable of making his or her defence, proceedings are resumed. If it is proved that the accused was “insane” at the time of commission of the act constituting the offence (defence of insanity), the court makes a “special finding” to the effect that the accused is not guilty of the act or omission charged by reason of insanity.<sup>91</sup>

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<sup>86</sup> Trial on Indictments Act, Cap 23, of Laws of Uganda, ss. 45-49.

<sup>87</sup> Magistrate Courts Act, Cap 16, of Laws of Uganda, ss. 113-118.

<sup>88</sup> Uganda Peoples’ Defence Forces Act, 2005.

<sup>89</sup> Magistrate Courts Act, Cap 16, of Laws of Uganda. s. 113(1) and (2); Trial on Indictments Act, Cap 23, of Laws of Uganda, s. 45.

<sup>90</sup> Anthony Wesaka, “Court strips minister of powers to release mentally ill prisoners”, *Daily Monitor*, 27 July 2015, available online at <http://www.monitor.co.ug/News/National/Court-strips-minister-powers--prisoner/-/688334/2810010/-/154pd1z/-/index.html> (accessed 27 July 2015).

<sup>91</sup> Magistrate Courts Act, Cap 16, of Laws of Uganda, ss. 115-117; Trial on Indictments Act, Cap 23, of Laws of Uganda, ss.46-48.

The court shall report the case to the Minister who is required to order that the person concerned be kept in custody as a “criminal lunatic.”<sup>92</sup>

### *Problem analysis*

As is the case in civil proceedings, the language used to make reference to people with mental disabilities is inappropriate, degrading and derogatory, and in itself prevents people with mental disabilities from participating in criminal trials on an equal basis with others.

Secondly, there are no criteria, principles or guidelines for conducting the determination as to whether an accused person is capable or not of making his or her defence. Although in practice courts have relied on the assistance of medical expert witnesses, this is not expressly required and is dependent on the discretion of the court.<sup>93</sup>

Thirdly, this criminal procedure is complex, time consuming and denies accused “persons of unsound mind” the right to a fair and speedy trial as provided for in Article 28(1) of the Constitution. This is confirmed by the testimony of one lawyer who said:

I am currently representing “persons of unsound mind” who are in Luzira Prisons waiting for the Minister’s orders. Some of them have been in custody for the past 10 or more years.

The *Daily Monitor*, Uganda’s local newspaper has also reported that there are about 30 prisoners with mental disabilities who have been waiting for extended periods for the Minister’s orders to be released.<sup>94</sup>

Fourthly, where an accused person appears before a Magistrate Court on charges which can only be tried by the High Court, the law is silent as to whether there can be an inquiry into his or her “unsoundness of mind” before committal to the High Court for trial. This position, together with the complexity and inadequacy of the criminal procedural law on accused persons of unsound mind is considered and summarised in the case of *Uganda v. Tesimana Rosemary*.<sup>95</sup>

1. The facts of this case are that the accused was charged with murder of her husband, on 20 February 1991. She was arraigned before a Magistrate’s Court on 1 March 1991. On that day the court noted, “Accused further remanded to 15 March 1991 and looks to be of unsound mind. She is ordered thus [;] she be taken to hospital for examination.”

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<sup>92</sup> Magistrate Courts Act, Cap 16, of Laws of Uganda, ss. 117(2); Trial on Indictments Act, Cap 23, of Laws of Uganda, s. 48(2).

<sup>93</sup> NUDIPU, *supra* note 45, p. 8.

<sup>94</sup> Daily Monitor, *supra* note 90.

<sup>95</sup> *Uganda v. Tesimana Rosemary*, Criminal Revisional Case No. MSK-00-CR-CV-0013 of 1999, para. 18, available at <http://www.ulii.org/ug/judgment/high-court/1999/3> (accessed 17 February 2015).

2. In spite of this order, the accused remained in custody in Kalisizo and Masaka Government Prison, until about May 1991, when the prosecution started reporting to court that she was sick. On 26 July 1991 she was reported to be in Butabika Hospital. This file was regularly mentioned every two weeks and it was routinely noted that the accused was sick, or absent or in Butabika Hospital and that there was no police file up to 10 February 1994. On this date the magistrate issued a production warrant for the accused. This was regularly extended until 30 November 1994. It was never executed or complied with by Prison authorities. Neither was any explanation provided to or sought by the court.
3. On 30 November 1994, the court made the following order: "File shelved away pending production of the accused." The file resurfaced on 19 February 1999, more than four years later and again the accused was absent. The court made the following order: "File referred to the DPP through C/R for action." It is not evident what action the officers referred to took. Subsequently the accused resurfaced in the judicial orbit after an absence of slightly over nine years.

The Judge held that as there is no "express law or rule" to deal with this particular "lacuna in the law",<sup>96</sup> Magistrates Courts and the High Court can apply "the principles of justice, equity and good conscience" to inquire in to the unsoundness of mind of an accused person."<sup>97</sup> Justice Egonda-Ntende said:

It is clear to me, in terms of the principles of justice, equity and good conscience, that it was important to establish as soon as possible whether the accused was a person of unsound mind or not to determine the best course of action to be taken by the Director of Public Prosecutions [...]

I now turn to the issue of the nine-year delay in this case before committal for trial of the accused person. Does this delay amount to an abuse of the process of court to warrant a stay of prosecution in terms of Section [17 (2)] of the Judicature Statute? [...] The section provides, "With regard to its own procedures and those of the magistrates courts, the High Court shall exercise its inherent powers to prevent abuse of the process of the court by curtailing delays, including the power to limit and stay delayed prosecution as may be necessary for achieving the ends of justice."<sup>98</sup>

The court held that the eight year delay in prosecuting the case was unreasonable and therefore an abuse of the process of court. The court ordered for the immediate release of the accused person.

In a recently decided case, *Bushoborozi Eric v. Uganda*<sup>99</sup> the court ruled that dumping persons of unsound mind in prison for years without resolution of their cases is cruel,

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<sup>96</sup> Here, the Judge was specifically referring to the fact that the law did not make provision for the courts' intervention in cases where an accused person of unsound mind is charged with an offence triable by the High Court.

<sup>97</sup> *Uganda v. Tesimana Rosemary*, *supra* note 95.

<sup>98</sup> *Ibid.*, paras. 18, 21.

<sup>99</sup> High Court of Uganda at Fort Portal, *Bushoborozi Eric v. Uganda*, HCT-01-CV-MC-0011 of 2015.

inhuman and degrading treatment contrary to Article 24 of the Constitution. The court ruled further that:

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.

The Court proposed the following procedure to replace the existing one for cases where a special finding is made:

- Where the trial court makes a special finding that a "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.
- The trial court must order, in line with Section 48(4) of the Trial on Indictments Act 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 person concerned or otherwise deal with him or her.
- 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.
- The Registrar may appoint Counsel on State briefs to assist court in revisiting the cases pending the judge's special orders.

It remains to be seen whether or not the procedure proposed by the Court will be adopted by other courts and whether it will lead to justice for people with mental disabilities.

### *Recommendations*

- 3.1. The Uganda Law Reform Commission should revise and initiate proposals for amendment of the law to abolish the use of discriminatory terminology. Parliament should amend and come up with provisions of the law that reflect a human rights-based approach to disability.
- 3.2. The Chief Justice together with the Rules Committee should put in place clear Rules of Procedure for cases concerning accused persons with a mental disability.
- 3.3. The Government must take immediate steps to end arbitrary detention of persons with mental disabilities. They must be provided with the opportunity to obtain bail and speedy disposal of cases against them on an equal basis with others.

## ii. Competence of witnesses and victims with mental disabilities

There are no special provisions for witnesses and victims with mental disabilities implying that general rules of procedure apply. The rules of evidence provide that all persons are competent witnesses unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by virtue of “tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind”.<sup>100</sup> This section further states that a “lunatic” is not incompetent to testify, unless he or she is “prevented by his or her lunacy from understanding the questions put to him or her and giving rational answers to them”.<sup>101</sup> In presenting evidence, every witness is required to give his or her testimony on oath administered by court.<sup>102</sup>

### *Problem analysis*

Respondents stated that although rules of evidence permit witnesses with mental disabilities to testify, they are perceived by some Judges and Magistrates to be incapable of understanding the nature of an oath. As a result, most witnesses and victims with mental disabilities are in practice denied the opportunity of giving evidence by exercise of a Judge’s or Magistrate’s discretion. In some cases, this resulted in accused persons being let free for lack of evidence to support the charges. This is confirmed by the testimony of a magistrate below:

I have a file before me where the victim is an “imbecile.” She was defiled. The victim could not talk. We released the suspect and dismissed the charges because the prosecution failed to produce witnesses. [...]

In addition, the adversarial system encourages the opposing party to rely on technical language and the mental condition of a witness or victim during cross examination in order to cast doubt on their evidence. This embarrasses and discourages witnesses from effectively understanding and responding to questions, particularly where such proceedings take place in open court. The following testimony provides a vivid picture of how such a system denies justice:

When I walked in to court, I found so many people. At first, I was scared because this was my first time in court. I was told to stand in front of people and swear. The Magistrate kept on shouting at me and told me that if I don’t talk the truth, he would send me to prison. [...] Then there was this lawyer who asked me so many questions in English which I did not even understand, but he kept on insisting that I should say “yes” or “no”. He angered me when he said that I am mentally ill. [...]

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<sup>100</sup> Evidence Act, Cap 6, of Laws of Uganda, s. 117.

<sup>101</sup> Evidence Act, Cap 6, of Laws of Uganda, s. 117.

<sup>102</sup> Magistrates Courts Act, Cap 16, of Laws of Uganda, s. 101; Trial on Indictments Act, Cap 23 of Laws of Uganda, s. 40.



### *Recommendations*

- 3.4. The Chief Justice should ensure that witnesses with mental disabilities are allowed to testify on an equal basis with others.
- 3.5. Language in court should be simplified and modified to reflect a more dignified and respectful language. The Chief Justice and Principle Judge should ensure that judicial officers lead this course by intervening whenever any party in the proceedings attempts to use derogatory language in reference to the witness such as “lunatic”, “idiot”, “insane”, “mentally ill” and “person of unsound mind”.
- 3.6. The Uganda Law Council should recommend the inclusion of mental health and disability law in law schools to equip prospective lawyers and State Attorneys with knowledge and skills for examining and leading evidence of victims and witnesses with mental disabilities in the criminal process.
- 3.7. The framing of questions during cross examination should take in to account the nature of disability of a witness. The questions should be presented in a simpler language and should be more of an inquiry rather than adversarial. This enables a witness to understand the questions and give responses as appropriately as possible.
- 3.8. Some witnesses may need a support person in court such as a close relative, peer, or other trained person to provide comfort and act as an intermediary. Such a person would help in interpreting and relaying evidence between the court and the witness/victim as well as providing emotional and moral support.
- 3.9. Procedural adjustments and reasonable accommodations should be made on a case-by-case basis to ensure that persons with mental disabilities are supported to provide evidence during the court process. Examples of this could include scheduling regular breaks, allowing witnesses to have support persons with them when they give their evidence, etc.

### **iii. Judgments and sentences**

Upon conclusion of evidence by each party, the Judge or Magistrate considers the evidence and makes a judgment which is delivered in open court and in the presence of both parties. If the court enters a conviction against the accused person, it will pronounce a sentence based on the law and other mitigating factors.

### *Problem analysis*

One of the respondents confirmed that the guidelines on sentencing are not clear on convicts with mental disabilities. The result has been the handing down of excessive sentences in disregard of the principles of a fair trial. The following is the testimony from a judge confirming this conclusion:

OK, I convicted him to 50 years imprisonment but it was one of the hardest cases which I handled because the public wanted him dead. [...] If I release this guy, he will not survive outside. And then, if I release him without him being treated, he is a danger to society because he had those kind of serial killer characters [...] He needed to be in an environment where he is controlled for his own security and that of other people. Hopefully, when he gets out of prison, he would be too old and probably the mental illness could have cured. There are many of my colleagues in similar situations but for me, I said let me be bold and convict this guy. If I am wrong, the Court of Appeal will correct that. [...]

Another judge reported:

Whereas the courts send people with mental illness to Luzira Prison on security reasons, they actually pose a threat to inmates as well in Luzira prison.

The above testimonies reveal that in convicting and sentencing people with mental disabilities, courts seem to rely on discriminatory perceptions that such people are a danger to society rather than the evidence and the relevant provisions of the law. These testimonies also confirm the stigma and stereotypes that are perpetuated by the judiciary. This denies people with mental disabilities the opportunity of obtaining an appropriate sentence for the offence committed because the ultimate aim is to have them kept away from the public for being dangerous.

### *Recommendations*

- 3.10. Sentencing must always be based on the law and evidence, and never on discriminatory stereotyping of people with mental disabilities.
- 3.11. The Chief Justice should put in place guidelines for the delivery of judgments and sentencing of people with mental disabilities.

## Chapter 4: Conclusion

People with mental disabilities continue to face numerous challenges to access courts in Uganda (and globally) for different reasons, including due to the absence of procedural and reasonable accommodations in courts. It is the obligation of the Ugandan Government to ensure that effective access to justice is made a reality for people with mental disabilities. One way to promote and protect their rights is by ensuring that people with mental disabilities can seek real access to justice in courts which are free of stigma, and which are fully guided by the principles of equality and non-discrimination.

To seek redress through the courts, a concerted effort needs to be made to make Ugandan courts more accessible. There is also a need for capacity-building at all levels of the judiciary on the obligation to provide procedural and age-appropriate accommodations to persons with disabilities. Whilst some of these changes can be effectuated through amending the rules themselves, others are reliant on Magistrates and Judges applying the rules in a way which ensures that justice is done. Such of these changes will take time to implement, but it is also clear that political will is necessary at the highest levels of the Ugandan Government to fulfill its human rights obligations towards people with mental disabilities. Research conducted by MDAC and MHU last year showed that people with mental disabilities in Uganda face multiple human rights abuses, exclusion and isolation, and so it is crucial that the courts are now opened up to them on an equal basis with others.

The recommendations set out in this report provide some of the necessary actions that should be taken. For example, regarding procedural accommodations for people with mental disabilities, the Ugandan Government will have to make modifications and adjustments to do with language and the content of court rules and procedures which presently have a bias towards exclusion rather than the provision of support. In terms of reasonable accommodations, it is important that each person with a disability is treated as an individual, and that officers of the judiciary understand the importance of making individualised adjustments to ensure that justice is done. At the micro-level, this means dealing flexibly with persons who have specific challenges such as quantifying things, giving effective descriptions about how and when something happened, limited oral language skills, and varying understandings of time. Overall accessibility should also be improved, meaning that old traditions will need to be reassessed: judges/magistrates could remove their gowns and wigs to create a less threatening environment, or give extra breaks to specific courts users.<sup>103</sup>

Ultimately, these reforms should be undertaken in close consultation with persons with mental disabilities themselves. It is time that the doors of justice were opened to all.

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<sup>103</sup> Open Society Foundation for East Africa workshop on access to justice, 3 to 4 November 2014, Nairobi, Kenya.

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