DETAILED ANALYSIS OF THE OBSERVATION OF THE RIGHT TO FAIR HEARING IN UGANDA

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A RESEARCH REPORT SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE BACHELORS DEGREE IN LAW OF KAMPALA INTERNATIONAL UNIVERSITY

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DECLARATION

I, Serah Recheal Reg. No. LLB/44885/143/DU declare to the best of my knowledge that this research is truly my original and has not been submitted in the fulfillment for any award of a degree in any other institution of higher learning or university, so it is entirely out of my own efforts.

Signature .....

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Date 19th/08/2019

APPROVAL

This is to satisfy that this research report is done under my supervision and it is now ready for submission to the school of law in Kampala international University with our approval.

Signature ..... Date 18/06/2018.....

SUPERVISOR

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ABSTRACT

The study examined the detailed analysis of the observation of the right to fair hearing in Uganda in this, the study was guided by the following objectives;- To examine the laws and regulatory framework in responses to rights on fair hearing in Courts of Uganda, to examine the extent to which the rights to fair hearing has been observed by Uganda government, to examine the challenges faced while implementing rights to fair hearing in Uganda and lastly to examine the recommendation and conclusion on rights to fair hearing in Uganda.

The right to fair hearing in criminal proceedings is synonymous with the hearing process itself and has gained recognition for centuries through codification in various international, regional and national instruments. It has existed in the international arena as an integral part of the general scheme for the protection of human rights. It is recognized since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, and its codification in the International Covenant on Civil and Political Rights (ICCPR) in 1966.

Article 28 on the other hand protects the right to a fair hearing which includes among others the presumption of innocence until proved guilty, the right to adequate time and facilities to prepare one's defence, the right to an interpreter, the right to a lawyer at ones cost and the right to cross examine witnesses among others.

The study therefore recommended that the government, through the department of justice, should embark on conducting public awareness campaigns to educate the public of the right to a fair trial especially the right to have a trial without unreasonable delay as it is stipulated in Article 28(1) of the Republic of Uganda Constitution that In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

CHAPTER ONE

1.0 Introduction

The right to a fair hearing is provided under Article 28 of the Constitution of the Republic of Uganda. Article 28(1)[1] directs that in the determination of civil rights and obligations or any criminal charge a person has a right to a fair, speedy and public hearing before an independent and impartial court.

1.1 Background of the study

The right to fair hearing is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms, especially the right to liberty and security of person.[2] It relates to the administration of justice in both civil and criminal proceedings. The administration of justice entails two aspects: the institutional, which comprises an independent and impartial court or tribunal; and procedural, which focuses on a fair and public hearing. In sharp contrast to civil cases where monetary damages are granted, criminal cases have stark and almost irreparable consequences such are death where the death penalty is awarded or lengthy imprisonment.[3] This calls for the need to ensure that the fundamental right to fair hearing is protected and promoted in order to deliver justice to the accused.

The scope of the right to fair hearing ranges from prohibition of torture during detention, to the right to an interpreter and the right to compensation and damages for injustice.[4] It hence constitutes a fair and public hearing carried out by an independent and impartial tribunal or body. This has been echoed in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), which provides that, all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights in a suit of law, everyone shall

[1] The Republic of Uganda Constitution 1995
[2] Legislation Online,'Fair Hearing' www.legislationonline.org/topics/topic/8 accessed 5 January 2015.
[3] Jennifer Smith and Michael Gompers, _Realizing Justice: The Development of Fair Hearing Rights in China' <http://scholarship.law.upenn.edu/ealr/vol2/iss2/4/> accessed 15 January 2015.
[4] Ibid.

be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[5]

The right to fair hearing in criminal proceedings is synonymous with the hearing process itself and has gained recognition for centuries through codification in various international, regional and national instruments.[6] It has existed in the international arena as an integral part of the general scheme for the protection of human rights. It is recognized since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948,[7] and its codification in the International Covenant on Civil and Political Rights (ICCPR) in 1966.[8] Article 10 of the UDHR provides that, Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

The right to fair hearing is also protected under article 6 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR);[9] article 8 of the American Convention on Human Rights (ACHR); and article 7 of the African Charter on Human and Peoples' Rights (ACHPR). Elements of right to fair hearing are embodied as pre-hearing rights, rights during hearing and rights after hearing.[10] The right to fair hearing must be protected throughout the hearing to ensure justice prevails.

The right to a fair hearing is considered as one of the most essential and fundamental human rights in all countries that respect the rule of law. Its applicability on a criminal charge does not start when charges are actually presented to court, but from the first contact between the suspect and State authorities that are involved in investigations.[11] It embodies aspects of both

[5] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI).
[6] Scholastica Omondi, The Right to Fair Hearing and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Uganda' (2014) 2 Journal of Research in Humanities and Social Science 38.
[7] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR).
[8] Busalile Jack Mwimali, Conceptualization and Operationalisation of the Right to a Fair Hearing in Criminal Justice in Uganda' (Doctor of Philosophy, University of Birmingham 2012).
[9] Article 6 of ECHR provides that, _In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...'.
[10] Kayatire Frank, _Respect of the right to a fair hearing in indigenous African Criminal Justice Systems: The case of Rwanda and South Africa' (MastersThesis, University of Pretoria 2004).
[11] Frank (n 9).

institutional and procedural fairness in the determination of criminal cases in order to ensure achievement of justice.[12] This right does not exist in isolation but is anchored on and acts as a safeguard for other important rights such as the right to life, liberty, freedom from torture, cruel and degrading treatment.

The right to fair hearing is not subject to any kind of limitation. The Human Rights Committee in its General Comment 13 on fair hearing declared that certain aspects of the right to a fair hearing under Article 14 could not be the subject of derogation even under emergencies.[13] The Committee was of a further opinion that under the principles of legality and the rule of law, the fundamental requirements of fair hearing must be respected at all times. According to the African Union (AU)[14], the general principles and guidelines applicable to legal proceedings are; public hearing, fair hearing,[15] independent tribunal and impartial tribunal. In Uganda, Article 28 (1) of 1995 contains similar provisions. It provides that, every person has the right to have any dispute that can be solved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body'. Article 44 of the Uganda constitution provides for the Prohibition of derogation of particular human rights and freedoms and the right to fair hearing is listed as one them, this research points out that this Article does not amount to the limitation of right to fair hearing, every person has a right to exercise in Court regardless of crime committed.

[12] Rhona K.M Smith, The essentials of human rights (2005), Hodder Education, at 130.
[13] *Ibid*
[14] African Union, _Principles and Guidelines on the Right to a Fair Hearing and Legal Assistance in Africa' cite website
[15] According to AU the essentials of a fair hearing are;
(a) equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military;
(b) equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, nat ional or social origin, means, disability, birth, status or other circumstances;
(c) equality of access by women and men to judicial bodies and equality before the law in any legal proceedings;
(d) respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused;
(e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
(f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;
(g) an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body;
(h) an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body;
(i) an entitlement to a determination of their rights and obligations without undue de lay and with adequate notice of and reasons for the decisions; and
(j) an entitlement to an appeal to a higher judicial body.

The right to fair hearing constitutes various safeguards. The underlying concept of fair hearing lies in affording an accused person a fair and public hearing by an independent and impartial court established by law. It generally comprises the following basic fundamental rights: the right of access to court and, consequently, to be heard by a competent, independent and impartial tribunal; the right to equality of arms'; the right to a public hearing; the right to be heard within a reasonable time; the right to counsel; and the right to interpretation.[16]

In Uganda Article 28(1)[17] In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law and facilities to prepare a defence; the right to a public hearing before a court established under the constitution; the right to have the hearing begin and conclude without unreasonable delay; the right to be present when being tried, unless the conduct of the accused makes it's impossible for the trail to proceed; the right to choose, and be represented by, an advocate and to be informed of this right promptly, the right to be assigned an advocate at state expense if substantial injustice would otherwise result; the right to remain silent and not testify during proceedings; the right to be informed of the evidence the prosecution intends to rely on and to have access to that evidence; the right to adduce and challenge evidence; the right to an interpreter without cost; the right to be tried for an offence known in law; the right not to be tried for an offence which an accused has either been previously acquitted or convicted; the right to the benefit of the least severe punishments and the right of appeal or review upon conviction.

1.2 Statement of Problem

The right to fair hearing is a fundamental right that is protected by law against limitation or derogation. Since criminal proceedings are likely to lead to imprisonment, the hearing process must be fair and just to ensure that only the guilty are convicted and punished. One of the key safeguards on the right to a fair hearing is the requirement that hearings are conducted without unreasonable delays.

[16] FJ Doebbler, *Introduction to International Human Rights Law* (CD Publishing, 2006).
[17] The Republic of Uganda Constitution 1995

The Ugandan judiciary has recognised the importance of ensuring that criminal hearings are conducted without unreasonable delays by introducing measures which are aimed at reducing case backlogs. These measures include hiring of additional judges and magistrates, introducing measures to ensure for accountability of judicial officers, introduction of the judicial week concept where only criminal cases are prioritised and heard during that period; among others. It is in this context that this study analyses the judicial interpretation of the right to fair hearing without unreasonable delay.

1.3 Purpose of the study

The main aim of the study is to examine the detailed analysis of the observation of the right to fair hearing in Uganda.

1.4 Research Objectives

i. To examine the laws and regulatory framework in responses to rights on fair hearing in Courts Uganda.
ii. To examine the extent to which the rights to fair hearing has been observed by Uganda government
iii. To examine the challenges faced while implementating of rights to fair hearing in Uganda
iv. To examine the recommendation and conclusion on rights to fair hearing in Uganda

1.5 Scope of the Study

1.5.1 Geographical scope

Uganda is a landlocked country in East Africa. It is bordered to the east by Uganda, to the north by South Sudan, to the west by the Democratic Republic of the Congo, to the south-west by Rwanda, and to the south by Tanzania. The southern part of the country includes a substantial portion of Lake Victoria, shared with Uganda and Tanzania. Uganda is in the African Great Lakes region. Uganda also lies within the Nile basin, and has a varied but generally a modified equatorial climate. Uganda takes its name from the Buganda kingdom, which encompasses a large portion of the south of the country, including the capital Kampala. The people of Uganda

were hunter-gatherers until 1,700 to 2,300 years ago, when Bantu-speaking populations migrated to the southern parts of the country.

1.5.3 Time scope

This study was covered from the period of February 2018 and finalized in June 2018. This was including the major elements in that are current happening the prisons of Uganda.

1.6 Significance of the study

This study is significant because the findings could assist policy makers make informed policy decisions that could help rights on fair hearing in Kampala Uganda.

The study aimed at analyzing the observation of the right to fair hearing in Uganda in Uganda specifically.

To organizations, the research will help legal practitioners understand the concept of fair hearing and its effects on citizens and how the Law can come up to see that the practice is abolished.

To the public, the research and the findings collected would act as a source of motivation to victims and other persons in appreciating the role media has played in rights to fair hearing in Uganda.

To the researchers; future researchers will use this work as a reference and a guide to their study.

The findings could also help contribute to the body of knowledge in-regards to rights to fair hearing in Uganda.

Finally, this study will be carried out in partial requirements for the award of bachelors of laws degree of Kampala international university which will enable the researcher obtain the degree.

1.7 Methodology

The study examined the detailed analysis of the observation of the right to fair hearing, in this case it utilized qualitative research methods in nature as, according to Leedy[18], this methodology is aimed at description. By utilizing qualitative methodologies the research is able to evaluate both formal and normative aspects of political activity. Qualitative research is used in several academic disciplines, including political science, sociology, education and psychology. According to Peshkin[19] in Patton, it usually serves one or more of a set of four purposes: description, interpretation and evaluation of a hypothesis or problem.

According to Quality Solutions and Research (QSR) (a, 2011:115), qualitative research "is used to gain insight into people's attitudes, behaviors, value systems, concerns, motivations, aspirations, culture or lifestyles." QSR continues to explain qualitative research as a method of making informed decisions in both business and politics.

1.8 Theoretical Framework

The underlying theories that will underpin the study are the theories of justice and human rights. In defining the term, right to fair trial' one cannot fail to take into consideration philosophical concepts associated with the category of justice as well, if only for the adjective fair' placed before the word trial'.[20]The full realization of the right to fair trial leads to justice to the accused and victim. Theories of justice are a significant and abiding concern of moral, political, and legal theory that have exercised the minds of thinkers since Plato and Aristotle.[21] Whenever a human right is violated it leads to injustice. The concept of justice in itself in an intuitively understandable, and varies from one society to another. More often no distinction is made between justice in the legal sense, moral sense, ethical sense and sociological sense.[22] The different understandings of the concept of justice inevitably lead to different ideas of what it

[18] Established on 2001:148
[19] [200:134]
[20] Piero Leanza & Ondrej Pridal, Justice and the Right to Fair Trial'<http://www.search.ask.com/web?q=Piero%20Leanza%20%26%20Ondrej%20Pridal%2C%20%E2%80%98%20Justice%20and%20the%20Right%20to%20Fair%20Trial%E2%80%99&o=15570&l=dis&qsrc=2871> accessed 3 January 2014.
[21] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, Oxford University Press 2012).
[22] Ibid.38

should entail: social order, the fair distribution of assets and values, righteous life, fair and just judicial activity, etc.[23]

Aristotle acknowledged that the concept of justice is imprecise, and it consists of treating equals equally and unequals unequally in proportion to their inequality.[24] He recognized that the equality implied in justice could be arithmetical- based on the identity of the persons concerned, or geometrical- based on maintaining the same proportion. He distinguished between corrective or commutative justice and distributive justice.[25] Corrective justice in his view was the justice of the courts which was applied in the redress of crimes or civil wrongs and it required that people be treated equally.[26] Distributive justice on the other hand, is concerned with giving each according to his desert or merit and it was the concern of the legislator.[27] The theory of justice as espoused by Aristotle will be used in discussing the concept of the right to a fair trial since by recognising this right, the law seeks to ensure that justice is done. Both concepts of corrective and distributive justice will be used while analysing the appropriate remedies which are available in the event of breach or violation of the right to a fair trial without unreasonable delay.

Plato on the other hand argued that a state has two key attributes: it is founded upon justice; and all citizens within it are happy.[28] Plato stressed on the value of education in order to attain justice in a society. This theory will be applied in discussing the conceptualization of the right to a fair trial. It will be used in understanding the development of the right and why many States have accepted this right as fundamental in safeguarding the rule of law and attainment of justice. Justice brings equality and brings a sense of happiness and satisfaction.

John Rawls was the greatest contributor to political and legal theory of his time. In his book, A Theory of Justice, Rawls regards utilitarianism as an unsatisfactory means by which to measure justice.[29] He asserted that the primacy of justice is social order and the very fact of disagreements and arguments about justice indicates humankind's commitment to the pursuit of justice.[30] The

[23] *Ibid*
[24] Ibid
[25] Ibid
[26] Ibid
[27] Ibid
[28] Wayne Morrison, *Jurisprudence: from the Greeks to Post-Modernism* (Cavendish Publishing Limited 1997).
[29] MDA Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell 2008).
[30] Morrison (n 41).

conception of justice according to Rawl, demands; maximization of liberty, subject only to such constraints as are essential for the protection of liberty itself; equality for all, both in the basic liberties of social life and also in the distribution of other social goods; and fair equality of opportunity and the elimination of all inequalities based on both birth or wealth.[31] This concept is relevant to this study since fair trial safeguards are meant to protect the right to liberty and ensure fairness and equality in administration of justice.

Rawls argued that people in original position as rational individual decide on general principles that will define the terms under which they will live a society. The first principle being, each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all'.[32]The second principle being, social and economic inequalities are to be arranged so that they are both: to the greatest benefit of the least advantaged, consistent with the just savings principle; and attached to offices and positions open to all under conditions of fair equality and opportunity'.[33]People will therefore put liberty above equality as none is ready to risk and lose liberty when the veil of ignorance is removed.

The theory of justice will be relevant in this research in order to show how the right to fair trial is relevant in realizing justice to both the accused and victim. Everyone has equal rights and must enjoy adequate scheme of equal basic liberties. The judiciary must ensure that the constitution is defended against the vagaries of legislative activity. The theory will also be relevant in explaining the link between the right to fair trial and realization of justice in a just society.

According to Rawls and Nozick there is a clear relationship between justice and rights. Rights are grounded in an equal concern and respect, and where a right is violated it leads to grave injustice. According to Dworkin, the protection of minorities is central to any theory of justice as majoritarianism can easily lead to the trampling of the rights of minorities.[34] The essence of theory of justice in this research is to show that a judge cannot reach a just decision without a fair trial in the first instance.

[31] Freeman (n 42).
[32] Wacks (n 43).
[33] Ibid
[34] Freeman (n 42)

Lon Fuller in Morality of Law, who is the major proponent of Procedural Natural Law theory, suggests that when a system violates the idea of procedural law, it can no longer claim to be law.[35] According to HLA Hart the concept of fairness plays a specific role within the general scheme of morality:[36]

> *The distinctive features of justice and their special connection with law begin to emerge if it is observed that most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words fair' and unfair'. Fairness is plainly not coextensive with morality in general; references to it are mainly relevant to it in two situations in social life. One is and when we are concerned not with a single individual's conduct but with the way in which classes of individuals are treated, when some broken or benefit falls to be distinguished among them. Hence what is typically fair or unfair is a share'. The second situation is when some injury has been done and compensation for redress is claimed.*

The concept of human rights has been described as one of the greatest inventions of civilization, which can be compared in its impacts on human social life.[37] The natural law theory led to the natural rights theory, is the theory mostly associated with modern human rights theory. The chief exponent of the natural rights theory was John Locke, who developed his philosophy within the framework of seventeenth century during the Age of Enlightenment.[38] John Locke in his Second Treatise of Government claimed that everyone had natural rights to life, liberty and property and that government was a trust established to protect these rights through the rule of law.[39]

The philosophical foundations of human rights can be traced during the Age of Enlightenment in Europe and its rationalistic doctrine of natural law which recognized individual human beings as subjects endowed with rights against the society and placed them at the centre of legal and social systems.[40] Over the centuries the idea of human rights has passed through three generations. The

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[35] Lon Fuller, *Morality of Law* (Oxford University Press 2002).
[36] HLA Hart, The Concept of Law (Oxford University Press 2002).
[37] Alan Gerwith, *Reason and Morality* (University of Chicago Press 1978).
[38] Jerome J Shestack, _The Philosophical Foundations of Human Rights' in Janusz Symonides (ed), *Human Rights: Concept and Standards* (Dartmouth Publishing Company Limited 2000).
[39] *Ibid*
[40] Manfred Nowak, *Introduction to the International Human Rights Regime* (The Raoul Wallenberg Institute of Human Rights Library Vol 14, Brill Academic Publishers 2003).

first generation comprises the seventeenth and eighteenth century, mostly the negative civil and political rights.[41] The second generation consists essentially of the social, economic and cultural rights while the third generation are primarily collective rights.[42] The right to fair trial falls under the first generation of rights which are civil and political rights.

Human rights are a broad area of concern but their potential subject-matters ranges from questions of torture and fair trial to social, cultural and economic rights.[43] The focus of the human right theory is on the life and dignity of human beings.[44] Human rights possess a number of important characteristics such as being universal, inalienable, legally binding, and based on the inherent dignity and equal worth of all human beings.

The human rights theory confers the state with the obligation to protect, respect and fulfill all human rights.[45] It encapsulates that each human right has specific content and claims. It is not just an abstract slogan. They are corresponding obligations of the duty bearer who has traditionally been considered to be state.[46] This theory is key to this research as it helps to explain the details of the right to fair trial under international human rights law and state's obligations towards it realisation.

1.9 Literature Review

The bulk of the rights contained in Chapter Four of the 1995 Constitution belong to the category known as first-generation rights (which include the traditional civil and political rights). These are rights generally included in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) to which Uganda is a party.[47] Briefly, the civil and political rights protected in the Constitution include the right to equality and freedom from discrimination,[48] the right to life,[49] personal liberty,[50] respect for human dignity

[41] Wacks (n 34).
[42] Ibid
[43] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012)
[44] Nowak (n 51).
[45] Ibid
[46] Ibid
[47] Uganda acceded to the ICCPR on 21 June 1995 and to the First Optional Protocol to the ICCPR on 14 November 1995.
[48] Article 21
[49] Article 22
[50] Article 23

and protection from inhuman treatment,[51] prohibition of slavery, servitude and forced labour,[52] the right to privacy,[53] the right to a fair hearing[54] and freedom of conscience, expression, movement, religion, assembly and association.[55] Also protected are the rights of certain groups including women, children, persons with disabilities, and minorities.[56] In addition, the Constitution protects the rights of citizens to participate in the affairs of government[57] and the right of access to information.[58]

Negru rightly affirms that law is a profession of words; no other domain gives as much importance to its linguistic vehicle as does the law.[59] In the courtroom, the means through which legal power is realised, exercised, abused or challenged are primarily linguistic.[60] Scholars on the subject of language in legal process have restricted the scope of the language debate in international criminal trials to translation. Beyond translation, Chapter 1 extends the debate to include multilingualism vis à vis multiculturalism, and the rights perspective of the language question in criminal justice. The interconnectedness of culture and language is affirmed by Danet;[61] Jiang;[62] Kelsall.[63] Culture is also a significant factor of interpretative performance.[64]

1.10 The essential elements of a fair hearing include

Equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military;[65] equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language,

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[51] Article 24
[52] Article 25
[53] Article 27
[54] Article 28
[55] Article 29
[56] Articles 33, 34, 35 and 36.
[57] Article 38.
[58] Article 41.
[59] ID Negru _Acceptability versus Accuracy in Courtroom Interpreting' in DS Giannoni & C Frade (eds) *Researching Language & the Law: Textual Features &Translation Issues* (2010) 213.
[60] JM Conley & WM. O'Barr *Just Words: Law, Language & Power* (1998) 2.
[61] B Danet _Language in the Legal Process' (1980) 14 *Law & Society Review* 445.
[62] W Jiang _The Relationship Between Culture & Language' (October 2000) 54 *ELT J* 328 [http://eltj.oxfordjournals.org/cgi/reprint/54/4/328].
[63] T Kelsall *Culture under Cross-Examination: International Justice & the Special Court for Sierra Leone* (2009).
[64] K Alfisi _Language barriers to justice' Washington Lawyer (April 2009) 20 (http://www.legalaiddc.org/pressroom/documents/WashingtonLawyer409LanguageBarriersToJustice.pdf; V Benmaman _Legal Interpreting: An Emerging Profession' *The Modern Language J* (1992)76 445; NA Combs *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).
[65] Principles and Guidelines on the Right to a Fair Hearing and Legal Assistance in Africa, 2003

political or other convictions, national or social origin, means, disability, birth, status or other circumstances;[66] equality of access by women and men to judicial bodies and equality before the law in any legal proceedings;[67] respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused;[68] adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;[69] an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;[70] an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body;[71] an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body;[72] an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and an entitlement to an appeal to a higher judicial body.

1.11 Public Hearing

All the necessary information about the sittings of judicial bodies shall be made available to the public by the judicial body;[73] A permanent venue for proceedings by judicial bodies shall be established by the State and widely publicised. In the case of ad-hoc judicial bodies, the venue designated for the duration of their proceedings should be made public.[74] Adequate facilities shall be provided for attendance by interested members of the public; No limitations shall be placed by the judicial body on the category of people allowed to attend its hearings where the merits of a case are being examined;[75] Representatives of the media shall be entitled to be present at and report on judicial proceedings except that a judge may restrict or limit the use of cameras during the hearings; The public and the media may not be excluded from hearings before judicial bodies except if it is determined to be in the interest of justice for the protection of

[66] *bid 18*
[67] *Ibid*
[68] *ibid*
[69] *ibid*
[70] *ibid*
[71] *ibid*
[72] *ibid*
[73] Principles and Guidelines on the Right to a Fair Hearing and Legal Assistance in Africa, 2003
[74] Principles and Guidelines on the Right to a Fair Hearing and Legal Assistance in Africa, 2003
[75] Principles and Guidelines on the Right to a Fair Hearing and Legal Assistance in Africa, 2003

children, witnesses or the identity of victims of sexual violence[76]; for reasons of public order or national security in an open and democratic society that respects human rights and the rule of law.

Judicial bodies may take steps or order measures to be taken to protect the identity and dignity of victims of sexual violence, and the identity of witnesses and complainants who may be put at risk by reason of their participation in judicial proceedings.[77] Judicial bodies may take steps to protect the identity of accused persons, witnesses or complainants where it is in the best interest of a child.[78] Nothing in these Guidelines shall permit the use of anonymous witnesses, where the judge and the defence is unaware of the witness' identity at hearing.[79] Any judgment rendered in legal proceedings, whether civil or criminal, shall be pronounced in public.

1.12 Related Literature

Despite its existence and recognition at international, regional and national level, there is no single agreed definition of what constitutes the right to fair trial.

Ouguergouz[80] discusses that the concept of the right to a fair trial is inevitably bound up with the concept of justice. He notes that there appears to be no definition of the right to a fair trial either in the international instruments which recognise it or in the case-law of the international bodies protecting these instruments. However, the notion of the right to a fair trial can be understood in two distinct levels; the conceptual or structural level whose ingredients include independent, impartial, open and accessible judiciary and the technical sense, which is defined by reference to a number of procedural safeguards or requirements such as the right to be informed of a charge, right to counsel, right to a speedy trial. These two concepts, though district, complement each other.

[76] Principles and Guidelines on the Right to a Fair Hearing and Legal Assistance in Africa, 2003
[77] Principles and Guidelines on the Right to a Fair Hearing and Legal Assistance in Africa, 2003
[78] Principles and Guidelines on the Right to a Fair Hearing and Legal Assistance in Africa, 2003
[79] Principles and Guidelines on the Right to a Fair Hearing and Legal Assistance in Africa, 2003
[80] Ouguergouz F, The African Chrater on Human and People's Rights; A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa' (2002) Martinus Nijhoff Publishers, the Hague

Halstead takes the view that is it possible to have a fair trial despite flaws in the procedure.[81] He notes that there are circumstances where a conviction can be upheld even though some principles of the right to a fair trial have been violated. This view has created a gap since these principles are aimed at ensuring that no party is disadvantaged by having a right violated. Any violation is likely give an advantage in favour of the violator. This will more often than not, affect the fairness of trial. Kameri - Mbote and Akech pointed out that some courts have taken the view that any violation of the right to fair trial, even at the pre–trial stage, is fundamental and affects the validity of the entire proceedings.[82] This entitles an accused to be acquitted. Halsends perspective seeks to promote substantive justice by considering the effect of the right or its violation on the entire trial. However, he fails to consider how violation of some rights impact an accused person's ability to effectively defend himself and may, on its own render the entire trial unfair.

Kameri - Mbote and Akech's view that any violation is fundamental and entitles an accused to an acquittal is too much focused on formal justice at the expense of substantive justice. This is because it is important to analyse the nature of a violation, its impact a trial and the overall effect before determining the appropriate remedy. They also fail to take into account the various remedies that may address a violation, such as damages, enforcement of the right (for example the right to counsel), instead of an acquittal, especially where the violation does not affect the fairness of a trial.

Chadambuka,[83] analyses co-relation between the seriousness of an offence with which an accused is charged vis a vis the right to a fair trial within a reasonable time. She argues that where there is an inordinate delay in trial, the court should be more willing to find a violation of the right to trial within a reasonable time in cases where an accused person is charged with a serious offence than where the charge is minor.[84] Seriousness of the crime relates to the gravity of the alleged criminal wrongdoing and how heavy the possible penalties can be if one is found guilty. She bases the right to speedy trial on seriousness of offence. By focusing on the

[81] Halstead P, Unlocking human rights (Hodder education 2009).
[82] Kameri -Mbote PK and Akech M, _Uganda: Justice sector and the rule of law' Johannesburg; Open society initiative for eastern Africa <http://www.ielrc.org/content/a1104.pdf> accessed 13 January 2014.
[83] Zvikomborero Chadambuka, Serious Offences and the Right to Trial within a Reasonable Time' (2012) 9 Essex Human Rights Review 1
[84] *Ibid*

seriousness of the offence as the key determinant in enforcing this right, the writer fails to appreciate the other impacts such as loss of evidence or witnesses due to passage of time which often times, render a trial unfair and unjust irrespective of its seriousness.

Mwimali,[85] explores issues concerning the conceptualization and operationalisation of the right to a fair trial in the Ugandan criminal justice system. He argues that the problems facing the full realization of the right to fair trial are not entirely attributed to shortcomings in the formal law and cannot be fully addressed from the formal law perspective alone. It impacts factors outside the formal law such as poverty, illiteracy, corruption and cultural perceptions and contextual issues affect the enforcement of the right to fair trial. The right to have trial concluded within reasonable time embodies a broad range of factors core to whether the enjoyment of the right to a fair trial in general is possible.[86] A legal system wrought with legal technicalities may lead to time wasting. He identifies factors that lead to delayed trials such as inept judicial officers, corruption, inadequate physical infrastructure and manpower as well as litigants themselves who may cause delays for various reasons. This literature is important as it gives an understanding of the factors which may lead to delays in conclusion of cases and hence a violation of this right.

However he did not discuss in detail what is a reasonable or unreasonable delay so as to give rise to this right. He did not explore the factors which ought to be taken into account in interpreting this right and the appropriate remedies that may be awarded once a violation occurs.

Juwaki,[87] discusses the causes of delays in obtaining a speedy trial for prisoners in custodial remand in Zimbabwe. She analyzes section 18 (2) of the Zimbabwean Constitution under the Bill of Rights which provides that, _if any person is charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time'. She concludes that there exists a large gap between what the law is in books and what is in practice in Zimbabwe. There are serious violations of the right to a speedy trial and there seems to be some

[85] Busalile Jack Mwimali, Conceptualization and Operationalisation of the Right to a Fair Trial in Criminal Justice in Uganda' (Doctor of Philosophy, University of Birmingham 2012).
[86] Ibid
[87] Yvonne Kudzai Juwaki, _Towards Trial of the Forgotten: An Enquiry into the Constitutional Right to a Speedy Trial for Remand Prisoners in Zimbabwe' (Masters, Netherlands 2012).

deliberate neglect over the respect, protection and enforcement of the right.[88] She makes various recommendations to speed trials in Zimbabwe so that prisoners 'right to a fair trial is realized.

These include increase in the number of courts that preside over criminal cases, increasing well remunerated judicial personnel, computerization of court records, discipline of judicial officers who contribute to delays of trials, institutional resource capacitation of prisons, participation, accountably and political non-interference.[89] This work will be key in analyzing the right to fair trial. However, it has not analyse in detail the meaning of the right to a trial without unreasonable delay and how courts in Zimbabwe have interpreted and treated this matter. The work further failed to consider what remedies are available in law where a violation of this right occurs. This study seeks to address this gap.

Wahiu[90] takes the view that the right to fair trial is fundamental to the rule of law as it seeks to check arbitrary and unaccountable power. It has firm foundations both in international human rights law and in constitutionalist practice, particularly where it is written as a specific guarantee in the constitution. He considers the right a peremptory norm that underpins the protection of other human rights and that failure to observe it undermines the enjoyment of all other rights. He also considers it to be an aspect of the natural justice rule which prohibits condemnation without a hearing. He notes that the right is concerned with both procedural fairness, such as the right to be informed of a trial, as well as substantive fairness. The work, however, does not consider how violation of this right affects the outcome of a trial.

Ried[91] explores the concept of right to have a fair trial without unreasonable delay. She observes that the reasonableness of the length of proceedings should be assessed in light of particular circumstances of a case, regard being had to three factors; the complexity of the case, the conduct of an applicant and the conduct of state authorities. The period to be taken into account in determining the duration of a case, starts from the time a formal charge is brought against an accused until the charge is finally determined or when the sentenced imposed becomes final.

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[88] *Ibid*
[89] *Ibid*
[90] Winluck Wahihu, _Human Rights Litigation and Domestication of Human Rights Standards in Sub – Saharan Africa' (2007) AHRAJ casebook series, Volume 1.
[91] Karen Reid, A practitioners guide to the Euro pean Convention on Human Rights' (1998), Sweet and Maxwell, London.

This may be the date of the last appeal or issuing of judgment. In cases where a challenge is brought in ongoing proceedings, the period which has already elapsed since the laying of the formal charge should be considered. This period should exclude any periods which an accused absconds during proceedings. On the issue of complexity, she observes that factors which should be taken into account while analysing this concept include the subject matter of the case, the number of disputed facts, international elements in a trial, the number of witnesses or volume of evidence will be considered. This should, however, be balanced against the general principle of securing proper administration of justice by ensuring that trials are heard and determined expeditiously. With regard to the conduct of parties, she argues that only delays which are attributable to the State may justify a finding of failure to comply with the reasonable time rule. However, the work only considered three factors as the ones which should be used in determining whether the right to a fair trial without undue delay has been violated. These factors are not exhaustive. This study will analyse the other factors which are taken into account in interpreting this right in addition to what has been considered by the writer. It will also consider the appropriate remedies available in the event of violation of the right to a speedy trial and factors which influence the award of a particular remedy as opposed to another.

Bakayana[92] discusses the right to a speedy trial by the Uganda Human Rights Commission (UHRC), a human rights institution in Uganda mandated to protect and promote human rights. The right to fair hearing is one of the key rights enshrined by Uganda's Constitutions since 1962. Bakayana discusses the right to speedy trial as a safeguard to a fair trial. He analyses the key challenges that UHRC faces in promoting the right to a speedy trial. These challenges include legal dilemmas such as lack of legislative anchoring, limited staff for the tribunals, unlimited adjournments, financial constraints and duplication of various human rights institution.[93]

Bakayana provides a well-explained framework on institutional implementation of the right to a fair trial by safeguarding a speedy trial. His work will be useful in enriching the present study by making a comparison between Kenya and Uganda.

[92] Isaac Bakayana, From Protection to Violation? Analyzing the Right to a Speedy Trial at the Uganda Human Rights Commission' (2006) 2 HURIPEC Working Paper.
[93] *Ibid*

The literature reviewed in this work did not explore how the Ugandan judiciary has interpreted of the right to trial without unreasonable delay and the remedies awarded by Kenyan courts in case of violation of the right. This work seeks to fill these gaps by analysing and discussing the Kenya judicial interpretation of the right trial without unreasonable delay.

CHAPTER TWO

CONCEPTUALIZATION OF THE RIGHT TO A FAIR TRIAL

2.1 Introduction

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. This chapter discusses the philosophical foundations of the right to fair trial and its normative content. It traces the historical development of the right, from the first written code of laws founded on Lex duodecim Tabularum - the Law of the Twelve Tables - to the present time, which is governed by treaties, international legal instruments and national legislation. It also seeks to provide an understanding of the normative content of the right to fair trial.

2.2 Concept of Right to a Fair Trial

The term fair trial is a legal and ethical concept used to describe the procedural rules of a court and the treatment of those accused of a crime.[94] It connotes that an accused person's rights during trial must be protected by the court in order to promote justice. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person.[95] When an accused person stands trial on criminal charges he or she is confronted with the machinery of state.

The definition of the right to fair trial becomes difficult due to the differences in criminal law and civil law in various states. There is no standard definition of the right to fair trial that applies to all the states. Every state has its own definition in accordance to the domestic legislation and application of international law and customary international law.

[94] WiseGeek, _What is a Fair Trial?' <http://www.wisegeek.com/what-is-a-fair-t rial.htm> accessed 2 February 2015.
[95] Lawyers Committee of Human Rights, *What is a Fair Trial?: A Basic Guide to Legal Standards and Practice* (Lawyers Committee of Human Rights 2000).

The right to a fair trial, in accordance with the interpretation given by the European Court of Human Rights in the case of ***Bönisch v. Austria***,[96] is a basic principle of the rule of law in a democratic society and aims to secure the right to a proper administration of justice. In this case, the complainant, a Viennese butcher, was convicted of an offence under the Austrian Food Hygiene Code after a finding that smoked meat produced by his company contained excessive quantities of water and a cancer-provoking substance. The Regional Court had appointed as an expert the Director of Australia Federal Food Control Institute. The said Director had taken meat samples from the complainant's company, tested them and the prepared a report which was relied upon by the prosecuting authorities to lay the charges against the complainant. The complainant objected to the appointed of the Director of the Institute as the court expert on this ground but his objections were disallowed by the Regional Court. The Regional Court relied on the report prepared by the expert to convict the complainant. Upon referral to the European Court of Human Rights, the court held that there was no equality of arms which resulted in unfair hearing[97]. The principle of equality of arms is a larger element of the right to fair trial. Equality of arms involves giving each party the reasonable possibility to present its cause, in those conditions that will not put a party in disadvantage against his or her opponent.[98]

The right to a fair trial is linked with the concept of fairness that lacks a standard definition that can be applied internationally. Understanding the concept of fairness is key in understanding the rationale of the right to fair trial. Judge Shahabuddeen, in the case of Prosecutor v Slobodan Milošević[99], argued that, the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him'.

Central to the concept of fairness is the power exercised by the court towards the individual. The standards upon which a trial is to be assessed in terms of fairness are numerous, complex and evolving. In order to determine the fairness of a trial, the court should adopt the laws of the

[96] Bonisch v. Austria (1991) 13 E.H.R.R. 409; [1986] E.C.H.R. 8658/79
[97] The European Court of Human Rights held that there was no equality of arms due to the dominant position held by the director of the Institute who was appointed court expert since he was allowed to examine de fence witnesses and the accused yet he was in essence the complainant. The court further held that the principle of equality of arms inherent in the concept of a fair trial required equal treatment as between hearing the director and persons who were called in whatever capacity by defence.
[98] Elisa Toma, _The Principle of Equality of Arms: Part of the Right to Fair Trial'<http://www.internationallawreview.eu/fisiere/pdf/06-Elisa-Toma.pdf> accessed 18 February 2015.
[99] Prosecutor v. Slobodan Milošević, Case No. IT-02-54-AR 73.4.

country in which the trial is being held, the human rights treaties to which that country is a party, and norms of customary international law.[100]

Judge Robinson of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of Prosecutor v Kanyabashi[101] held that:

> *One of the objects, if not the fundamental object, of the Statute and Rules (of the ad hoc tribunals) is achieving a fair and expeditious trial... Trial Chambers have on occasion highlighted the achievement of a fair and expeditious trial as the fundamental purpose of the Statue and Rules.*[102]

2.3 Historical development to the Right to a Fair Trial

The right to a fair trial emerged with the contemporary human rights. However, the framework for its operation in the municipal laws precedes the international human rights system. It has existed in diverse legal systems predating the international order and the United Nations. The roots of the basic principles of the right to a fair trial can be traced all the way back to the Lex Duodecim Tabularum the Law of the Twelve Tables which was the first written code of laws in the Roman Republic around 455 B.C.[103] These laws contained the right to have all parties 'present at the hearing, the principle of equality amongst citizens and the prohibition of bribery for judicial officials.[104] From ancient times, traces of individual principles underlying fair trial in criminal processes were outlined in a number of texts including the Code of Hammurabi, the Bible and the Quran, among other documents.[105]

The Magna Carta was also a historical development of the right to fair trial. The Magna Carta proclaimed that, No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed nor will we go upon or send upon him save by the lawful judgment of his

[100] Lawyers Committee of Human Rights (n 59)
[101] Prosecutor v. Nyiramasuhuko et al.., Case No. ICTR – 98 42-T.
[102] Gwynn MacCarrick, The Right to a Fair Trial in International Criminal Law (Rules of Procedure and Evidence in Transition from Nuremberg to East Timor)' <http://www.isrcl.org/Papers/2005/MacCarrick.pdf> accessed 6 February 2015.
[103] Judge Patrick Robinson, The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY (2009) 3 Berkeley JL Int'l L Publicist 1
[104] Ibid. In modern times these principles refer to the right to be heard and to defend oneself, the right to be subject to the rule of law, and the right to have one's case adjudicated by an independent and impartial tribunal.
[105] Busalile Jack Mwimali, _Conceptualization and Operationalisation of the Right to a Fair Trial in Criminal Justice in Kenya' (Degree of Doctor of Philosophy, University of Birmingham 2012).

peers or by the law of the land'.[106] The Treaty of Arbroath of 1320,[107] articulated the notion of equality for all, a principle that was later replicated in other developing democracies, such as France and the twelve American colonies of the British Empire. It is argued that the United States Declaration of Independence is linked to the Treaty of Arbroath.[108] The notion of equality for all citizens in terms of fair trial rights has been interpreted to mean both the general prohibition of discrimination and the promise of equality between the parties in the modern jurisprudence.[109]

In 1791, the United States 6th Amendment to the United States Constitution which provided a criminally accused person the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation against one; to be confronted with the witnesses against one; to have compulsory process for obtaining witnesses in one's favor; and to have the assistance of counsel for one's defence.[110] The French Revolution played a great role in the historical development of the right to fair trial. Articles 6 through 9 of the French Declaration of the Rights of Man, adopted in 1789, require a presumption of innocence and prohibit detention unless determined by law.

The philosophical foundations of the modern right to fair trial can be traced during the Age of Enlightenment in Europe and its rationalistic doctrine of natural law which recognized individual human beings as subjects endowed with rights against the society and placed them at the centre of legal and social systems.[111] During this period the political focus of government began to shift away from an all powerful sovereign and towards the will of the people, and the limits of governmental power began to be restructured accordingly.[112] The term human rights' was rarely used before the Second World War until when the UN declared in its UN Charter preamble its determination to reaffirm faith in fundamental human rights.[113] After the second World War

[106] The British Library, _Magna Carta' <http://www.bl.uk/magna-carta> accessed 2 February 2015.
[107] This was a declaration of Scottish Independence sent by 51 Scottish nobles and magistrates as evidence o f a contract between Robert the Bruce and his subjects.
[108] Robinson (n 68).
[109] Stefan Trechsel, *Human Rights In Criminal Proceedings* (Oxford University Press 2005).
[110] Ibid
[111] Manfred Nowak, *Introduction to the International Human Rights Regime* (The Raoul Wallenberg Institute of Human Rights Library Vol 14, Brill Academic Publishers 2003).
[112] Robinson (n 68).
[113] Michael Freeman, _The Historical Roots of Human Rights Before the Second World War' in Rhona KM Smith and Christien van den Anker (eds), *Essentials of Human Rights* (Hodder Arnold 2005).

(WWII), the right to fair trial was codified. The 1948 United Nations Universal Declaration of Human Rights (UDHR) adopted by the United Nations General

Assembly in December[114], provides in Article 10 that, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. In 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted. It provided in Article 6 that an accused person is entitled to a fair and public hearing within a reasonable time period, to prompt information on the trial in a language which he understands, to confront witnesses testifying on behalf of the prosecution, to order the appearance of witnesses to testify on his behalf, and to legal assistance.

In 1966 the International Covenant on Civil and Political Rights (ICCPR) was adopted and entered in force in 1976.[115] Article 14 of ICCPR provides for the right to a fair trial and affords the minimum rights of an accused person. Article 8 of American Convention on Human Rights, adopted in 1969 provides the full spectrum of rights to a criminally accused person, comparable to the European Convention.[116] Article 7 of African Charter on Human and Peoples Rights, contains many of the rights included in other human rights instruments, such as the right to an appeal, the presumption of innocence, and the right to be tried within a reasonable time period by an impartial court or tribunal. Currently the right to fair trial has received universal recognition in national constitutions and its values seemingly unquestionable and non-derrogable.[117]

2.4 The Normative Content of the Right to a Fair Trial

The normative content of the right to fair trial entails the protection of key rights enjoyed by the accused and guaranteed in the legal framework. It entails the various safeguards as guaranteed in the international and domestic framework. It also entails the right to a fair hearing before an independent and impartial court of law or tribunal. The scope of fair trial in criminal matters varies from one jurisdiction to another. However fair trial guarantees must be observed from the

[114] The Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810.
[115] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI).
[116] Robinson (n 68)
[117] David S Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff 2001)

moment the investigation against the accused commences until the criminal proceedings, including any appeal, have been completed.[118]

The Lawyer's Committee on Human Rights argues that the right to fair trial can be grouped into three categories: the pre-trial procedures; the actual trial; and the post-trial procedures.[119] This distinction can be blurred in fact, but the violations of human rights during one stage can have diverse effects on another stage. It also varies from one jurisdiction to another. In the United Kingdom, for instance, it has been held that the scope of protection of the right to a fair trial under Article 6 of the European Convention comes into play as soon as a criminal charge is brought against an individual; and it remains in place until the charge is determined.[120] This position was also adopted by the European Court of Human Rights in the case of Escoubet v. Belgium where it was held that the right to fair trial did not cover the pre-charge phase of prosecution.[121] This case concerned the immediate but temporary withdrawal of the driving license of a motorist who, following a road accident was suspected by the police of drunken driving.[122]

The pre-trial proceeding encompasses different rights enjoyed by the accused keeping in mind that an accused has to be presumed innocent until proven guilty by a court of law. Pre-trial rights include: prohibition of arbitrary arrest and detention;[123] right to know the reasons of arrest;[124] right to legal counsel; right to prompt appearance before a judge to challenge the lawfulness of arrest and detention;[125] the prohibition of torture and the right to humane conditions during pretrial detention; and prohibition of incommunicado detention. These rights are usually referred to as the rights of arrested persons. The Constitution of Kenya 2010, under Article 49, recognises rights of an arrested person which fall under this category[126].

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[118] Lawyers Committee on Human Rights
[119] *Ibid*
[120] Paul Mahoney, _Right to Fair Trial in Criminal Matters under Article 6 ECHR' (2004) 4 Judicial Studies Institute 107.
[121] [1999] E.C.H.R. 26780/95
[122] *Ibid*
[123] Article 9 (1), ICCPR.
[124] Article 9(2), ICPPR. The reasons for arrest and explanation of other rights such as the right to counsel must be given in a language the accused understands.
[125] An arrested person has to be brought promptly before the court. In most cases it is within 24 hrs from the time of arrest.
[126] Rights of an arrested person under Article 23(2) of the 1995 Uganda Constitution include the right to be informed promptly the reasons for the arrest, the right to remain silent, right not to be compelled to make any confession or admission that could be used in evidence against the person, right to be brought before a court within 24 hours of arrest, right to be charged or informed reasons for continued arrest, right to be released on bail or bond.

Upon completion of the pre-trial proceedings, which comprises the rights of an arrested person, the person is brought before a court of law to face the actual trial. In order to ensure that an accused person faces a fair trial during an actual trial, there are some rights which must be protected. The rights that encompass a fair trial during actual trial are well encapsulated under Article 14 of ICCPR. It specifically provides for equality before the courts and for the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, regardless of whether a criminal trial or a suit at law is involved.

During trial the court must also observe the rights of accused person. These rights include: the right to presumption of innocence;[127] the right to prompt notice of the nature and cause of criminal charges; the right to adequate time and facilities for the preparation of defence;[128] and the right to trial without undue delay.[129] The right to defend oneself in person or through legal counsel; right to examine witness; right to an interpreter; prohibition on self-incrimination; prohibition of retroactive application of law; and prohibition of double jeopardy are also key rights protected during the actual trial.[130] These rights have been embodied in the Kenyan legal system under Article 50 of the Constitution of Kenya 2010 and form the basis for all criminal trials.

The post-trial rights are the rights an accused person is entitled to after trial. These rights include: the right to appeal and the right to compensation of miscarriage of justice. Article 14 (5) of ICCPR grants the accused the right to have his or her conviction and sentence reviewed by a higher court or tribunal through an appeal.

The right to a fair trial also requires that the procedures be carried out fairly, within the law, in public and adjudicated upon by an independent and impartial tribunal established under the law. This has been anchored in the UDHR, ICCPR, national constitutions and other regional instruments protecting the right to fair trial.

[127] The burden of proof lies with the prosecution and the accused has a benefit of doubt. The presumption of innocence must be maintained throughout the whole trial phase.
[128] Article 14(3) (b), ICPPR.
[129] Article 14 (3) (c), ICPPR.
[130] Lawyer Committee for Human Rights (n 59).

The principle of equality of arms is inherent in the concept of fair trial. Equality of arms implies that every person must be granted equal access before the court or tribunal. The African Commission on Human and People's Rights in its communication regarding Advocate San Frontiers v. Burundi[131] noted that: the right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial.

The concept of the right to fair trial requires that the proceeding be conducted by an independent and impartial court or tribunal established by law.[132] The rationale is to avoid biasness and unfairness that would result if a political or administrative body would be hearing a criminal case. The court's competence refers to the appropriate personal, subject matter, territorial or temporal jurisdiction of a court in a given case. Independence eludes separation of powers between the judiciary and other arms of government to avoid interference and undue influence. Impartiality refers to the court's conduct and bearing on the outcome of the case.

3.5 Conclusion

The term fair trial is a legal and ethical concept used to describe the procedural rules of a court and the treatment of those accused of a crime. It is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. It entails the various safeguards as guaranteed in the international and domestic framework. It also entails the right to a fair hearing before an independent and impartial court of law or tribunal. Its scope in criminal matters, however, varies from one jurisdiction to another.

This right has existed in diverse legal systems predating the international order. Currently, the right to fair trial has received universal recognition in national constitutions and its values seemingly unquestionable and non-derrogable.

[131] Advocate San Frontiers v Burundi (Communication No. 231/99)
[132] Article 14 (1), ICCPR.

CHAPTER THREE

LAWS AND REGULATORY FRAMEWORKS IN RESPONSES TO RIGHTS ON FAIR HEARING

3.1 Introduction

It is usually said that the level of a nation's civilization can be seen most clearly in the way it treats its prisoners. Accordingly, many constitutions that contain bills of rights attempt to provide for some level of protection for those suspected as well as convicted of criminal acts. In this regard, Article 23 of the Ugandan Constitution deals with the protection of personal liberty, which includes rights for arrested, detained or restricted persons. Furthermore, Article 28 deals with the right to a fair hearing and spells out the rights of a person charged with a criminal offence.

In that context, respondents were asked if they thought the Constitution provided enough protection for suspects and prisoners. More than half of the respondents (52.2%) replied in the negative, slightly over a quarter (27.1%) replied in the affirmative and 20.7% said they did not know. It is therefore clear that the majority of Ugandans think that the rights of suspects and prisoners are not sufficiently protected. This is not surprising, considering that Uganda has frequently been criticized for its poor prison conditions which pose severe health risks leading to a number of deaths from malnutrition, dehydration, dysentery and pneumonia.[133]

Legal aid provision aims at among others providing access to justice by ensuring equality before the law, the right to counsel and the right to a fair hearing.[134]

3.2 The Regional and International Legal Framework

Presently, legal aid is conceptualized as an integral part of due process and the associated rights to a fair hearing/hearing. For this reason, it may be said to be governed by a number of human

[133] A Dissel, 'Prison conditions in Africa', http://www.csvr.org.za/paper/papdis10.htm accessed 27 April 2005.
[134] The proposed Draft Legal Aid Bill, 2011.

rights treaties at both the international and regional level.[135] Uganda is party to most of these treaties, including the International Covenant on Civil and Political Rights (ICCPR),[136] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[137] and the African Charter on Human and Peoples' Rights (ACHPR).[138] Article 14(1) of the ICCPR guarantees equal rights for all before all courts and tribunals while also emphasizing every person's right to a fair hearing. Article 14(3)(d) guarantees free legal representation for all persons who cannot afford legal services. On the other hand, Article 7(1) of the African Charter guarantees the right to a fair hearing in almost similar terms. The Charter protects every person's right to defence counsel. Still at the regional level, Article 8 of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa protects the right of women to access judicial and legal services including legal aid.[139]

The African Commission on Human and Peoples Rights (ACHPR) has also affirmed the right to legal aid in a number of Declarations. For example, the Dakar Declaration recognises the need for legal assistance in actualizing Articles 7 and 26 on the right to a fair hearing which includes the provision of legal aid services to those who cannot otherwise afford them.[140] Finally, the Lilongwe Declaration enjoins African states to recognize and support the right to legal aid in their criminal justice systems.[141] The Declaration provides one of the most comprehensive guidelines on legal aid services provision in Africa.

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[135] Don Fleming, 'Legal and Aid and Human Rights,' A paper Presented to the International Legal Aid Group Conference, Antwerp, 6-8 June, 2007. Available at http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/Antwerpen_2007/Conference_Papers/Legal_Aid_and_Human_Rights.pdf.

[136] International Covenant on Civil and Political Rights, UN Doc. A/6316 (1966), 999 U.N.T.S. 171. Uganda ratified the ICCPR on 21st June 1995. See http://www1.umn.edu/humanrts/research/ratification-uganda.html.

[137] International Covenant on Economic, Social and Cultural Rights, UN Doc. A/6316 (1966), 993 U.N.T.S.3, entered into force Jan. 3, 1976. Uganda ratified the ICESCR on 21st January 1987. See http://www1.umn.edu/humanrts/research/ratification-uganda.html.

[138] African Charter on Human and Peoples' Rights, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986. Uganda ratified the ACHPR on 10th May 1986. See http://www1.umn.edu/humanrts/research/ratification-uganda.html.

[139] Article 8, Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, Adopted by the African Union on 11th July 2003 and entered into force on 25th November 2005. Also available on http://www.achpr.org/english/_info/women_en.html.

[140] ACHPR /Res.41(XXVI)99: Resolution on the Right to Fair Hearing and Legal Aid in Africa (1996). Also available at http://www.achpr.org/english/resolutions/resolution46_en.html.

[141] Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non- Lawyers and other service Providers in Africa, Lilongwe, Malawi, Novemebr 22-24, 2004. Available on http://www.penalreform.org/files/rep-2004-lilongwe-declaration-en.pdf.

3.3 Constitution of Uganda, 1995

The Ugandan Constitution does not contain an express provision on legal aid but can be said to tacitly incorporate it in a number of provisions. Article 21 of the Constitution for instance guarantees equality before the law for all Ugandan citizens. This in effect means that the poor and the well to do are equal before the law. Article 28 on the other hand protects the right to a fair hearing which includes among others the presumption of innocence until proved guilty, the right to adequate time and facilities to prepare one's defence, the right to an interpreter, the right to a lawyer at ones cost and the right to cross examine witnesses among others. Importantly, these rights can only be effectively realized where there is legal representation although the Constitution only guarantees free legal representation in cases where the maximum penalty is death.[142]

3.4 The Right to a Timely Trial

The right to have trials being concluded within reasonable time, which is the second safeguard that we shall examine, is usually affected by a broad range of factors that are core to whether the enjoyment of the right to a fair trial in general is possible. For example, a legal system wrought with legal technicalities may lead to time wasting. Delays in concluding trials may also be caused by inept judicial officers and the courts manned by incompetent personnel who may even cause delays as a means to solicit bribes. Moreover, inadequate physical infrastructure and manpower may lead to fewer cases being concluded at any one time, while litigants themselves may cause delays for whatever reasons. An investigation into these issues will thus address a broad range of factors that may generally be seen to be affecting a good number of other related values or even the enjoyment of the right to a fair trial as a whole.

That this right is quite important to the scheme of protection of the right to a fair trial in most instruments is evidenced by it being one of the basic/minimum guarantees that every accused person must enjoy. Under the old Constitution, for example, section 77(1) 'afforded a fair hearing within a reasonable time,' to accused persons. The newly enacted constitution had

[142] Article 28 (2) (e)

retained this approach.[143] At international and regional levels also, all human rights instruments that accord accused individuals the right to a fair trial contain provisions requiring timely trials as a core guarantee. For instance, both the International Covenant on Civil and Political Rights and the Rome Statute provide among the minimum guarantees for each individual facing trial the right to be tried without undue delay.[144] The African Charter and the European Convention on Human Rights (ECHR) also contain similar provisions.[145]

There are a number of reasons why the value of trials being conducted within a reasonable time is essential. First, delays reduce the chance of the court arriving at proper decision thus compromising fairness. Protracted proceedings that take a long time normally make it difficult to ascertain the guilt or innocence of the accused persons. With the passage of time, witnesses tend to forget the exact details of the events leading to charges being instituted against individuals thereby prejudicing the trial.

Secondly, delays make it harder for accused persons to effectively make their defence. Witnesses may have moved away to other places making it costly for the accused to trace them and have them summoned to give evidence. Where there are inordinate delays, witnesses may even die before being called to the stand to give evidence thereby completely foreclosing the possibility of their evidence ever being given. Under the law of evidence, if witnesses are dead or cannot be found after the police have conducted their investigations and taken written statements, their statements will be admitted in evidence by the court but the accused individuals in that case will not have the benefit of impeaching the evidence by cross-examining the witnesses.

Thirdly, if individuals are incarcerated because they cannot afford bail or are deemed to pose a risk to the society or there are fears that they may escape from the court's jurisdiction and are, therefore, denied bail, undue delays will mean that their right to personal liberty is violated and the presumption of innocence in their favour is denied.

To the community, even if the accused are finally convicted after years of trial, justice will never be seen to have really been done when the public loses interest in the case. In that case, the

[143] The Constitution of Kenya [2010], art 50.
[144] ICCPR art 14(3)(c); the Rome Statute art 67(1)(c).
[145] African Charter art 7(1)(d); and ECHR art 6 talk about trial within 'reasonable time.'

efficacy of criminal justice will have been lost in spite of correct decisions being made to convict those who are indeed guilty. Thus, there is a truism that justice delayed is justice denied.

3.5 The Evidence Act Cap 6

The Evidence Act contained ample provisions protecting accused persons, some of which may be noted. For example, the right against self-incrimination was secured by provisions ensuring that confessions or admissions of facts tending to the proof of guilt made by accused persons were not admissible in court unless they were made before a magistrate, or before a police officer of or above the rank of assistant inspector the Chief Inspector of Police.[146] Moreover, under the Act, witnesses' evidences in one case could not be used against them in other trials and advocates were also granted the privilege against being compelled to disclose communications with their client and vice versa as part of these safeguards.[147]

The Evidence (Out of Court Confessions) Rules, 2009 made under the Act clarified the safeguard against self-incrimination by ensuring that the necessary information was available both to the accused individual and the police officers. It made it clear that confessions were to be made without coercion and in a language that the accused was comfortable with. It also provided for the form in with confessions were to be made and recorded to avoid intimidation of the accused and safeguarded the right to legal representation.

3.6 Institutional aspects of the right to an independent tribunal

Institutional independence as an aspect of the right to an independent tribunal requires, first of all, that courts should have adequate safeguards to protect them from political and other interferences, especially with respect to matters that relate to their judicial function.[148] In the context of military justice, it requires that military tribunals must be free from interference, especially from the executive and the military hierarchical command with respect to matters that relate to their judicial function. They must not only be self-governing as regards their administrative and operational matters, but must also be independent in their decision making.

[146] Evidence Act s 23. However, under s 156, a co-accused called as a defence witness may be asked any question in cross-examination notwithstanding that the answer may incriminate him.
[147] Ibid ss 128, 134
[148] Para 19 General Comment 32 (n 5 above). See also Principle 3 of the Basic Principles on the Independence of the Judiciary, adopted 6 September 1985; UN Doc A/ conf./121/22/Rev 1 1B.

Decisions of military courts, like those of the ordinary civil courts, should also never be subjected to revision by a non-judicial establishment.[149]

The basic principle upon which both the institutional and individual independence of military tribunals may be guaranteed is to ensure that members of military courts and other critical staff in the administration of military justice (like the judge advocates and prosecutors) have a status guaranteeing their independence in particular vis-à-vis the military hierarchy and command.[150] One of the important prerequisites for ensuring the institutional independence of military tribunals is that the authority that appoints members of a tribunal must not be the same one that appoints prosecutor(s). In R v Généreux,[151] where this was the case, delivering the judgment of the Supreme Court of Canada, Chief Justice Lord Lamer emphasised that[152]

[i]t is not acceptable that the convening authority, i.e the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as triers of fact.

He stressed that, at a minimum, 'where the same representative of the executive, the "convening authority", appoints both the prosecutor and the triers of fact, the requirements of s 11(d) will not be met'.[153]

To avoid a scenario where members of military courts and prosecutors are appointed by the same authority, Ireland amended its military law in 2007 to separate the functions of convening military courts and appointing the prosecutors. Under Ireland's Defence (Amendment) Act,[154] convening general courts martial and limited courts martial, including appointing the panel members, is the responsibility of the court martial administrator.[155] In the performance of his or her duties, the independence of the court martial administrator is guaranteed.[156]

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[149] Basic Principles on the Independence of the Judiciary (n 15 above) Principle 4. See also *Morris v United Kingdom* (2002) 34 EHRR 52 Para 73.
[150] See Principle 13 of the Principles on Military Justice (n 7 above).
[151] *R v Généreux* [1992] CanLII 117 (SCC) 1.
[152] *R v Généreux* 62.
[153] As above. Sec 11(d) of the Canadian Charter of Rights and Freedoms provides for the right to an independent tribunal, among other things.
[154] Act 24 of 2007.
[155] Sec 184B(4).
[156] Sec 184A(4).

The appointment of prosecutors, on the other hand, is the responsibility of the Director of Military Prosecutions.[157] The independence of the Director of Military Prosecutions is also protected.[158]

It is also an essential requirement for ensuring the institutional independence of military tribunals that those persons who preside as judge advocates must be appointed by an independent establishment.[159] In R v Généreux, while holding that the appointment of the judge advocate by the Judge Advocate-General undermined the institutional independence of the general court martial, Chief Justice Lamer observed that '[t]he close ties between the Judge Advocate-General, who is appointed by the Governor in Council, and the Executive, is obvious'.[160] He emphasised that the effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence of the tribunal.[161] He stressed that, in order to comply with the right to an independent tribunal, the appointment of military personnel to sit as judge advocates at military tribunals should be in the hands of an independent and impartial judicial officer.[162]

[157] Secs 184C(1) & 184F(1).
[158] Sec 184E(2).
[159] Judge advocates are the persons who advise military courts on issues of law and procedure.
[160] *R v Généreux* (n 18 above) 63
[161] Ibid
[162] Ibid

CHAPTER FOUR

THE EXTENT TO WHICH THE RIGHTS ON FAIR HEARING HAS BEEN OBSERVED

4.1 Introduction

The right to a fair trial, which encompasses the right to have trial begin and conclude without unreasonable delay, is protected under Article 28(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. This chapter analyses the constitutional protection of the right to fair trial without unreasonable delay under the 1995 Constitution of Uganda. It interrogates how the judiciary has interpreted the meaning of a trial without unreasonable delays and seeks to understand, through analysis of relevant case law, the meaning of unreasonable delay and what factors are to be considered before it can be said that a trial has delayed in a manner that is unreasonable. This chapter will also analyse pre-trial delays vis a vis delays that occur during trial in order its impact in interpreting the right to a trial without unreasonable delays.

4.2 The Constitutional Protection of the Right to a Fair Trial without Unreasonable Delay

Article 20 articulates that, the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individual and communities and to promote social justice and the realization of the potential of all human beings'. Article 28 of the said Constitution provides for the right to fair hearing and a fair trial of an accused person. This is one of the fundamental rights under the Bill of Rights that is non- derrogable by the constitution.

An accused person has a right to have a trial begin and conclude without unreasonable delay. This right is further buttresses by the guiding principles on the exercise of judicial authority.

The right to trial within a reasonable period is a key ingredient of the right to fair trial in article 14 of the ICCPR as well as the right to be heard in article 7 of the ACHPR. Constitutional protection of the right to fair trial gives it the strongest legal protection as the constitution is the

supreme law of the land, and any act violating its provision can be declared unconstitutional by a court of law. In most countries, the constitution as the supreme law of the land embodies the values, morals, aspirations and individuals 'contractual obligations with the state.

The right to a friar trial without unreasonable delay has been recognized by numerous international and regional legal instruments such as the UDHR, ICCPR, ACHPR and ACHR. The right has also attained the status of Jus Cogen and is widely accepted as part of international customary law. These laws form part of Ugandan Laws.

In an illustration, In the case of ***Rono v Rono & Another***,[163] the Court of Appeal, which by then was the highest court, extensively examined the applicability of international laws in the domestic context prior to the enactment of the CoK 2010 and made the following conclusions:

> *There has, of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated.*

In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law.

Echoing the wording in Article 26 of the ICCPR and Article 3 of the ACHPR, the Constitution guarantees equality before the law in Article 21, which states that every person is equal before the law and has the right to equal protection and equal benefit of the law. A right of fair trial to be judicially enforced the accused must be brought before a court or tribunal established by law.

The principle of equality is also an important feature of the right to fair trial. The Human Rights Committee, while explaining the fair trial principle, noted that the requirements of equality of arms in adversarial proceedings would not be met where the accused is denied the opportunity

[163] [2005] KLR 538 Court of Appeal, which by then was the highest court

personally to attend the proceedings or where he is unable properly to instruct his legal representative.[164]

Since Uganda is a member state to them, she has taken a step in providing for its right in the constitution of the republic of Uganda 1995, under Art 28 which constitutes a fair, speedy, and public hearing before an independent and impartial court or tribunal established by law.

But although Uganda has such a provision there are circumstances where they have not been respected as such. For example in the case of ***Uganda law society & ors V AG***[165] on impartiality the petition was brought by the Uganda law society a body corporate established under the Uganda law society act, cap 276 of the laws of body 2000; the background of the petition briefly is that Rt. Col. Kiiza Besigye, a leader of one the opposition political parties known as forum for democratic change (FDC) and twenty two others were jointly charged with treason and misprision of treason under the Penal Code Act. The accused were taken to high court for bail application before Hon. Justice Jugayizi Fourteen of the accused were granted bail but because of certain alleged acts of security personnel at the court premises bail papers could not be processed. The said security men were dressed in dark clothes and armed. They entered into some of the offices and interrupted the courts normal duty of processing bail as a result the accused had to be taken back to prison. Art 28(1) provides for impartiality as one of the elements that constitute a right to a fair hearing but if the agency of the government can interfere with court duties. Then someone may wonder where the impartiality of court and independence is.

The interference appears to have inflicted fear in the judges or judicial officers to make a ruling in favor of the Attorney general of the republic of Uganda meaning that it was not just on its own in performing the principle of justice.

Being represented by a lawyer of the accused choice is also one of the elements provided for under Art 28 that constitute a right to a fair hearing.

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[164] Communication No. 289/1988.
[165] ((Constitutional Petition No. 18 of 2005)) [2006] UGCC 10 (30 January 2006)

4.3 The Right to have a Trial Begin and Conclude without Unreasonable Delay.

Once an accused person appears before the court after an arrest and pleads not guilty to the charge, the stage is set for the court to hear the case with a view of determining or establishing whether the complaint against the accused is true. The Uganda Constitution of 1995 envisages that an accused person has the right to have a trial begin and conclude without unreasonable delay.

According to Amnesty International Manual on the right to a fair trial,[166] there are two sets of standards that require criminal proceedings be completed within a reasonable time. The first set applies only to people detained before trial while the second set of standards, applies to everyone charged with a criminal offence, whether or not detained.[167]

4.3.1 Pre-Trial Delay

One of the contentious issues that has been before the Uganda Constitution in whether Article 28 envisioned pre-trial delays as an aspect of the right to a trial to begin and conclude within reasonable time. In cases where accused persons argued that delay to be prosecuted occasioned a violation of their right to a speedy trial, regional courts have considered whether the pre-trial delay occasioned prejudice to the accused leading to unfair trial. In the case of ***Wernhoff v Germany***,[168] it was held that prolonged delays in bringing detained individuals to trial, resulting in longer pre-trial detention, exacerbate overcrowding in detention facilities and may lead to conditions that violate international standards. Under international law, the reasonableness of time between arrest and trial is determined on a case by case basis. In the case of Sextus v Trinidad and Tobago,[169] a man charged with capital murder, was held for more than 22 months before trial, the Human Rights Committee reiterated that, in cases involving serious charges where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible. Wahiu argues that:

[166] Amnesty International, Fair Trial Manual (2nd edn, Amnesty International 2014).
[167] Ibid
[168] (2122/64), European Court [1968]
[169] HRC, UN Doc. CCPR/C/ 72/D/818/1998 (2001)

A basic rule in criminal law is that a person will be arrested only upon reasonable suspicion of having committed an offence, and when the arresting authorities, frequently the police, have sufficient evidence against the person to make out a prima facie case at trial. A case can therefore be made that a procedure that permits police to arrest and detain a person at the stage in their investigations when they have no evidence against him or her, or the evidence is not sufficient to commit him or her to trial is arbitrary, overbroad, prejudicial or oppressive, hence unlawful.[170]

4.4 Missing Court Records

All registry staff of the Kampala High Court in Uganda that participated in a study on the management of legal records at the court in 2007 revealed that they had lost and misplaced files, and they could not tell the number of files they lost in a year.[171] This experience is not peculiar to Uganda.[172] It was found that the manual file tracking system was difficult and did not assist in expediting filing or tracking borrowed files. The Court had no prescribed period for which an action officer could keep a file, and unfiled documents piled up in registries.[173] Records were seldom kept under lock and key, hence exposing them to improper access. These are some of the factors that contributed to misplacing or losing records.[174]

The disappearance of court files and documents from the record jeopardises the successful and efficient conclusion of cases. While a civil matter loses its place on the court calendar when the court record is missing,[175] a criminal matter is not scheduled for hearing without the record, which can lead to prolonged detentions. Records are lost due to negligence and sometimes administrative inefficiency. Tampering with the records of proceedings amounts to a malpractice that leads to a miscarriage of justice.[176] The High Court of Uganda discovered an obvious malpractice in the case of ***Salongo Lutwama v Emmanuel Sebaduka & Another.***[177] A case file

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[170] Wahiu (n 96).
[171] Motsaathebe & Mnjama (n 19 above) 182.
[172] Maseh (n 1 above) 85.
[173] Motsaathebe & Mnjama (n 19 above) 182.
[174] Ibid
[175] *Eric Ntungura v Jane Mwesigwa* Civil Suit 71 /2005 [201 0] UGHC 1 30 - delay of 4 years due to a misplaced court file; *S v Charuka* CLHLB-000067-07 [2008] BWHC 393 para 1: There was scanty progress with an appeal for 5 years due to misplacement of the case file. Even the partially-reconstructed hearing record lacked certain relevant documentation such as details of previous convictions and the committal warrant.
[176] *Turyahikayo James & Others v Ruremire James* HCT Civil App 43/2010 [2012] UGHC 157.
[177] [2012] UGHC 238.

was reported missing although the suit had been entered in the register. A fictitious suit was superimposed over the suit of the alleged lost file and was being used interchangeably with another suit. The court regretted being unable to make sense of the anomalies because the record of proceedings in respect of the latter suit was incomplete, as it did not include the pleadings or final submissions.

A missing record may lead to loss of evidence. In the case of *David Muhenda,*[178] the sketch drawing of the *locus in quo* which the hearing magistrate had made got lost and was not available to the Appellate High Court judge. The Appellate Court had to visit the *locus in quo,* hence descending into the arena of the hearing court. Even then, the learned appellate judge did not make notes of what had transpired during his visit at the *locus in quo.* Although this did not occasion a miscarriage of justice, the Supreme Court took note of the failure to fulfill that duty.[179] The costs of both hearing time and resources spent by the court on the subsequent fact-finding mission are significant.

A case of a missing record leads to a rehearing or hearing of the matter *de novo* (anew). In the case of *Byabagambi v E Kenzirekwija,*[180] the record was unavailable. A party to the case raised the plea of *res judicata* (a matter judged), alleging that the matter had already been heard. The High Court of Uganda held:[181]

The availability of a judgment and record of proceedings of the [Local Council] I Court would have put this matter to rest at the earliest opportunity ... There is no judgment or record of proceedings from which this court may ascertain if the issues in the first case were about inheritance, trusteeship or ownership. It may well be explained that the [Local Council] I of that time and indeed many of them even today do not keep records. It may be for this reason that the [Local Council] system, appellate courts start cases *de novo.* But this does not provide the excuse rather it makes it difficult for any party who wants to raise a plea of *res judicata* to do so without supporting evidence. I cannot guess what the proceedings were in order to rule on this ground. I

[178] *David Muhenda & 3 Others v Margret Kamuje* Civil App 9/1999 [2000] UGSC 7.
[179] Ibid
[180] HCT-05-CV-CA-48-2003.
[181] *Byabagambi* (n 85 above) 4 5.

would say that it is not substantial and it fails since issues that were determined in the first case cannot be ascertained.

Similarly, the court record has evidential value in circumstances where a person seeks to challenge double jeopardy: In such cases the record of the previous conviction or acquittal is essential. It is a fair hearing warrant that a person cannot be tried or punished for an offence for which they already have been convicted or acquitted (article 14(7) of the ICCPR). In short, the record makes the hearing a reality and in so doing aids fair hearing guarantees. The absence of the record renders a hearing unsupported.

4.5 Unavailable Court Records

The general rule is that the court record is a public document accessible to all persons and may be in both soft and hard copy.[182] However, the intervention of a court may be required to obtain the record of proceedings. [183] There are instances when the court is not able to access the record. An unavailable record is distinguishable from a missing record because the former may exist but is simply inaccessible or cannot be acquired in a practical or effective way. Unavailable or misplaced records of proceedings prolong hearings. In the case of *Tendani Mahube,*[184] the record of proceedings had been misplaced by the hearing court. The matter before the High Court of Uganda could not proceed for three years because the registrar's office had not typed the record of proceedings as requested by the attorneys handling the matter. This delay was not only inordinately excessive, but it was also unexplained. [185] There were two obstacles to the accessibility of the court record in the aforementioned case: the misplacement of the record by the hearing court and the subsequent delay in typing it by the registrar's office. Delays in accessing the record may also arise from searching for the relevant file among the bulk of paper files of a court. Several hearings and hearings of interlocutory matters are delayed by the length of time it takes to type and produce the court record.[186]

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[182] *Shell (U) Ltd & 9 Others v Rock Petroleum (U) Ltd & 2 Others* Misc Applic 645/ 2010. See also International Records Management Trust (n 3 above) para 60.
[183] *Commissioner General Uganda Revenue Authority & Another v Kyotera Victoria Fishnet Company Limited & Another* Misc Applic 362/2012, [2012] UGCOMMC 96.
[184] *Tendani Mahube v The State* Cr Applic F76/2004 [2005] BWHC 92.
[185] Distinction drawn in *S v Setlhare* MCHLB-000059-07 [2009] BWHC 4 para 3, 14.
[186] *S v Kebojakile* CTHLB-000014-06 [2007] BWHC 197.

4.6 Inadequate court records

This category includes documents that are written in illegible handwriting; incorrect records; incomplete records; and mutilated records such as those that are partly destroyed by fire, are torn or faded.

4.6.1 Illegible material

This mainly relates to handwritten material. The pressure upon an adjudicating officer who has to capture the proceedings in writing affects the quality of the handwriting and eventually the output. The quality of handwritten material also depends on the abilities of the writer; there is no guarantee of uniformity or comprehensibility of the material produced in this manner because there is no standard handwriting. A judicial process should promote certainty and precision among its sectors, including the preparation of the court record, by utilising modern and standardised modes of recording.

4.6.2 Incorrect records

A court record may be wholly or partially incorrect. A record that gives a different rendition of the proceedings may be misleading during a hearing. In the case of *Kitti,*[187] the facts on the record were disputed by the appellant. The High Court of Uganda found that that which appeared on the record as facts was what was written by the court clerk, presumably after the court proceedings. What compounded the situation was that even the clerk of the court who prepared the record conceded that part of the record had been prepared by the police at the police station. There was no sufficient proof that the record of proceedings accurately reflected the statement of the facts as dictated by the prosecutor at the hearing.

In the case of ***Gabasie,***[188] the appellant averred that the incorrect recording of his age as 28 rather than 23 years had an impact on the sentence. Although this possibility was ruled out as his youthfulness had been considered as an extenuating factor, it is a viable illustration.

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[187] *Kitti v Attorney-General & Others* MAHLB-000217-08 [2008] BWHC 156.
[188] *Gabasie v The State* MCHFT 000 088/2006 [2006] BWHC 47 para 11.

4.6.3 Incomplete and mutilated records

The judge in ***Dichabe v The State***[189] was confronted with the problem of an incomplete recording of the evidence. In his language, the judge noted:[190]

I must observe that the evidence on record, as is usually the case in the magistrate's court, was not taken *verbatim.* It is impossible to know what questions were put to the complainant or indeed to any witness in cross-examination or re-examination because only the witness' responses and not the questions asked are recorded.

An appellate court in Hong Kong found that where the evidence taken down is in question and answer form, it is vital that it should be recorded *verbatim.*[191] The deficiency of the court record, in the aforementioned regard, raised the likelihood of bias as the failure to connect the responses to the questions obscured the direction of the inquiry, and also the evidence that informed the judge's determination.[192] A court record should be made in light of its objective and purpose as a full representation of the proceedings in a case.

An incomplete or improper record may also deprive evidence adduced of character, validity and value. In ***Ojaka Yeko & 2 Others v Onono Philips,***[193] the record did not state whether the evidence of the parties and witnesses had been taken under oath. The court made a finding that this negated the quality of the evidence. The record is everything to a judicial process; it is a means of justice.

Courts have sternly redressed matters of incomplete records. In the case of *Bishanga Silagi v Bataha Joselin,*[194] the record of the proceedings, both typed and handwritten, did not indicate that the witnesses had been sworn or affirmed before giving their evidence, and it did not indicate who asked the questions in cross-examination and who answered them, among several errors. The first successful ground of appeal was that the hearing magistrate had erred in law and

[189] Cr App F142/03, [2005] BWHC 7.
[190] *S v Raditsebe* CLHLB-00126-07 [2008] BWHC 394: The magistrate briefly recorded selective aspects of the evidence of the witnesses
[191] *Or Chung-yan v R* Fct Cr App 964 of 1973 in (1975) 5 *Hong Kong Law Journal* 365 (notes of cases).
[192] *Or Chung-yan* (n 96 above) 366.
[193] Civil App 36/2007 [2008] UGHC 111.
[194] HCT-05-CV-CA-0015-2011 [2012] UGHC 202.

fact by relying on a tangled record of the proceedings and sketchy unintelligible evidence to make a decision, and this error occasioned a miscarriage of justice. The Appellate Court held:[195]

The manner of receiving and recording evidence adopted by the hearing court was grossly irregular, and exhibits a tangled mesh-mash of confusion. One only derives from the record a general hazy impression of what the case is all about due to the poor methods of receiving and recording the evidence by the hearing court. The record is obviously tainted with multiple gross irregularities which could not be left to stand as they certainly led to a miscarriage of justice.

Thus, an incomplete and inadequate record may jeopardise a case. In 1975, a Hong Kong law journal suggested that consideration should be given to the tape recording of all hearings in Hong Kong. It advanced the view that machines by their very nature are unbiased, and when used properly they can prevent suspicions directed at more fallible creatures.[196] All lower courts in Pretoria, South Africa, were found to record all cases on audio cassettes.[197] These carefully-tracked recordings form the basis of transcriptions and the transcriptions are verified by the magistrate who heard the case.[198]

Poor handling and storage of records may expedite their wear and tear.[199] Crowded facilities of uncontrolled temperatures are unfavourable for paper records.[200] The state of magistrate's courts in Nigeria, as observed by Ali,[201] is shared by several lower courts in other African countries. Those courts do not have proper or secure places to keep court records and exhibits.[202] The records are exposed to the risk of fire and other hazards such as theft. The form in which these records are kept (as paper files) is also more prone to such dangers. In July 2004, fire gutted the old Mahalapye magistrate's court house in Uganda, reducing all the court records to ashes. The records of proceedings in two part-heard matters of *State v Lebakeng* and *State v Ngahino*[203]

[195] *Bishanga Silagi* (n 99 above) 4.
[196] *Or Chung-yan* (n 96 above) 365 366.
[197] International Records Management Trust (n 3 above) para 105.
[198] International Records Management Trust paras 143 &144
[199] Abioye (n 2 above) 36: 'In some cases, wooden racks were used for the storage of records while records were also dumped on the floor unorganised.
[200] Motsaathebe & Mnjama (n 19 above) 183. See also Abioye (n 2 above) 36
[201] YO Ali 'Delay in the administration of justice at the magistrate court: Factors responsible and solution' http://www.yusuali.net/articles/delay_in-the_administration_of_justice.pdf (accessed 2 November 2015).
[202] As above.
[203] MCHFT 000 046, 047, 054/2006 [2006] BWHC 28, [2006] 2 BLR 331

were among the records that were completely destroyed.[204] These cases had to be commenced afresh, thus causing a delay of justice to the accused and victims.

The destruction of records in the *Lebakeng* case was found to be the result of criminal arson at no fault of the state.[205] The fire at the Mahalapye magistrate's court was proof of the management problems regarding court records in Uganda, and constituted one of the driving factors for the project to computerise court records.[206] Indeed the state should assume the responsibility of facilitating courts with modern means of storing and backing up records. Court competency in the ambit of a fair hearing should encompass the capacity by a court to secure records. A competent court should embrace technological advancements in handling information securely and efficiently.

4.7 Effect of the court record on the right to a fair hearing

The contribution of the court record to the realisation of the right to a fair hearing is assessed on the basis of the impact that the record has on the fulfillment of the minimum guarantees. A person who is charged with a criminal offence is entitled to the following minimum rights: (a) the presumption of innocence; (b) information on the nature of the offence; (c) adequate time and facilities for the preparation of the defence; (d) the presence and legal representation of the accused at hearing; (e) legal aid; (f) the assistance of an interpreter; and (g) facilitation to examine and cross-examine witnesses.[207] The ICCPR and the African Charter on Human and Peoples' Rights (African Charter) supplement this list with the guarantee of appeal, among others.[208] The court record directly facilitates four minimum rights: (i) presence at the hearing; (ii) adequate time and facilities for the preparation of a defence; (iii) a hearing without undue delay; and (iv) appeal.

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[204] Phuthego v The State Cr App F17/2004 [2006] BWHC 60: The record of proceedings was destroyed in a fire which gutted the old Mahalapye magistrate's court house where the appellant had been tried and convicted on three separate charges of theft. The conviction and sentence of 7 years were set aside. The hearing records in S v Sebitola MCHLB-000005-07 [2007] BWHC 24 were destroyed. The court exercised its inherent powers to grant the orders requested by the accused, that his sentence run concurrently, without further consideration. In Mochela v Director of Public Prosecutions MCHFT 000 111/2006 [2007] BWHC 273, the conviction and sentence were set aside because the record was burnt in a fire that engulfed the magistrate's court at Mahalapye and could not be reconstructed.

[205] S v Lebakeng MCHFT 000 046, 047, 054/2006 [2006] BWHC 28, [2006] 2 BLR 331 para 19.

[206] Motsaathebe & Mnjama (n 19 above) 178. 4 .1 Presence at the hearing

[207] Art 28(3) Constitution of Uganda; art 10(2) Constitution of Uganda, with the exception of the guarantee of legal aid.

[208] Art 14(5) ICCPR ; art 7(1)(a) African Charter

4.7.1 Presence at the hearing

The general principle is that an accused person is entitled to effective presence at his or her hearing.[209] Effective presence entails a facilitated state of competency to participate in the proceedings. This involves the practical possibility of informing the record, accessing the content of the record, and seeking to effect necessary changes to the record, such as corrections and additional information, among others. A person appears in a suit by filing pleadings.[210] In summary presence is participation and participation is by way of filing documents.

In criminal proceedings, the court record is often the basis upon which the accused appears before the court and in civil proceedings, it is the reference for scheduling hearings. By facilitating the appearance of the accused before the court, the court record is the foundation of the right to be heard.[211] The disappearance of case files is a common and absurd cause of the prolonged detention of persons charged, especially in subordinate courts in Uganda.[212] Files disappear as a result of malpractices such as bribery of court officials to destroy evidence,[213] arson as well as accidental fires, negligence or poor filing practices. Missing court records also adversely affect the computation of sentences or prison terms.[214]

Civil matters are eroded by missing records or mutilated documentary evidence. The record serves as the basis of a claim, without which the matter is unsubstantiated or obscure.

4.7.2 Adequate time and facilities for preparation of the Defence

A person on hearing is entitled to adequate time and facilities to defend himself or herself.[215] Adequate facilities include a functional record that fully and effectively represents the proceedings. The record is particularly important in situations of appeal,[216] a change of counsel,

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[209] Art 28(3)d Constitution of Uganda, 1995, as amended; sec 10(2)(d) Constitution of Uganda, 1966, as amended.
[210] Order VIII Civil Procedure Act.
[211] CS Namakula 'Language fair hearing rights in the Uganda criminal justice system' (2014) 20 East African Journal of Peace and Human Rights 131
[212] Ibid
[213] in Nigeria, Yerima & Hammed (n 67 above) 118.
[214] *Sibanda v S* MCHLB -000035-08 [2009] BWHC 162 para 7
[215] Art 28(3)(c) Constitution of Uganda, 1995; sec 10(2)(c) Constitution of Uganda.
[216] See *James Mutoigo t/a Juris Law Office v Shell (U) Ltd* HCT-00-CC-MA-0068-2007 [2007] UGCommC 35.

a change of the adjudicator, and to refresh the memory of the adjudicator(s) at the time judgment is to be made. The Commercial Court of Uganda held:[217]

To be afforded a fair hearing, a litigant must have adequate time, resources and facilities to prepare and present his or her case. Some of these factors must be afforded by the state or the court system or by the individual person himself. In the case of appeals, the person must be afforded by the court system adequate time and the necessary records to be able to prepare an appeal and present the same for hearing.

The time considered adequate to prepare an appeal starts from the date the registrar of the court notifies a litigant that the court record is ready for collection.[218] The availability of the record is a significant milestone in the appeal process.

The High Court of Uganda observed that the records of proceedings in lower courts often are not available[219] and that, if they exist, they are inadequate. The records of local council courts at levels I and II came under intense scrutiny when a matter originating from a local council court was referred to the High Court of Uganda for revision in the case of *Uganda v Rugarwana Constance & Another.*[220] The record of Local Council Court I, particularly, left a lot to be desired: It lacked precise details of the date when the case was heard, the statement of claim and the names and addresses of witnesses.

There are obvious defects in generating reliable records at the local council courts level.[221] These defects are mainly due to a lack of facilities to generate a competent record, and also the limited personal abilities of the officials even to use the available facilities. A court that lacks facilities to execute its functions has no capacity to offer adequate facilities to its clients. The issue is whether such a court is competent enough to guarantee a fair hearing.

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[217] Ibid

[218] *James Mutoigo* (n 121 above) para 11.

[219] Otile Charles v Onedo Beneyokasi Civil App 45/2007, [2009] UGHC 47. The statutory courts of South Sudan try almost all cases originating from customary courts de novo due to the inadequacy of records. See P Mertenskoetter & SD Luak 'An overview of the legal system and legal research in the Republic of South Sudan' (2012) http://www.nyulawglobal.org/globalex/South_Sudan.html (accessed 20 October 2015).

[220] HCT-05-CV-0001-2005 [2005] UGHC 90.

[221] eg Otile Charles v Onedo Beneyokasi Civil App 45/2007 [2009] UGHC 47: The local council courts could not provide authentic records of the complete hearing.

The inadequacy of case files has been a cause for adjournments and standing over of cases, sometimes characterised by a further remand of accused persons. A senior magistrate of a court in South Africa revealed to the International Records Management Trust that seven out of ten cases brought to court lacked information, and if the prosecutor was not satisfied with the ripeness of the case, he or she would ask the presiding officer that the accused be remanded pending further investigation.[222] Whereas some of this information may be missing because it had not been obtained, some of it may simply be misplaced, misfiled or lost.[223]

Justice is the result of a contest among streams of information. This contest involves the extraction, analysis, comparison, maximisation and development of information as captured on the record. The court depends on the record to deliver justice. Motsaathebe and Mnjama correctly note:[224]

The daily operations of the court depend on availability of accurate, authentic and reliable information, presented in a timely manner, hence the need to maintain an effective and efficient record keeping system for the [judiciary].

The record and justice are interconnected. The proper management of case files and security of evidence are important facets of a defence. By filing its pleadings and evidence with the court, the defence entrusts the court with its 'assets', especially from the prosecution which is often viewed as one with the court.

4.7.3 Hearing without undue delay

An accused person must be tried promptly and expeditiously.[225] There has to be a hearing; the hearing should commence in good time, should proceed at a reasonable pace, and it must be completed within a reasonable period. This process is driven by the evidence on record, before an adjudicating officer.[226] The primary source of all court actions and decisions is the case file. Properly managed court records aid the expediency of hearings. This is illustrated by the following examples:

[222] International Records Management Trust (n 3 above) para 100.
[223] International Records Management Trust para 167.
[224] Motsaathebe & Mnjama (n 19 above) 174
[225] Art 28(1) Constitution of Uganda, 1995; sec 10(1) Constitution of Uganda
[226] *Obadia Kuku v Uganda* Cr App 5/1998 [1999] UGCA 5.

(1) A record of evidence given by a witness at a hearing has the same force and effect as the witness testimony; it is enough to tender that record on evidence without recalling the witness.[227] A court record secures the authenticity of actions taken in the course of legal proceedings; it suffices that those actions were properly taken once in the hearing.

(2) A document produced before any court in Uganda as a record of evidence given in a judicial proceeding or before an authorised officer is presumed genuine and its contents accurate.[228]

(3) Foreign judicial records are equally presumed genuine and accurate by the courts of Uganda, subject to the conditions laid down in section 86 of the Evidence Act Cap 6. There would be no need for further transboundary actions so as to obtain evidence that is not controversial.

(4) The function of the record of evidence taken as a true and correct representation of proceedings allows for the hearing to proceed without undue delay by accused persons absconding from hearings or obstructing their own hearings and having to be removed.[229] Such persons are provided with the record of proceedings so as to follow their hearing.

A modern court record facilitates efficient modes of perusing the case file. Searchable databases and documents allow targeted screening that potentially saves time. Video and audio recordings of the proceedings that can be sorted according to the dates of hearings also offer an efficient way of examining the court record. The High Court of Uganda has pronounced itself on this matter, holding:[230]

Despite the shortfalls of evidence by video link or video recordings such as the lack of opportunity for a judge to ask further questions to the witness, seeing and listening to a good video recording is very close to hearing the witness directly as opposed to the paper record especially in as far as it enables the judge to examine the demeanor of the witness.

On the other hand, poor court record management practices cause delays in registering cases, and filing and locating documentation.[231] An adjudicating officer who is obliged to write out the

[227] Sec 69 Criminal Procedure and Evidence Act Cap 08:02.
[228] Sec 79 Evidence Act Cap 6.
[229] Sec 100 Criminal Procedure and Evidence Act Cap 08:02.
[230] *First National Bank of Uganda Limited v Eastgate Enterprises (Pty) Ltd & Others* CACLB-059-07 [2008] BWHC 3.
[231] Motsaathebe & Mnjama (n 19 above) 180 182; Maseh (n 1 above) 78.

proceedings on paper needs more time to hear the case than one who has the assistance of a trained typist or stenographer. A failure to make records available to the court on time for whatever reason slows down a hearing. In South Africa it was found that dockets created by the police were supposed to be in court three days before the date set for the hearing, but delays are frequent.[232] The police allege a lack of means of transport to convey dockets to court, but court officials claim that there is a lack of discipline on the side of the police.[233] This leads to adjournments that could otherwise have been avoided. Such delays translate into the increased cost in litigation, in addition to the stress associated with long periods of waiting for justice to be done.[234] Delays also erode confidence in the judiciary by the public.[235] Frustrated litigants sometimes withdraw their cases.[236]

An expert has recommended that 'records should be classified in a manner that facilitates systematic storage and speedy retrieval of information'.[237]

4.7.4 Appeal/Review/Revision

Appeal, review and revision are identical functions. A person aggrieved by a decision of a court may appeal to an appropriate forum.[238] Every person convicted of a crime has the right of his or her conviction or sentence to be reviewed by a higher tribunal according to the law.[239] The review of a case is scrutiny of the record.[240] In the exercise of its powers of revision, the High Court of Uganda may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court.[241] Revision is principally an examination of the record of proceedings.[242]

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[232] International Records Management Trust (n 3 above) para 109.
[233] Ibid
[234] Abioye (n 2 above) 27 28.
[235] Abioye 27 30.
[236] International Records Management Trust (n 3 above) paras 109 & 173.
[237] Motsaathebe & Mnjama (n 19 above) 174 180.
[238] Art 50(3) Constitution of Uganda, 1995. The Constitution of Uganda does not provide for the right to appeal. However, this right may derive from the ICCPR and the African Charter, to which Uganda is a state party.
[239] Art 14(5) ICCPR. The Constitution of Uganda accords the right to judicial review to various categories of persons, such as detainees (sec 16(2)(c) Constitution of Uganda), and persons whose freedom of movement is restricted (sec 14(4) Constitution of Uganda), among others.
[240] See sec 50 Criminal Procedure Code Act Cap 116; Order 61 Rule 9, Rules of the High Court, 2011.
[241] Sec 48, Criminal Procedure Code Act Cap 116.

An appeal can only be adequately and reasonably prepared upon receipt of the record of proceedings and the reasons for the decision made, from which the appeal arises.[243] In fact, an allegation by an appellant has merit only if it is supported by the record.[244] The limited fact-finding mandate of an appellate court confines the court to the record of proceedings in deciding whether a judgment was made correctly.[245] The record, therefore, is among the documents which initiate the processes of appeal and review.[246] A certified record of proceedings has to be attached to the documents of appeal.[247] The duty of the first appellate court to evaluate and scrutinise the evidence afresh and to come to its own independent conclusion, is facilitated by a competent and reliable court record. In the case of *Getrude Nakanwagi v Stanislaus Muwonge,*[248] the court reiterated the significance of this duty of the first appellate court, while noting that the record filed in that case regrettably was 'so jungled to the extent that a significant claim and the proceedings thereon were not on the record of evidence'. A second appellate court may also be compelled to re-evaluate the evidence and to make an appropriate order where it finds that the first appellate court erred in law in that it failed in its duty to treat the evidence as a whole to that fresh and exhaustive scrutiny to which an appellant is entitled.[249] This reinforces the importance of an adequate record as a tool in the appeal process.

A proper record saves the time of an appellate court and enables it to deliver justice expeditiously. The Supreme Court of Uganda lamented the wasting of time during the hearing of the appeal of Katuramu.[250] The Court was asked to verify whether the hearing court had actually sentenced the appellant after having convicted him. The original handwritten notes of the hearing judge and the typed record were missing. Only a formal typed order, extracted from the original,

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[242] As above. Higher magistrate's courts may also revise proceedings of inferior magistrate's courts under sec 49 of the Criminal Procedure Code Act Cap 116.
[243] *James Mutoigo* (n 121 above) para 9.
[244] *Molosiwa Resheng v The State* Cr App F4/2003 [2003] BWHC 19
[245] See *Keganne v Law Society of Uganda & Others* Misc Case 439/2004, [2005] BWHC 2.
[246] Edward F Kisitu (Administrator of the estate of the Late Kagombe Sepiriya) v Sam Bateesa Makabugu Civil App 56/2011 [2014] UGHC 26: An appellate court as of necessity relies on the record as compiled or recorded by the lower court. Sinden v Attorney-General of Uganda Misc Civil Applic F175/2003 [2005] BWHC 17: 'The submission of the record of proceedings is a step preliminary to the hearing of any review application. The record enables the court to properly review the proceedings and the decision concerned.'
[247] See Orient Bank Limited v Avi Enterprises Limited Civil App 2/2013 [2013] Ugcommc 182: Handwritten unauthenticated notes were filed on appeal as a record of proceedings. The court refused to rely on a document that was not authenticated by certification. See also Order 59 Rule 3, Rules of the High Court, 2011; Order 60, Rules of the High Court, 2011: The record of an appeal, in a civil matter, must contain a correct and complete copy of the pleadings, evidence and all other documents necessary for the hearing of the appeal.
[248] HCT Civil App 52/07 [2010] UGHC 16.
[249] *Margaret Kato & Another v Nuulu Nalwoga* Civil App 3/2013 [201 3] UGSC 07.
[250] *John Katuramu v Uganda* Cr App 2/1998 [1998] UGSC 14 (SC)

was available but was unsigned. The Court had to trace the commitment warrant signed by the hearing judge, which acted as evidence that the appellant had been duly sentenced. The Supreme Court pronounced itself on the matter as follows:[251]

We are constrained to direct the Registrar and all others responsible for and concerned with compiling the records of appeal, and the custody of the original court files, to pay more attention to accuracy of the record, and preservation of the original court file intact.

In the interests of fairness, there should be an acceptable time frame within which the court record should be made available. This is a problematic area for courts. In *S v* Letsholo,[252] the appellant was sentenced on 21 July 2000. He lodged his appeal timely, but the record of the case was made available only in 2004 after the intervention of the ombudsman. The court held that this was an unacceptable state of affairs for an institution administering justice, although it did not state or recommend a time frame for making the record of appeal available.[253] The lack of reliable facilities to manage court records makes a commitment to time frames unrealistic. It is to be noted that the Rules of the High Court of Uganda set the date from which a copy of the record in a civil matter on appeal may be availed at not less than four months from the date of receipt of a notice of appeal.[254] There is no commitment to a deadline.

Conversely, the appeal process is also abused by persons who take advantage of flaws in court record management systems and fraudulently procure the disappearance of their court files. In the words of Chief Justice Mogoeng of South Africa, explaining problems facing the court system:[255]

A trend has emerged where records of proceedings disappear after people are convicted and sentenced . and it happens that a person in prison somehow knows that the records are gone and then institutes an appeal. With their records missing, it means the court would have difficulty in executing the appeal effectively.

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[251] Ibid
[252] CRAF-221/2004 [2007] BWHC 236.
[253] *S v Letsholo* CRAF-221 /2004 [2007] BWHC 236 para 2.
[254] Order 59 Rule 1, Rules of the High Court, 2011. See also Order 60 Rule 2, Rules of the High Court, 2011, which accords an adjudicator of a criminal matter appealed against 10 court days to provide a summary statement of the facts and justification for his or her findings and decision. This forms part of the record but it is not a record of the proceedings.
[255] See 'Modernise court systems' (n 3 above).

Such cases may have to be dismissed and the accused released. The absence of systematic record keeping and control creates an opportunity for such corrupt practices, often involving collusion between lawyers and court officials.[256]

Thurston correctly observed:[257]

Dysfunctional records management undermines legal and judicial reform. Decisions are made without full information about cases, and the absence of systematic recordkeeping and controls leaves scope for corruption or collusion between court officials and lawyers. Court time is wasted, delays are created, and the judiciary's standing is lowered. The large volume of records passing through a typical court system, their sensitivity, and time pressures on courts makes effective records management essential.

4.8 Uganda's Military Justice System and the Right to a Fair Trial

At the national level, there is indeed very little scholarly work on the issue of military justice and the right to a fair trial. Most of the scholarly work on Uganda's military is generally centered on the role of the army in the country's politics. Among the very few scholarly works that have attempted to canvas the issue of military justice and the right to a fair trial in Uganda is Onoria's journal article about the Kotido Executions124 and the working paper I authored on the trials and tribulations of Rtd. Col. Dr. Kiiza Besigye and the 22 others. As shall shortly hereafter be highlighted, these works equally have many gaps in the context of this thesis.

Onoria's article analyses the constitutionality of the Field Court Martial which tried and sentenced Corporal Omedio and Private Abdullah Mohammad. The two soldiers were indicted, tried and executed on the same day for the alleged murder of three civilians in Kotido district in North Eastern Uganda. The trial itself did not last more than three hours. He concludes that this Field Court Martial violated several fair trial and other human rights of these soldiers as guaranteed by Uganda's Constitution. The working paper on the trials and tribulations of ***Rtd. Col. Dr. Kizza Besigye and the 22 others*** mainly focused on the extent to which the General

[256] See Maseh (n 1 above) 85.
[257] A Thurston 'Fostering trust and transparency through information systems' (2005) 36 ACARM Newsletter 2.

Court Martial which attempted to try Besigye and the 22 others complied with the right to an independent and impartial tribunal.

The following points must be made regarding the above works in the context of this thesis. First, the works highlighted above focus on the specific trials and the particular circumstances surrounding those trials. While they attempt to address the issue of independence and impartiality of court martial in Uganda, they mainly focus on the particular military courts. In the case of Onoria's work, he focused on the Field Court Martial which tried the two convicts. Regarding the paper on the trials and tribulations of Dr. Kiiza Besigye, the focus was on the General Court Martial. Over and above the General Court Martial and the Field Court Martial, this research analyses the extent to which the other military courts i.e. the Court Martial Appeal Court, the Division Court Martial, the Unit Disciplinary Committees and the Summary Trial Authority comply with not only the right to an independent and impartial tribunal, but also the right to a fair and public hearing by a competent tribunal.

Further, beyond analysing the compliance of Uganda's military justice system with the right to a fair and public hearing by a competent, independent and impartial tribunal, this thesis also explores the implications of a fair trial noncompliant military justice system on democracy and the rule of law. Also, unlike the works highlighted above, this thesis not only examines the concept of military justice, but also analyses its validity in the context of Uganda's situation. Finally, this thesis explores the historical foundation and evolution of Uganda's military justice system especially as it relates to the protection and respect of the right to a fair trial which none of the above mentioned scholarly works did. It therefore follows that while the above highlighted scholarly works have been instrumental in informing this research, they have many gaps which this thesis addresses.

4.9 Analysis of International and Regional Human Rights Instruments

A critical analysis of the relevant international and regional human rights instruments to which Uganda is party is undertaken in Chapter Two to establish the nature and scope of Uganda's human rights obligations as regards the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. In particular, relevant

provisions of the ICCPR and the African Charter are examined. Other regional and international human rights instruments and materials in which the right to a fair and public hearing by a competent, independent and impartial tribunal has been elaborated and affirmed are also analysed. These include; the HRC's General Comment 32 (2007), the UN Principles on Military Justice, the UN Basic Principles on the Independence of the Judiciary and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (herein after referred to as the African Commission Principles).

Although these materials are considered to be soft law and therefore not legally binding, they serve as important interpretative aids for the relevant binding treaty provisions on which this thesis is based.

4.10 Appraisal of Relevant Case Law and Concluding Observations of the HRC

There are many cases arising from the different regional and international human rights instruments which have repeatedly dealt with the issue of administration of military justice, that it can now be said that an international body of military justice jurisprudence is emerging.130

4.11 Remedies

A person whose rights are violated is entitled to an effective remedy.[258] Inefficient court records may be an infringement of the right to a fair hearing, hence entitling the aggrieved party to a remedy. The objective is to avoid prejudice to an accused person, or to restore a party in a matter to the position in which he or she would have been if the defect in the record had not occurred. This is an exercise of judicial discretion, and the jurisprudence illustrates some of the courses of action adopted by the courts, including (i) correction of the error; (ii) the quashing of an order made on the basis of a defective court record; (iii) discharge of the accused person; (iv) setting aside of the verdict; (v) rehearing; and (vi) a permanent stay of prosecution.

[258] Art 2(3)(a) ICCPR.

4.12 Conclusion

The right to a fair trial without unreasonable delay envisions both pre-trial and actual trial delays. There is no formal definition of what amounts to unreasonable delay. This is determined on a case by case basis depending on the facts and circumstances of a particular case. In the case of pre trial delays, long delays which are beyond the prescribed statutory limits will normally be deemed to amount to unreasonable delay unless justifiable reasons for the delay are given by the prosecution.

With regard to actual trial delays, factors to be considered in determining whether the right has been violated include the length of the delay, reasons for the delay, failure to assert the right, nature of the offence, societal expectations and the prejudice to the accused.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This is an explored conclusion and recommendation on various areas a right to fair hearing was observed, handled by court in Uganda, practiced and the opportunity given to persons.

5.1 Conclusion

To a court of law, the record is everything. The court record refers to the entire court file. A court can only guarantee a fair hearing based on a record that is complete, substantially accurate and authentic. It has also become crucial that courts develop their capacity to maintain electronic case files so as to capture the best evidence. The fair hearing guarantees of presence at hearing, adequate time and facilities to prepare one's defence, hearing without undue delay and appeal, are facilitated by the court record. Justice derives from an efficient court record management system.

The question as to whether this right is observed in Uganda is still a matter of controversy. In particular courts of Uganda in a sense that there are some courts in Uganda that do not afford the citizens of Uganda for whom it is meant an opportunity to enjoy this right in totality. It should be kept in remembrance that this right entails representation of an individual in the courts of law in proceedings where such an individual is faced with difficulty of either a financial or intellectual nature. Article 50 of the constitution of the republic of Uganda (as amended) gives liberty to any person or organization to apply to court for redress in case of any infringement of a fundamental or other rights or freedom guaranteed under the constitution right to a fair hearing being part. The state however has failed its duty to sensitize the people on their rights and freedoms so that they should not be taken for granted.

5.2 Recommendation

5.2.1 Conducting regular public awareness campaigns

One of the factors which contribute to violation of the right to a fair trial without unreasonable delay is ignorance. Many litigants, especially accused persons in Uganda are not aware of the existence of the right and hence cannot seek to enforce it. It is recommended that the government, through the department of justice, should embark on conducting public awareness campaigns to educate the public of the right to a fair trial especially the right to have a trial without unreasonable delay. This will inform the general public of their legal rights and enable them to demand strict enforcement. In the long run, it will also address the problem of case backlog which has continued to affect the Ugandan judiciary and which contribute to delay in cases since courts will always prioritise old cases and neglect new cases.

Continuous public education and awareness will enhance litigants'ability to defend the right to speedy trial and demand appropriate remedies in case of violation. Enforcement of the right will enhance observance of the law by all parties involved and reduced cases of breach or violation.

5.2.1 Employing record management system

A good record management system should contain standards that ensure that records are cared for in a systematic and planned manner in accordance with the legal and administrative requirements of the establishment.[259] It is not enough to computerise filings. Uganda, among other jurisdictions, needs a normative framework constituted of legislation, policies and procedures to guide the management of records.[260] Uganda deserves commendation for legislating on the key aspects of court record management, including the admissibility of electronic evidence. Challenges facing the management of court records are twofold: administrative inefficiencies and *lacunae,* leading to a lack of proper guidance on how court records should be taken, maintained and disposed of. Courts are faced with problems of storage,

[259] Motsaathebe & Mnjama (n 19 above) 175.
[260] See Maseh (n 1 above) 81.

retrieval, and the loss and misplacement of records.[261] These problems with record management are confirmed by court findings.

5.2.2 Setting time frames in criminal cases

Whereas it is generally difficult to determine how long a case will take from filing to conclusion, setting time frames within which certain matters are to be done will greatly reduce delays. This include setting timelines on how long a party should take comply with certain requirements, such as finding an advocate, supply of evidence by the prosecution, regulating the number of adjournments etc.

[261] See Motsaathebe & Mnjama (n 19 above) 1 78

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