

A CRITIQUE OF THE LAW ON THE RIGHT TO A FAIR HEARING IN CRIMINAL TRIALS IN UGANDA¹

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ABSTRACT

The right to a fair hearing is a non-derogable right under article 44(c) of chapter four of the Constitution of the Republic of Uganda, 1995. The observation of this right has fallen short of expectations even after being accorded such importance. This paper interrogates the observation of the right to a fair hearing of an accused person undergoing criminal trial in Uganda, specifically focusing on the law and practice. Doctrinal research approach was applied in this paper. The analysis concludes that; the provisions relating to observation of the right to fair hearing in criminal trials in Uganda are dotted in different Acts of Parliament, some legislation are contrary to the spirit of the Constitution of the Republic of Uganda, 1995, Courts interpret and apply articles relating to the right to fair hearing in isolation of each other instead of harmony, which have greatly hampered efforts to enjoyment of the right to a fair hearing during criminal trials in Uganda. Recommendations to guarantee the observation of the right to fair hearing of accused persons in Uganda during criminal trials include; amendments, repeal, consolidation and enactment of relevant laws, judicial activism, and training of the various stakeholders in the criminal trial process.

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Introduction

Fair hearing refers to “a judicial proceeding that is conducted in such manner as to conform to fundamental concepts of justice and equality. In criminal trial when an individual is arrested, a fair hearing means the right to be notified of the charge being brought against him or her and the chance to meet that charge”.³ The right to a fair hearing is fundamental to the rule of law and democracy. The right to a fair hearing is absolute and cannot be limited. It requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law. The procedural requirements of fair hearing might differ according to the circumstances of the accused.⁴

The right to a fair hearing is a preemptory norm in international law.⁵ Several international instruments to wit; treaties, conventions and statutes guarantee the observation of the right to a fair hearing while an accused person is undergoing criminal trial. A snapshot of the provisions of Universal Declaration of Human Rights (UDHR),⁶ International Convention on Civil and Political Rights (ICCPR),⁷ African Charter on Human and Peoples Rights (ACHPR)⁸ the Rome Statute of the International Criminal Court⁹ to mention a few have provisions clearly providing for a fair hearing in criminal trials.

In the Ugandan context, the right to fair hearing involves the accused person being informed of the charges against him/her,¹⁰ presumption of innocence,¹¹ and equality

³[https://legal-dictionary.thefreedictionary.com/fair hearing](https://legal-dictionary.thefreedictionary.com/fair+hearing)>fair hearing<, accessed on 06/02/2017.

⁴The European Convention on Human Rights, 1950, article 6, retrieved from <https://www.liberty-human-rights.uk>, accessed on 06/02/2017.

⁵ Judge Patrick Robinson, *The right to a fair trial in International Law, with specific reference to the work in ICTY*, Berkeley Journal of International Law, Publicist - Vol. 3 (2009) retrieved from <https://bjil.typepad.com> accessed on 25. November, 2018.

⁶1948, articles 7 and 11, retrieved from <www.un.org/universal-declaration-human-rights, accessed on 26 September 2017

⁷1966, articles 14 and 15, retrieved from <<https://treaties.un.org/publications>, accessed on 26 September 2017

⁸1981, articles 3 and 7 (1) and (2), retrieved from <www.chr.up.ac.za/documents-by-theme accessed on 26 September 2017

⁹ 1998, articles 66 and 67 retrieved from <https://www.icc-cpi.int-RS>, accessed on 25 November, 2018.

¹⁰ The Constitution of the Republic of Uganda, 1995, articles 23(3) and 28(3)(b).

before the law,¹² impartial trial,¹³ pre-trial disclosure of the evidence to be brought against him/her,¹⁴ an opportunity to present the accused's case in defence.¹⁵ The right to a fair hearing is non-derogable in Uganda.¹⁶

The right to fair hearing is one of the fundamental and non derogable human rights in Uganda,¹⁷ encompassing various segments of rights to be observed during criminal trials as enshrined under article 28.¹⁸

The right to a fair hearing is the bedrock of criminal trials in a democratic country, where all judicial and non-judicial decisions during criminal trials are hinged.¹⁹ In the case of *Kawooya Joseph vs. Uganda*,²⁰ the Supreme Court in its judgment reasoned that every accused person is entitled to a fair trial. Advocates assigned to defend accused persons should do it diligently and professionally. Judicial officers presiding over criminal matters equally should ensure a fair hearing of the accused person in accordance with the provisions of the law.

Criminal trials in Uganda

Criminal trials in Uganda are characterized by delayed adjudication of cases, compromised judicial independence due to corruption, military intimidation and influence by political actors in various government offices and departments. In the recent times, case backlog has become a common vocabulary in the justice, law and order sector (JLOS) reports. There are many cases which have been in the court system

¹¹ The Constitution of the Republic of Uganda, 1995, article 28(3)(a).

¹² The Constitution of the Republic of Uganda, 1995, article 21(1).

¹³ The Constitution of the Republic of Uganda, 1995, article 28(1).

¹⁴ The Constitution of the Republic of Uganda, 1995, article 28(3)(c); See also the case of *Soon Yeon Kong Kim and another vs Attorney General* (2008)ULR 478 at 483-4.

¹⁵ *ibid.*

¹⁶ The Constitution of the Republic of Uganda, 1995, articles 28 and 42.

¹⁷ The Constitution of the Republic of Uganda, 1995, article 44(c).

¹⁸ The Constitution of the Republic of Uganda, 1995.

¹⁹ The Constitution of the Republic of Uganda, 1995, article 28.

²⁰(2001)KALR 68 at 72.

for over two years.²¹To prove the magnitude of case backlog in Uganda; the Chief Justice in October 2016, set up a case backlog reduction committee. In the Committee's report of 29th March, 2017, it was indicated that there were cases that have been in Courts of law for over 10 years, between 5 to 10 years, and majority were due to be declared backlog soon.²² The common adage of delayed justice is justice denied, fits the situation that has engulfed accused persons in Uganda.

There are also incidences of detention beyond constitutionally mandated period of 48 hours by Uganda Police Force,²³torture of suspects,²⁴ long period spent on remand,²⁵ denial of bail,²⁶ non-provision of legal representation to accused persons who are poor but not charged with capital offences,²⁷ unprofessional legal representation by advocates on state brief,²⁸ and establishment of specialized criminal courts with monopoly over adjudication of certain offences,²⁹ are some of the incidences undermining the observation of the right to fair hearing in criminal trials.

The judiciary with other justice, law and order sector institutions implemented a number of interventions to deal with the case backlog including; chain linked initiative, specialized divisions of the High Court, plea bargaining, session system, JLOS backlog system among others.³⁰ However, some of the interventions have turned out to jeopardize the observation of the right to a fair hearing in criminal trials. For example

²¹ The Judiciary, '*A report of the case backlog reduction committee*' (29 March 2017) 31 retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017.

²² *ibid* 30, 34-35 & 36.

²³ *Uganda vs Robert Sekabira & 10 others*, High Court Criminal Session Case No. 0085 of 2010 (unreported).

²⁴ Maria Burnett, 'Fresh Torture Accusations Leveled Against Uganda's Police' *The Human Rights Watch* (East Africa, Uganda 14 May 2017) retrieved from <https://www.hrw.org/news/2017> accessed 4/6/2017.

²⁵ Wilson Asiimwe, 'Inmates decry long remand period without trial' *The newvision* (Kampala 3 June 2017) retrieved from <https://www.newvision.co.ug>, accessed 4/6/2017.

²⁶ Juliet Kigongo, 'Court has duty to protect society from lawlessness-judge tells Kanyamunyu' *The Daily monitor* (Kampala 30 March 2017) retrieved from <https://www.monitor.co.ug> accessed on 4/6/2017.

²⁷ The Constitution of the Republic of Uganda, 1995, article 28 (3)(e).

²⁸ *Kawooya Joseph vs Uganda* (2001) KALR 68 at 72.

²⁹ The Anti-Corruption Act, Act No. 6 of 2009, laws of Uganda; See also The High Court (Anti-Corruption Division) Practice Direction No. 3 of 2009; see also <https://www.the-judiciary.go.ug-data-smenu-anti-corruption-division-judiciary>, accessed 25 September 2017.

³⁰ *ibid* 4.

the establishment of specialized courts only based in Kampala like the Anti-Corruption Division of the High Court of Uganda,³¹ the International Crimes Division of the High Court of Uganda³² and the Court for adjudicating cases relating to environment, and utility cases³³ are some of the efforts that have negatively impacted on observation of the right to a fair hearing. The accused persons are made to be tried far away from where the offences were committed, far away from witnesses, thereby incurring high costs in gathering evidence to use in their defence, expensive and avoidable travel expenses to attend court proceedings and legal fees.

The session system which refers to the holding of criminal trials on designated days and places by the High Court to adjudicate capital offences by a presiding High Court judge³⁴ has not solved the backlog either. Sessions take long to be held either due to lack of funds and also abuse of the process by those who want personal gains, thereby increasing backlog.³⁵ The situation in Uganda therefore points to existence of shortcomings in observation of the right to a fair hearing during criminal trials at a time when the country is considered to be democratic and civilized.

In view of the foregoing, this article tries to critique the law and practice on observation of the right to a fair hearing during criminal trials in Uganda.

The law on the right to fair hearing in Uganda

The law regulating observation of the right to fair hearing in criminal trials is found in the Constitution³⁶ and procedural laws governing trials like the Magistrates Courts Act³⁷

³¹ The Anti-Corruption Act, Act No. 6 of 2009, laws of Uganda; See also The High Court (Anti-Corruption Division) Practice Direction No. 3 of 2009; see also https://www.the_judiciary.go.ug-data-smenu-anti-corruption-division-judiciary, accessed 25 September 2017.

³² The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, laws of Uganda retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017.

³³ Judiciary launches Specialised Court to Deal with Utilities, Wildlife and Standards, *The Judiciary* (Kampala 26 May 2017) retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017.

³⁴ The Trial on Indictment Act, Cap. 23, s. 4, laws of Uganda.

³⁵ The Judiciary, 'A report of the case backlog reduction committee' (29 March 2017) 39 retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017.

³⁶ The Constitution of the Republic of Uganda, articles 28 and 23(6).

³⁷ Cap. 16.

and the Trial on Indictments Act³⁸ and The Criminal Procedure Code Act.³⁹ The Criminal Procedure Code Act, which would be the central reference legislation to protect the accused persons' right to fair hearing in criminal trials is not detailed to cover much of the proceedings in criminal trials.

Besides the above Acts, there are others legislations, to wit, the Uganda Peoples Defence Act,⁴⁰ the Prisons Act,⁴¹ The Police Act,⁴² Children Act⁴³ as amended⁴⁴ all providing for legal representation, bail, presumption of innocence, time and facilities to prepare for defence among others.

The Concept of a fair hearing in criminal trials.

Fair hearing in criminal trials is a procedural concept or requirement that derives its basis in article 2, 28 and 44(a)⁴⁵ and several other international and regional instruments whose objects are to limit or delegitimize arbitrary actions by state organs or such other persons or bodies charged with determining the rights of individuals.⁴⁶ The concept emphasizes individual rights and constitutional safeguards against arbitrary or unfair judicial or administrative proceedings. The concept encompasses prohibition of illegal arrest and detention, search and seizure, self-incrimination; double jeopardy; excessive bail conditions and unduly long pre-trial detention, cruel and unusual punishment among others.⁴⁷ The concept does not only embrace the rights of the accused but the society as one entity and therefore Courts in observation of the right to a fair hearing, should bear in mind their duty to the public.⁴⁸

³⁸ Cap. 23.

³⁹ Cap. 116.

⁴⁰ Cap. 59.

⁴¹ 2006.

⁴² Cap. 303 as amended.

⁴³ Cap. 59.

⁴⁴ The Children Amendment Act, 2016.

⁴⁵ *ibid.*

⁴⁶ The International Convention on Civil and Political Rights, 1966; the African Charter on Human and Peoples Rights, 1981.

⁴⁷ Etannibi (n 23)16; Musa Ssekaana, *Criminal Procedure and Practice in Uganda* (lawAfrica) 41-2.

⁴⁸ Musa Ssekaana, *Criminal Procedure and Practice in Uganda* (lawAfrica) 42.

1. Fair and speedy trial

Article 28(1) and (2)⁴⁹ provide that in determination of civil rights and obligations or criminal charges, a person shall be entitled to a fair, speedy and public trial except a court or tribunal may exclude public or the press from all or any proceedings before it on grounds of morality, public order or national security as may be necessary in a free and democratic society.

The concept of fair hearing requires the court to ensure that every hearing or trial is reasonable, free from suspicion of bias, free from clouds of prejudice, every step is not obscure, and whatever is done, it is imperative to weigh the interest of both parties and make an estimate of what is reciprocally just. The processing and hearing of a case must be free from prejudice, favoritism and self-interest. The court must be detached, unbiased, even-handed, just, disinterested, balanced, upright and square. There must be shown all the qualities of impartiality and honesty.⁵⁰

It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments, conducted impartially in accordance with the fundamental principles of justice and due process of law of which a party has had reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be appraised of the evidence against him in the matter so that he will be fully aware of the basis of the adverse view of him for the judgment, a right to argue that a decision be made in accordance with the law and evidence.⁵¹

The requirement not to delay justice (ensuring a speedy trial) needs to be balanced against the other core elements involved in the dispensation of justice. In the Kotido

The Constitution of the Republic of Uganda, 1995.

⁵⁰ Benjamin Odoki, A Guide to Criminal Procedure in Uganda (3rd edn, Law Development Centre 2006)100

⁵¹ *Uganda Law Society v Attorney General*, Constitutional Petitions No. 02 and 08 of 2002

Field Court Martial executions, Constitutional Court rejected the state's argument that the trial and execution of the accused soldiers within less than 3 hours of conclusion of the tribunal's hearings was geared at achieving a speedy trial as required by Article 28 of the Constitution, stating that the trial was too speedy to enable thorough investigations to be carried out on the matter, resulting in a miscarriage of justice.⁵²

At the other end of the spectrum, trials in many courts of law in Uganda still take an inordinately long period of time, on account of several factors.⁵³

2. Public hearing and exclusion of the press or the public

The provision of article 28(1) in relation to public trial connotes that all trials must be heard in open court, allowing everyone to witness the hearing. However, Courts reserve the right to have the proceedings *in camera* where the matter touches on sensitive matters of national security or issues of morals whose disclosure is not in the public interest and may compromise interests of national security or that of the litigants.⁵⁴

Court trials are meant to be public simply because courts have to be open to the people while doing their work since they exercise judicial power derived from the people and in the name of the people. They owe the people accountability of how they exercise the judicial power in both criminal and civil matters.⁵⁵

3. Independent and impartial court or tribunal

Article 28(1)⁵⁶ provides that besides the individual right to a fair and speedy trial, such trial shall be heard by an impartial court or tribunal established by law. The requirement that the proceedings must be before an impartial court/tribunal are indispensable to the realization of a fair trial. In the case of *Prof. Isaac Newton Ojok vs. Uganda* the accused

⁵²ibid

⁵³ For a discussion of the phenomenon at the Uganda Human Rights Commission, see Isaac Bakayana, 'From Protection to Violation: Analyzing the Right to a Speedy Trial at the Uganda Human Rights Commission, HURIPED Working Paper No.2 (November 2006).

⁵⁴ The Constitution of the Republic of Uganda, 1995. See also Benjamin J. Odoki, *A guide to Criminal Procedure in Uganda*, (3rd edn, The Law Development Centre) 105.

⁵⁵ The Constitution of the Republic of Uganda, 1995, article 126(1).

⁵⁶ The Constitution of the Republic of Uganda, 1995.

person requested the trial judge to recuse herself on the grounds that she was related to one of the senior government officials and was likely to be partial while trying his case. The trial judge rejected the application and it was one of the grounds on appeal to the Supreme Court.⁵⁷ Justice Kwesiga recently recused himself from a murder case on grounds that he was counsel to the parent of one of the deceased persons (Nteireho) while in private practice.⁵⁸ These incidences of recusal or challenging partiality of judicial officers are an indication that where there is the slightest likelihood of bias, such a trial is wholly said to be impartial.

The Judiciary may also be a target of intimidation and coercion in the performance of its functions under the law. There is executive-led impunity, particularly when Courts judgments are willfully disobeyed or ignored. The peak of executive disdain of the courts came with the infamous attack of the 'Black Mamba' on the High Court in what Hon. The Principal Judge Emeritus Justice James Ogoola described as the 'rape of the temple of justice' and the riotous protests outside the High Court precinct after the annulment of the Referendum Act by the Constitutional Court.⁵⁹

4. Presumption of innocence

Article 28(3)(a)⁶⁰ provides that an individual charged with any criminal offence is presumed innocent until he or she is found guilty or pleads to the guiltiness of the charges. The only exception to this provision is where the law imposes a duty to an accused person to prove particular facts known as evidential burden.⁶¹ Scholars have termed the exception as the reverse onus clause. A reverse onus clause is a provision that requires an accused person presumed innocent to have burden to prove certain facts. This provision may reduce the burden of the prosecution to prove its case beyond

⁵⁷ Criminal Appeal No. 333 of 1991

⁵⁸ Justice Kwesiga recuses himself from Entebbe expressway murder case (The Independent Magazine, 21 April, 2021, Kampala) retrieved from <http://www.independent.co.ug>, on 03 August, 2021.

⁵⁹ George W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance* (2nd impn, lawAfrica 2010) 46-49; see An International Bar Association Human Rights Institute Report titled; *Judicial independence undermined: A report on Uganda*, September, 2007, p. 22

⁶⁰ The Constitution of the Republic of Uganda, 1995

⁶¹ The Constitution of the Republic of Uganda, 1995, article 28(4)(a).

reasonable doubt. However, the reverse onus clause is limited to particular facts under the applicable law. The prosecution may further be required to justify the application of such reverse onus clauses.⁶² The legal burden of proving charges by the prosecution beyond reasonable doubt remain unchanged in criminal trials. The application of the exception should further be read with article 43 and 44(c) which provide for the general limitations on enjoyment of human rights and right to fair hearing being non-derogable where the presumption of innocence is inclusive.⁶³

Presumption of innocence has been a nightmare of judicial officers in their efforts to balance the protection of individual rights and interests of the general public (maintenance or keeping law and order) by preventing suspects from continuous commission of crimes before pleading or being found guilty of the charges.⁶⁴ Courts have to differentiate between rebuttable and non-rebuttable presumptions before allowing the application of the reverse onus clauses and the limitations to enjoyment of human rights.⁶⁵ Presumption of innocence is amongst the minimum standards of criminal trials under the common law system⁶⁶ to wit; *it is better that, 99 guilty men should go free than that one innocent man should be punished*. Different individuals including political leaders like Mwalimu Julius Kambarage Nyerere (RIP) have had their sentiments and disapproval of this legal principle.⁶⁷ Ugandan Courts have at several occasions pronounced themselves on the centrality of this right in criminal trials.⁶⁸

⁶²Kakungulu Mayambala, *Guilty before trial: Presumption of innocence and the public parading of criminal suspects in Uganda*, (Huripec Working Paper No. 32, December, 2011) 33-8.

⁶³ The Constitution of the Republic of Uganda, 1995.

⁶⁴ Kanyeihamba (n 192) 52.

⁶⁵ *Ismael Serugo Vs Kampala Capital City and Attorney General*, Constitutional Appeal, No.2 of 1998 (unreported).

⁶⁶ *Woolmington V DPP* (1935) AC 462 at 481.

⁶⁷ Kanyeihamba (n 209) 53.

⁶⁸ The Uganda Criminal Justice Bench Book (1st edn, The Law Development Centre, 2017) 75-6

5. Information as to the nature of the offence

Article 28(3)(b)⁶⁹ is to the effect that, a person charged with a criminal offence shall be informed immediately, in a language that the person understands, of the nature of the offence he or she is charged with.

An accused person cannot defend himself without knowing what he or she is charged of in the first place. For a fair trial to be realized by any court or tribunal, it is imperative that the accused person undergoing criminal trial is informed at earliest what the charge is and the likely consequences if found guilty of the same. Such information enables the accused to know the charge and would help him or her to inform Court of previous trial and conviction or take a plea of previous acquittal or conviction in the circumstances if he or she was tried for a similar offence before and save Court's time.⁷⁰ Courts have gone further to hold that a trial in violation this right renders such trial a nullity as it violates the accused person's right to a fair trial.⁷¹

6. Time and facilities to prepare defence

Article 28(3)(c) which guarantees the accused adequate time and facilities for the preparation of his/ her defense.⁷² The clause requires in essence that for a hearing to be fair a person charged with a criminal offence must be afforded among other things "facilities for the preparation of his defence" and "facilities to examine the witnesses called by the prosecution and to obtain the attendance and carry out the examination of witnesses to testify on his behalf". He/she must be given and afforded the facilities to do those things. In practical terms this constitutional edict is satisfied only if an accused person is given and allowed or afforded everything which promotes the ease of preparing his defence, examination of any witnesses called by the prosecution and securing witnesses to testify on his behalf. In general terms it means that an accused person shall be free from difficulty or impediment and free. More or less completely

⁶⁹The Constitution of the Republic of Uganda, 1995; see the Magistrates Courts Act, Cap. 16, Section 124(1) and the Trial on Indictments Act, Cap. 23, section 160.

⁷⁰ Kanyeihamba (n) 82-3.

⁷¹ *Uganda V Engonu* HC Crim Rev No. 1 of 2013.

⁷² *Adrea vs Republic* (1970) EA 26.

from obstruction or hindrance in fighting a criminal charge made against him/her. He should not be denied anything the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall his case and defence or lessen and bottleneck his fair attack on the prosecution case.⁷³

7. Facilitation to examine and call witnesses

Article 28(3)(g) provides that the accused person shall be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.⁷⁴ In relation to enabling the accused to secure the attendance of witness the constitution goes to suggest that in limited conditions, public funds may need to be spent in the circumstances.⁷⁵ The accused person is entitled to same remedies like prosecution where witnesses are called and fail to appear when properly summoned or if they become refractory witnesses.⁷⁶

However, the accused's right to examine and calling witnesses is affected by the level of appreciation of criminal trial proceedings by the accused person, lack of legal representation in lower courts where state provided legal representation for indigents is not available save for those charged with capital offences.⁷⁷ Accused persons are also unable to call witnesses having spent longer times on remand and lost touch with witnesses and societal attitude of frowning and disassociating with imprisoned persons except close family relations who may be considered biased or were not present at the time the alleged offences were leveled against the accused persons.

⁷³ *Soon Yeon Kong Kim V Attorney General*, Constitutional Reference No. 6 of 2007 (unreported); see also *Uganda Law Society and Jackson Karugaba vs Attorney General*, Constitutional Petitions Nos. 2 & 8 of 2002 (unreported).

⁷⁴ The Constitution of the Republic of Uganda, 1995.

⁷⁵ The Constitution of the Republic of Uganda, 1995, article 28(4)(b).

⁷⁶ Benjamin J. Odoki, A guide to Criminal Procedure in Uganda (3rd edn, The Law Development Centre, 2006)102.

⁷⁷ The Constitution of the Republic of Uganda, 1995, article 28(3)(d)and(e).

8. Personal appearance or by counsel

Article 28(3)(c)⁷⁸ provides that an accused shall be permitted to appear before Court in person or be represented by a lawyer at his or her expense. In *Muyimba & Ors vs. Uganda*⁷⁹ the trial was to be heard in Masaka and the accused person's lawyer who was in Kampala was informed about this on the morning of the day of the trial and thus could not make it to court in time. When the accused requested an adjournment, the Magistrate declined the request and proceeded with the trial, an action held to have been a violation of the accused person's right to legal representation.

The spirit of this article is to enable accused persons who can afford legal services to seek them and any attempts by Court or tribunal to deny an accused this service, the action will amount an unfair trial and the point alone is a ground for an appeal and may read to an order of retrial on appeal or revision.⁸⁰

9. Legal representation at the expense of the state

In this regard, article 28(3)(e) entitles the accused to legal representation, a provision that is closely related to article 28(3)(c) which guarantees the accused adequate time and facilities for the preparation of his/ her defense.⁸¹ However, the right to legal representation has proven problematic, both on account of the knowledge of the right as well as of the availability and affordability of a lawyer for the purpose, particularly within the criminal justice system. As Mayambala points out State briefs—lawyers paid by the State to represent indigent accused persons—only cover persons accused of capital offences, and even then, those who require such services far exceed available lawyers.⁸² This right is only available to accused persons charged with capital offences, leaving the majority of Ugandans charged with non-capital offences who are

⁷⁸ The Constitution of the Republic of Uganda, 1995; the Trial on Indictment Act, Cap. 23 section 55 and the Magistrates Courts Act, Cap. 16, section 158.

⁷⁹ (1969) EA 433;

⁸⁰ *ibid.*

⁸¹ See *Adrea v Republic* (1970) EA 26.

⁸² R. Kakungulu Mayambala, 'Legal Representation in Uganda from 1995 to 2005: Aiming High and Falling Short?' *East African Journal of Peace & Human Rights*, 15/2, (2009) at 492; See also *Kawooya Joseph vs Uganda* (2001) KALR 68 at 72.

everywhere in magistrates courts against trained state attorneys and prosecutors. What kind of fair trial is that to indigent Ugandans but not charged of capital offences?

10. Assistance of an interpreter

Article 28 (3)(f)⁸³ provides that every person charged with a criminal offence shall be afforded without payment by that person the assistance of an interpreter if that person cannot understand the language used at the trial.

The Trial judicial officer has an obligation to ensure that the accused person present on trial and doesn't understand the Court's language during trial, is availed an interpreter to and the same is to the advocates of the accused where evidence is being given in a language other than the language of Court (English), then an interpretation in English is made to the advocate.⁸⁴

However, the challenge remains the capacity of interpretation services provided and the unavailability of interpreters and its effect on the general object of the right to fair hearing in general especially speedy trials. The challenge of judiciary staff is such regard were well highlighted in one of the presentation by, J.P.M. Tabaro J as then was as captured in the edited newspaper edition where he observed that, government agencies had institutional challenges like lack of accommodation facilities, poor remuneration of staff, little or no advanced equipment like computers, transport means without forgetting administrative staff in the Judiciary Secretarial staff, interpreters, clerks, ushers and so many other categories is not enough due to the massive retrenchment in the Public Service which did not spare the judiciary.⁸⁵

⁸³ The Constitution of the Republic of Uganda, 1995.

⁸⁴ The Uganda Criminal Justice Bench Book (1st edn, 2017) 91; See also of the Magistrates Act, Cap. 16, section 139 and the Trial of Indictment Act, Cap. 23, section 56.

⁸⁵ Justice Patrick Tabaro, *Alternative justice - a solution to backlog in Uganda's judicial system*, (The Observer, Kampala August 31, 2012), retrieved from <https://www.observer.ug> on 30/09/ 2018.

11. Entitlement to a copy of proceedings

Article 28(6)⁸⁶ provides that a person tried for any criminal offence or any of his or her authorized agent, shall after judgment in respect of an offence shall be entitled to a copy of proceedings at fee prescribed by law.

This provision envisages that an accused person who intends to seek post-trial remedies is entitled to a copy of proceeding but he or she has to pay a prescribed amount of fees before accessing the record. The concern is what happens to indigents who aren't capable of having the prescribed fees or in circumstances that do not allow them the opportunity to use cheaper alternatives and not among those provided for under state representation under article 28(3)(e).⁸⁷ It was reported recently that Counsel Bob Kasango was asked to pay for Court record or the same be sent to him through email while he was in prison. Unfortunately Kasango had no access to the internet to read his emails, he had no legal representation, and neither did he know how much he needed to pay to be availed a record of proceedings. He felt that such treatment would greatly affect his preparation to defend himself.⁸⁸

12. No retrospective charges and punishments

Article 28(7) and (8)⁸⁹ provides inter alia; a person shall not be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.

The spirit of this provision is to ensure that where facts did not constitute an offence before a law is enacted; a person should not be retrospectively charged and tried.

⁸⁶ The Constitution of the Republic of Uganda, 1995

⁸⁷ Ibid.

⁸⁸ Racheal Agaba, *Pension case: Jailed lawyer Kasango asked to pay for court record*, (PML Daily, Kampala online newspaper, 7 August 2018) retrieved from <http://www.pmldaily.com/news/2018/08/pension-case-jailed-lawyer-kasango-asked-to-pay-for-court-record.html> on 30th September, 2018.

⁸⁹ The Constitution of the Republic of Uganda, 1995.

Besides that where the facts constituted an offence and the punishment prescribed, then in case an amendment is made and the punishment is enhanced then an accused person cannot be sentenced to the enhanced punishment as it would be to a retrospective application of law to facts and sanctions before the enactment of such law.⁹⁰

3.2.13 Double jeopardy

Article 28(9) and (10)⁹¹ provides that a person who shows that he or she was tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not be tried for the same or for any other criminal offence which he or she could have been convicted at the trial for the said offence except upon an order of a superior court in the course of appeal or review proceedings relating to the conviction or trial. The provisions further provide that a person shall not be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence. This provision was further extended to concurrent trials of an accused person in respect of the same or similar offences in different Courts of law.⁹²

14. Spouse not a compellable witness

Article 28(11)⁹³ provides that where a person is tried for criminal offence, neither the accused nor their spouse should be compelled to give evidence against that person. The essence of this provision is to protect the privileged relationship and communication between the married persons. Matrimonially and religiously upon marriage a husband and wife become one.⁹⁴

Under common law, ordinarily all persons are competent and compellable witness except for certain categories of persons as provided under statutory provisions who

⁹⁰ Benjamin Odoki, *A Guide to Criminal Procedure in Uganda* (3rd edn, Law Development Centre 2006)

⁹¹ The Constitution of Republic of Uganda, 1995

⁹² The Uganda Criminal Justice Bench Book (1st edn, The Law Development Centre 2017)92-3; see also Mulenga JSC judgment in *Uganda Law Society v Attorney General*, Supreme court Constitutional Appeal No.01 of 2006.

⁹³ *ibid* (n 218)

⁹⁴ Mark Chapter 10 verses 7-8, the Holy Bible, New International Version (The Bible Society in Australia Inc. 2007) 1063.

include spouses.⁹⁵ A spouse is a competent but not a compellable witness against his or her spouse without the consent of the accused person (spouse). However, where the husband or wife of the accused person is a defence witness, he or she shall be a competent and compellable witness, regardless of whether the spouse is singularly or jointly charged with another person.⁹⁶

It should however, be noted that it is only legally recognized spouses that are an exception to compellability of witnesses.⁹⁷

15. Legality of charges

Article 28(12)⁹⁸ in relation to protection of the accused person's right from being retrospectively charged and punished, this particular clause of article 28 of the Constitution relating to fair hearing focuses on specification of charges and attendant sanction(s) (punishment) before one is brought before any competent court or tribunal except for the charge of contempt of court.

The spirit of this clause is that, an individual shall not be charged, tried and punished of a non-existent offence and sentenced to a non-existent sanction. There must be a specific provision of law specifying a certain fact or set of facts as an offence and its sanction(punishment) provided for in a specific law (Act of Parliament or statute).

Where anyone is charged and tried on a fact or set of facts which do not amount to any offence and no penalty provided thereof in the statute books of Uganda, or the sentence provided therein offends the provisions of the constitution, then trial is an illegality, null and void.⁹⁹

⁹⁵The Evidence Act, Cap. 6, section 117; see also the Uganda Criminal Justice Bench Book (1st edn, Law Development Centre 2017)180.

⁹⁶The Evidence Act, Cap. 6, section 120; see also The Uganda Criminal Justice Bench Book (1st edn, Law Development Centre 2017)182.

⁹⁷ *Alai vs Uganda* (1967) EA 596.

⁹⁸ The Constitution of the Republic of Uganda, 1995.

⁹⁹ *Kekinyumu vs Uganda* (1969) EA 333; see also *Salvatori Abuki vs Attorney General, Constitutional Appeal No. 1 of 1998*.

The right to fair hearing in criminal trials can be seen as a bundle of rights that an accused person charged with a criminal offence is entitled to and duly guaranteed by the Constitution of the Republic of Uganda and various statutes in our law books. It is not an isolated bundle of rights, provided in the constitution. It is closely connected with the right to liberty under article 24, freedom against discrimination under article 21, the right to life and therefore the right can be considered in the context of harmonization and reading the constitution as one and whole document principles of constitutional interpretation to realize the object of chapter four of our constitution and implementation of Uganda's obligations under various international instruments.

CRITIQUE OF THE LAW AND PRACTICE RELATING TO OBSERVATION OF THE RIGHT TO A FAIR HEARING DURING CRIMINAL TRIAL IN UGANDA

The Constitution is the supreme law of Uganda.¹⁰⁰ It is the grundnorm of the Uganda's legal system. In relation to criminal trials, the constitution provides for the establishment of courts of judicature, their jurisdictions and independence,¹⁰¹ the Uganda Police Force and its mandate,¹⁰² the office of the Director of Public Prosecutions and its functions,¹⁰³ the inspectorate of government and its mandate,¹⁰⁴ the Prisons Service¹⁰⁵ and its mandate and other related institutions like Uganda Peoples Defence Forces (UPDF).¹⁰⁶ Besides providing for the establishment of the various institutions, the Constitution provides for the rights of persons charged and or those who find themselves in the hands of the criminal justice institutions ¹⁰⁷ amongst which include

¹⁰⁰ The Constitution of the Republic Uganda, 1995, article 2.

¹⁰¹ See chapter 8.

¹⁰² Articles 211, 212, 213 and 214.

¹⁰³ Article 120.

¹⁰⁴ Chapter 13.

¹⁰⁵ Articles 215, 216 and 217.

¹⁰⁶ Articles 208, 209 and 210.

¹⁰⁷ Chapter 4.

the right to fair hearing.¹⁰⁸ This part of the article discusses the right to apply for bail, legal representation, plea bargaining and the speedy trial is examined.

1. Bail and fair trial:

The law on bail in its skeleton form is laid down in the Constitution of the Republic of Uganda. This is in respect of the person's constitutional right to personal liberty. The right to bail may be invoked at any stage of the proceedings, as provided under the law.¹⁰⁹ The question of bail revolves around, a delicate balance between two competing values: the welfare of the society sought to be protected and fairness to the accused.¹¹⁰

It must be borne in mind that bail includes security given to court by another person that the accused will attend his trial on the appointed date. Bail is a constitutional right under Article 23(6)(a),(b) and (c).¹¹¹ Two basic ideas underlie bail. First, the accused is not guilty until proven so and it would be unfair to keep him or her imprisoned; and second, a need for an assurance that when he or she is released, such a person will turn up for the trial. In deciding whether bail should be granted or refused courts are guided by the statutory provisions and precedents.

The law on bail is found in various legislations such as the Magistrates Courts Act Cap 16, Trial and Indictments Act, Cap. 23, the Criminal Procedure Code Act, Cap. 116. Most of the legislations pre-date the Constitution of the Republic of Uganda, 1995.

Particularly, article 23(6) confirms the right to bail which is to be granted by court on application and on such conditions as the courts deems reasonable. Sometimes such laws are in conflict, rendering the state of law in this area uncertain and thus requiring review. There is a need to consider enactment of a Bail Code, which could also look to comparative jurisprudence to determine what would best work in the case of Uganda.

¹⁰⁸ Article 28.

¹⁰⁹ See for example section 14 of the Trial on Indictment Act Cap 23.

¹¹⁰ *Mugisha Gregory vs Uganda*, Court of Appeal, Miscellaneous Criminal Application No. 05 of 2011 (unreported).

¹¹¹ The Constitution of the Republic of Uganda, 1995

Section 15 of the Trial Indictments Act requires an accused person to show to the satisfaction of the court that exceptional circumstances exist justifying his or her release on bail and that he or she will not abscond when released on bail.¹¹² On the other hand, for other crimes bail applications are usually granted provided the applicant satisfies the considerations laid down in Section 77 of the Magistrates Court Act. These are; the nature of the accusation, the gravity of the offence, the antecedents of the applicant, a fixed place of abode and whether the applicant is likely to interfere with any of the witnesses.

In *Attorney General vs. Joseph Tumushabe*,¹¹³ the Supreme Court stated that irrespective of the provisions of the UPDF Act concerning bail, it was mandatory for the detainees to be released having been in custody for more than 120 days awaiting trial in accordance with article 23(6) of the Constitution.¹¹⁴ In contrast to the general view that bail was an automatic right of an accused person, the court stated that it was necessary to consider whether such release is likely to prejudice the pending trial, meaning that the Court has the discretion to grant or reject the application.¹¹⁵

Pre-trial and post-trial bail are significant in the criminal trial process and if the observation of the right is to be realized, then the discretion of Court would take a second place while determining applications for bail by Courts as discussed below.

(a) Bail and presumption of innocence

In the case of *Uganda vs. Dr. Kizza Besigye*,¹¹⁶ the respondent, and 22 others who had been arrested before the High Court Judge around March 2003, were jointly charged with treason, contrary to section 23(1) (c) of the Penal Code Act. The respondent who was also charged with rape contrary to section 123 of the Penal Code Act applied for bail to the High Court, vide Miscellaneous Application No. 228/05, under article 23(6)(a)

¹¹² *Uganda vs Zubairu and another* (1973) E.A 470.

¹¹³ Constitution Appeal No.3 of 2005

¹¹⁴ *ibid.*

¹¹⁵ Mulira, *op.cit.*, 163-164.

¹¹⁶ Constitution Reference No.20 of 2005.

of the Constitution. The issue for determination before court was whether under article 23(6) of the Constitution, courts have the discretion to grant or not to grant bail.

The constitutional court ruled that article 28(3)(a) provides that every person charged with a criminal offence shall be presumed innocent until proved guilty or until that person has pleaded guilty. Article 44(c) of the constitution prohibits any derogation from the right to a fair hearing. The Court went further to state that while the seriousness of the offence and the possible penalty which could be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant will appear for trial and would not abscond. The applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the applicant the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially.

In the same vein, *Foundation for Human Rights Initiative (FHRI) v The Attorney General*,¹¹⁷ the petition by a Non-Governmental Organization (NGO) known as the Foundation for Human Rights Initiatives whose objectives include and observance of human rights before court was mainly challenging the constitutionality and legality of the restrictions and limitations imposed on grant of bail by the impugned provisions of the above-mentioned Acts of Parliament, namely, TIA, MCA, UPDF and Police Act. The question for this Court to determine was whether they are inconsistent with Articles, 20, 23(1), 28(1), 23(3) and 23(6) of the Constitution. The petitioner sought the right to apply for bail as a fundamental and inherent right not given by the State. To the petitioner bail was a question of liberty. The petition was, hence, seeking nullification of those provisions to the extent of inconsistency. The Constitutional held that, Courts had the discretion to grant bail on reasonable conditions to ensure that the accused attends

¹¹⁷ *Foundation for Human Rights Initiative vs Attorney General* (2008) ULR 460.

court where and when required. The conditions only have to be reasonable and acceptable in free and democratic state as envisaged under Article 43 (2) of the Constitution.

The absurdity of this construction of the right to bail and its effect to the right to fair hearing especially the presumption of innocence came to light in the same case of *Foundation for Human Rights Initiative (FHRI) v The Attorney General*¹¹⁸ wherein court agreed with the petitioners counsel and was of the view that whereas an accused is presumed innocent and if he or she acquitted after trial, the bail wasn't automatic but just mere release of an accused from physical custody on conditions laid down by court to ensure attendance where and when court requires him or her to do so.¹¹⁹

The resultant effect of the exercise of discretion is that the Courts will make an accused person presumed innocent to serve a custodial sentence even before he or she is found guilty. In the circumstances that the accused person is denied bail due to the discretion of the Courts is found not guilty, he or she will have served an illegal sentence but sanitized by the courts as having exercised their discretion to keep him or her on remand custody before completion of his or her trial.

(b) Bail and provision of adequate facilities to prepare for defence

Article 28(3)(c)¹²⁰ provides that every person charged with a criminal offence shall be given adequate time and facilities to prepare his or her defence. Whereas article 23(6)(a) and (b)¹²¹ provide for the right to apply for bail and courts at their discretion may grant the same or not, the spirit of the former clause is to avail the accused person time and facilities to prepare his or her defence. The adequate time and facilities to prepare defence appear to our courts to be when actual hearing of the case begins. Otherwise considering criminal trials in Uganda being adversarial in nature,¹²² every

¹¹⁸ *Foundation for Human Rights Initiative v Attorney General* (2008) ULR 460.

¹¹⁹ *Foundation for Human Rights Initiative v Attorney General* (2008) ULR 460 at 475.

¹²⁰ The Constitution of the Republic of Uganda, 1995.

¹²¹ *ibid.*

¹²² Ssekaana Musa, *Criminal Procedure and Practice in Uganda* (LawAfrica 2010)6

litigant including the accused person is expected to gather counter evidence against the accusations brought against him or her. The accused is also entitled to seek any professional services where necessary including an advocate for legal representation and seek for any witnesses.¹²³

The ideal situation therefore would be that the accused person before appearing upon the trial court or any other court to take plea or mention of the case, he or she should be granted bail to have such adequate time and facilities to prepare his or her counter evidence. How else would a trial be fair where one party is carrying out evidence gathering activities (investigations) while the other is incarcerated pending trial?

On the 27th August, 2018 while Mubiru J was determining the bail application for Hon. Kasiano Wadri and 33 others, he underscored the importance of investigations and the environment such investigations are done.¹²⁴ The orders given in the learned judge's ruling gave the state unequalled advantage against Hon Wadri and his co-accused while the state was free to gather evidence against Wadri and his co-accused. The proper arrangement would be to give both parties equal time and facilities at their expense, if the criminal trial process is to be fair process as envisaged in article 28 of the Constitution of the Republic of Uganda.¹²⁵

Whereas Ugandan Courts have endeavored to protect the right of an accused person to be availed adequate time and facilities like pre-trial disclosure, adequate time to prepare for defence by not conducting criminal trials in hurry,¹²⁶ the same Courts have failed to consider grant of bail pending trial as one of the greatest facility and remedy that would cover the object of the right envisaged under article 28(3)(c)¹²⁷ instead of focusing on peripheral activities which have remained wanting especially unrepresented

¹²³ The Uganda Criminal Justice Bench Book, (1st edn, The Law Development Centre, 2017) 83.

¹²⁴ Joseph Kizza; *Bob Wine, 32 others granted bail by Gulu High Court*, (The Newvision Kampala, 27th August 2018) retrieved from https://www.newvision.co.ug/new_vision/news/1484446/bobi-wine-granted-bail-gulu-court, on 12/10/2018.

¹²⁵ 1995

¹²⁶ The Uganda Criminal Justice Bench Book, (1st edn, The Law Development Centre, 2017)83-4

¹²⁷ The Constitution of the Republic of Uganda, 1995.

litigants in the lower courts and indigents charged with capital offences tried by the High Court of Uganda.

(c) Bail pending appeal or revision

The Constitutional Court in the case of *Foundation for Human Rights Initiative v The Attorney General*¹²⁸ confirmed the position in *Uganda (DPP) vs Dr. Kizza Besigye*,¹²⁹ that there is no automatic right to bail. The rights granted is only limited to the right to apply for bail. Court then retains the discretion to grant or not to grant bail. Still court has to be satisfied that the applicant satisfies the conditions for grant of bail.

The Constitution does not mention anything about bail pending appeal. Rightly so, the right to apply for bail stems from article 28 (3) (a)¹³⁰ of the Constitution which is about the presumption of innocence. Since an applicant for bail is presumed innocent until proved guilty by a competent court, it follows that such a person should have a right to bail at all levels of trial until possibilities of trial or challenging the verdict of the court trying him or her are exhausted.

Section 34(1) and (2) and 50 of the Criminal Procedure Court Act ¹³¹ provides for the powers of the appellate courts and High Court on revision respectively as follows; the Appellate Court has powers to allow appeal and set aside the judgement, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. The appellate court may reverse the finding and sentence, acquit or discharge the appellant or order him to be retried. On the other hand, the High Court on revision may exercise the powers of the appellate court, which is set aside the judgment; dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred or ordering for a retrial.

¹²⁸ *Foundation for Human Rights Initiative vs Attorney General* (2008) ULR 460

¹²⁹ Constitution reference No. 20 of 2005

¹³⁰ The Constitution of the Republic of Uganda, 1995.

¹³¹ Cap. 116

Similarly sections 40(2), 47 and 49(3) of the Criminal Procedure Act¹³² provide for the appellate court and the Chief Magistrates Court to grant bail pending appeal and revision respectively. The powers in section 49(3) above are further provided under section 221(4) of the Magistrates Courts Act.¹³³ None of these sections except section 132(4) of the Trial on Indictment Act¹³⁴ provide for conditions for bail pending appeal save for the discretion of Courts in determining whether to grant or not to grant bail pending appeal or revision.

Courts of law however, have gone ahead and developed principles governing the grant of bail pending appeal and even differentiated them from those governing bail before conviction. Bail pending appeal may be granted after considering: whether leave to appeal has been granted; whether there is a strong likelihood of success of the appeal; public interest and where there is a risk that if bail is not granted, the sentence will have been served by the time the appeal is heard.¹³⁵

In *Raghib Singh Lamba vs. R*¹³⁶ the arguments for bail pending appeal were that the appeal could more easily be prepared if the applicant was on bail, previous good character of the applicant and the hardships to his dependants if he remained in prison. Spry -J- held that the principle to be applied is that 'bail pending appeal should only be granted for exceptional and unusual reasons'. He further noted that neither the complexity of the case nor the good character of neither the applicant nor the alleged hardship to his dependants could justify the grant of the bail. Had the court been "satisfied" that there was an overwhelming probability that the appeal would succeed, the application would have been granted. The present application was dismissed for want of satisfaction to the court that there was an overwhelming probability of success. The decision which was later denied force by Muli -J- in *Motichand*.¹³⁷ While insisting on

¹³² ibid

¹³³ Cap. 16

¹³⁴ Cap. 23

¹³⁵ *Mugisha Gregory vs Uganda*, Court of Appeal Miscellaneous Criminal Application No. 05 of 2011(unreported).

¹³⁶ (1958)EA337.

¹³⁷ (1972) EA 399.

unusual reasons, Spry -J- was of the view that when a person is awaiting trial, the onus of proving his guilt ultimately rests with the prosecution and consequently, the onus of showing cause why bail should not be granted. On the other hand, when a person has been convicted the onus is on him to show cause why the conviction should be quashed and similarly, it is upon him to show cause why as a convicted person, he should be released on bail.¹³⁸

Shockingly, a short custodial period, as accepted by Madan -J- in *Hasham vs. R*¹³⁹ is not in itself a special ground for granting an application for bail. However, without prejudice to this argument, if the sentence is the maximum provided, then the fact should be taken into consideration as there is the possibility that the sentence might be served before the appeal is heard or when it is going on.

It should also be noted like in the first instance court or trial court, bail is not automatic. In the case of *Shah vs. R*,¹⁴⁰ it was suggested that rather than grant bail, steps should be taken to see that the hearing of the appeal is expedient and it was further added that bail should be granted only in exceptional cases.

The dilemma and the absurdity of this line of legal thinking can be seen in the case of *Abdullah vs. R*¹⁴¹ where the appellants had already served their sentences and had been discharged when the appeal was allowed; the conviction quashed and sentence set aside. This dilemma is bound to happen even today in our country considering the position taken by our courts while determining applications for bail pending appeal.

In the case of *Gregory Mugisha vs. Uganda*¹⁴² the Applicant was charged, tried, convicted by the High Court of Uganda (Anti-Corruption Division) and sentenced to three (3) and two (2) years on each count respectively to served concurrently. The applicant after three months in imprisonment applied for bail pending appeal. In

¹³⁸ *ibid.*

¹³⁹ Criminal Appeal No. 582 of 1967 (unreported).

¹⁴⁰ (1972) EA 476 at 480.

¹⁴¹ (1963) EA 223.

¹⁴² Court of Appeal Miscellaneous Criminal Application No. of 5 of 2011(unreported).

determination of the application, Kasule JA held that there was a fundamental difference between consideration of bail pending trial and bail pending appeal. That the former had a benefit of presumption of innocence which the latter does not have since the applicant is a convict at the time. Courts had to deal firmly with convicts and the sentence of three years would not be completed before determination of the appeal. Similarly in an earlier case Nshimye JA in *Angelo Muwanga vs Uganda*¹⁴³ while rejecting the application for bail pending appeal, held the position that the appeal would be determined before serving a sentence imposed on the applicant. Both justices never considered time spend serving a sentence that is likely to be set aside by quashing of the conviction on appeal.¹⁴⁴

The gravity of the offence as one of the grounds relied upon in these two rulings and issue of time to be taken to determine the appeal appeared as one of the major grounds to deny the applicants the release on bail pending determination of their appeals.¹⁴⁵ The issue of exceptional circumstances kept in the minds of the judicial officers on the appeal.¹⁴⁶ Whereas the provisions of the statutes are open and grant unfettered discretion to appellate courts,¹⁴⁷ the courts have raised too high standards at the expense of the right to presumption of innocence, since the appellate courts have powers of the original trial court.¹⁴⁸ Instead the appellate courts have decided to serve the public interest and not any appropriate remedy suggested for an appellant whose conviction is quashed and found innocent after serving part or whole of the sentence.¹⁴⁹

¹⁴³ Court of Appeal Miscellaneous Criminal Application No. 41 of 2008

¹⁴⁴ Petride Mudoola, *It was a hell living with people I jailed, A chat with Karakire*, The Saturday Vision, (Kampala 9 November, 2017) 13. In an interview with His Worship Stephen Karakire the former Magistrate Grade II of Lyantonde and Kyazanga Courts who had been discharged from Luzira Prison after serving a three year sentence before his appeal had been heard and determined and the learned magistrate maintained that he enjoyed his constitutional right to presumption of innocence until he exhausts his right to appeal.

¹⁴⁵ Court of Appeal Miscellaneous Criminal Application No. 41 of 2008 at page 10; see also Court of Appeal Miscellaneous Criminal Applications No. 5 of 2011 at pages 7, 12, 13, 14 and 15

¹⁴⁶ Court of Appeal Miscellaneous Criminal Applications No. 5 of 2011 at page 7.

¹⁴⁷ The Criminal Procedure Code Act, Cap. 116 sections 40(2), 47 and 49(3), the Trial on Indictment Act, Cap. 23, section 132 (4) and the Magistrates Courts Act, Cap. 16 section 221(4).

¹⁴⁸ The Judicature Act, Cap.13 sections 7, 11

¹⁴⁹ Court of Appeal Miscellaneous Criminal Applications No. 5 of 2011 at pages 8-9

The failure by appellate court to recognise the ground of likely delay to determine appeals is in total contrast to the realities of case backlog reduction committee report findings.¹⁵⁰ Important to note from the this report was that amongst the backlog cases as at January 31st, 2017, majority of the criminal appeals had been in the Court of Appeal and the Supreme Court beyond two years which is almost equal the sentence of imprisonment of three years Mugisha Gregory ¹⁵¹ and Angelo Muwanga ¹⁵² would have served before even their appeals were determined.¹⁵³

The above report indicates how the violation and non-observance of the right to a speedy trial to persons before the appellate courts who are denied bail pending appeal remain serving sentences that are likely to be overturned without any other remedy in sight.¹⁵⁴ The practice therefore ignores the results and only focuses on the current situation in disregard of the individual rights for the benefit of the public interest which is contrary to the common law principle and constitutional right of presumption of innocence until proven guilty by the last appellate court or one admits guiltiness by either losing the appeal or not appealing at all.

2. Committal proceedings and right to a fair hearing

The Magistrates Courts Act and the Trial on Indictments Act provides that an accused person charged with an offence only tried by the High Court can only be brought before the High Court after committal proceedings in the Magistrate Court.¹⁵⁵

The challenges of the accused person undergoing through the committal process in the magistrate courts are two fold;

¹⁵⁰ The Case Backlog Reduction Committee – Report (29th March 2017)33

¹⁵¹ *Uganda vs Mugisha Gregory*, High Court Criminal Session Case No. 50 of 2010; See also *Mugisha Gregory vs Uganda* Court of Appeal Miscellaneous Criminal Application No. 5 of 2011

¹⁵² *Angelo Muwanga vs Uganda*, High Court Criminal Appeal No. 95 of 2007; see also *Angelo Muwanga v Uganda*, Court of Appeal Miscellaneous Criminal Application No. 41 of 2008.

¹⁵³ The Case Backlog Reduction Committee – Report (29th March 2017)33.

¹⁵⁴ Juliet Kigongo; *Kazinda's jail term ends before appeal is heard*, (The Daily Monitor, Kampala 17/10/2018) retrieved from <http://mobile.monitor.co.ug/News/Kazinda-jail-term-ends-before-appeal-heard/2466686-4809196-format-xhtml-shvfuc/index.html> on 24/10/2018.

¹⁵⁵ The Magistrates Court Act, Cap. 16, section 168 and Trial on Indictment Act, Cap. 23, Section 1.

- a) The Magistrates Court lack jurisdiction to handle the matter and thus unable to grant pre-trial remedies like bail pending trial;
- b) The High Court cannot hear the matter before the process of committal has been completed even if it takes such a longer time, since its scope and limits are not defined, save for grant of pre-trial bail under article 23(6)(b)¹⁵⁶ by the High Court and mandatory bail under article 28(6)(c) and (d)¹⁵⁷ available to the lower courts.

In the case of *Shabahuria Matia vs. Uganda*¹⁵⁸ the applicant was arraigned before magistrate Grade III Court in Masaka on charges of murder in September, 1995 and was accordingly remanded. The accused was granted mandatory bail, absconded, re-arrested and remanded pending committal to the High Court for over four years appearing before Magistrates Courts. Ntende J as then was held that an accused person being on remand and pending committal to the High Court for a long period of time was oppressive. It is against the spirit of article 28(1). The accused feels the anxiety of being guilty without trial that causes grave psychological effects.

The predicament of *Matia* is the ugly reality of the effects of the committal proceedings. The proceedings have no specific legislation to limit their scope. When considered with the discretionary powers of Court to grant bail which includes setting conditions for bail that are at times impossible to be satisfied by litigants as it was in the case of *Shabahuria Matia vs. Uganda*,¹⁵⁹ then the right to fair hearing is an illusion and the process amounts to abuse of court process and oppression of the accused person instead of the enjoyment of the non derogable right of the right to a fair hearing by an accused person; the bedrock of criminal trials in Uganda.

¹⁵⁶ The Constitution of the Republic of Uganda, 1995.

¹⁵⁷ *ibid*.

¹⁵⁸ High Court Criminal Revisional Cause, No. MSK-00-Cr-0005 of 1999 (Arising From Criminal Case No. MMA. 435 of 1995) (unreported).

¹⁵⁹ *ibid*.

3. Criminal session system and speedy trial

The Judicature Act provides for continuous trial of both criminal and civil matters and also hold sessions in different parts of the country subject to court vacations. Further that in consideration of article 141 of the Constitution, the Principal Judge assigns High Court business to judges putting into the right to fair hearing. The sittings of the High Court to hear criminal matters are determined by the Principal Judge and communicated by the Registrar to the responsible Chief Magistrates.¹⁶⁰

According to the Case Backlog Reduction Committee, the session system is a longtime practice in the adjudication of criminal matters by the High Court in Uganda. With limited number of Judges, the session system was seen as the only way in which criminal and civil cases could be handled. In such a system pretrial process and activities are handled before a trial judge can be assigned a session. The processes ensured proper preparations were made and funding provided accordingly for the assigned judge to preside over the session according to the figures and circumstances of the cases to be heard.¹⁶¹

A consideration of the foregoing provisions and the practice highlighted in the case backlog reduction report indicates that criminal matters other than interlocutory applications are handled at criminal sessions. The sessions may take time to be organized especially where the nature and number of cases registered don't appear significant to be scientifically budgeted for. In an event an accused person has been denied bail pending trial, and a criminal session is not forthcoming, it is important to interrogate what happens to the accused and that incarceration period on remand pending trial. The session system does not only work in the High Court but goes further to be applied in the appellate courts (the Court of Appeal and the Supreme Court) while handling criminal appeals.¹⁶²

¹⁶⁰ The Judicature Act, Cap. 13, sections 4,18, 19 and 20(1)

¹⁶¹ The Judiciary, *The Case Backlog Committee Report*, (29th March, 2017) 39

¹⁶² *ibid.*

The effect of the foregoing challenges met by the session system and the rigidity of provisions for having session system to handle criminal cases has resulted in overstay on remand of accused persons. This is brought about by trials taking long to commence; those that commence are not completed; and even those completed are not handled with utmost professional and with a judicious approach. In effect the system is short of guaranteeing a fair, speedy trial before an independent tribunal envisaged under article 28(1).¹⁶³ The backlog reduction committee report indicated that by December, 2015 majority of the backlog cases were criminal in nature only rivaled by civil matters at least.¹⁶⁴

These statistics do not give hope to any person who finds him or herself in the criminal trial system of Uganda. He or she cannot expect a fair and speedy trial before an independent tribunal. The overwhelming burden to the judicial officer, the need to have one's case in the nearest session will not spare the conscience of both the litigant and the responsible relatives or legal representative to find ways of ensuring that the accused person's case is scheduled. More dangerously and detrimental to right to a fair hearing is to make the accused person preferring or opt for plea bargaining for the sake of quickening the process in lieu of seeking justice and fairness so that the trial system comes to a closure.

4. Legal representation and the right to a fair hearing

To begin with section 55 of the Trial on Indictment Act,¹⁶⁵ provides that, any person accused of an offence before the High Court may of right be defended by an advocate, at his or her own expense and section 158 of the Magistrates Court Act,¹⁶⁶ provides that, any person accused of an offence before a magistrate's court may of right be defended by an advocate. These provisions are in tandem with the provision of article 28(3)(d).¹⁶⁷ To note however, article 28(3)(e)¹⁶⁸ goes beyond personal choice of an

¹⁶³ The Constitution of the Republic of Uganda, 1995.

¹⁶⁴ The Judiciary, *Case Backlog Reduction Committee – Report*, (29th March 2017)21-3.

¹⁶⁵ Cap. 23

¹⁶⁶ Cap. 16

¹⁶⁷ The Constitution of the Republic of Uganda, 1995.

accused to have counsel of his choice at his or her cost and imposes a duty to the state to provide legal representation to persons charged with capital offences but unable or cannot afford to access legal representation on their own.

The sanctity of the right to legal representation both at ones choice with affordability and state provided legal services to indigents facing capital offences have well been pronounced by Ugandan Courts wherever such right has been ignored by courts or other tribunals.¹⁶⁹

For example in the case of *Vincent Rwamaro vs. Uganda*¹⁷⁰ it was stated that an accused has a constitutional right to be defended by counsel of his choice. If deprived of that right through no fault of his or his counsel and a conviction follows, such conviction will be quashed on appeal. In *Kataryeba Zackary vs. Uganda*¹⁷¹ court held that the right to legal representation extends to grant of an adjournment so as to enable the accused engage another counsel where the earlier one was not still available. Refusal to adjourn the case is denial of the accused a constitutional right to be represented. Such an act constituted a miscarriage of justice. In *Kawooya Joseph vs. Uganda*, the Supreme Court went ahead to impose a duty on the defence counsel and trial court to ensure that counsel conducts defence diligently with skill and in the best interest of the client while the trial court ensures the accused gets affair trial.

However, the concern of this article is the extent to which the right to legal representation under article 28(3)(e) that only focuses on indigents charged with capital offences only and leaves a bulk of Ugandans whose charges don't meet the standard to be availed legal counsel at their trial.

¹⁶⁸ *ibid.*

¹⁶⁹ The Uganda Criminal Justice Bench Book (1st edn, The Law Development Centre, 2017)85-91.

¹⁷⁰ (1988-90)HCB70.

¹⁷¹ (1996)HCB 16.

The magnitude of this discrimination can be observed in the decision of Mugambe J as he then was in the case of *Kazibwe John vs. Uganda*¹⁷² where he held that there were no provisions in the Constitution and the Magistrates Courts Act which made legal representation a must except for offences where punishment is life imprisonment or death. Accused persons and the advocates have a duty to be vigilant and follow up their matters before Courts.

The provisions of article 28(3)(e)¹⁷³ completely ignores the set-up of criminal trials in Uganda. Regardless of which court the matter is being handled from and what stage the trial is the state/prosecution is represented by trained lawyers in both substantive and procedural.¹⁷⁴ Majority of the poor Ugandans are facing trial in the lower courts where they are not entitled to state provided legal representation. They are at the mercy and vigilance of the trial magistrates to ensure that their rights are protected or observed during criminal trials. The same judicial officers are overwhelmed by the backlog of criminal cases and others, thereby not much inclined to focus on the accused persons' right to fair trial qualitatively.

Besides the foregoing, the legal representation at the cost of the state, to the indigent persons charged with capital offences comes at the time of actual trial in the criminal sessions. At the point of committal proceedings, the accused person is not availed counsel, who would assist in investigating the charges at early stage and prepare the best defence for the accused person.

The enjoyment of the right to legal representation at one's choice and cost or its non-provision to the indigents in lower courts for minor offences and its provision to indigents charged with capital offences is discriminative, insufficient and does not guarantee a fair trial in criminal trials in Uganda.

¹⁷²High Court Criminal Case No. 10 of 2014 (unreported); see also The Uganda Criminal Justice Bench Book (1st edn, The Law Development Centre, 2017)877.

¹⁷³ The Constitution of the Republic of Uganda, 1995.

¹⁷⁴ George W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance*, (2nd impn. LawAfrica Publishing (U) Ltd 2010) 54.

5. Plea bargaining and the right to a fair hearing in Uganda

A plea bargain is an agreement in which the prosecutor and accused arrange to settle a case against the latter. This is normally in the form of the accused pleading guilty or no contest to all or some of their alleged crimes in exchange for concessions by the prosecutor. These concessions may take the form of a reduction of the charges, the dismissal of charges or limiting the punishment imposed upon the accused subject to approval of Court. The prosecutor will then disclose the facts of the case that involve the accused in a more flattering light.¹⁷⁵ Generally plea agreements allow parties to agree on the outcome and settle pending charges.¹⁷⁶

Plea bargaining is considered at three stages; fact bargaining, charge bargaining and sentence bargaining.¹⁷⁷ These have been discussed below in brief.

(a) Fact bargaining refers to when a accused changes his or her plea from not guilty to guilty on the reliance that the prosecution will present the facts of the case in a less incriminating light. Again, this is advantageous for the prosecutors as they obtain a guilty plea without having to take the risk of a full trial. Presumably, the accused would also benefit from a reduced sentence in exchange for this guilty plea. The accused would supposedly benefit from this kind of bargaining if they are actually guilty of a serious crime. One of the major concerns about fact bargaining is the lack of checks it has in place and the victims may appear unconsidered in the process.

(b) Charge bargaining. There are two kinds of situations where charge bargaining may be used. The first is where the accused is charged with two or more crimes. Here, it is possible for the prosecution to drop one or more of the charges in return for a guilty plea for the remaining. The other situation is when the accused has been charged with a serious offence. Here, the prosecution might

¹⁷⁵The Judiciary, *Case Backlog Reduction Committee – Report*, (29th March 2017)7

¹⁷⁶ *Rule 4 of the Judicature (Plea bargain) Rules, Statutory Instrument No.46 of 2016; See also The Judiciary, Case Backlog Reduction Committee – Report*, (29th March 2017) 43-4.

¹⁷⁷ The Judiciary, *Case Backlog Reduction Committee – Report*, (29th March 2017) 44.

drop this charge in exchange for a guilty plea to a less serious offence. There is no doubt a guilty accused would enjoy the benefits of charge bargaining but the biggest disadvantage here is when an accused is in the situation where they are actually innocent of all the charges but feel compelled to plead guilty as a form of 'risk management' as if found guilty after a full trial they would receive a more severe sentence.

(c) Sentence bargaining. In instances of sentence bargaining, or pure plea bargaining, accused persons would change their plea from not guilty to guilty for the purpose of receiving a reduced sentence.

The process of plea bargaining was intended to achieve institutional efficacy including the optimal deployment of resources to secure the maximum outcomes through case dispositions, as it cuts down the number of trials that the court has to hear. It also, guarantees a conviction for the accused and it may also be used to illicit additional useful information from that accused relevant to future prosecutions.¹⁷⁸

It is against this background that plea bargain, a new mechanism set to enhance the effectiveness of the criminal trial process in Uganda was sought be the antidote for all parties involved in a trial by reducing case backlog and achieve the mandate of the judiciary to promote reconciliation under the Constitution.¹⁷⁹

However, there are a number of challenges identified in the process of plea bargaining such as judges departing from agreed positions by the parties in a plea bargain agreement, innocent persons who finds himself or herself accused may feel highly pressured into pleading guilty out of fear of a more severe sentence being passed, overstay on remand and its psychological effect that makes accused persons prefer to

¹⁷⁸ibid.

¹⁷⁹ ibid; see also The Constitution of the Republic of Uganda, article 126(2)(d).

enter agreements for purposes of closure of their matters and lack of information, non-legal representation among others.¹⁸⁰

The foregoing challenges have bogged down the expectations of the accused persons who have in the end been found guilty of offences they have not committed or even given harsher sentences in circumstances that one would have been found innocent if a full trial was conducted.

6. The right to a fair hearing in specialized Courts or Divisions

With the growing demand for justice and the judiciary to deliver within reasonable time and therefore be seen to dispense justice, the judiciary has been forced to carry out further decentralization by creating more judicial units to solve many challenges that have affected its efficiency and effectiveness. Amongst the approaches has been the creation of specialized courts to handle certain cases in the country. Amongst the courts or divisions created were; the Anti-Corruption Division of the High Court,¹⁸¹ the International Crimes Division (currently the War Crimes Division) of the High Court¹⁸² and recently the Utilities, Wildlife and Standards Court.¹⁸³

(a) The International Crimes Division

During the 2008 Juba peace talks between the Government of Uganda (GoU) and the Lord's Resistance Army (LRA), the Special Division of the High Court (SDHC) was provided for in the Final Peace Agreement (FPA), as one of the mechanisms for personal accountability by different actor in the war. Unfortunately, Joseph Kony refused to append his signature to the FPA. The GoU disregarded the failure to execute the Final Peace Agreement and went ahead to establish the Court and named it War

¹⁸⁰ The Judiciary, Case *Backlog Reduction Committee – Report*, (29th March 2017) 44.

¹⁸¹ The Anti-Corruption Act, Act No. 6 of 2009, laws of Uganda; See also The High Court (Anti-Corruption Division) Practice Direction No. 3 of 2009; see also <https://www.the-judiciary.go.ug-data-smenu-anti-corruption-division-judiciary>, accessed 25 September 2017.

¹⁸² ¹⁸² The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, laws of Uganda retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017.

¹⁸³ Judiciary launches Specialised Court to Deal with Utilities, Wildlife and Standards, *The Judiciary* (Kampala 26 May 2017) retrieved from [https:// www.judiciary.go.ug](https://www.judiciary.go.ug) accessed 25 September 2017

Crimes Division of the High Court and today it is called the International Crimes Division (ICD).¹⁸⁴

The establishment of the ICD showed Uganda's repugnance to impunity; and her determination to hold all persons responsible for the gravest crimes that shock the conscience of mankind accountable. The court is guided by both domestic and international legislation including the; Constitution of the Republic of Uganda, 1995, International Criminal Court Act,¹⁸⁵ Extradition Act,¹⁸⁶ Magistrates Courts Act,¹⁸⁷ Prisons Act,¹⁸⁸ Trial on Indictments Act,¹⁸⁹ Uganda Citizenship and Immigration Control Act,¹⁹⁰ Geneva Conventions Act,¹⁹¹ and the Penal Code Act.¹⁹²

(b) The Anti-Corruption Division

The ACD is one of eight specialized divisions of the High Court. It has original jurisdiction over offences under the 2009 Anti- Corruption Act and can also hear cases under other statutes related to corruption. If a defendant before the ACD has been charged with "any other offence related to" the corruption-related offence, the ACD can also hear the related charge. Cases from the ACD can be appealed to the Court of Appeal, which, however, is not specialized. The ACD is located in Kampala, but pursuant to the Judicature Act, it may hear cases in any area of the country designated by the Chief Justice and the Principal Judge.

¹⁸⁴ The International Criminal Court Act, 2010, the long title.

¹⁸⁵ Act No. 11 of 2010.

¹⁸⁶ Cap. 117.

¹⁸⁷ Cap. 16.

¹⁸⁸ Cap. 304.

¹⁸⁹ Cap. 23.

¹⁹⁰ Cap 66.

¹⁹¹ Act of 1964.

¹⁹² Cap 120.

Since the establishment of the two divisions of the High Court, they have been based in Kampala save for the ICD that recently commenced the hearing of the criminal case of Uganda against Kwoyelo at the Gulu High Court Circuit.¹⁹³

The ICD rules of procedure provide a two tier trial process namely pretrial hearing to confirm charges and the actual trial.¹⁹⁴ The practice of the court has also been trials being presided over by a panel contrary to the provisions of the Judicature Act.¹⁹⁵

The consequence of the seat of these specialized court being in Kampala, the funding shortcomings to move or rotate them across the country where the offences were committed from, have left accused persons whether on bail or pre-trial remand in a disadvantaged position.

For example the Anti- Corruption Division has been trying Mr. Rwabuhoro and others¹⁹⁶ for offences committed in Manafwa District. Their immediate families are either in Kyenjojo or Mbale. Majority of the witnesses and evidence is in Manafwa District. Accessing all these (witnesses and evidence) would require a reasonable amount of financial, time and material resources for the accused persons and their advocates in case they have any.

The essence of a fair hearing or trial is to avail both parties equal opportunity to prepare their cases and evidence therein. To avail the accused time and facilities to prepare for defence. In circumstances of Uganda where almost every regional town has a High Court Circuit, the most prudent way to protect the accused rights to a fair trial would be to commence and conduct trials in places or near places where the offences were committed. These would be beneficial to both the public and the accused person by providing accountability to the public by Court (Uganda v Kwoyelo-where the

¹⁹³ Michael Ntezza, *Kwoyelo Committed for Trial; Case to Be Heard in Gulu*, (Chimp reports online news, Kampala 31st August, 2018), retrieved from <https://chimpreports.com/kwoyelo-committed-for-trial-case-to-be-heard-in-gulu/> on 14/10/2018.

¹⁹⁴ *Uganda vs Sheikh Kamoga*, Criminal Session Case No. HCT – 00 – ICD – CR – SC – No. 004 Of 2015 (unreported)

¹⁹⁵ Cap.13, section 20

¹⁹⁶ *Uganda v Rwabuhoro and others*, High Court (Anti-Corruption Division) Cases No. 15 and 16 of 2014

accused person being tried in Gulu within the region where the alleged offences were committed from) and also affording the accused person easy access to the witnesses and evidence.

Considering the trial process in the ICD (the pre-trial and actual trial hearing process), the location of the two courts (Divisions) being in Kampala and the practice of the Anti-Corruption Division to collect all accused persons from upcountry local governments and other private entities to be tried at its seat in Kampala, compromises the right to equality before the law. Equality is the basis of the right to a fair trial where parties (Prosecution and the accused person) are to be afforded equal time and facilities to prepare their cases. In Uganda bail pending trial is at the discretion of court. Then the resultant effect of this criminal trial process is that the accused persons are not different from presumption of guiltiness rather than innocence before trial.

7. Presumption of innocence on appeal or revision

To begin with, does the presumption of innocence have a role to play after conviction? Does this presumption therefore act as a policy directive protecting the fundamental security and 'freedom of an individual after conviction? If it still operates, does it afford the same protection to an applicant for bail pending sentence and on appeal or review and how does it fit into the system created by the Bill of Rights?

In the cases of *Kyeyune Mitala Julius vs. Uganda*¹⁹⁷ and *Mugisha Gregory v. Uganda*¹⁹⁸ Courts observed that the right to presumption innocence is not extinguished until the appeal process is exhausted as Courts make mistakes too and may wrongly convict an innocent person.

The reading of the foregoing court decisions indicate that the right to presumption of innocence subsists after an accused has been convicted and has an appeal pending before Court competent to determine such an appeal.

¹⁹⁷ Supreme Court Criminal Miscellaneous Application No. 4 of 2017(unreported).

¹⁹⁸ Criminal Reference No 179 of 2011.

Courts of judicature in Uganda (the Supreme Court, the Court of Appeal/Constitutional Court and the High Court) have indicated an interrelationship between the right to fair hearing and other rights under chapter four of the Constitution during criminal trials.

However, the decisions do not seem to be enough to alter the current legal framework and practice relating to observation of the right to a fair hearing during criminal trials in Uganda. A number of decisions have indicated that rights like presumption of innocence is major consideration at pre-trial bail and least at bail pending appeal. This approach has made accused persons serve sentences before their appeals are determined and consequently dismissed as the decisions on appeal would be nugatory.¹⁹⁹

The efforts that were aimed at improving the situation of observation of the right to a fair hearing have instead become a negative factor. Establishment of specialized Courts/Divisions, introduction of criminal sessions, plea bargaining, legal representation at state expense for indigents charged with capital offences, exceptional circumstances on bail pending appeal, committal proceedings, and unfettered discretion of Court in bail applications among others, have left the accused persons more disadvantaged and at times discriminated where the state funds one group and leaves others out rather than affording them a right to fair hearing at the various stages of criminal trials.

Conclusion

The Uganda's legal framework is two-fold. The Acts of Parliament that preceded the promulgation of the Constitution of the Republic of Uganda²⁰⁰ and those Acts after its promulgation. The Constitution bridged the gap and updated the existing law under article 274²⁰¹ in an attempt to take care of the law preceding its promulgation. However, the attempt to modify and construe the pre-promulgation of the Constitution

¹⁹⁹ Juliet Kigongo; *Kazinda's jail term ends before appeal is heard*, (The Daily Monitor, Kampala 17/10/2018) retrieved from <http://mobile.monitor.co.ug/News/Kazinda-jail-term-ends-before-appeal-heard/2466686-4809196-format-xhtml-shvfuc/index.html> on 24/10/2018.

²⁰⁰ 1995

²⁰¹ The Constitution of the Republic of Uganda, 1995.

Acts, Statutes and regulations made therefrom, the efforts have not been enough as indicated in the following observations;

Inconsistencies and contradictions within the law

The right to fair hearing is a non derogable right. However, the non-derogation does not extend to the right to liberty,²⁰² which by extension is part of the right to fair hearing.²⁰³ The right to fair hearing focuses on preventing an accused person from suffering any sanction before due process has been carried out. The objective of article 28 can properly be protected if article 23 is read and considered together with the provisions of article 28 especially provisions relating to bail,²⁰⁴ presumption of innocence,²⁰⁵ time and facilities to prepare for defence²⁰⁶ amongst others.

Further the constitution gives unfettered discretion to Courts to grant bail²⁰⁷ which in practical terms derogates/fetters the provisions of article 28 specifically the provisions relating to presumption of innocence, no punishment before a fair trial, time and facilities to prepare for defence among others.

The process of trials in minor and capital offences are entirely similar except for jurisdiction, accused persons undergoing trial in the High Court and Chief Magistrates Courts for offences whose punishment is imprisonment for life or death sentence and are unable to afford legal representation for themselves are entitled to legal representation at the cost of the state.²⁰⁸ This right is not available to an accused person where the offence doesn't fall in the category of article 28(3)(e) but faced with

²⁰² The Constitution of the Republic of Uganda, 1995 article 23.

²⁰³ The Constitution of the Republic of Uganda, 1995 article 28.

²⁰⁴ The Constitution of the Republic of Uganda, 1995 article 23(6)

²⁰⁵ The Constitution of the Republic of Uganda, 1995 article 28(3)(a)

²⁰⁶ The Constitution of the Republic of Uganda, 1995 article 28(3)(c)

²⁰⁷ *Uganda (DPP) v Dr. Kizza Besigye*, Constitutional reference No. 20 of 2005; See also *Foundation for Human Rights Initiative v Attorney General* (2008) ULR 460.

²⁰⁸ The Constitution of the Republic of Uganda, 1995 article 28(3)(e).

trials where the state is represented by trained and professional State Attorneys and Prosecutors.²⁰⁹

The provisions in the Magistrates Courts Act regarding to costs except compensation are applicable to the state and private persons where it is discovered that there were no reasons to prosecute the person and the costs are limited to two hundred thousand only. Considering what accused persons go through, financially to defend themselves, the time spent on pretrial remand if never granted bail at times on trumped up charges initiated by the state go unpunished. State prosecutions are not covered under provision for compensation for initiating frivolous and vexatious charges. The provisions on compensation are therefore discriminatory and insufficient to restitute the loss in legal fees, time lost and psychological torture caused by frivolous and vexatious charges initiated by the state.²¹⁰

The procedure, the burden of proof, the arrangement of evidence and the various standards to be observed are the same. All the trials involve evidence gathered by the Police, under the direction of the DPP. Then why not avail all the accused persons' similar treatment (rights) when undergoing criminal trial before Courts of law in the same country or society.

Outdated laws and irrelevant provisions

Legislations like the Habitual offenders (Preventive Detention) Act,²¹¹ that grants Courts and the President of Uganda to impose an imprisonment sentence above what has been imposed after due process (criminal trial) based on one's antecedent criminal record which was not part of the charge he or she has been convicted of is unfair, arbitrary

²⁰⁹ *Kazibwe John v Uganda* HC Crim. Case No. 10 of 2014 (unreported); See also The Uganda Criminal Justice Bench Book (1st edn, The Law Development Centre, 2017)87-8; See also George W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance*, (2nd impn. LawAfrica Publishing (U) Ltd 2010) 54.

²¹⁰ The Magistrates Courts Act, Cap. 16, sections 195 and 196; see also the Trial on Indictment Act, Cap. 23, section 125, where the award of costs is limited to three thousand shillings only under section 125(2).

²¹¹ Cap. 118, sections 1, 2, and 4.

and unconstitutional. This is against the spirit of article 28.²¹² Even if article 274²¹³ is applied it cannot cure the shortcomings of such legislation.

Besides the legislation, provisions like the ones relating to committal proceedings whose scope and control is ambiguous are still enforced in Uganda during criminal trials.²¹⁴ An accused person charged with an offence under the exclusive jurisdiction of the High Court has to still go through the Magistrates Courts for committal to the High Court. This is a process implemented by Courts without any power to grant pre-trial remedies but to remand accused person endlessly. This is a legalized abuse of Court process.²¹⁵

Isolative interpretation of the provisions of the law

Ugandan Courts are the interpreters of legal provisions and statutes that govern criminal trials and provide for the rights of the accused persons during criminal trials. One of the principles/rules of constitutional interpretation is the rule of harmony, wherein provisions relating to a similar issue or principle of law are read together to avoid them contradicting or destroying each other.²¹⁶ The right to fair hearing in criminal trials especially the right to speedy trial, presumption of innocence and availing the accused time and facilities to prepare for defence can be realized by applying the principle of harmony and integral constitutional interpretation. This same principle should apply in the determination of the right to apply and grant of bail with the right to fair hearing.

²¹² The Constitution of the Republic of Uganda, 1995.

²¹³ *ibid.*

²¹⁴ The Magistrates Courts Act, Cap. 16, section 168; See also the Trial on Indictment Act, Cap. 23 section 1.

²¹⁵ *Shabahuria Matia vs Uganda*, High Court Criminal Revisional Cause, No. MSK-00-Cr-0005 of 1999 (Arising From Criminal Case No. MMA. 435 of 1995) (unreported)

²¹⁶ *Paul Kawanga Ssemwogere v Attorney General*, Supreme Court Constitutional Appeal No. 1 of 2002 (unreported); See also *Attorney General v David Tinyefuza*, Supreme Court Constitutional petition No. 1 of 1997 (unreported); See also The Uganda Civil Justice Bench Book (1st edn, The Law development Centre, 2016) 353-4.

Unfortunately, Courts in Uganda have continued to consider the right to bail singularly and in isolation to the right to fair hearing.²¹⁷ Whereas sometimes in determination for bail applications, the presumption of innocence is considered, there has not been much consideration of the right to be availed time and facilities to prepare for defence by an accused person being a factor for consideration of bail pending trial or appeal. The situation is further complicated by the unfettered discretion of Courts while determining bail applications.²¹⁸

Further the Courts have held that the right to presumption of innocence is not extinguished until all the rights to appeal are exhausted,²¹⁹ on the other hand the same courts hold that a person who loses in the first criminal trial court does not benefit from the presumption of innocence in application for bail pending appeal.²²⁰

In consideration of the foregoing observations, the following recommendations are suggested to the various stakeholders both in relation to the legal framework and the practice in observation of the right to fair hearing in criminal trials in Uganda. The recommendations are here below are in relation to the legal framework and practice as follows;

1. Consolidation

The government through Parliament should enact a consolidated Act for criminal trial procedure code covering the right to fair hearing. For example the Criminal Procedure Code Act, the Magistrates Courts Act (provisions relating to criminal trials and right to fair hearing), the Trial of Indictment Act, the Uganda Peoples Defence Act, the Children Act among others can be consolidated to provide a one principal legislation on criminal trials and observation of the right to fair hearing in the process of conducting criminal trials in Uganda.

²¹⁷ *Uganda (DPP) vs Dr. Kizza Besigye*, Constitutional reference No. 20 of 2005; See also *Foundation for Human Rights Initiative v Attorney General* (2008) ULR 460.

²¹⁸ *ibid.*

²¹⁹ *Kyeyune Mitala Julius vs Uganda*, Supreme Court Criminal Miscellaneous Application No. 4 of 2017(unreported); See also *Mugisha Gregory vs Uganda* Criminal Reference No 179 of 2011 (unreported).

²²⁰ *Gregory Mugisha vs Uganda*, Court of Appeal Miscellaneous Criminal Application No. of 5 of 2011(unreported).

2. Amendment

The constitutional provisions on fair hearing should be brought in direct consideration of bail, and right against discrimination. Legal representation at state's cost should be available to all indigents regardless of the gravity of offence and punishment, remove the unlimited discretion of Courts in considering bail applications and at least make the discretion limited to the circumstances un-favourable to the accused person until his or her trial or appeal is disposed of. For example where the life of the accused or appellant is at stake, then the courts would have reason to deny the grant of bail to preserve the accused person's right to life.

The legislations relating to observation of the right to fair hearing in criminal trials should be amended to actualize the various pronouncements by Courts of law where the provisions have been found to be in contradictions with the Constitution or where relevant provisions are not there or were removed without replacement.²²¹ For example since the SCU decision in the case of Salvatori Abuki on the unconstitutionality of banishment as a punishment, the Witchcraft Act has remained un-amended.²²²

The provisions relating to costs and compensation of accused persons under the Magistrates Courts Act and the trial on Indictment Act, needs to be amended to reflect the spirit of the constitution on non-discrimination between the state and individuals who institute frivolous and vexatious criminal charges against others. The limits of costs should be left open and at the discretion of Courts. The amount of two hundred thousand shillings and three thousand shillings in the MCA and TIA respectively are outdated and cannot cover costs incurred and injury caused to an accused person in defending him or herself and clearing his name soiled in a criminal trial in Uganda arising from frivolous and vexatious charges.

3. Repeal

²²¹ *Shabahuria Matia v Uganda*, High Court Criminal Revisional Cause, No. MSK-00-Cr-0005 of 1999 (Arising From Criminal Case No. MMA. 435 of 1995) (unreported).

²²² *Salvatori Abuki v Attorney General*, Constitutional Appeal No. 1 of 1998.

The Habitual Offenders (Preventive Detention) Act, sections of the Magistrates Courts Act and Trial on Indictments Act relating to committal proceedings. The Habitual Offenders (Preventive Detention) Act is against the spirit of article 28(7).²²³ For committal proceedings, there are not relevant and there is no reason why an accused person should appear and be remanded by a Court that has no jurisdiction to determine the case or grant any other remedy in the same. In alternative amend the MCA to provide powers to the magistrates to grant remedies to accused persons and prevent abuse of court process.²²⁴

4. Enactment of new laws

Further government through Parliament should enact laws concerning provision of free legal aid services to indigents undergoing criminal trials from Police investigations to appeal. In other jurisdictions it is called public defenders scheme. At the moment the same are provided by the Justice Centres Uganda, the Legal Aid and Pro bono project of the Uganda Law Society and the Law Development Centre mostly funded by donors not the state. The system does not have well-articulated statutory guidance and obligations to the service providers in the law. The quality and scope of the services provided is therefore inevitable and the same can be cured by enactment of a law to that effect.²²⁵

5. Training and sensitization

The policies aimed at ensuring observation of the right of fair hearing have not realized their objectives because the stakeholders are not well inducted on the benefits and procedures of the policy under implementation. The case of plea bargaining and the attitudes of the different stakeholders like private lawyers, state prosecutors and court officials themselves for lack of proper information about the objects and procedures

²²³ The Constitution of the Republic of Uganda, 1995.

²²⁴ *Shabahuria Matia vs Uganda*, High Court Criminal Revisional Cause, No. MSK-00-Cr-0005 of 1999 (Arising From Criminal Case No. MMA. 435 of 1995) (unreported), Egonda Ntende J as then was advised that the Magistrates Act needed such an amendment to grant them powers while handling committal proceedings which were removed in the Magistrates Courts (Amendment) Act, Act 4 of 1985..

²²⁵ The Judiciary, 'A report of the case backlog reduction committee' (29 March 2017) 4-5 retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017

have not made the accused persons properly benefit from the project from a point of knowledge. Therefore, there is need for training and continued sensitization of the judicial officers, private and state employed advocates and the general public on the different policies geared at improving the observation of the right to fair hearing during criminal trials in Uganda. Projects like the Chain linked of JLOS, plea bargaining, reduction of dialogue should be shared and stakeholders enlightened on their modus operandi before implementation phase.²²⁶

²²⁶ Betty Amamukori, *We are being forced to sign plea bargain agreements*, (The newvision, Kampala 04 May, 2018), retrieved from <https://www.newvision.co.ug> on 03/11/2018; See also Michael Ntezza, *Chief Justice warns defence lawyers on neglecting suspects in plea bargaining*, (Chimpreports, Kampala 21 June, 2018), retrieved from <https://chimpreports.com> online newspaper on 03/11/2018.