

**CRITIQUE OF THE LAW ON RIGHT TO FAIR HEARING IN CRIMINAL TRIALS  
IN UGANDA**

**A Thesis**

**Submitted to the College of Higher Degrees and Research of**

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**Kampala, Uganda**

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**In Partial Fulfilment for the Award of Master of Laws Degree**

**of Kampala International University**

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**BY**

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**1163-01056-08630**

**JANUARY 2019**

## **DECLARATION**

I declare that this thesis is the work of AUGUSTINE AKINEZA alone, except where acknowledgement is made in the text.

Signature:.....

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## **APPROVAL**

I certify that I have read this thesis and that in my opinion it conforms to the acceptable standards of scholarly presentation and is fully adequate in scope and quality as a thesis for partial fulfillment for the award of the degree of Master of Laws of Kampala International University.

Signature of the Supervisor:.....

Name of the Supervisor:.....

Date :.....

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Special thanks also go to Madam Karnoel Rose, Head of Department Diploma in Law Programme/Coordinator Master of Laws Programme, School of Law, Kampala International University, for all the professional guidance and administrative assistance extended to me while compiling this work.

To my wife Christine and our children Daniela, Matthew, Octavia and Joseph I thank you for always accepting my excuses for being absent in your lives during the time I was pursuing my postgraduate studies.

## **DEDICATION**

This thesis is dedicated to my mother who believes in my ability to change the world amidst the challenge of material inadequacies.

## **LIST OF STATUTES**

### **DOMESTIC STATUTES**

The Anti-Corruption Act, Act No. 6 of 2009  
The Children Act, Cap. 59.  
The Children Amendment Act, 2016  
The Constitution of the Republic of Uganda, 1995  
The Criminal Procedure Code Act, Cap. 116.  
The Habitual Offenders (Preventive Detention) Act, Cap. 118  
The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011.  
The International Criminal Court Act, 2010  
The Judicature Act, Cap. 13  
The Judicature (High Court) (International Crimes Division) Rules Statutory Instrument No. 40. 2016.  
The Judicature (Plea Bargain) Rules, Statutory Instrument No. 46 of 2016  
The Magistrates Courts Act, Cap. 16  
The Penal Code Act, Cap. 120.  
The Trial on Indictment Act, Cap. 23  
The Uganda Peoples' Defence Forces Act, 2005

### **INTERNATIONAL INSTRUMENTS**

The African Charter on Human and Peoples Rights, 1981  
The European Convention on Human Rights, 1950  
The International Convention on Civil and Political Rights, 1966  
The Universal Declaration of Human Rights, 1948

## LIST OF CASES

*Abdullah v R* (1963) EA 223.

*Adrea v Republic* (1970) EA 26.

*Alai v Uganda* (1967) EA 596.

*Angelo Muwanga v Uganda*, Court of Appeal Miscellaneous Criminal Application No. 41 of 2008 (unreported).

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*Kaye v Attorney General*, Constitutional Petition No.5 of 2012

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*Motichand (1972)* EA 399.

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

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*Paul Kawanga Ssemwogere v Attorney General*, Supreme Court Constitutional Appeal No. 1 of 2002 (unreported).

*Prof. Isaac Newton Ojok v. Uganda*, Criminal Appeal No. 333 of 1991(unreported).

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*Raghibin Singh Lamba v R* (1958) EA 337.

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*Salvatori Abuki v Attorney General*, Constitutional Appeal No. 1 of 1998(unreported).

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*Shah v R* (1972) EA 476 at 480.

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*Uganda Law Society v Attorney General* Constitutional Petition No. 2 of 2002(unreported).

*Uganda Law Society v Attorney General*, Constitutional Petition No. 18 of 2005 (unreported).

*Uganda v Engonu* HC Crim Rev No. 1 of 2013 (unreported).



*Uganda v Mugisha Gregory*, High Court Criminal Session Case No. 50 of 2010 (unreported)

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

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

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

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

*Woolmington v DPP* (1935) AC 462 at 481.

## **LIST OF ACRONYMS**

UDHR: Universal Declaration of Human Rights

ICCPR: International Convention on Civil and Political Rights

ACHPR: African Charter on Human and Peoples Rights

KALR: Kampala Law Reports

DPP: Directorate of Public Prosecutions

CJ: Chief Justice

JSC: Justice of the Supreme Court

CID: Criminal Investigations Department

LL.M: Master of Laws

JLOS: Justice, Law and Order Sector

SCU: Supreme Court of Uganda

COA: Court of Appeal

HC: High Court

MCA: Magistrates Courts Act

JA: Justice of the Court of Appeal

JHC: Judge of the High Court

GoU: Government of Uganda

LRA: Lord's Resistance Army

SDHC: Special Division of the High Court

FPA: Final Peace Agreement

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## **ABSTRACT**

*The right to fair hearing is non-derogable right under article 44(c) of chapter four of the Constitution of the Republic of Uganda, 1995. The observation of this right has fell short of expectations even after being accorded such importance. The researcher investigated the status of observation of the right to fair hearing of an accused person undergoing criminal trial in Uganda, specifically focusing on the law and practice. Qualitative methods of research were applied in the study. The study revealed that the provisions relating to observation are dotted in different Acts of Parliament, some legislation are contrary to the spirit of the Constitution of Uganda, isolative interpretation and application of the articles relating to the right to fair hearing, and public attitude have greatly hampered efforts to enjoyment of the right to fair hearing in Uganda. Recommendations which include the amendments and enactment of relevant laws, political will, and training of the various stakeholders in the criminal trial process, if implemented would go far to guarantee the observation of the right to fair hearing of accused persons in Uganda during criminal trials.*



## **CHAPTER ONE**

### **GENERAL INTRODUCTION**

#### **1.1 BACKGROUND TO THE STUDY**

Fair hearing refers to “a judicial proceeding that is conducted in such manner as to conform to fundamental concepts of justice and equality. In criminal law when an individual is arrested, a fair hearing means the right to be notified of the charge being brought against him or her and the chance to meet that charge”.<sup>1</sup> The right to fair hearing is fundamental to the rule of law and democracy. ...the right to fair hearing is absolute and cannot be limited. It requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law. The procedural requirements of fair hearing might differ according to the circumstances of the accused.<sup>2</sup>

Similarly in the Ugandan context, the right to fair hearing involves the accused person being informed of the charges against him/her,<sup>3</sup> presumption of innocence,<sup>4</sup> and equality before the law,<sup>5</sup> impartial trial,<sup>6</sup> pre-trial disclosure of the evidence to be brought against him/her,<sup>7</sup> an opportunity to present the accused’s case in defence.<sup>8</sup> Uganda has ably provided for the right to fair hearing or trial in its legal system.<sup>9</sup>

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<sup>1</sup>[https://legal-dictionary.thefreedictionary.com/fair hearing>fair hearing<](https://legal-dictionary.thefreedictionary.com/fair+hearing), accessed on 06/02/2017.

<sup>2</sup>The European Convention on Human Rights, 1950, article 6, retrieved from <https://www.liberty-human-rights.uk>, accessed on 06/02/2017.

<sup>3</sup> The Constitution of the Republic of Uganda, 1995, articles 23(3) and 28(3)(b).

<sup>4</sup> *ibid*, article 28(3)(a).

<sup>5</sup> *ibid*, article 21(1).

<sup>6</sup> *ibid*, article 28(1).

<sup>7</sup> *ibid*, article 28(3)(c); See also the case of Soon Yeon Kong Kim and another V Attorney General(2008)ULR 478 at 483-4.

<sup>8</sup> *ibid*.

<sup>9</sup> *ibid*, article 28 and 42.

The right to fair hearing is one of the fundamental and non derogable human rights in Uganda,<sup>10</sup> encompassing various segments of rights to be observed during criminal trials as enshrined under article 28.<sup>11</sup>

In view of the foregoing provisions of the Uganda's Constitution, the right to fair hearing also known as the right to fair trial may be looked at as, the bedrock of criminal trials in a democratic country, where all judicial and non-judicial decisions during criminal trials are hinged.<sup>12</sup> In the case of *Kawooya Joseph vs. Uganda*,<sup>13</sup> the Supreme Court in its judgment reasoned that every accused person is entitled to fair trial. Advocates assigned to defend accused persons should do it diligently and professionally. Judicial officers presiding over criminal matters equally should ensure a fair hearing of the accused person in accordance with the provisions of the law.

Where the basket of the rights provided under article 28,<sup>14</sup> is empty or half full, the non derogable right, being the bedrock of rule of law in a democratic country may be an illusion.

The Uganda's criminal justice system being adversarial and accusatorial in nature, the procedure should be able to balance the accused person's rights and the state's obligation to conduct speedy and efficient trials as an objective of dispensing justice.<sup>15</sup> Criminal trials should be governed by principles of fairness, taking into account both the accused and the victim. It is further submitted that fair hearing is not only a basic human right but also an essential tool for prosecution and punishment of human rights violators, and accountability to the victims.<sup>16</sup>

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<sup>10</sup> *ibid*, article 44(c).

<sup>11</sup> The Constitution of the Republic of Uganda, 1995.

<sup>12</sup> *ibid*, article 28.

<sup>13</sup> (2001)KALR 68 at 72.

<sup>14</sup> The Constitution of the Republic of Uganda, 1995.

<sup>15</sup> Ssekaana Musa, *Criminal Procedure and Practice in Uganda* (LawAfrica 2010)6.

<sup>16</sup> *ibid*.

The right fair hearing during criminal trials in Uganda covers aspects such as just and speedy determination of criminal proceedings, equality and independence of courts in adjudication of cases to mention but a few. Uganda's legal framework in relation to criminal proceedings is coined to provide for a fair administration of justice, removal of expensive processes and delay in adjudication of cases.<sup>17</sup>

It appears from the foregoing highlighted provisions of the law and scholarly views that, at the heart of every criminal trial, there should be just and fair actions against the accused person by all the actors in the process, also termed as the due process. That the due process prohibits self-incrimination; double jeopardy; excessive bail conditions and unduly long pre-trial detention, cruel and unusual punishment.<sup>18</sup>

Whereas the right to fair hearing is indispensable in criminal trials, this right was not sufficiently provided for and observed in Uganda before the promulgation of the Constitution of the Republic of Uganda in 1995. The period before October, 1995 was characterized by unconstitutional and military governments which never saw any importance of upholding civil rights including the right to fair hearing in criminal trials but preferred detentions without trial and use of emergency laws.<sup>19</sup>

Surprisingly, the situation in Uganda today appears not to be different from the one before October, 1995 in relation to observation of the right to fair hearing during criminal trials. Long periods spent on remand by accused persons before and during trial, plus the discretion of courts in granting bail to persons presumed innocent in all criminal cases before they have been proved or pleaded guilty, has been validated by courts in Uganda. This dilemma was well captured by the Uganda's Constitutional Court holding that an accused person is presumed innocent under article 28(3) of the Constitution and if such person is remanded in custody pending trial which takes a

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<sup>17</sup> *ibid.*

<sup>18</sup> Etannibi E.O. Alemika: *Criminal Justice: Norms, Politics, Institutions, Processes and constraints; The theory and Practice of Criminal Justice in Africa* (2009)16: *African Humana Security initiation Monograph 161*, accessed from <http://www.files.ethz.ch> on 18/02/2017.

<sup>19</sup> Samuel Kalega Njuba; *The Betrayal* (2013)31,39,45,49,51,81,89,91,99,105,111,119-21.

longtime, he or she will have suffered gross injustice, but the grant of bail was not automatic as the law is at the moment, regardless of such likelihood of one made to serve a custodial sentence while the same person is presumed innocent.<sup>20</sup>

The observation of the Constitutional Court was an indication of how Ugandan Courts have under looked the gravity of the effects of denial of bail pending trial and or pending appeal under the guise of discretion of Courts, to the enjoyment of right to fair hearing during criminal trials.

The state continues to enjoy unequaled advantage over accused persons in its efforts to gather evidence, professional legal representation during criminal trials and access to witnesses as the accused person is under detention on remand, his or her release is at the discretion of courts when he or she is presumed innocent until a final verdict is reached by Court. This practice is most likely going to defeat the object and purpose of the right to fair hearing in criminal trials in Uganda as expected in a democratic country.

## **1.2 STATEMENT OF THE PROBLEM**

The right to fair hearing during criminal trials in Uganda appears to have fallen below the minimum standards acceptable in a democratic country. Criminal trials are characterized by delayed adjudication of cases, compromised judicial independence due to corruption, military intimidation and influence by political actors in various government offices and departments.

In the recent times, case backlog has become a common vocabulary in the justice, law and order sector (JLOS) of the Uganda's economy. Case backlog refers to cases which have been in the court system for over two years.<sup>21</sup> To prove the magnitude of case backlog in Uganda; the Chief Justice in October 2016, set up a case backlog reduction committee. In the Committee's report of 29<sup>th</sup> March, 2017, it was indicated there were cases that have been in Courts for over 10 years, between 5 to 10 years, and majority

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<sup>20</sup> Foundation for Human Rights Initiative v Attorney General (2008) ULR 460 at 475.

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

were due to be declared backlog soon.<sup>22</sup> The common adage of delayed justice is justice denied, fits the situation that has engulfed accused persons in Uganda.

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

The inactions by the stakeholders in the criminal trial process have a direct bearing on the observance of the right to fair hearing in Uganda, especially on speedy trials, equality before the law, ability to prepare defence, effective legal representation, confidence in the judiciary<sup>30</sup> among others.

In the executive summary of the case backlog committee report, it was stated that the judiciary with other justice, law and order sector institutions had implemented a number of interventions to deal with the case backlog including; chain linked initiative,

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<sup>22</sup> ibid 30, 34-35 & 36.

<sup>23</sup> *Uganda V Robert Sekabira & 10 others*, High Court Criminal Session Case No. 0085 of 2010 (unreported).

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

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

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

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

<sup>28</sup> *Kawooya Joseph V Uganda* (2001) KALR 68 at 72.

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

<sup>30</sup> The Judiciary, 'A report of the case backlog reduction committee' (29 March 2017) 8 retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017.

specialized divisions of the High Court, plea bargaining, session system, JLOS backlog system,... among others.<sup>31</sup>

Surprisingly some of the interventions have instead denied the accused persons' enjoyment of the right to fair hearing, especially the establishment of specialized courts only based in Kampala like the Anti-Corruption Division of the High Court of Uganda,<sup>32</sup> the International Crimes Division of the High Court of Uganda<sup>33</sup> and the most recent court for adjudicating cases relating to environment, and utility cases<sup>34</sup> to mention a few. The accused persons are made to be tried far away from where the offences were committed, far away from witnesses, thereby incurring high costs in gathering evidence to use in their defence, expensive and avoidable travel expenses to attend court proceedings and legal fees.

The session system which refers to the holding of criminal trials on designated days and places by the High Court to adjudicate capital offences by a presiding High Court judge<sup>35</sup> has not solved the backlog either. Sessions take long to be held either due to lack of funds and also abuse of the process by those who want personal gains, thereby increasing backlog.<sup>36</sup>

The situation in Uganda points to existence of challenges in observation of the right to fair hearing during criminal trials. This may be happening mostly due to contradictions in the legal framework and practices by various players during criminal trials, even at a time when Uganda is considered to be a democratic country.

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<sup>31</sup> *ibid* 4.

<sup>32</sup> The Anti-Corruption Act, Act No. 6 of 2009, laws of Uganda; See also The High Court (Anti-Corruption Division) Practice Direction No. 3 of 2009; see also <https://www.the-judiciary.go.ug-data-smenu-anti-corruption-division-judiciary>, accessed 25 September 2017.

<sup>33</sup> The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, laws of Uganda retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017.

<sup>34</sup> Judiciary launches Specialised Court to Deal with Utilities, Wildlife and Standards, *The Judiciary* (Kampala 26 May 2017) retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017.

<sup>35</sup> The Trial on Indictment Act, Cap. 23, s. 4, laws of Uganda.

<sup>36</sup> The Judiciary, 'A report of the case backlog reduction committee' (29 March 2017) 39 retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017.

In view of the foregoing, it became necessary to investigate and critique the law and practice in Uganda relating to observation of the right to fair hearing during criminal trials.

### **1.3 OBJECTIVES OF THE STUDY**

This section focuses on the general and specific objectives of the study, the researcher intend to achieve at the end of the research process.

#### **1.3.1 General objective of the study**

Critique the law relating to observation of right to fair hearing during criminal trials in Uganda.

#### **1.3.2 Specific objectives of the study**

The specific objectives of the study;

- (1) To analyze the concept of the right to fair hearing in the conduct of criminal trials in Uganda.
- (2) To identify gaps and shortcomings in the observation of the right to fair hearing during criminal trials in Uganda.

### **1.4 RESEARCH QUESTIONS**

- 1) What is the legal framework relating to observation of the right to fair hearing during criminal trials in Uganda?
- 2) What are the conceptual components of the right to fair hearing during the conduct of criminal trials in Uganda?
- 3) What are the gaps and shortcomings in the in observation of the right to fair hearing during criminal trials in Uganda?
- 4) What are the probable remedies to the gaps and shortcomings in the observation of the right to fear hearing during criminal trials in Uganda?

## **1.5 SCOPE OF THE STUDY**

The scope includes;

### **1.5.1 Geographical scope**

The study was limited to observation of the right to fair hearing during criminal trials in Uganda. Except for exhaustive and elaborative study which was carried out, the researcher consulted texts on observation of the right to fair hearing during criminal trials from other jurisdictions which apply the common law like, the United Kingdom, South Africa, Nigeria, Ghana and some East African Countries.

### **1.5.2 Content scope**

The study was limited to the law governing the observation of the right to fair hearing during criminal trials in Uganda, by Courts of Judicature, the Directorate of Public Prosecutions (DPP) and other stakeholders.

### **1.5.3 Time scope**

The research covered the period after the promulgation of Constitution of the Republic of Uganda (8<sup>th</sup> October, 1995) to 2018.

The research was conducted in twelve months ending in December, 2018. The activities carried out were the analysis of both primary and secondary sources of data. These include; domestic and international statutes or instruments, court decisions, and review of related literature.

## **1.6 SIGNIFICANCE OF THE STUDY**

The research will help in highlighting to the Uganda's Judiciary, Police and Directorate of Public Prosecutions (DPP) their cardinal duty and mandate to observe the right to fair hearing during criminal trials in Uganda.

The research will also help to highlight the failures and contradictions in the Uganda's legal framework and practice in relation to the observation of the right to fair hearing during criminal trials.



The research will also improve on the available knowledge in criminal justice system in relation to observation of the right to fair hearing during criminal trials in Uganda.

## **1.7 METHODOLOGY**

The researcher conducted doctrinal legal research. This is research about what the prevailing state of a legal doctrine, legal rule or legal principle is. In this study the researcher considered the prevailing state of the right to fair hearing in criminal trials in Uganda.

The study thus involved; the systematic analysis of various statutory provisions relating to fair hearing in criminal trials; and the logical and rational review of the legal propositions and principles of law relating to the right to fair hearing in criminal trials.

In the study therefore the researcher focused on analysis of substantive laws, doctrines, concepts and court decisions. The study further considered other legal materials like the Hansard of the Parliament of Uganda and works of prominent legal scholars in the area of human rights and criminal proceedings or trials.

The foregoing information or data was got from both primary and secondary sources which were consulted by the researcher;

- (a) Primary sources referred to sources that contain original information or data or observations. These included the Constitution of the Republic of Uganda, 1995, various Acts of Parliament, Uganda Gazette that publishes the Acts of Parliament and other government pronouncements, subsidiary legislations like rules, regulations, orders, and directives by different government agencies, law reports where courts decisions are reported and international legal instruments.
- (b) Secondary sources referred to sources of information that furnish information from primary sources. These sources organize the information in a systematic manner and in a planned way. Such sources included; textbooks, commentaries

on statutes, abstracts, bibliographies, dictionaries, encyclopedias, reviews, thesauri, treatises among others.

## **1.8 LITERATURE REVIEW**

This section contains review of relevant literature by other scholars who have taken studies or wrote about the subject under study and also highlighted what areas have not been covered by the various studies that this study has covered.

Schmallager asserts that, Cessare Beccaria in his punishment and crime theory was against torture of suspects while in jail, a practice which was a device used against weak suspects to confess to commission of crime which wasn't true and strong suspects survived punishment as they endured torture and never confessed to commission of crime even when they weren't innocent.<sup>37</sup>

To Beccaria, adjudication and punishment should be speedy for them to have meaning and achieve the objective of preventing commission of crime and making the results of adjudication more justifiable. That to make punishment not appear to be violence against the accused or against the rights of a private citizen, the process of punishment must be public and prompt.<sup>38</sup>

This literature and theory was relevant to the current study as it provided the historical development of the right to fair hearing in the criminal justice process and how the said right can be observed especially, the non-use of torture on suspects, speedy and public trials that are also enshrined in the Uganda's criminal justice system under article 28.<sup>39</sup>

The crime and punishment theory is further buttressed by the Utilitarian principle theory, where Jeremy advocated for legislation being aimed at creating happiness for

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<sup>37</sup> Frank Schmallager, *Criminology Today; An Integrative Introduction* (3<sup>rd</sup> edn, update. Pearson Education Inc. 2004)116 discussion of the views of Cesare Baccaria an Italian born criminologist, who earned his doctor of laws at 20 years of age, was the architect of the philosophy of punishment developed and published in his book titled *Essay on Crimes and Punishment* in the years of 1764.

<sup>38</sup> *ibid.*

<sup>39</sup> The Constitution of the Republic of Uganda, 1995.

the community. He believed human beings were rational creatures and should be treated equally before the law. Punishment has to be just enough to cause inconvenience against the criminal to deter him or others from further commission of crime and immediately meted against the criminal from the time of commission of the crime; that is trial should be immediate and speedy.<sup>40</sup>

The two theories are the bedrock for the respect for human rights in criminal trials, where the society is said to owe to its citizens' respect for their rights in face of actions by authorities and also respecting others rights or menacing the public good. The introduction of due process, where individual accused persons are presumed innocent till proven guilty and no punishment is meted against an individual before an authority with competent jurisdiction has pronounced itself on the same, speedy and public trials, independent and impartial tribunals were introduced at this time of enlightenment revolution in criminal justice.<sup>41</sup> This literature was relevant to the study as it helped the researcher to establish the core elements of the right to fair hearing in the criminal trials in Uganda, its origin and shortcomings therein.

However, Schmallerer in the discussion of Cesare Beccaria and Jeremy Bentham views, did not consider the role of societal attitude and its influence on decision making by judicial officers in exercising their discretion and outcomes of the legislation process that affect the observation of the right to fair hearing in criminal trials especially when considering rights at the pre-trial period and pending final appeal decisions. The views of the above criminologists focused mostly on how executive and judiciary operate to uphold the right to fair hearing but not how the societal values influence the approach by different state agencies in the criminal justice system, hence the need to conduct this study.

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<sup>40</sup> Frank (n 37)118, discussion of the utilitarian principle theory propounded by Jeremy Bentham an English criminologist of the 18<sup>th</sup> century, in the year 1789 in his publication titled *Introduction to the Principles of Morals and Legislation*.

<sup>41</sup> *ibid*, 119.

According to Rawls in his theory of justice,<sup>42</sup> he propounds that where individuals put themselves in the cover of ignorance of their future individual positions, social status, economic status, abilities, intelligence, strength and other personal attributes, they are likely to make just choices based on the cover of ignorance. The cover of ignorance makes one act fairly to all by developing a scheme of justice that treats all persons fairly. This theory developed principles that; every person has equal right to the most extensive social system of equal basic liberties that fit in comparably same system of liberty for all. Any socio-economic divide is organized to the benefit of the underprivileged and not inconsistent with the just savings principle and election and appointment to offices and positions is meritorious, on a fair and leveled playing ground.

These two principles are hinged on citizens' political liberties to vote, run for office, freedom of speech and assembly, liberty of conscience ....and freedom from arbitrary arrests; Any inequality in the society should be for the benefit of the under privileged of the society; All individuals have a reasonable opportunity to societal benefits regardless of their material resources.<sup>43</sup>

This literature was relevant to the study as it highlights how stakeholders in the criminal justice system like legislators should have empathy while making laws, especially where it involves discretionary powers of courts and the application of the laws. They should act in the pretext cover of not knowing what their positions will be in future. They need to act and treat accused persons in manner they would want to be treated in if they were in similar position.

However, the theory of justice focused much on the legislative mandate and how a law maker can legislate fairly and objectively. The theory does not consider the factors that influence the determination of the rights to liberty and how they affect the enjoyment

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<sup>42</sup>John Rawls, *A theory of Justice* (Rev. edn, Belknap Press 1999) retrieved from <https://www.hup.harvard.edu/catalog> accessed 26/09/2017.

<sup>43</sup><https://www.enotes.com/topics/theory-of-justice>, accessed 25 September 2017.

of other rights by other arms of government, which have been at the forefront of disrespecting the same. It presupposes an environment where legislation is driven by common good not autocratic attitude of the leaders. The situation is not the same in Uganda, hence this study.

Zulawski and Wicklander opine that in the United States of America, an employer investigating an employee with a potential of preferring criminal charges against him or her criminally must ensure that he or she follows the due process. The two authors further observe that where interrogation is done by a law enforcement officer of an individual in custodial environment, then the Miranda rule can apply. Miranda rule is whereby the person being interrogated is informed or advised of his or her right to an attorney, right against self-incrimination and right to remain silent. That where Police goes ahead to record a custodial suspects statement without following the Miranda rule, such evidence cannot be used against him or her to establish the guiltiness of the accused.<sup>44</sup>

However, the views of Zulawski and Wicklander ran short of application in Uganda. The situation in United States of America appears to be that, from onset; a person under threat of trial is availed legal representation at the costs of the state. This situation is not wholly embraced in Uganda, hence the study to establish the sufficiency of the provisions on legal provisions relating legal representation in criminal trials especially the right to legal representation both to those who can afford and the ones who cant.

Examination of this literature was further relevant to this study especially in comparing the Uganda's confession, charge and caution statements recording procedures conducted by Criminal Investigations Department (CID) investigators and those of the civilized nations, while interrogating custodial suspects and the upholding of the suspects rights in ensuring the existence of due process in crime investigations which affect the quality of evidence and consideration during criminal trials in Uganda.

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<sup>44</sup> David E Zulawski and Douglas E Wicklander, *Practical Aspects of Interview and Interrogation* (2<sup>nd</sup> edn, CRC Press 2001)50 and 63.

Odoki observes that, the test for the standard of judicial independence in any country is to consider how courts and judges are free to exercise their jurisdiction, discretion and performance of their functions without internal and external influence. That where, there are incidences of corruption, a section of the citizenry may not enjoy equality in protection by the law. Judicial officers should be guided by the rule of law in the protection and enforcing without any influences and should despise any attempts to any encroachment by any other authority to influence their decision making.<sup>45</sup>

Examination of this literature was relevant to the study that was undertaken in analyzing the independence of judiciary as part and parcel of the right to fair hearing in the Uganda's criminal justice system. Judicial independence faced challenges of "*black mamba*" attacks, alleged corruption and political maneuvers and how it can remain unshaken on its principles of fairness and observing the rule of law.

According to Kanyeihamba, the Courts' mandate to adjudicate criminal cases without bias, treatment of all parties equally, decide matters based on evidence and the law applicable, give balanced and fair decisions and do all the above without any influence whatsoever is provided for under the constitution. The judiciary has positively responded to protection of human rights in Uganda even when the judicial officers' safety has not been guaranteed.<sup>46</sup> Examination of the literature was relevant to this study as it provided avenues to critique the current practices in the observance of the right to fair hearing by the judiciary amidst political and government interference in Uganda.

Odoki further opines that, the Uganda Police officers in carrying out investigations and interrogations of suspected criminals should ensure that torture, or force is not employed in obtaining information about commission of crimes. Information gathered from statements obtained from the suspects give leads to investigators, disclosure of

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<sup>45</sup> Benjamin J Odoki (JSC), *An Introduction to Judicial Conduct and Practice* (3<sup>rd</sup> edn, The Law Development Centre 1990)131, 134 and 139.

<sup>46</sup> George W Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance*, (2<sup>nd</sup> impn. LawAfrica Publishing (U) Ltd 2010) 46 and 51.

possible denials of criminal liability, and the same statements may help in defence in certain matters. That in recording statements, Police Officers should not cross examine the detainees. Police officers must obtain confessions voluntarily as any confession made out of threats, force or inducement will be irrelevant at the time of prosecution of the suspect, and further that the responsible Police Officer will be required at prosecution to prove that the confession was obtained voluntarily in a trial within a trial.<sup>47</sup>

Analysis of the literature was relevant to this study especially in the understanding of Police investigations and treatment of detained suspects in order to obtain useful and objective information for prosecution of cases without using torture and other human rights abuses while at the hands of Police investigators and the shortcomings therein.

According to Odoki, the Director of Public Prosecutions (DPP) has the general control of all criminal prosecutions on behalf of the state, guided by the Constitution of the Republic of Uganda with independence from any other authority. The DPP has powers to control investigations, public and private prosecutions, discontinuation of criminal proceedings and all these powers are to be exercised with regard to public interest and administration of justice.<sup>48</sup> Examination of this literature was relevant to the study as the researcher's objectives include establishing whether the DPP is the only institution with control over criminal investigations and prosecution in Uganda today, whether its actions are in public interest, administration of justice and independent from other authorities.

Odoki further asserts that the Constitution of the Republic of Uganda<sup>49</sup> under article 28 provides for the right to fair hearing for protection of every individual accused of criminal offence. The provisions are observed in all countries with principles of governance based on the rule of law and must be observed and adhered to by both the

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<sup>47</sup> Benjamin J Odoki (CJ), *A guide to criminal procedure in Uganda*, (3<sup>rd</sup> edn, The Law Development Centre 2006) 22 and 25-26.

<sup>48</sup> *ibid* (n 47)96-98.

<sup>49</sup> 1995.

prosecution and Courts of law.<sup>50</sup> The literature was relevant to this study as it helped the researcher, to establish the legal basis of non-derogation of the right to fair hearing in criminal trials in Uganda, and the expectations from all stakeholders during criminal trials in Uganda.

However, notwithstanding that the two foregoing Ugandan authors (Odoki and Kanyeihamba) were Justices of the Supreme Court of Uganda at one time in both of their works reviewed in this study, they emphasized the concept of judicial independence and rule of law. Not much is talked about the role of the provisions of the law and their interpretation by Courts in negating the enjoyment of the right to fair hearing during criminal trials in Uganda. Their writings do not consider the discriminatory nature of certain provisions under article 28 of the Constitution of Uganda and the unchecked discretionary powers of courts in pretrial remedies such bail.

Whereas the authors highlighted the importance of independence of judiciary, equality during trial and the other related aspects, the two authors did not delve much into the discussion of the interdependence of the several elements of the right to a fair hearing and other rights of accused persons in criminal trials in Uganda, such as the right to bail in relation to the right to time and facilities to prepare for defence, right to legal representation at state costs in trials other than for capital offences, the time when legal representation is availed to an accused person charged with capital offence among others. The unfairness arising out of these inequalities, shortcomings in the law and isolated treatment of the concept elements of the right to fair hearing may not have captured the eye of the two Ugandan scholars. This study therefore became relevant to highlight the plight of accused persons during criminal trials and suggests the way forward in upholding the right to fair hearing in criminal trials in Uganda.

Parker an American scholar observed that upon arrest, a suspect is likely to be subjected to various police actions like search, interrogation, extraction of confessions, and identification parades. These actions are important and greatly impact on evidence

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<sup>50</sup> Odoki (n 47)100.



at trial and to protect suspects from the Police taking advantage and exploit suspects psychological distress, the United States Supreme Court had to provide control against the unconstitutional actions, abuse of power of Police Officers, by providing for the Miranda warning; that is the suspect should be warned that he or she is entitled to an attorney and where the person cannot afford a private attorney, one would be provided free of charge.<sup>51</sup>

Analyzing this literature is relevant to the current study as the researcher tries to establish how suspects are treated in Uganda and the extend of provision of legal representation to indigent suspects under police custody during investigations, the discrimination in state provision of legal representation during trial based on gravity of charges and any other assistance given to suspects under police custody in relation to their investigations.

Parker further states that the due process referred to the standard of criminal justice that adheres to emphasis of individual accused persons' rights, safe guards against arbitrary, unfair judicial and administrative trials as provided by the constitution.<sup>52</sup> Examination of this literature was relevant to the study which sought to critique the due process that every nation Uganda inclusive strives to observe in the criminal trials and whether the same standards are observed by stakeholders in Uganda's criminal justice system.

The views of Parker emphasized legal representation from the time a person is brought before Police through the Miranda warning and the likely effects it may have on the actual trial process. Emphasis is on individual rights and does not endeavor to discuss the concern of public interest in the determination of criminal cases especially the pretrial remedies. The effect of discretionary court powers aren't discussed too. Besides the level of civilization and observation of individual rights in the American system

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<sup>51</sup> Herbert L. Parker, *The Limits of the Criminal sanction* (1<sup>st</sup> edn, Stanford University Press 1968) 4 and 14.

<sup>52</sup> *ibid* 26.

aren't at the same footing with Uganda where political sentiments and interference supersede legal provisions.

According to Etannibi, a fair hearing also known as a fair trial means due process. It is a process that discourages coercion and persecution, rather than prosecution of suspects. It prohibits illegal arrest and detention, search and seizure, self-incrimination; double jeopardy; excessive bail conditions and unduly long pre-trial detention, cruel and unusual punishment.<sup>53</sup> Further that it is a model of criminal justice that emphasizes individual rights and constitutional safeguards against arbitrary or unfair judicial or administrative proceedings.

An examination of the foregoing literature reviewed, shows that there was a clear indication that the non derogable right of fair hearing cherished under common law system, has not been upheld within the scope of Uganda's criminal justice system. The state has remained with unequaled advantage over individual suspects or accused persons in the whole process.

Whereas Etannibi's observations are relevant and of considerable consideration, he does not give remedies to individuals who find themselves faced with long pretrial detention and excessive bail conditions. He does not discuss the circumstances that may influence courts to impose excessive bail conditions or hold accused persons unduly long on pretrial detention, hence the need to interrogate the situation further especially in Uganda's context.

## **1.9 ORGANISATIONAL LAYOUT**

The study was covered in five chapters which relate upon each other to help the researcher address the objectives of the study.

Chapter one is the introduction to the research; it sets out the background of the study, statement of the problem, objectives of the study, research questions to be

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<sup>53</sup> Etannibi (n 18)16.

answered, methodology, scope of the study, literature review, and organizational layout.

Chapter two covers the analysis of the legal framework on the right to fair hearing in criminal trials in Uganda.

Chapter three dealt with the concept elements of the right to fair hearing in criminal trials in Uganda. It provides a detailed discussion of the concept elements of the right to fair hearing during criminal trials in Uganda.

Chapter four contains the critique of the right to fair hearing in criminal trials in Uganda. It provides a detailed discussion of the right to fair hearing in criminal trials, highlighting the gaps and shortcomings in the efforts to interpret and practice the provisions in different legislations while presiding over criminal trials by various courts of law.

Chapter five contains findings, conclusions and recommendations to close the gaps and shortcomings identified in relation to observation of the right to fair hearing in the conduct of criminal trials in Uganda.

## CHAPTER TWO

### ANALYSIS OF THE LEGAL FRAMEWORK ON THE RIGHT TO FAIR HEARING IN CRIMINAL TRIALS IN UGANDA

#### 2.0 Introduction

This chapter discusses the legal regime in Uganda that provides for procedures followed, powers and privileges of different stakeholders in the criminal trials while upholding the right to fair hearing, the rights enjoyed by the accused persons during criminal trials in Uganda and any shortcomings in the legislations if any.

#### 2.1 Understanding Criminal trials at a Glance

The jurisdiction of the criminal courts is limited to crimes committed within Uganda.<sup>54</sup> In the case of *Uganda v Atama Mustapha*<sup>55</sup> it was held that whether or not a prosecution can be sustained is entirely a matter of municipal law, which may choose to disinterest itself in the activities of its national extraterritoriality. That extraterritorial jurisdiction must be statutorily conferred. Therefore, the court had no jurisdiction to try a Ugandan national for his acts committed wholly outside Uganda. In response to this decision the Penal Code Act was amended to confer jurisdiction on the courts of Uganda to try offences of treason and offence against the state,<sup>56</sup> acts intended to alarm or annoy or ridicule the President,<sup>57</sup> concealment of Treason,<sup>58</sup> terrorism<sup>59</sup> and promoting war on chiefs<sup>60</sup> committed outside Uganda by a Ugandan citizen or a person ordinarily resident in Uganda.

It is the High Court which has original jurisdiction in criminal cases and such appellate and other jurisdiction as may be conferred on it by the Constitution or other law. In

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<sup>54</sup> The Penal Code Act, Cap 120, section 4.

<sup>55</sup> [1975] H.C.B 254.

<sup>56</sup> *ibid* (n 54), section 23.

<sup>57</sup> *ibid*, section 24.

<sup>58</sup> *ibid*, section 25.

<sup>59</sup> *ibid*, section 26.

<sup>60</sup> *ibid*, section 27.

particular, it is only the High Court that has jurisdiction to try capital offences whose maximum sentence is death.<sup>61</sup>

The Magisterial Courts have limited jurisdiction in terms of geography and gravity of the offence. The law limits the territorial jurisdiction of magistrates' courts to the local limits of their establishment, and the offences that can be entertained by various grades of Magistrates Courts as follows; the Chief Magistrate Court is barred from trying any offence in which the maximum penalty is death, a Magistrate Grade I from trying any offence in which the maximum penalty is death or imprisonment for life, and Magistrate grade II not to try offences whose sentence is more than three years or a fine above Uganda Shillings five hundred thousand or both.<sup>62</sup> However, this limitation does not apply to preliminary proceedings like committal proceedings.<sup>63</sup>

## **2.3 The National Legal Framework**

Uganda's legal framework on the right to fair hearing in criminal trials is not short of provisions that ably provide for the observance and upholding the accused rights during criminal trials. However, these provisions have claw-backs within the law and are skewed or wanting in conduct of observance of the accused person's rights by the various stakeholders in the criminal trial process as the discussion below indicates.

### **2.3.1 The Constitution of the Republic of Uganda, 1995**

Worth noting from the very start is that the 1995 Constitution unlike its predecessors of 1962 and 1967 is more explicit in proclaiming the supremacy of the Constitution. The 1995 Constitution added the crucial phrase, '... and shall have binding force on all authorities and persons throughout Uganda.'<sup>64</sup> The effect of this provision—as several important decisions have pointed out—is to finally subordinate every individual and institution in the country to the full authority of the Constitution. The Constitutional

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<sup>61</sup> The Constitution of the Republic of Uganda, 1995, article 139(1); See also the Trial on Indictment Act, Cap. 23, section 1 and the Judicature Act, Cap. 13, section 14.

<sup>62</sup> The Magistrates Courts Act, Cap. 16, as amended, sections 3, 161 and 162

<sup>63</sup> *ibid*, section 168.

<sup>64</sup> The Constitution of the Republic of Uganda, 1995, article 2.

Court of Uganda emphasized the supremacy of the Constitution of Uganda, 1995 wherein it pointed out that everybody, including institutions and organs of Government are bound by the Constitution and are obliged to adhere to its supremacy.<sup>65</sup>

The Constitution provides for the basis and backbone of the Uganda's legal system. In relation to criminal trials, the constitution provides for the establishment of Courts of judicature, their jurisdictions and independence,<sup>66</sup> the Uganda Police Force and its mandate,<sup>67</sup> the office of the Director of Public Prosecutions and its functions,<sup>68</sup> the inspectorate of government and its mandate,<sup>69</sup> the Prisons Service<sup>70</sup> and its mandate and other related institutions like Uganda Peoples Defence Forces (UPDF).<sup>71</sup>

Besides providing for the establishment of the various institutions, the Constitution provides for the rights of persons charged and or those who find themselves in the hands of the criminal justice institutions <sup>72</sup> amongst which include the right to fair hearing.<sup>73</sup>

The Constitution further provides for the saving of all legislations that existed before its promulgation and are to be construed with modifications, adaptations, qualifications and exceptions as may be necessary to bring them in conformity with the Constitution. This saved all legislations relating to criminal trials and the right to fair hearing in Uganda that were in existence before the promulgation of the Constitution.<sup>74</sup>

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<sup>65</sup> Twinobusingye Severino v Attorney General, Constitutional Petition No. 47 of 2011 (unreported).

<sup>66</sup> See chapter 8.

<sup>67</sup> Articles 211, 212, 213 and 214.

<sup>68</sup> Article 120.

<sup>69</sup> Chapter 13.

<sup>70</sup> Articles 215, 216 and 217.

<sup>71</sup> Articles 208, 209 and 2010.

<sup>72</sup> Chapter 4.

<sup>73</sup> Article 28.

<sup>74</sup> Article 274.

The Constitution further provides for equality of all persons before the law and no one shall be discriminated against on the basis of political, economic, social and cultural life of such a person. And that actions allowed under the same constitution shall not be said to be inconsistent with the right to equality before and or under the law.<sup>75</sup>

In Uganda any person charged with a criminal offence and has been arraigned before court or arrested by the Police or any other authorized agency is held in lawful custody until released on bond or court bail.<sup>76</sup> The same Constitution further provides that in any criminal proceedings, by or against government particularly in criminal matters the prosecution shall be designated by the word Uganda.<sup>77</sup> Article 257(1) (ee)<sup>78</sup> defines Uganda to mean the Republic of Uganda.

The Ugandan Criminal justice system is adversarial and accusatorial in nature, the procedure must strike a balance between the suspect's/accused person's rights and the state's obligation to conduct speedy and efficient trials as an objective of dispensing justice.<sup>79</sup> This situation envisages both parties to the criminal proceedings to be accorded equal opportunity to gather evidence to counter each other at the trial.

However, while the person suspected to commit or about to commit a crime can be deprived of his or her liberty, the state (Uganda) is at liberty to gather evidence to prosecute the accused in future while he or she is in its custody on remand. He or she is only entitled to disclosure at the time of trial<sup>80</sup> which is too late to prepare and or gather counter evidence considering the incarceration before the actual trial if one wasn't granted bail pending trial.<sup>81</sup> This is pure manifest of inequality in the criminal trial process and doesn't suffice to fair hearing as it is similar to going into a boxing ring to compete with an opponent who is tied with ropes.

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<sup>75</sup> Article 21(1) and (5).

<sup>76</sup> Article 23(4) and (6).

<sup>77</sup> Article 250(4).

<sup>78</sup> *ibid.*

<sup>79</sup> Ssekaana Musa: Criminal Procedure and Practice in Uganda (2010)6.

<sup>80</sup> The Constitution of the Republic of Uganda, 1995, article 28(3)(c).

<sup>81</sup> Article 23(6).

The Constitution further provides that a person may be deprived of liberty upon reasonable suspicion that he or she has committed or is about to commit a criminal offence under the laws of Uganda.<sup>82</sup> However, the same Constitution provides that every person charged with a criminal offence shall be presumed innocent until proven or pleads guilty.<sup>83</sup>

The two provisions of the Constitution therefore bring a conflict in the mind of a legal scholar. If a person is presumed innocent until a trial court has proven him or her guilty or he/she has pleaded to his or her guiltiness, why deprive him or her of his or her liberty before the presumption has been rebutted through a due process provided under the laws of Uganda.

The principles of constitutional interpretation, specifically the principles of purpose and effect, harmonization and reading the constitution as one integrated whole document, generous and purposive construction as explained in the cases of *Hon. Sam Kuteesa and two others vs. Attorney General and Another*,<sup>84</sup> and *Salvatori Abuki and Another vs. Attorney General*<sup>85</sup> are so important in discussing the contradictions in the application of the foregoing provisions of the constitution in relation to presumption of innocence, right to application to be release on bail and courts discretion to grant the application for bail, right to facilities to prepare one's defence and the right to personal liberty.

It is a constitutional presumption that an accused person is innocent until he or she pleads guilty or is proved guilty by a competent court after trial.<sup>86</sup> At the same time, the constitution gives court discretion to determine whether the same innocent person should be granted bail or not,<sup>87</sup> when the presumption has not been rebutted, and the same person is entitled to facilities to prepare for his or her defence.<sup>88</sup> If the

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<sup>82</sup> Article 23(1)(c).

<sup>83</sup> Article 28(3)(a).

<sup>84</sup> Constitutional Petition No. 46 of 2011 and Constitutional Reference No. 54 of 2011

<sup>85</sup> Constitutional Case No. 2 of 1997.

<sup>86</sup> The Constitution of the Republic of Uganda, 1995, article 28(3)(a).

<sup>87</sup> *ibid*, article 23(6)(a).

<sup>88</sup> Article 28(3)(c).



constitution was to be read as an integral document, and interpreted generously in relation to provisions that affect non derogable right,<sup>89</sup> and emphasizing the harmonization of the provisions relating to the right to a fair hearing in criminal trials, the right to apply and grant for release on bail would be an automatic right. The right could only be limited where the interests of the accused person are under threat.

An accused person can be able to adequately prepare his or her defence when he or she is enjoying his liberty, under the terms of bail pending trial or appeal for only ensuring his return to face trial.

The foregoing position was well articulated by Lugayizi J in *Layan Yahya vs. Uganda*<sup>90</sup> wherein he was of the view that the right to be granted bail was automatic and Court had no discretion to refuse to grant the same since the accused person was presumed to be innocent.

The foregoing are some of the contradictions of the provisions of the Uganda's Constitution that needs to be reconsidered by judicial officers and other stakeholders in the conduct of criminal trials in Uganda and the researcher further interrogated them in the following chapters.

### **2.3.2 The Judicature Act, Cap 13**

The Judicature Act is one of the principal legislations in relation to criminal trials and the right to fair hearing. To begin with, the Act provides for the hierarchy, order of precedence of Courts and their jurisdictions in Uganda in both civil and criminal matters and the law applicable in the adjudication of matters before them.<sup>91</sup>

The Act further provides that, judges of the High Court subject to the Constitution and subject to vacations shall so far as reasonably possible sit continuously for the trial of civil and criminal causes. The High Court can exercise its inherent powers to prevent

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<sup>89</sup> Article 44(c).

<sup>90</sup> HC Crim.MA No.96 of 2005 at p. 6

<sup>91</sup> The Judicature Act, Cap. 13, sections 2-17.

abuse of Court process to limit and stay delayed prosecutions and not forgetting curtailing of delays.<sup>92</sup>

The Act also provides for establishment of High Court Circuits for holding sessions in various areas of Uganda to try both civil and criminal causes.<sup>93</sup> That in the distribution of business before the High Court and other duties to the judges by the Principal Judge, consideration shall be made to the right to a fair hearing.<sup>94</sup>

The foregoing provisions of the Judicature Act, indicates that efforts are made in the legislation to promote the right of fair hearing especially in conducting continuous sessions and establishing more High Court Circuits meant to bring the court closer to the communities and further reduce on backlog of criminal cases with intention to have speedy and public trials.

However, the same Act provides for court sessions subject to vacations. Judicial officers, are entitled to annual leave like the rest of public servants, but also take court vacations. It has also been reported by the judiciary authorities that the session system has also increased backlog of cases instead of reducing them. It has been abused by self-seeking judicial officers.<sup>95</sup>

The procedure of session thereby prolongs the process of adjudicating criminal matters and negatively affects the observation of the right to a fair hearing, especially the right to a speedy trial and determination of cases.<sup>96</sup>

It can be observed that the practice and efforts adopted by the judiciary to achieve the and observation of the right to fair hearing have instead increased the abuse by increasing the backlog of criminal cases and making innocent persons serve indirect

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<sup>92</sup> Section 18.

<sup>93</sup> Section 19.

<sup>94</sup> Section 20.

<sup>95</sup> The Judiciary: *A report of the case backlog reduction committee*, (29<sup>th</sup> March, 2017) 31

<sup>96</sup> Asiimwe (n 25).

imprisonment sentences through long periods of remand pending trial as they await trial in the criminal sessions.<sup>97</sup>

### **2.3.3 The Magistrates Courts Act, Cap 16**

The Magistrates Courts Act covers the majority part of criminal trials in Uganda. The Act provides for the establishment of the Magistrates Courts,<sup>98</sup> their criminal jurisdiction and sentencing powers.<sup>99</sup> The Act goes further to provide for the Courts' jurisdiction in handling preliminary procedures for matters out of jurisdiction including the committal proceedings.<sup>100</sup>

The Act further provides for the procedure of bringing an accused before the Courts of law for criminal trials to commence criminal proceedings. These provisions of the Act set in motion criminal trials and the stage when to determine the observation of the right to fair hearing.<sup>101</sup> Unlike proceedings before the High Court which involve capital offences and the accused persons without capacity to pay for legal representation are given legal assistance at the state's cost, it is not mandatory for accused persons to have legal representation.<sup>102</sup>

This position is a clear manifestation of discrimination and inequality in the Uganda's criminal trials across the board especially to the indigent undergoing trials in the lower courts.<sup>103</sup> On one hand the state is represented by trained attorneys who understand the techniques of criminal trials against indigent and unknowledgeable accused persons in both substantive and procedural law of the land.<sup>104</sup> It is also a constitutional mandate for the state to provide legal representation to indigent accused persons undergoing

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<sup>97</sup> *ibid.*

<sup>98</sup> The Magistrates Courts Act, Cap. 16, Part II.

<sup>99</sup> Sections 161, 162, 163, 164 and 165

<sup>100</sup> Sections 166, 167, 168 and 169.

<sup>101</sup> Sections 42 and 43.

<sup>102</sup> Section 158; See also the Constitution of the Republic of Uganda, 1995, article 28(3)(e).

<sup>103</sup> Article 28(3)(d); see the Magistrates Courts Act, Cap. 16 section 158; see also *Kazibwe John V Uganda HC Crim. Case No. 10 of 2014* (unreported); see also the *Uganda Criminal Justice Bench Book* ( 1<sup>st</sup> Edn. The Law Development Centre, 2017)85-90.

<sup>104</sup> The Constitution of the Republic of Uganda, 1995, article 120(4)(a); see the Magistrates Court Act, Cap. 16 sections 42(1)(b).

trial for capital offences,<sup>105</sup> but not to those with minor offences tried by Magistrates Courts who are pitted against trained lawyers on the prosecution side.<sup>106</sup> The legal frame work of such construction orchestrates legalized discrimination and inequality before the law, and greatly affects the observation of the right to a fair hearing during criminal trials in Uganda.

The Act further provides for Courts power to grant bail pending trial, and bail pending appeal.<sup>107</sup> But like the provisions of the Constitution under scrutiny in this study, the discretion is left to the trial Magistrate in consideration of certain conditions mentioned in the Act, which defeats the presumption of innocence elucidated in the Constitution of Uganda.<sup>108</sup>

The Act also provides for the award of compensation for troubles and expenses incurred by the accused as result of proceedings arising from private prosecutions, upon dismissal of any private prosecutions where in Court's opinion the charges were frivolous and vexatious.<sup>109</sup> These are in addition to costs awarded.<sup>110</sup> Further to this is that the Court may award compensation to any person who may have suffered material loss or injury in consequence of the offence and in opinion of court are recoverable in a civil suit, whether he or she may be the prosecutor or witness.<sup>111</sup>

However, the same provisions especially, compensation to an accused person for frivolous and vexatious charges upon dismissal only applies to private prosecutions. This is a discriminatory provision as the government represented by the DPP or the complainants on whose behalf the DPP prosecutes cases are not subject to this provision. Further to the above, the award of costs being limited to a sum not

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<sup>105</sup> The Constitution of the Republic of Uganda, 1995, article 28(3)(e).

<sup>106</sup> Article 28(3)(d); see the Magistrates Courts Act, Cap. 16 section 158; see also Kazibwe John V Uganda HC Crim. Case No. 10 of 2014 (unreported); the Uganda Criminal Justice Bench Book (1<sup>st</sup> Edn. The Law Development Centre, 2017)85-90.

<sup>107</sup> The Magistrates Courts Act, Cap. 16, sections 75-80, and 205.

<sup>108</sup> The Constitution of the Republic of Uganda, 1995, article 28(3)(a).

<sup>109</sup> The Magistrates Court Act, Cap. 16, section 196.

<sup>110</sup> Section 195.

<sup>111</sup> Section 197(1) and (2).

exceeding the sum of two hundred thousand shillings only doesn't represent adequacy in compensation for losses incurred in criminal trials especially by accused persons.<sup>112</sup>

From the foregoing, the Magistrates Court Act<sup>113</sup> is amongst the core legislations to be analyzed in this study, since its provisions affect the right to fair hearing in criminal trials of the majority Ugandans.

#### **2.3.4 The Penal Code Act, Cap. 120 as amended**

The Penal Code Act is the principal Act that provides for the Uganda's criminal code to actualize the provisions of the Uganda's Constitution of providing for offences and sanctions before any person could be subjected to the criminal trial process.<sup>114</sup>

The Act provides for the application of other penal provisions of other laws other than itself. This empowers the Police, the DPP, IGG and courts of judicature, to prosecute and adjudicate cases whose offences and penalties are provided in other Acts of Parliament other than the Penal Code Act.<sup>115</sup>

The Act further provides for the territorial jurisdiction of Ugandan Courts while handling criminal trials. The jurisdiction of Ugandan Courts extends to every place in Uganda except that for offences of treason and offences against the state, the jurisdiction extends beyond the territory of Uganda.<sup>116</sup>

The Act also provides for the protection of accused persons from double jeopardy and immunity to judicial officers. That an individual making decisions in judicial capacity shall not be criminally liable for such actions except as expressly provided for in the Act. A person cannot be punished twice for the same offence whether in this Act or any other law.<sup>117</sup> These provisions are in fulfillment of the constitutional provisions to ensure

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<sup>112</sup> Section 195(2); see also the Constitution of the Republic of Uganda, 1995, article 126(2)(c).

<sup>113</sup> Cap. 16, laws of Uganda.

<sup>114</sup> The long title of the Penal Code Act, Cap. 120; see also the Constitution of the Republic of Uganda 1995, article 28 (7), (8) and (12).

<sup>115</sup> Section 3(a-f); see The Constitution of the Republic of Uganda 1995, article 28(12).

<sup>116</sup> The Penal Code Act, Cap.120, sections 4 and 5.

<sup>117</sup> Sections 3, 13 and 18.

that judicial officers enjoy their independence while adjudicating cases and persons are also protected from being punished by the state for offences they could have already served under the pretext of different laws.<sup>118</sup>

The Penal Code Act therefore cements the provisions of the Constitution in actualizing the right to fair hearing in criminal trials in Uganda, especially the principle of legality that forms the backbone of criminal law and procedure, jurisdiction to try offences by Ugandan Courts of judicature to mention a few.

### **2.3.5 The Criminal Procedure Code Act, Cap.116**

The Criminal Procedure Code Act provides for the various powers of arrests with or without warrant by Police Officers and Magistrates within their area of jurisdiction. The Act further provides for powers of Police Officers to search, access or gaining entry to various places.<sup>119</sup>

The gist of this Act in relation to the right to fair hearing in criminal trials, are the provisions on criminal appeals and revision powers of the High Court.<sup>120</sup> The Act provides for the accused right to appeal on the issues of fact or law or mixed fact and law on first appeals and on matter of law in second criminal appeals.<sup>121</sup> The Act further provides for the powers of the appellant Courts and procedure for commencing criminal appeals in Uganda.<sup>122</sup>

In case an accused person is dissatisfied with a decision of a magistrate Court on grounds of correctness, legality or propriety of finding or order, he or she has a right to seek revision of the same in the High Court.<sup>123</sup> The Act further provides for bail pending

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<sup>118</sup> The Constitution of the Republic of Uganda 1995, articles 128(4) and 28(9) and (10).

<sup>119</sup> The Criminal Procedure Code Act, sections 6-23.

<sup>120</sup> Sections 28, 45 and 46.

<sup>121</sup> Sections 28(4) and 45(1)

<sup>122</sup> Section 28, 31-38.

<sup>123</sup> Sections 48-53.

appeal and revision.<sup>124</sup> All these are aimed at preserving the right to presumption of innocence until one is proven guilty through the criminal trial process.

However, with all the good intentions for the legislations, the delays in transferring files for revision, delays in disposing of appeals and stance of some judicial officers towards grant of bail pending appeal in regard to presumption of innocence have watered down the much revered enjoyment of the right to fair hearing in criminal trials in Uganda.<sup>125</sup>

### **2.3.6 The Trial on Indictment Act, Cap.23**

According to its preamble, the Trial on Indictment Act<sup>126</sup> is an Act to consolidate the law relating to the trial of criminal cases on indictment before the High Court and for matters connected therewith and incidental thereto. Generally speaking, it defines the trial procedure in High court. On its face, the Trial on Indictment Act generally uses objective and mostly neutral language although it has some subjective and in some cases gender specific provisions.

The Act provides that the High Court shall have jurisdiction to try any offence under any written law and may pass any sentence authorized by law.<sup>127</sup>

The Trial on Indictment Act<sup>128</sup> provides that the High Court may at any stage of the proceedings release an accused person on bail; that is to say, on taking from him or her a recognizance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date and at such a time as is named in the bond.

The High court has powers after releasing an accused person on bail to increase the amount of the bail. This the court will do so by issuing *a warrant of arrest* against the person released on bail directing that he be brought before the court to execute a new

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<sup>124</sup> Sections 40(2), 47 and 50(6).

<sup>125</sup> The Judiciary; The Case backlog reduction Committee Report (2017)33; see also Kasule JA in *Mugisha Gregory V Uganda*, Court of Appeal Miscellaneous Criminal Application No. 05 of 2011(unreported) at page 6.

<sup>126</sup> Chapter 23, Laws of Uganda, 2000.

<sup>127</sup> Sections 1 and 2.

<sup>128</sup> Section 14(1).

bond for an increased amount; and the High court will have powers to commit the person to prison if he or she fails to execute the new bond for an increased amount.<sup>129</sup>

More specifically, Court may refuse to grant bail where a person accused of an offence specified in sub-section (2) does not prove to the satisfaction of the Court – a) that exceptional circumstances exist justifying his or her release on bail; and b) that he or she will not abscond when released on bail. Exceptional circumstances mean (a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody. It should be noted from the above that Court determines what amounts to grave illness.<sup>130</sup>

The consideration for exceptional circumstances of grave illness by Courts has been demonstrated in different cases where court rejected the applicant's argument due failure to produce authentic medical reports by recognized professionals and held that mere production of receipts of treatment was not sufficient proof of grave illness.<sup>131</sup>

The net effect of the provisions highlighted above, is to frustrate further the enjoyment of the right to fair hearing in criminal trials rather than observing it in Uganda.

### **2.3.7 The Police Act, Cap 303 (*as amended*)**

The Police Act<sup>132</sup> is the principal legislation governing the police. It is the law that sets out the rules in details for functioning of the police. In that regard, the entire Police Act is important for the police. It also provides the composition of the Police Force to include regular Uganda police force, Uganda Police Reserve; special constables, local administration police and any other person appointed as a member of the force.

The functions of the force are designated as follows: To protect the life, property and other rights of the individual; to maintain security within Uganda; to ensure public

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<sup>129</sup> Section 14(2).

<sup>130</sup> Section 15(1) and (3).

<sup>131</sup> *Kaye v Attorney General*, Constitutional Petition No.5 of 2012

<sup>132</sup> Cap 303, Laws of Uganda.



safety and order; to prevent and detect crime in the society; to perform services of a military force as provided; and to cooperate with civilian authorities and other security organs.<sup>133</sup>

What one can deduce from the above is that the Police Force is charged with very important functions and if not well performed, results into grave implications for the country and its citizens. It should be noted that the protection of rights, maintaining security, prevention and detection of crime requires a high level of discipline and professionalism. It is for this reasons that policemen and women are expected to be disciplined and to carry out their duties in a professional manner.

The police also have a duty to maintain law and order; the police can be required by a court of law to carry out this duty in case there is a default. The police is expected to execute these duties objectively without any interference or direction by any person or authority. In *R v Commissioner of Police ex parte Blackburn*,<sup>134</sup> the Court held that the duty of the police was to enforce the law of the land and must take steps to detect crime so that honest citizens may go about their duties in peace. The Court held further that the police may exercise a discretion in discharging its functions by, for instance, deciding whether or to conduct inquiries or to prosecute a crime. In spite of this, there are circumstances where the court may interfere and countermand this discretion.

### **2.3.8 The Uganda People's Defence Forces Act, 2005**

In accordance with its mandate to regulate the Uganda Peoples' Defence Forces, Parliament of Uganda enacted the Uganda Peoples Defence Forces Act, 2005 (UPDF Act).<sup>135</sup>

The Act provides for the appointment of members of the military Court, their hierarchy and jurisdiction in Uganda. The military Courts include; Unit Disciplinary Committee,

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<sup>133</sup> The Constitution of the Republic of Uganda, article 212.

<sup>134</sup> (1968) QB 118.

<sup>135</sup> The Constitution of the republic of Uganda, 1995, article 210.

Division Court Martial, the Field Court Martial, General Court Martial (GCM) and the Court Martial Appeal Court.<sup>136</sup>

The Act further prescribes what offences fall under its mandate that is to say service offence. These are offences under the UPDF Act or any other Act for the time being in force, committed by a person while subject to military law.<sup>137</sup> This therefore means that with some exceptions, where the law specifically limits the criminal jurisdiction regarding a particular offence to a particular Court, the GCM has jurisdiction to try any person subject to military law for any criminal offence under any law in Uganda under its unlimited jurisdiction.

The Act also provides for the persons who are subject to military law. These include not only officers and militants of the regular force, but also any person who voluntarily through the prescribed acts and omissions brings him or herself within the confines of military law.<sup>138</sup> This therefore means that in the prescribed circumstances, the GCM has the jurisdiction to try civilians. Besides any person dissatisfied with the decision of the GCM may appeal to the Court Martial Appeal Court. This court hears and determines appeals from persons who have been tried and convicted by a General Court Martial<sup>139</sup>.

The Act provides with exceptions, for the right to public hearings before the court and guarantees the appearance in Court of witnesses and advocates of the accused.<sup>140</sup> The Act expressly provides that the rules of evidence and procedure to be observed in the proceedings before the court martial shall as far as practical be the same as those applicable before civil courts. The Act also provides for the right to bail.<sup>141</sup> It further provides in *pari materia* with the Constitution for the right against double jeopardy<sup>142</sup>

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<sup>136</sup> Sections 2, 119, 194, 195, 197(1) and (2), 199, 200(1) and (2), 201.

<sup>137</sup> Section 2.

<sup>138</sup> Section 119; See also section 2 defining a militant as any person other than an officer who is enrolled on or who is attached or seconded otherwise than as an officer of the Defence Forces.

<sup>139</sup> Section 199.

<sup>140</sup> Section 214.

<sup>141</sup> Sections, 183, 209 and 219.

<sup>142</sup> Section 216 and Article 28(9) respectively.

The foregoing highlights provisions and many others in the UPDF Act which are laudable provisions for the protection of the right to a fair hearing. These provisions were included to ensure that accused persons get a fair and just trial. They were intended to minimize bias, ensure that there is no interference in the decision-making process and to guarantee a conducive atmosphere for the accused persons to prepare their defence, among other things. However, considering the appointment process of the military Courts, the conduct of the GCM affairs in the recent times, the observation of the right to fair hearing of accused persons under going trial before the military Courts has been more of a fallacy than reality.<sup>143</sup>

### **2.3.9 The Children Act, Cap 59 as amended**

The Act is basically concerned with how child offenders are treated by Courts of law in Uganda while considering both national and international instruments that provide for their rights while undergoing trial.

More specifically, part X of the Act as amended provides for the determination of criminal responsibility,<sup>144</sup> bail,<sup>145</sup> remand,<sup>146</sup> criminal jurisdiction of the family and children court,<sup>147</sup> the jurisdiction of the Magistrates Courts and High Court and its powers,<sup>148</sup> the powers and roles of the Minister.<sup>149</sup>

Section 99 of the Act is so interesting in relation to child offenders, to the fact that it provides for cases involving children to be determined in three months or twelve months where the matter is found to be serious. Short of that such matters should be

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<sup>143</sup> Abubaker Lubowa, *Kitatta denied bail again*, *The daily monitor*, (Kampala, 6 November 2018), retrieved from <https://www.monitor.co.ug> on 17/11/2018.

<sup>144</sup> Section 88 and 108

<sup>145</sup> Section 90.

<sup>146</sup> Section 91.

<sup>147</sup> Section 93 and 94.

<sup>148</sup> Sections 103 and 104 as amended.

<sup>149</sup> Sections 110 and 104 as amended.

dismissed and the child discharged from criminal liability and child is never to be charged on the same facts or the same offence.<sup>150</sup>

The Act further provides for privacy of children during criminal trials,<sup>151</sup> prohibits use of conventional criminal descriptions like convict<sup>152</sup> and abolishes corporal punishment in schools among others.<sup>153</sup>

In a nutshell, the Children Act as amended goes a step ahead to protect the child offenders' right to fair hearing as envisaged in article 28<sup>154</sup> save for the short comings common to the Uganda's criminal trial system that is dodged by backlog and non-consideration of provisions of law in decision making.<sup>155</sup>

### **2.3.10 The Habitual Criminals (Preventive Detention) Act, 118**

In principle this is one of the archaic and ridiculous laws in the Uganda's criminal justice system. The Act specifically provides for the powers of Court to in addition to sentences provided under the law to impose more detention time on a person sentenced to imprisonment of two years, being above thirty years and having been previously convicted before on three occasions since the attainment of sixteen years.<sup>156</sup>

The Act further gives the president of Uganda to commute a convict's imprisonment sentence to preventive detention, set up separate camps for persons under preventive detention, and to review the sentences, make rules to enforce the Act among others.<sup>157</sup>

These provisions do not provide the criteria and the convicts rights in a way that such sentences are not part of the sentences envisaged under article 28 (7), (8) and (12).<sup>158</sup>

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<sup>150</sup> Section 99(1), (2) and (4).

<sup>151</sup> Section 102.

<sup>152</sup> Section 101.

<sup>153</sup> Section 106(A).

<sup>154</sup> The Constitution of the Republic of Uganda, 1995.

<sup>155</sup> Juvenile justice, *Facilities still lacking*, *The Daily Monitor* (Kampala, 2 July 2014) retrieved from <http://www.monitor.co.ug>, on 24/10/2018.

<sup>156</sup> Sections 1(1) and 3

<sup>157</sup> Sections 2, 4, 5 6 and 7

<sup>158</sup> The Constitution of the Republic of Uganda, 1995.

Instead the Act focuses on enhancing the convicts sentence for matters alien to a charge he or she has been convicted of and moreover because the previous sentences were imprisonment sentences.<sup>159</sup>

The object of the Act is discriminative and unfair to persons convicted and sentenced to imprisonment sentences since the Act doesn't apply to other sentences under the law to be treated in the same way. The provisions of this Act are contrary to the spirit of article 28(8).<sup>160</sup>

## **2.4 THE INTERNATIONAL LEGAL FRAMEWORK**

Uganda is a party to numerous international and regional instruments that promote access to justice and in particular criminal justice system. These instruments are not only guidelines for States, but create obligations that require governments to reform their policies and practices to realize their provisions. These include the Universal Declaration of Human Rights;<sup>161</sup> the International Covenant on Civil and Political Rights;<sup>162</sup> Convention against Torture;<sup>163</sup> The African Charter on Human and Peoples Rights<sup>164</sup> among others. These international instruments proclaim that those who face criminal prosecution ought to be afforded a 'presumption of innocence', and the importance and central role of this presumption is recognized by legal systems throughout the world. There is, however, little agreement about the meaning and extent of application of the right to fair hearing in different jurisdiction including Uganda.

The right to a fair hearing 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. It is guaranteed under the International Covenant on Civil and Political

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<sup>159</sup> *ibid* (n 167) section 1(1).

<sup>160</sup> The Constitution of the Republic of Uganda, 1995.

<sup>161</sup> 1948.

<sup>162</sup> 1966.

<sup>163</sup> 1985.

<sup>164</sup> 1981.

Rights (ICCPR),<sup>165</sup> which provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated but, most recently, by a proposal to include it in the non-derogable rights provided for in the ICCPR.<sup>166</sup> The right to a fair hearing is applicable to both the determination of an individual's rights and duties in a suit at law and with respect to the determination of any criminal charge against him or her. The term “suit at law” refers to various types of court proceedings—including administrative proceedings, for example—because the concept of a suit at law has been interpreted as hinging on the nature of the right involved rather than the status of one of the parties.<sup>167</sup> The standards against which a trial is to be assessed in terms of fairness are numerous, complex, and constantly evolving. They may constitute binding obligations that are included in human rights treaties to which the state is a party. But, they may also be found in documents which, though not formally binding, can be taken to express the direction in which the law is evolving.<sup>168</sup>

Unless it falls within the specified legal exceptions, interference with the liberty of an individual is unconstitutional. The law guards against such interferences and in order for it to carry out its role of a guardian more effectively, the law are aided by criminal procedures. Among these procedures is bail, whose object is to shield the individual from pre-trial incarceration. Thus a person who is arrested for violating any of the state-laws should except in very few cases be entitled to pre-trial release.

## **2.5 Conclusion**

It is evident from the discussion above that the national and international legal framework adequately caters for the right to a fair hearing. Court decisions have buttressed the meaning of the right through interpretations offered with the view of

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<sup>165</sup> Article 14.

<sup>166</sup> Article 4(2).

<sup>167</sup> *ibid.*

<sup>168</sup> A Handbook on International Criminal Justice Handbook, 2005.

shedding light on the unclear provisions. However, most of these provisions have remained a dead letter on the statute books and at times the interpretations falling short of and observation by Courts and other criminal justice stakeholders as shall be discussed in the proceeding chapters.<sup>169</sup>

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<sup>169</sup> Foundation for Human Rights Initiative v Attorney General (2008) ULR 460 at 475.

## **CHAPTER THREE**

### **THE CONCEPT OF RIGHT TO FAIR HEARING DURING CRIMINAL TRIAL IN UGANDA**

#### **3.0 Introduction**

The right to fair hearing is the bedrock of the criminal trial process in Uganda. Article 28<sup>170</sup> contains numerous protections to the accused person so that the ends of justice are realized the criminal trial process. In this regard, this chapter lays down the concept of right to fair hearing and its elements in the context of a criminal trial process in Uganda.

#### **3.1 The Concept of fair hearing in criminal trials.**

Fair hearing in criminal trials is a procedural concept or requirement that derives its basis in article 2, 28 and 44(a)<sup>171</sup> and several other international and regional instruments whose objects and mandate are to limit or delegitimize arbitrary actions by state organs or such other persons or bodies charged with determining the rights of individuals.<sup>172</sup> Further that it is a model of criminal justice that emphasizes individual rights and constitutional safeguards against arbitrary or unfair judicial or administrative proceedings. The concept encompasses prohibition of illegal arrest and detention, search and seizure, self-incrimination; double jeopardy; excessive bail conditions and unduly long pre-trial detention, cruel and unusual punishment among others.<sup>173</sup> The concept does not only embrace the rights of the accused but the society as one entity and therefore Courts in observation of the right to fair hearing, should bear in mind their duty to the public.<sup>174</sup>

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<sup>170</sup> The Constitution of the Republic of Uganda, 1995

<sup>171</sup> *ibid.*

<sup>172</sup> The International Convention on Civil and Political Rights, 1966; The African Charter on Human and Peoples Rights, 1981.

<sup>173</sup> Etannibi (n 18)16; Musa Ssekaana, Criminal Procedure and Practice in Uganda (lawAfrica) 41-2.

<sup>174</sup> Musa Ssekaana, Criminal Procedure and Practice in Uganda (lawAfrica) 42.



### **3.2.The elements of right to fair hearing in criminal trials**

Article 28,<sup>175</sup> was an attempt by Uganda government through the Constituent assembly to specify the rights of an accused person undergoing a criminal trial in Uganda. The rights highlighted in the article do not operate in isolation but are interdependent with other provisions relating to human rights as provided under the Constitution and the Constitution in general. Some of the provisions are much considered and observed in Courts of first instance but not given much attention on appeal. At the centre of observation of the right to fair hearing are court of judicature and therefore judicial officers are expected to control their behavior to ensure just and fair trials.<sup>176</sup> Below are the concept elements of the right to fair hearing in criminal trials in Uganda.

#### **1. Fair and speedy trial**

Article 28(1) and (2)<sup>177</sup> provide that in determination of civil rights and obligations or criminal charges, a person shall be entitled to a fair, speedy and public trial except a court or tribunal may exclude public or the press from all or any proceedings before it on grounds of morality, public order or national security as may be necessary in a free and democratic society.

The concept of fair hearing requires the court to ensure that every hearing or trial is reasonable, free from suspicion of bias, free from clouds of prejudice, every step is not obscure, and in whatever is done it is imperative to weigh the interest of both parties alike for both, and make an estimate of what is reciprocally just. The processing and hearing or trial of a case must be free from prejudice, favoritism and self-interest; and the court must be detached, unbiased, even-handed, just, disinterested, balanced, upright and square. There must be shown all the quantities of impartiality and honesty. Fair hearing is one which has the following minimum elements present.<sup>178</sup> It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence

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<sup>175</sup> The Constitution of the Republic of Uganda, 1995.

<sup>176</sup> *ibid* (n 174)65.

<sup>177</sup> *ibid* (n 170).

<sup>178</sup> Benjamin Odoki, A Guide to Criminal Procedure in Uganda (3<sup>rd</sup> edn, Law Development Centre 2006) 100

and arguments, conducted impartially in accordance with the fundamental principles of justice and due process of law of which a party has had reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be apprised of the evidence against him in the matter so that he will be fully aware of the basis of the adverse view of him for the judgment, a right to argue that a decision be made in accordance with the law and evidence.<sup>179</sup>

The requirement not to delay justice (ensuring a speedy trial) needs to be balanced against the other core elements involved in the dispensation of justice. For instance, in the Kotido Field Court Martial executions, court rejected the state's argument that the trial and execution of the accused soldiers within less than 3 hours of conclusion of the tribunal's hearings was geared at achieving a speedy trial as required by Article 28 of the Constitution, stating that the trial was too speedy to enable thorough investigations to be carried out on the matter, resulting in a miscarriage of justice.<sup>180</sup>

At the other end of the spectrum, trials in many courts of law in Uganda still take an inordinately long period of time, on account of several factors.<sup>181</sup> The most recent delays in the Supreme and Constitutional courts are due to retirements and delayed replacements of Justices, leading to a backlog of cases and unjustified delay in the delivery of justice.

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

The provision of article 28(1) in relation to public trial connotes that all trials must be heard in open court allowing everyone to witness the hearing, although court reserves

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<sup>179</sup> Uganda Law Society V Attorney General, Constitutional Petitions No. 02 and 08 of 2002

<sup>180</sup> Ibid

<sup>181</sup> For a discussion of the phenomenon at the Uganda Human Rights Commission, see Isaac Bakayana, 'From Protection to Violation: Analyzing the Right to a Speedy Trial at the Uganda Human Rights Commission, HURIPEC Working Paper No.2 (November 2006).

the right to have the proceedings *in camera* where the matter touches on sensitive matters of national security or issues of morals whose disclosure is not in the public interest and may compromise national security or that of the litigants.<sup>182</sup>

Court trials are meant to be public simply because courts have to be open to the people while doing their work since they carry out their duties and exercise of judicial power derived from the people and in the name of the people. Therefore they owe the people accountability of how they exercise the judicial power in both criminal and civil matters.<sup>183</sup>

Public hearing therefore means the ability to have access and follow trial process whether in chambers, court rooms or in any other place where a criminal trial may be taking place from, except in circumstances where national security may be jeopardized or matters involving minors or public morality is at stake, or where interests of justice are at stake. In such circumstances Courts have discretion to bar public hearings and limit the public participation.<sup>184</sup>

### **3. Independent and impartial court or tribunal**

Article 28(1)<sup>185</sup> provides that besides the individual right to a fair and speedy trial, it also provides that such trial shall be heard publicly by an impartial court or tribunal established by law. The requirement that the proceedings must be before an impartial court/tribunal are indispensable to the realization of a fair trial. This was manifested in the case of *Prof. Isaac Newton Ojok v. Uganda*.<sup>186</sup> Justice Kanyeihamba was also asked to step down from the Tinyefuza case, but refused to do so.<sup>187</sup> These incidences of requesting for recusal or challenging partiality of judicial officers are an indication that where there is the slightest likelihood of bias, such a trial is wholly said to be impartial.

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<sup>182</sup> The Constitution of the Republic of Uganda, 1995.

<sup>183</sup> The Constitution of the Republic of Uganda, 1995, article 126(1).

<sup>184</sup> *ibid* article 28(2); Benjamin J. Odoki, *A guide to Criminal Procedure in Uganda*, (3rd edn, The Law Development Centre) 105.

<sup>185</sup> *ibid* (n 176).

<sup>186</sup> Criminal Appeal No. 333 of 1991

<sup>187</sup> Attorney General V Major General David Tinyefuza, Constitutional Appeal No. 1 of 1997

Needless to say, the Judiciary can find itself the target of intimidation and coercion in the performance of the functions it has been designated under the 1995 Constitution. When the Constitutional Court declared the Referendum Act null and void, the government came out to condemn the judges and organized riotous protests outside the High Court precinct.<sup>188</sup>

The Judiciary also faces executive-led impunity, particularly when its judgments are willfully disobeyed or ignored. Thus, in the case of *Uganda Law Society v. Attorney General*,<sup>189</sup> and in *Attorney General v. Uganda Law Society*,<sup>190</sup> both the Constitutional Court and the Supreme Court held that military courts do not have jurisdiction over civilians. Despite this ruling, the various security agencies of the State continue to subject civilians to military trials with impunity.<sup>191</sup> The peak of executive disdain of the courts came with the infamous attack of the 'Black Mamba' on the High Court in what Justice James Ogoola poignantly described as the 'rape of the temple of justice.'<sup>192</sup>

Through judicial activism, the judiciary has sought to exercise its power in a manner that gives primacy of place to the protection and enforcement of human rights.<sup>193</sup> It has largely carried out this task with dignity and devotion.<sup>194</sup> Although in the early years of the 1995 Constitution the judiciary appeared excessively timid.<sup>195</sup> The judiciary with time has grown out of this reluctance and has become a steady and forceful bastion

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<sup>188</sup> George W. Kanyeihamba, Kanyeihamba's Commentaries on Law, Politics and Governance (2nd impn, lawAfrica 2010) 46; See also An International Bar Association Human Rights Institute Report titled; *Judicial independence undermined: A report on Uganda*, September, 2007, p. 22.

<sup>189</sup> Constitutional Petition No. 18 of 2005: January 31, 2006.

<sup>190</sup> Constitutional Appeal No.1 of 2006; January 20, 2009.

<sup>191</sup> See Human Rights Watch, *op.cit.*, at 12

<sup>192</sup> George W. Kanyeihamba, Kanyeihamba's Commentaries on Law, Politics and Governance (2nd impn, lawAfrica 2010) 49

<sup>193</sup> *ibid* p. 45-7; See also George W. Kanyeihamba, *The Rule of Law and Independence of the Judiciary*, A presentation to Law Course, 16th April-9th May, 2007, at the Law Development Centre, Kampala, 2007.

<sup>194</sup> *ibid*

<sup>195</sup> Ismael Serugo V Kampala Capital City and Attorney General, Constitutional Appeal, No.2 of 1998 (unreported).

against executive excess and human rights abuse. Unconstitutional legislation and criminal trials have been struck down or out.<sup>196</sup>

However, the Judiciary also suffers from internal problems that need to be addressed in order to ensure that it is fully equipped to address the contemporary needs of the Ugandan populace. These problems include; corruption,<sup>197</sup> competence and capacity, both of which relate to whether the members of the Bench are able to robustly defend the rights of the most dispossessed,<sup>198</sup> and, the manner of recruitment of judicial officers.<sup>199</sup> A leaf should perhaps be borrowed from the recent process of recruitment of new judges in Kenya, where all positions on the Bench are advertised (including that of the Chief Justice), public interviews are held, and questions are posed about the judicial philosophies and the past professional and personal records of the applicants are scrutinized.<sup>200</sup>

#### **4. Presumption of innocence**

Article 28(3)(a)<sup>201</sup> provides that individuals charged with any criminal offence is presumed innocent until he or she is found guilty or pleads to the guiltiness of the charges.

The only exception to this provision is related where the law imposes a duty to an accused person to prove particular facts known as evidential burden.<sup>202</sup> Scholars have termed the effect of this clause as the reverse onus clause. A reverse onus clause is a

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<sup>196</sup> *Salvatori Abuki V Attorney General, Constitutional Appeal No. 1 of 1998*; see also Hon. Justice Ogoola PJ emeritus granting Dr. Kizza Besigye Interim bail pending determination of Uganda (DPP) Vs Dr. Kizza Besigye and 22 Others, Constitutional reference No. of 2006, Dr. Kizza Besigye V Attorney General, Constitutional Petition No. 07 of 2007, court discontinued all criminal trial against Dr. Kizza Besigye.

<sup>197</sup> The Judiciary, *Case Backlog Reduction Committee – Report*, (29th March, 2015) 45; See also George W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance* (2nd impn, lawAfrica 2010) 51-2

<sup>198</sup> *ibid*

<sup>199</sup> Justice Choudry's petition to the High Court challenging the proceedings initiated for his removal failed to make headway. See *Anup Singh Choudry v. Attorney General* [2012] UGHC 37 and Hon. Gerald Kafureka Karuhanga V Attorney General Constitutional Petition No. 039 of 2013 challenging the re-appointment of retired CJ Odoki on temporary contract as chief Justice of Uganda.

<sup>200</sup> Nompumelelo Sibulukhulu, *The Judicial appointment process in Kenya and its implications for judicial independence*, MPhil(Multidisciplinary Human Rights) Faculty of Law, University of Pretoria (July 2012) 45 and 49.

<sup>201</sup> The Constitution of the Republic of Uganda, 1995

<sup>202</sup> *Ibid*, article 28(4)(a).

provision that requires an accused person presumed innocent to have burden to prove certain facts. This provision may reduce the burden of the prosecution to prove its case beyond reasonable doubt. However, a reading of the exception provision to presumption of innocent and the understanding of the reverse onus clause are limited to such particular facts under the applicable law. The prosecution may further be required to justify the application of such reverse onus clauses.<sup>203</sup> Besides the legal burden of proving the charges by the prosecution beyond reasonable doubt remain unchanged in criminal trials. The application of the exception should further be read with article 43 and 44(c) which provide for the general limitations on enjoyment of human rights and right to fair hearing being non-derogable where the presumption of innocence is inclusive.<sup>204</sup>

Presumption of innocence has been a nightmare of judicial officers in their efforts to balance the protection of individual rights and interests of the general public (maintenance or keeping law and order) by preventing suspects from continuous commission of crimes before pleading or being found guilty of the charges.<sup>205</sup> Judicial officers are therefore called upon to further consider the effect of the reverse onus clauses and their effect on the presumption of innocence. Courts may have to differentiate between rebuttable and non-rebuttable presumptions before allowing the application of the reverse onus clauses (exceptions to the presumption of innocence clause) and the limitations to enjoyment of human rights.<sup>206</sup>

Presumption of innocence is amongst the minimum standards of criminal trials under the common law system<sup>207</sup> to wit; *it is better that, 99 guilty men should go free than that one innocent man should be punished*. Different individuals including political

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<sup>203</sup> Kakungulu Mayambala, Guilty before trial: Presumption of innocence and the public parading of criminal suspects in Uganda, (Huripec Working Paper No. 32, December, 2011) 33-8.

<sup>204</sup> The Constitution of the Republic of Uganda, 1995;

<sup>205</sup> George W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance* (2nd impn, lawAfrica 2010) 52.

<sup>206</sup> *ibid* (n 195)

<sup>207</sup> *Woolmington V DPP* (1935) AC 462 at 481.

leaders like Mwalimu Julius Kambarage Nyerere (RIP) have had their sentiments and disapproval of this legal principle.<sup>208</sup> Ugandan Courts have at several occasions pronounced themselves on the centrality of this right in criminal trials in Uganda.<sup>209</sup>

## **5. Information to the nature of the offence;**

Article 28(3)(b)<sup>210</sup> is to the effect that, a person charged with a criminal offence shall be informed immediately, in a language that the person understands, of the nature of the offence he or she is charged with.

An accused person cannot defend himself without knowing what he or she is charged of in the first place. For a fair trial to be realized by any court or tribunal, it is imperative that the accused person undergoing criminal trial is informed at earliest what the charge is and the likely consequences if found guilty of the same. Such information and enabling the accused to know the charge would help him or her to inform Court of previous trial and conviction or take a plea of previous acquittal or conviction in the circumstances if he or she was tried for a similar offence before and save Court's time.<sup>211</sup>

Courts have gone further to hold that a trial in violation of this right renders such trial a nullity as it violates the accused person's right to a fair trial.<sup>212</sup>

## **6. Time and facilities to prepare defence**

Article 28(3)(c) which guarantees the accused adequate time and facilities for the preparation of his/ her defense.<sup>213</sup> The clause requires in essence that for a hearing to be fair a person charged with a criminal offence must be afforded among other things "facilities for the preparation of his defence" and "facilities to examine the witnesses called by the prosecution and to obtain the attendance and carry out the examination of witnesses to testify on his behalf". He must be given and afforded the facilities to do

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<sup>208</sup> *ibid* (n 194) 53.

<sup>209</sup> The Uganda Criminal Justice Bench Book (1<sup>st</sup> edn, The Law Development Centre, 2017) 75-6

<sup>210</sup> *ibid* (n 192); See also of the Magistrates Courts Act, Cap. 16, Section 124(1) and the Trial on Indictment Act, Cap. 23, section 160.

<sup>211</sup> *ibid* (n 188) 82-3.

<sup>212</sup> *Uganda V Engonu HC Crim Rev No. 1 of 2013.*

<sup>213</sup> *Adrea v Republic* (1970) EA 26.

those things. In practical terms his constitutional edict is satisfied only if an accused person is given and allowed or afforded everything which promotes the ease of preparing his defence, examination of any witnesses called by the prosecution and securing witnesses to testify on his behalf. He must be given and afforded that which aids or makes easier for him to defend himself if he chooses to defend the charge. In general terms it means that an accused person shall be free from difficulty or impediment and free more or less completely from obstruction or hindrance in fighting a criminal charge made against him. He should not be denied something the result of which denial will hamper encumber hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall his case and defence or lessen and bottleneck his fair attack on the prosecution case.<sup>214</sup>

## **7. Facilitation to examine and call witnesses;**

Article 28(3)(g) the accused person shall afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.<sup>215</sup> In relation to enabling the accused to secure the attendance of witness the constitution goes to suggest limitation conditions where public funds may need to be spent in the circumstances.<sup>216</sup>

The accused person is entitled to same remedies like prosecution where witnesses called and fail to appear when properly summoned or if they become refractory witnesses.<sup>217</sup>

However, the enjoyment of the right to examine and calling witnesses is affected by the level of appreciation of criminal trial proceedings by the accused person or if he or she is not represented by counsel of his or her choice in lower courts and state provided legal for indigents charged with capital offences. Many times, accused persons have no capacity to hire services of legal counsel in lower courts and are not entitled to legal

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<sup>214</sup> Soon Yeon Kong Kim V Attorney General Constitutional Reference No. 6 of 2007 (unreported); see also Uganda Law Society and Jackson Karugaba V Attorney General, Constitutional Petitions Nos. 2 & 8 of 2002 (unreported).

<sup>215</sup> The Constitution of the Republic of Uganda, 1995.

<sup>216</sup> *ibid*, article 28(4)(b).

<sup>217</sup> Benjamin J. Odoki, A guide to Criminal Procedure in Uganda (3rd edn, The Law Development Centre, 2006)102.



representation on state costs since they are not covered under the provisions of the Constitution.<sup>218</sup> Accused persons are further unable to call witnesses having spent longer times on remand and lost touch with witnesses and societal attitude of frowning and disassociating with imprisoned persons except close family relations who may be considered biased or not present at the time the alleged offences were leveled against the accused persons.

## **8. Personal appearance or by counsel.**

Article 28(3)(c)<sup>219</sup> provides that an accused shall be permitted to appear before Court in person or be represented by a lawyer at his or her expense. In *Muyimba & Ors v. Uganda*<sup>220</sup> the trial was to be heard in Masaka and the accused person's lawyer who was in Kampala was informed about this on the morning of the day of the trial and thus could not make it to court in time. When the accused requested an adjournment, the Magistrate declined the request and proceeded with the trial, an action held to have been a violation of the accused person's right to legal representation.

The spirit of this article is to enable accused persons who can afford legal services to seek them and any attempts by Court or tribunal to deny an accused this service, the action will amount an unfair trial and the point alone is a subject of an appeal and may read to an order of retrial on appeal or revision.<sup>221</sup>

## **9. Legal representation at the expense of the state;**

In this regard, article 28(3)(e) entitles the accused to legal representation, a provision that is closely related to article 28(3)(c) which guarantees the accused adequate time and facilities for the preparation of his/ her defense.<sup>222</sup> However, the right to legal representation has proven problematic, both on account of the knowledge of the right as well as of the availability and affordability of a lawyer for the purpose, particularly

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<sup>218</sup> The Constitution of the Republic of Uganda, 1995, article 28(3)(d)and(e)

<sup>219</sup> The Constitution of the Republic of Uganda, 1995; the Trial on Indictment Act, Cap. 23 section 55 and the Magistrates Courts Act, Cap. 16, section 158.

<sup>220</sup> (1969) EA 433;

<sup>221</sup> *ibid* (n 207).

<sup>222</sup> See *Adrea v Republic* (1970) EA 26.

within the criminal justice system. As Mayambala points out State briefs—lawyers paid by the State to represent indigent accused persons—only cover persons accused of capital offences, and even then those who require such services far exceed available lawyers.<sup>223</sup> This right is only available to accused persons charged with capital offences, leaving the majority of Ugandans charged with non-capital offences who are everywhere in magistrates courts against trained state attorneys and prosecutors. What kind of fair trial is that to indigent Ugandans but not charged of capital offences?

## **10. Assistance of an interpreter**

Article 28 (3)(f)<sup>224</sup> provides that every person charged with a criminal offence shall be afforded without payment by that person the assistance of an interpreter if that person cannot understand the language used at the trial.

The Trial judicial officer has an obligation to ensure that the accused person present on trial and doesn't understand the Court's language during trial, is availed an interpreter to and the same is to the advocates of the accused where evidence is being given in a language other than the language of Court (English), then an interpretation in English is made to the advocate.<sup>225</sup>

However, the challenge remains the capacity of interpretation services provided and the unavailability of interpreters and its effect on the general object of the right to fair hearing in general especially speedy trials. The challenge of judiciary staff is such regard were well highlighted in one of the presentation by, J.P.M. Tabaro J as then was as captured in the edited newspaper edition where he observed that, government agencies had institutional challenges like lack of accommodation facilities, poor remuneration of staff, little or no advanced equipment like computers, transport means without forgetting administrative staff in the Judiciary Secretarial staff, interpreters, clerks, ushers and

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<sup>223</sup> R. Kakungulu Mayambala, 'Legal Representation in Uganda from 1995 to 2005: Aiming High and Falling Short?' *East African Journal of Peace & Human Rights*, 15/2, (2009) at 492; See also *Kawooya Joseph V Uganda* (2001) KALR 68 at 72.

<sup>224</sup> *ibid* (n 206).

<sup>225</sup> The Uganda Criminal Justice Bench Book (1<sup>st</sup> edn, 2017) 91; See also of the Magistrates Act, Cap. 16, section 139 and the Trial of Indictment Act, Cap. 23, section 56.

so many other categories is not enough due to the massive retrenchment in the Public Service which did not spare the judiciary.<sup>226</sup>

## **11. Entitlement to a copy of proceedings**

Article 28(6)<sup>227</sup> provides that a person tried for any criminal offence or any of his or her authorized agent, shall after judgment in respect of an offence shall be entitled to a copy of proceedings at fee prescribed by law.

This provision envisages that an accused person who intends to seek post-trial remedies is entitled to a copy of proceeding but he or she has to pay a prescribed amount of fees before accessing the record. The concern is what happens to indigents who aren't capable of having the prescribed fees or in circumstances that do not allow them the opportunity to use cheaper alternatives and not among those provided for under state representation under article 28(3)(e).<sup>228</sup> It was reported recently that Counsel Bob Kasango was asked to pay for Court record or the same be sent to him through email while he was in prison. Unfortunately Kasango had no access to the internet to read his emails, he had no legal representation, and neither did he know how much he needed to pay to be availed a record of proceedings. He felt that such treatment would greatly affect his preparation to defend himself.<sup>229</sup>

## **12. No retrospective charges and punishments**

Article 28(7) and (8)<sup>230</sup> provides inter alia; a person shall not be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence and no penalty shall be imposed for

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<sup>226</sup> Justice Patrick Tabaro, *Alternative justice - a solution to backlog in Uganda's judicial system*, (The Observer, Kampala August 31, 2012), retrieved from <https://www.observer.ug> on 30/09/ 2018.

<sup>227</sup> The Constitution of the Republic of Uganda, 1995

<sup>228</sup> Ibid.

<sup>229</sup> Racheal Agaba, *Pension case: Jailed lawyer Kasango asked to pay for court record*, (PML Daily, Kampala online newspaper, 7 August 2018) retrieved from <http://www.pmldaily.com/news/2018/08/pension-case-jailed-lawyer-kasango-asked-to-pay-for-court-record.html> on 30th September, 2018.

<sup>230</sup> The Constitution of the Republic of Uganda, 1995.

a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.

The spirit of this provision is to ensure that where facts did not constitute an offence before a law is enacted; a person should not be retrospectively charged and tried. Besides that where the facts constituted an offence and the punishment prescribed, then in case an amendment is made and the punishment is enhanced then an accused person cannot be sentenced to the enhanced punishment as it would be to a retrospective application of law to facts and sanctions before the enactment of such law.<sup>231</sup>

### **13. Double jeopardy**

Article 28(9) and (10)<sup>232</sup> provides that a person who shows that he or she was tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not be tried for the same or for any other criminal offence which he or she could have been convicted at the trial for the said offence except upon an order of a superior court in the course of appeal or review proceedings relating to the conviction or trial. The provisions further provide that a person shall not be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence. This provision was further extended to concurrent trials of an accused person in respect of the same or similar offences in different Courts of law.<sup>233</sup>

### **14. Spouse not a compellable witness**

Article 28(11)<sup>234</sup> provides that where a person is tried for criminal offence, neither the accused nor their spouse should be compelled to give evidence against that person. The essence of this provision is to protect the privileged relationship and communication

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<sup>231</sup> Benjamin Odoki, *A Guide to Criminal Procedure in Uganda* (3<sup>rd</sup> edn, Law Development Centre 2006)

<sup>232</sup> The Constitution of Republic of Uganda, 1995

<sup>233</sup> The Uganda Criminal Justice Bench Book (1<sup>st</sup> edn, The Law Development Centre 2017)92-3; see also Mulenga JSC (RIP) judgment in *Uganda Law Society v Attorney General*, Supreme court Constitutional Appeal No.01 of 2006.

<sup>234</sup> *ibid* (n 218)

between the married persons. Matrimonially and religiously upon marriage a husband and wife become one.<sup>235</sup>

Under common law, ordinarily all persons are competent and compellable witness except for certain categories of persons as provided under statutory provisions who include spouses.<sup>236</sup> A spouse is a competent but not a compellable witness against his or her spouse without the consent of the accused person (spouse). However, where the husband or wife of the accused person is a defence witness, he or she shall be a competent and compellable witness, regardless of whether the spouse is singularly or jointly charged with another person.<sup>237</sup>

It should however, be noted that it is only legally recognized spouses that are an exception to compellability of witnesses.<sup>238</sup>

## **15. Legality of charges**

Article 28(12)<sup>239</sup> in relation to protection of the accused person's right from being retrospectively charged and punished, this particular clause of article 28 of the Constitution relating to fair hearing focuses on specification of charges and attendant sanction(s) (punishment) before one is brought before any competent court or tribunal except for the charge of contempt of court.

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

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<sup>235</sup> Mark Chapter 10 verses 7-8, the Holy Bible, New International Version (The Bible Society in Australia Inc. 2007) 1063.

<sup>236</sup> The Evidence Act, Cap. 6, section 117; see also the Uganda Criminal Justice Bench Book (1st edn, Law Development Centre 2017)180.

<sup>237</sup> The Evidence Act, Cap. 6, section 120; see also The Uganda Criminal Justice Bench Book (1st edn, Law Development Centre 2017)182.

<sup>238</sup> Alai V Uganda (1967) EA 596.

<sup>239</sup> The Constitution of the Republic of Uganda, 1995.

Where anyone is charged and tried on a fact or set of facts which do not amount to any offence and no penalty provided thereof in the statute books of Uganda, or the sentence provided therein offends the provisions of the constitution, then trial is an illegality, null and void.<sup>240</sup>

### **3.3 Conclusion**

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

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<sup>240</sup> *Kekinyumu V Uganda* (1969) EA 333; see also *Salvatori Abuki V Attorney General*, Constitutional Appeal No. 1 of 1998.

## **CHAPTER FOUR**

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

#### **4.0 Introduction**

The Constitution is the supreme law of Uganda.<sup>241</sup> It provides for the basis and backbone of the Uganda's legal system. In relation to criminal trials, the constitution provides for the establishment of courts of judicature, their jurisdictions and independence,<sup>242</sup> the Uganda Police Force and its mandate,<sup>243</sup> the office of the Director of Public Prosecutions and its functions,<sup>244</sup> the inspectorate of government and its mandate,<sup>245</sup> the Prisons Service<sup>246</sup> and its mandate and other related institutions like Uganda Peoples Defence Forces (UPDF).<sup>247</sup> Besides providing for the establishment of the various institutions, the Constitution provides for the rights of persons charged and or those who find themselves in the hands of the criminal justice institutions<sup>248</sup> amongst which include the right to fair hearing.<sup>249</sup> Most importantly, the chapter underscores the right to apply for bail, legal representation, plea bargaining and the speedy trial is examined.

The chapter also examines the independence of the tribunal in regard to the right to a fair hearing and related matters. The conclusion of the chapter is finally cast.

#### **4.1 Bail and the fair trial:**

The law on bail in its skeleton form is laid down in the Constitution of the Republic of Uganda. This is in respect of the person's constitutional right to personal liberty. The

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<sup>241</sup> The Constitution of the Republic Uganda, 1995, article 2.

<sup>242</sup> See chapter 8.

<sup>243</sup> Articles 211, 212, 213 and 214.

<sup>244</sup> Article 120.

<sup>245</sup> Chapter 13.

<sup>246</sup> Articles 215, 216 and 217.

<sup>247</sup> Articles 208, 209 and 210.

<sup>248</sup> Chapter 4.

<sup>249</sup> Article 28.

right to bail may be invoked at any stage of the proceedings, as provided under the law.<sup>250</sup> The question of bail revolves around, a delicate balance between two competing values: the welfare of the society sought to be protected and fairness to the accused.<sup>251</sup>

It must be borne in mind that bail includes security given to court by another person that the accused will attend his trial on the appointed date. Bail is a constitutional right under Article 23(6)(a),(b) and (c).<sup>252</sup> Two basic ideas underlie bail. First, the accused is not guilty until proven so and it would be unfair to keep him or her imprisoned; and second, a need for an assurance that when he or she is released, such a person will turn up for the trial. In deciding whether bail should be granted or refused courts are guided by the statutory provisions and precedents.

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

Particularly, Article 23 confirms the right to bail which is to be granted by court on application and on such conditions as the courts deems reasonable. Sometimes such laws are in conflict, rendering the state of law in this area uncertain and thus requiring review. There is a need to consider enactment of a Bail Code, which could also look to comparative jurisprudence to determine what would best work in the case of Uganda.<sup>253</sup>

Section 15 of the Trial Indictments Act requires an accused person to show to the satisfaction of the court that exceptional circumstances exist justifying his or her release on bail and that he or she will not abscond when released on bail.<sup>254</sup> On the other hand, for other crimes bail applications are usually granted provided the applicant satisfies the considerations laid down in Section 77 of the Magistrates Court Act. These are; the

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<sup>250</sup> See for example section 14 of the Trial on Indictment Act Cap 23.

<sup>251</sup>

<sup>252</sup> The Constitution of the Republic of Uganda, 1995

<sup>253</sup> See Mugula *supra*.

<sup>254</sup> *Uganda v Zubairu and another* (1973) E.A 470.



nature of the accusation, the gravity of the offence, the antecedents of the applicant, a fixed place of abode and whether the applicant is likely to interfere with any of the witnesses.

In *Attorney General vs. Joseph Tumushabe*,<sup>255</sup> the Supreme Court stated that irrespective of the provisions of the UPDF Act concerning bail, it was mandatory for the detainees to be released having been in custody for more than 120 days awaiting trial in accordance with Article 23(6) of the Constitution.<sup>256</sup> In contrast to the general view that bail was an automatic right of an accused person, the court stated that it was necessary to consider whether such release is likely to prejudice the pending trial, meaning that the Court has the discretion to grant or reject the application.<sup>257</sup>

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

#### **4.1.1 Bail and presumption of innocence**

In the case of *Uganda vs. Dr. Kizza Besigye*,<sup>258</sup> the respondent, and 22 others who had been arrested before the High Court Judge around March 2003, were jointly charged with treason, contrary to section 23(1) (c) of the Penal Code Act. The respondent who was also charged with rape contrary to section 123 of the Penal Code Act applied for bail to the High Court, vide Miscellaneous Application No. 228/05, under article 23(6)(a) of the Constitution. The issue for determination before court was whether under article 23(6) of the Constitution, courts have the discretion to grant or not to grant bail.

The constitutional court ruled that article 28(3)(a) provides that every person charged with a criminal offence shall be presumed innocent until proved guilty or until that person has pleaded guilty. Article 44(c) of the constitution prohibits any derogation

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<sup>255</sup> Constitution Appeal No.3 of 2005

<sup>256</sup> *ibid.*

<sup>257</sup> Mulira, *op.cit.*, 163-164.

<sup>258</sup> Constitution Reference No.20 of 2005.

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

In the same vein, *Foundation for Human Rights Initiative (FHRI) v The Attorney General*,<sup>259</sup> the petition by a Non-Governmental Organization (NGO) known as the Foundation for Human Rights Initiatives whose objectives include and observance of human rights before court was mainly challenging the constitutionality and legality of the restrictions and limitations imposed on grant of bail by the impugned provisions of the above mentioned Acts of Parliament, namely, TIA, MCA, UPDF and Police Act. The question for this Court to determine was whether they are inconsistent with Articles, 20, 23(1), 28(1), 23(3) and 23(6) of the Constitution. The petitioner sought the right to apply for bail as a fundamental and inherent right not given by the State. To the petitioner bail was a question of liberty. The petition was, hence, seeking nullification of those provisions to the extent of inconsistency. The Constitutional held that, Courts had the discretion to grant bail on reasonable conditions to ensure that the accused attends court where and when required. The conditions only have to be reasonable and acceptable in free and democratic state as envisaged under Article 43 (2) of the Constitution.

The absurdity of this construction of the right to bail and its effect to the right to fair hearing especially the presumption of innocence came to light in the same case of

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<sup>259</sup> Foundation for Human Rights Initiative V Attorney General (2008) ULR 460.

*Foundation for Human Rights Initiative (FHRI) v The Attorney General*<sup>260</sup> wherein court agreed with the petitioners counsel and was of the view that whereas an accused is presumed innocent and if he or she acquitted after trial, the bail wasn't automatic but just mere release of an accused from physical custody on conditions laid down by court to ensure attendance where and when court requires him or her to do so.<sup>261</sup>

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

#### **4.1.2 Bail and provision of adequate facilities to prepare for defence**

Article 28(3)(c)<sup>262</sup> provides that every person charged with a criminal offence shall be given adequate time and facilities to prepare his or her defence. Whereas article 23(6)(a) and (b)<sup>263</sup> provide for the right to apply for bail and courts at their discretion may grant the same or not, the spirit of the former clause is to avail the accused person time and facilities to prepare his or her defence. The adequate time and facilities to prepare defence appear to our courts to be when actual hearing of the case begins. Otherwise considering criminal trials in Uganda being adversarial in nature,<sup>264</sup> every litigant including the accused person is expected to gather counter evidence against the accusations brought against him or her. The accused is also entitled to seek any professional services where necessary including an advocate for legal representation and seek for any witnesses.<sup>265</sup>

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<sup>260</sup> *Foundation for Human Rights Initiative V Attorney General* (2008) ULR 460.

<sup>261</sup> *ibid* (n 240) 475.

<sup>262</sup> The Constitution of the Republic of Uganda, 1995.

<sup>263</sup> *ibid*.

<sup>264</sup> Ssekaana Musa, *Criminal Procedure and Practice in Uganda* (LawAfrica 2010)6

<sup>265</sup> The Uganda Criminal Justice Bench Book, (1st edn, The Law Development Centre, 2017) 83.

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

On the 27<sup>th</sup> August, 2018 while Mubiru J was determining the bail application for Hon. Kasiano Wadri and 33 others, he underscored the importance of investigations and the environment such investigations are done.<sup>266</sup> The orders given in the learned judge's ruling gave the state unequalled advantage against Hon Wadri and his co-accused while the state was free to gather evidence against Wadri and his co-accused. The proper arrangement would be to give both parties equal time and facilities at their expense, if the criminal trial process is to be fair process as envisaged in article 28 of the Constitution of the Republic of Uganda.<sup>267</sup>

Whereas Ugandan Courts have endeavored to protect the right of an accused person to be availed adequate time and facilities like pre-trial disclosure, adequate time to prepare for defence by not conducting criminal trials in hurry,<sup>268</sup> the same Courts have failed to consider grant of bail pending trial as one of the greatest facility and remedy that would cover the object of the right envisaged under article 28(3)(c)<sup>269</sup> instead of focusing on peripheral activities which have remained wanting especially unrepresented litigants in the lower courts and indigents charged with capital offences tried by the High Court of Uganda.

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<sup>266</sup> Joseph Kizza; *Bobi Wine, 32 others granted bail by Gulu High Court*, (The Newvision Kampala, 27th August 2018) retrieved from [https://www.newvision.co.ug/new\\_vision/news/1484446/bobi-wine-granted-bail-gulu-court](https://www.newvision.co.ug/new_vision/news/1484446/bobi-wine-granted-bail-gulu-court), on 12/10/2018.

<sup>267</sup> 1995

<sup>268</sup> The Uganda Criminal Justice Bench Book, (1st edn, The Law Development Centre, 2017)83-4

<sup>269</sup> The Constitution of the Republic of Uganda, 1995.

### 4.1. 3 Bail pending appeal or revision

The Constitutional Court in the case of *Foundation for Human Rights Initiative v The Attorney General*<sup>270</sup> confirmed the position in *Uganda (DPP) v Dr. Kizza Besigye*,<sup>271</sup> that there is no automatic right to bail. The rights granted is only limited to the right to apply for bail. Court then retains the discretion to grant or not to grant bail. Still court has to be satisfied that the applicant satisfies the conditions for grant of bail.

The Constitution does not mention anything about bail pending appeal. Rightly so, the right to apply for bail stems from article 28 (3) (a)<sup>272</sup> of the Constitution which is about the presumption of innocence. Since an applicant for bail is presumed innocent until proved guilty by a competent court, it follows that such a person should have a right to bail at all levels of trial until possibilities of trial or challenging the verdict of the court trying him or her are exhausted.

Section 34(1) and (2) and 50 of the Criminal Procedure Court Act <sup>273</sup> provides for the powers of the appellate courts and High Court on revision respectively as follows; the Appellate Court has powers to allow appeal and set aside the judgement, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. The appellate court may reverse the finding and sentence, acquit or discharge the appellant or order him to be retried. On the other hand, the High Court on revision may exercise the powers of the appellate court, which is set aside the judgment; dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred or ordering for a retrial.

Similarly sections 40(2), 47 and 49(3) of the Criminal Procedure Act<sup>274</sup> provide for the appellate court and the Chief Magistrates Court to grant bail pending appeal and revision respectively. The powers in section 49(3) above are further provided under

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<sup>270</sup> Foundation for Human Rights Initiative V Attorney General (2008) ULR 460

<sup>271</sup> Constitution reference No. 20 of 2005

<sup>272</sup> The Constitution of the Republic of Uganda, 1995.

<sup>273</sup> Cap. 116

<sup>274</sup> *ibid*

section 221(4) of the Magistrates Courts Act.<sup>275</sup> None of these sections except section 132(4) of the Trial on Indictment Act<sup>276</sup> provide for conditions for bail pending appeal save for the discretion of Courts in determining whether to grant or not to grant bail pending appeal or revision.

Courts of law however, have gone ahead and developed principles governing the grant of bail pending appeal and even differentiated them from those governing bail before conviction. Bail pending appeal may be granted after considering: whether leave to appeal has been granted; whether there is a strong likelihood of success of the appeal; public interest and where there is a risk that if bail is not granted, the sentence will have been served by the time the appeal is heard.<sup>277</sup>

In *Raghibin Singh Lamba v R*<sup>278</sup> the arguments for bail pending appeal were that the appeal could more easily be prepared if the applicant was on bail, previous good character of the applicant and the hardships to his dependants if he remained in prison. Spry -J- held that the principle to be applied is that 'bail pending appeal should only be granted for exceptional and unusual reasons'. He further noted that neither the complexity of the case nor the good character of neither the applicant nor the alleged hardship to his dependants could justify the grant of the bail. Had the court been "satisfied" that there was an overwhelming probability that the appeal would succeed, the application would have been granted. The present application was dismissed for want of satisfaction to the court that there was an overwhelming probability of success. The decision which was later denied force by Muli -J- in *Motichand*.<sup>279</sup> While insisting on unusual reasons, Spry -J- was of the view that when a person is awaiting trial, the onus of proving his guilt ultimately rests with the prosecution and consequently, the onus of showing cause why bail should not be granted. On the other hand, when a person has

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<sup>275</sup> Cap. 16

<sup>276</sup> Cap. 23

<sup>277</sup> *Mugisha Gregory V Uganda*, Court of Appeal Miscellaneous Criminal Application No. 05 of 2011(unreported).

<sup>278</sup> (1958)EA337.

<sup>279</sup> (1972) EA 399.

been convicted the onus is on him to show cause why the conviction should be quashed and similarly, it is upon him to show cause why as a convicted person, he should be released on bail.<sup>280</sup>

Shockingly, a short custodial period, as accepted by Madan -J- in *Hasham v R*<sup>281</sup> is not in itself a special ground for granting an application for bail. However, without prejudice to this argument, if the sentence is the maximum provided, then the fact should be taken into consideration as there is the possibility that the sentence might be served before the appeal is heard or when it is going on.

It should also be noted like in the first instance court or trial court, bail is not automatic. In the case of *Shah v R*,<sup>282</sup> it was suggested that rather than grant bail, steps should be taken to see that the hearing of the appeal is expedient and it was further added that bail should be granted only in exceptional cases.

The dilemma and the absurdity of this line of legal thinking can be seen in the case of *Abdullah v R*<sup>283</sup> where the appellants had already served their sentences and had been discharged when the appeal was allowed; the conviction quashed and sentence set aside. This dilemma is bound to happen even today in our country considering the position taken by our courts while determining applications for bail pending appeal.

In the case of *Gregory Mugisha V Uganda*<sup>284</sup> the Applicant was charged, tried, convicted by the High Court of Uganda (Anti-Corruption Division) and sentenced to three (3) and two (2) years on each count respectively to served concurrently. The applicant after three months in imprisonment applied for bail pending appeal. In determination of the application, Kasule JA held that there was a fundamental difference between consideration of bail pending trial and bail pending appeal. That the former had a benefit of presumption of innocence which the later doesn't have since

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<sup>280</sup> *ibid* (n 265) 337.

<sup>281</sup> Criminal Appeal No. 582 of 1967 (unreported).

<sup>282</sup> (1972) EA 476 at 480.

<sup>283</sup> (1963) EA 223.

<sup>284</sup> Court of Appeal Miscellaneous Criminal Application No. of 5 of 2011(unreported).

the applicant is a convict at the time. Courts had to deal firmly with convicts and the sentence of three years would not be completed before determination of the appeal. Similarly in an earlier case Nshimye JA in *Angelo Muwanga v Uganda*<sup>285</sup> while rejecting the application for bail pending appeal, held the position that the appeal would be determined before serving a sentence imposed on the applicant. Both justices never considered time spend serving a sentence that is likely to be set aside by quashing of the conviction on appeal.<sup>286</sup>

The gravity of the offence as one of the grounds relied upon in these two rulings and issue of time to be taken to determine the appeal appeared as one of the major grounds to deny the applicants the release on bail pending determination of their appeals.<sup>287</sup> The issue of exceptional circumstances kept in the minds of the judicial officers on the appeal.<sup>288</sup> Whereas the provisions of the statutes are open and grant unfettered discretion to appellate courts,<sup>289</sup> the courts have raised too high standards at the expense of the right to presumption of innocence, since the appellate courts have powers of the original trial court.<sup>290</sup> Instead the appellate courts have decided to serve the public interest and not any appropriate remedy suggested for an appellant whose conviction is quashed and found innocent after serving part or whole of the sentence.<sup>291</sup>

The failure by appellate court to recognise the ground of likely delay to determine appeals is in total contrast to the realities of case backlog reduction committee report findings.<sup>292</sup> Important to note from the this report was that amongst the backlog cases

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<sup>285</sup> Court of Appeal Miscellaneous Criminal Application No. 41 of 2008

<sup>286</sup> Petride Mudoola, *It was a hell living with people I jailed, A chat with Karakire*, The Saturday Vision, (Kampala 9 November, 2017) 13. In an interview with His Worship Stephen Karakire the former Magistrate Grade II of Lyantonde and Kyazanga Courts who had been discharged from Luzira Prison after serving a three year sentence before his appeal had been heard and determined and the learned magistrate maintained that he enjoyed his constitutional right to presumption of innocence until he exhausts his right to appeal.

<sup>287</sup> Court of Appeal Miscellaneous Criminal Application No. 41 of 2008 at page 10; see also Court of Appeal Miscellaneous Criminal Applications No. 5 of 2011 at pages 7, 12, 13, 14 and 15

<sup>288</sup> Court of Appeal Miscellaneous Criminal Applications No. 5 of 2011 at page 7.

<sup>289</sup> The Criminal Procedure Code Act, Cap. 116 sections 40(2), 47 and 49(3), the Trial on Indictment Act, Cap. 23, section 132 (4) and the Magistrates Courts Act, Cap. 16 section 221(4).

<sup>290</sup> The Judicature Act, Cap.13 sections 7, 11

<sup>291</sup> Court of Appeal Miscellaneous Criminal Applications No. 5 of 2011 at pages 8-9

<sup>292</sup> The Case Backlog Reduction Committee – Report (29th March 2017)33



as at January 31<sup>st</sup>, 2017, majority of the criminal appeals had been in the Court of Appeal and the Supreme Court beyond two years which is almost equal the sentence of imprisonment of three years Mugisha Gregory<sup>293</sup> and Angelo Muwanga<sup>294</sup> would have served before even their appeals were determined.<sup>295</sup>

The above report indicates how the violation and non-observance of the right to a speedy trial to persons before the appellate courts who are denied bail pending appeal remain serving sentences that are likely to be overturned without any other remedy in sight.<sup>296</sup> The practice therefore ignores the results and only focuses on the current situation in disregard of the individual rights for the benefit of the public interest which is contrary to the common law principle and constitutional right of presumption of innocence until proven guilty by the last appellate court or one admits guiltiness by either losing the appeal or not appealing at all.

#### **4.2 Committal proceedings and right to a fair hearing**

The Magistrates Courts Act and the Trial on Indictments Act provides that an accused person charged with an offence only tried by the High Court can only be brought before the High Court after committal proceedings in the Magistrate Court.<sup>297</sup>

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

- a) The Magistrates Court lack jurisdiction to handle the matter and thus unable to grant pre-trial remedies like bail pending trial;
- b) The High Court cannot hear the matter before the process of committal has been completed even if it takes such a longer time, since its scope and limits are not

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<sup>293</sup> Uganda V Mugisha Gregory, High Court Criminal Session Case No. 50 of 2010; See also Mugisha Gregory v Uganda Court of Appeal Miscellaneous Criminal Application No. 5 of 2011

<sup>294</sup> Angelo Muwanga v Uganda, High Court Criminal Appeal No. 95 of 2007; see also Angelo Muwanga v Uganda, Court of Appeal Miscellaneous Criminal Application No. 41 of 2008.

<sup>295</sup> Ibid (n 284) 33

<sup>296</sup> Juliet Kigongo; *Kazinda's jail term ends before appeal is heard*, (The Daily Monitor, Kampala 17/10/2018) retrieved from <http://mobile.monitor.co.ug/News/Kazinda-jail-term-ends-before-appeal-heard/2466686-4809196-format-xhtml-shvfuc/index.html> on 24/10/2018.

<sup>297</sup> The Magistrates Court Act, Cap. 16, section 168 and Trial on Indictment Act, Cap. 23, Section 1.

defined, save for grant of pre-trial bail under article 23(6)(b)<sup>298</sup> by the High Court and mandatory bail under article 28(6)(c) and (d)<sup>299</sup> available to the lower courts.

In the case of *Shabahuria Matia v Uganda*<sup>300</sup> the applicant was arraigned before magistrate Grade III Court in Masaka on charges of murder in September, 1995 and was accordingly remanded. The accused was granted mandatory bail, absconded, re-arrested and remanded pending committal to the High Court for over four years appearing before Magistrates Courts. Ntende J as then was held that an accused person being on remand and pending committal to the High Court for a long period of time was oppressive. It is against the spirit of article 28(1). The accused feels the anxiety of being guilty without trial that causes grave psychological effects.

The predicament of *Matia* is the ugly reality of the effects of the committal proceedings. The proceedings have no specific legislation to limit their scope. When considered with the discretionary powers of Court to grant bail which includes setting conditions for bail that are at times impossible to be satisfied by litigants as it was in the case of *Shabahuria Matia V Uganda*<sup>301</sup>, then the right to fair hearing is an illusion and the process amounts to abuse of court process and oppression of the accused person instead of the enjoyment of the non derogable right of the right to a fair hearing by an accused person; the bedrock of criminal trials in Uganda.

#### **4.3 Criminal session system and speedy trial**

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

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<sup>298</sup> The Constitution of the Republic of Uganda, 1995.

<sup>299</sup> *ibid.*

<sup>300</sup> High Court Criminal Revisional Cause, No. MSK-00-Cr-0005 of 1999 (Arising From Criminal Case No. MMA. 435 of 1995) (unreported).

<sup>301</sup> *ibid.*

Court to hear criminal matters are determined by the Principal Judge and communicated by the Registrar to the responsible Chief Magistrates.<sup>302</sup>

According to the Case Backlog Reduction Committee, the session system is a longtime practice in the adjudication of criminal matters by the High Court in Uganda. With limited number of Judges, the session system was seen as the only way in which criminal and civil cases could be handled. In such a system pretrial process and activities are handled before a trial judge can be assigned a session. The processes ensured proper preparations were made and funding provided accordingly for the assigned judge to preside over the session according to the figures and circumstances of the cases to be heard.<sup>303</sup>

A consideration of the foregoing provisions and the practice highlighted in the case backlog reduction report indicates that criminal matters other than interlocutory applications are handled at criminal sessions. The sessions may take time to be organized especially where the nature and number of cases registered don't appear significant to be scientifically budgeted for. In an event an accused person has been denied bail pending trial, and a criminal session is not forthcoming, it is important to interrogate what happens to the accused and that incarceration period on remand pending trial. The session system does not only work in the High Court but goes further to be applied in the appellate courts (the Court of Appeal and the Supreme Court) while handling criminal appeals.<sup>304</sup>

The effect of the foregoing challenges met by the session system and the rigidity of provisions for having session system to handle criminal cases has resulted in overstay on remand of accused persons. This is brought about by trials taking long to commence; those that commence are not completed; and even those completed are not handled with utmost professional and with a judicious approach. In effect the system is short of guaranteeing a fair, speedy trial before an independent tribunal

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<sup>302</sup> The Judicature Act, Cap. 13, sections 4,18, 19 and 20(1)

<sup>303</sup> The Judiciary, The Case Backlog Committee Report, (29th March, 2017) 39

<sup>304</sup> *ibid.*

envisaged under article 28(1).<sup>305</sup> The backlog reduction committee report indicated that by December, 2015 majority of the backlog cases were criminal in nature only rivaled by civil matters at least.<sup>306</sup>

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

#### **4.4 Legal representation and the right to a fair hearing**

To begin with section 55 of the Trial on Indictment Act,<sup>307</sup> provides that, any person accused of an offence before the High Court may of right be defended by an advocate, at his or her own expense and section 158 of the Magistrates Court Act,<sup>308</sup> provides that, any person accused of an offence before a magistrate's court may of right be defended by an advocate. These provisions are in tandem with the provision of article 28(3)(d).<sup>309</sup> To note however, article 28(3)(e)<sup>310</sup> goes beyond personal choice of an accused to have counsel of his choice at his or her cost and imposes a duty to the state to provide legal representation to persons charged with capital offences but unable or cannot afford to access legal representation on their own.

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<sup>305</sup> The Constitution of the Republic of Uganda, 1995.

<sup>306</sup> *ibid* (n 266) 21-3.

<sup>307</sup> Cap. 23

<sup>308</sup> Cap. 16

<sup>309</sup> The Constitution of the Republic of Uganda, 1995.

<sup>310</sup> *ibid*.

The sanctity of the right to legal representation both at one's choice with affordability and state provided legal services to indigents facing capital offences have well been pronounced by Ugandan Courts wherever such right has been ignored by courts or other tribunals.<sup>311</sup>

For example in the case of *Vincent Rwamaro V Uganda*<sup>312</sup> it was stated that an accused has a constitutional right to be defended by counsel of his choice. If deprived of that right through no fault of his or his counsel and a conviction follows, such conviction will be quashed on appeal. In *Kataryeba Zackary V Uganda*<sup>313</sup> court held that the right to legal representation extends to grant of an adjournment so as to enable the accused engage another counsel where the earlier one was not still available. Refusal to adjourn the case is denial of the accused a constitutional right to be represented. Such an act constituted a miscarriage of justice. In *Kawooya Joseph V Uganda*, the Supreme Court went ahead to impose a duty on the defence counsel and trial court to ensure that counsel conducts defence diligently with skill and in the best interest of the client while the trial court ensures the accused gets a fair trial.

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

The magnitude of this discrimination was well stated by Mugambe J as he then was in the case of *Kazibwe John V Uganda*<sup>314</sup> where he held that there were no provisions in the Constitution and the Magistrates Courts Act which made legal representation a must except for offences where punishment is life imprisonment or death. Accused persons and the advocates have a duty to be vigilant and follow up their matters before Courts.

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<sup>311</sup> The Uganda Criminal Justice Bench Book (1st edn, The Law Development Centre, 2017)85-91

<sup>312</sup> (1988-90)HCB70

<sup>313</sup> (1996)HCB 16

<sup>314</sup> High Court Criminal Case No. 10 of 2014 (unreported); see also The Uganda Criminal Justice Bench Book (1st edn, The Law Development Centre, 2017)877.

The provisions of article 28(3)(e)<sup>315</sup> completely ignores the set-up of criminal trials in Uganda. Regardless of which court the matter is being handled from and what stage the trial is, the state/prosecution is represented by trained lawyers in both substantive and procedural.<sup>316</sup> Majority of the poor Ugandans are facing trial in the lower courts where they are not entitled to state provided legal representation. They are at the mercy and vigilance of the trial magistrates to ensure that their rights are protected or observed during criminal trials. The same judicial officers are overwhelmed by the backlog of criminal cases and others, thereby not much inclined to focus on the accused persons' right to fair trial qualitatively.

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

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

#### **4.5 Plea bargaining and the right to a fair hearing in Uganda**

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

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<sup>315</sup> The Constitution of the Republic of Uganda, 1995.

<sup>316</sup> George W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance*, (2<sup>nd</sup> impn. LawAfrica Publishing (U) Ltd 2010) 54.

the accused in a more flattering light.<sup>317</sup> Generally plea agreements allow parties to agree on the outcome and settle pending charges.<sup>318</sup>

Plea bargaining is considered at three stages; fact bargaining, charge bargaining and sentence bargaining.<sup>319</sup> These have been discussed below in brief.

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

(b) Charge bargaining. There are two kinds of situations where charge bargaining may be used. The first is where the accused is charged with two or more crimes. Here, it is possible for the prosecution to drop one or more of the charges in return for a guilty plea for the remaining. The other situation is when the accused has been charged with a serious offence. Here, the prosecution might drop this charge in exchange for a guilty plea to a less serious offence. There is no doubt a guilty accused would enjoy the benefits of charge bargaining but the biggest disadvantage here is when an accused is in the situation where they are actually innocent of all the charges but feel compelled to plead guilty as a form of 'risk management' as if found guilty after a full trial they would receive a more severe sentence.

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

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<sup>317</sup>The Judiciary, *Case Backlog Reduction Committee – Report*, (29<sup>th</sup> March 2017)7

<sup>318</sup> *Rule 4 of the Judicature (Plea bargain) Rules, Statutory Instrument No.46 of 2016*; See also The Judiciary, *Case Backlog Reduction Committee – Report*, (29<sup>th</sup> March 2017) 43-4.

<sup>319</sup> The Judiciary, *Case Backlog Reduction Committee – Report*, (29<sup>th</sup> March 2017) 44.

The process of plea bargaining was intended to achieve institutional efficacy including the optimal deployment of resources to secure the maximum outcomes through case dispositions, as it cuts down the number of trials that the court has to hear. It also, guarantees a conviction for the accused and it may also be used to illicit additional useful information from that accused relevant to future prosecutions.<sup>320</sup>

It is against this background that plea bargain, a new mechanism set to enhance the effectiveness of the criminal trial process in Uganda was sought be the antidote for all parties involved in a trial by reducing case backlog and achieve the mandate of the judiciary to promote reconciliation under the Constitution.<sup>321</sup>

However, there are a number of challenges identified in the process of plea bargaining such as judges departing from agreed positions by the parties in a plea bargain agreement, innocent persons who finds himself or herself accused may feel highly pressured into pleading guilty out of fear of a more severe sentence being passed, overstay on remand and its psychological effect that makes accused persons prefer to enter agreements for purposes of closure of their matters and lack of information, non-legal representation among others.<sup>322</sup>

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

#### **4.6.0 The right to fair hearing in specialized Courts or Divisions**

With the growing demand for justice and the judiciary to deliver within reasonable time and therefore be seen to dispense justice, the judiciary has been forced to carry out further decentralization by creating more judicial units to solve many challenges that have affected its efficiency and effectiveness. Amongst the approaches has been the

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<sup>320</sup> *ibid.*

<sup>321</sup> *ibid*; see also The Constitution of the Republic of Uganda, article 126(2)(d).

<sup>322</sup> *ibid* (n 306).



creation of specialized courts to handle certain cases in the country. Amongst the courts or divisions created were; the Anti-Corruption Division of the High Court,<sup>323</sup> the International Crimes Division (currently the War Crimes Division ) of the High Court<sup>324</sup> and recently the Utilities, Wildlife and Standards Court.<sup>325</sup>

#### **4.6.1 The International Crimes Division**

During the 2008 Juba peace talks between the Government of Uganda (GoU) and the Lord's Resistance Army (LRA), the Special Division of the High Court (SDHC) was provided for in the Final Peace Agreement (FPA), as one of the mechanisms for personal accountability by different actor in the war. Unfortunately, Joseph Kony refused to append his signature to the FPA. The GoU disregarded the failure to execute the Final Peace Agreement and went ahead to establish the Court and named it War Crimes Division of the High Court and today it is called the International Crimes Division (ICD).<sup>326</sup>

The establishment of the ICD showed Uganda's repugnance to impunity; and her determination to hold all persons responsible for the gravest crimes that shock the conscience of mankind accountable. The court is guided by both domestic and international legislation including the; Constitution of the Republic of Uganda, 1995, International Criminal Court Act,<sup>327</sup> Extradition Act,<sup>328</sup> Magistrates Courts Act,<sup>329</sup> Prisons Act,<sup>330</sup> Trial on Indictments Act,<sup>331</sup> Uganda Citizenship and Immigration Control Act,<sup>332</sup> Geneva Conventions Act,<sup>333</sup> and the Penal Code Act.<sup>334</sup>

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<sup>323</sup> The Anti-Corruption Act, Act No. 6 of 2009, laws of Uganda; See also The High Court (Anti-Corruption Division) Practice Direction No. 3 of 2009; see also [https://www.the\\_judiciary.go.ug-data-smenu-anti-corruption-division-judiciary](https://www.the_judiciary.go.ug-data-smenu-anti-corruption-division-judiciary), accessed 25 September 2017.

<sup>324</sup> <sup>324</sup> The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, laws of Uganda retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017.

<sup>325</sup> Judiciary launches Specialised Court to Deal with Utilities, Wildlife and Standards, *The Judiciary* (Kampala 26 May 2017) retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017

<sup>326</sup> The International Criminal Court Act, 2010, the long title.

<sup>327</sup> Act No. 11 of 2010.

<sup>328</sup> Cap. 117.

<sup>329</sup> Cap. 16.

<sup>330</sup> Cap. 304.

<sup>331</sup> Cap. 23.

#### 4.6.2 The Anti-Corruption Division

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

Since the establishment of the two divisions of the High Court, they have been based in Kampala save for the ICD that recently commenced the hearing of the criminal case of Uganda against Kwoyelo at the Gulu High Court Circuit.<sup>335</sup>

The ICD rules of procedure provide a two tier trial process namely pretrial hearing to confirm charges and the actual trial.<sup>336</sup> The practice of the court has also been trials being presided over by a panel contrary to the provisions of the Judicature Act.<sup>337</sup>

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

For example the Anti- Corruption Division has been trying Mr. Rwabuhoro and others<sup>338</sup> for offences committed in Manafwa District. Their immediate families are either in Kyenjojo or Mbale. Majority of the witnesses and evidence is in Manafwa District.

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<sup>332</sup> Cap 66.

<sup>333</sup> Act of 1964.

<sup>334</sup> Cap 120.

<sup>335</sup> Michael Ntezza, *Kwoyelo Committed for Trial; Case to Be Heard in Gulu*, (Chimp reports online news, Kampala 31<sup>st</sup> August, 2018), retrieved from <https://chimpreports.com/kwoyelo-committed-for-trial-case-to-be-heard-in-gulu/> on 14/10/2018.

<sup>336</sup> Uganda V Sheikh Kamoga, Criminal Session Case No. HCT – 00 – ICD – CR – SC – No. 004 Of 2015 (unreported)

<sup>337</sup> Cap.13, section 20

<sup>338</sup> Uganda v Rwabuhoro and others, High Court (Anti-Corruption Division) Cases No. 15 and 16 of 2014

Accessing all these (witnesses and evidence) would require a reasonable amount of financial, time and material resources for the accused persons and their advocates in case they have any.

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

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

#### **4.7 Presumption of innocence on appeal or revision**

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

In the cases of *Kyeyune Mitala Julius v Uganda*<sup>339</sup> and *Mugisha Gregory v. Uganda*<sup>340</sup> Courts observed that the right to presumption innocence is not extinguished until the appeal process is exhausted as Courts make mistakes too and may wrongly convict an innocent person.

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

#### **4.8 Civil Society and the right to fair hearing in Uganda.**

The role of the Civil Society Organisations (CSOs) cannot be underestimated in the effort to put various stakeholders to task in relation to the observation of the right to fair hearing in criminal trials in Uganda. CSOs have provided the much needed legal representation to indigents not charged with capital offences and not benefiting from the provisions of article 28(3)(e) of the Constitution of the Republic of Uganda.<sup>341</sup>

Where the state has been found to callous and arbitrarily limited the observation of the right to fair hearing in criminal trials, CSOs have moved in to seek redress from Courts of law and restore the sanctity of this non derogable right.<sup>342</sup>

However, the CSOs efforts have not been without shortcoming and bottlenecks. Some of the bottlenecks are inherent in the law. For example in the case of Foundation for Human Rights Initiative vs. Attorney General, in the Constitutional Court and the Supreme Court, the wording of article 23(6)(a)<sup>343</sup> has remained a challenge to both Courts and practitioners and all efforts to make bail an automatic right has remained a

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<sup>339</sup> Supreme Court Criminal Miscellaneous Application No. 4 of 2017(unreported).

<sup>340</sup> Criminal Reference No 179 of 2011.

<sup>341</sup> Legal Aid Projects/services of the; Uganda Law Society, Justice Centres Uganda, Justice Cares Uganda, Muslim Centre for Justice and Law among others.

<sup>342</sup> Uganda Law Society V Attorney General, Constitutional Petitions No. 02 and 08 of 2002, where the trial of two UPDF officers was challenged for violating the right to fair hearing; Uganda Law Society v Attorney General, Supreme court Constitutional Appeal No.01 of 2006 where the Uganda Law Society challenged the concurrent trial of Dr. Kizza Besigye and 22 others in the High Court and General Court Martial for terrorism and murder charges; Foundation for Human Rights Initiative v Attorney General, Supreme Court Constitutional Appeal No. 03 of 2009; Foundation for Human Rights Initiative v Attorney General (2008) ULR 460 where the Non-Governmental Organisation was challenging the discretionary powers of Courts to grant bail.

<sup>343</sup> The Constitution of the Republic of Uganda, 1995.

wish as Courts have maintained that granting bail is discretionary in disregard of presumption of innocence and right to time and facilities to prepare for defence. Besides the legal challenges CSOs are resource handicapped and unable to reach the majority Ugandans facing trial before Magistrate's Courts and not charged with capital offences.

#### **4.9 Conclusion**

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

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

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

## **CHAPTER FIVE**

### **CONCLUSIONS, FINDINGS AND RECOMMENDATIONS**

#### **5.0 INTRODUCTION**

The chapter lays down what the researcher discovered in the course of the study, the logical conclusions made therefrom and suggested recommendations to areas that were found to be wanting in the observation of the right to fair hearing in criminal trials in Uganda.

#### **5.1 CONCLUSIONS**

The research was guided by the theme to critique the law and practice relating to observation of the right to fair hearing in criminal trials in Uganda. The researcher traversed relevant Acts of Parliament in Uganda and international instruments to the study, Court decisions in and outside Uganda and textbooks with materials concerned to criminal trials in Uganda. The study revealed areas in the legal framework and practice that are still wanting which may be the reason why accused persons in Uganda are yet to fully benefit from the objectives of article 28 and related articles under chapter 4 of the Constitution of the Republic of Uganda.

The majority of the statutes relating to observation of the right to fair hearing in criminal trials in Uganda predate the promulgation of the Constitution. The framers of the Constitution attempted to bridge the gap by including article 274.<sup>344</sup> The constitution further provided for article 137 which empowers the constitutional court to interpret the constitution.<sup>345</sup>

However, existing laws have a major structural deficiency that cannot be cured by only modification, and bringing the provisions in conformity with the provisions of the Constitution. The failure to apply this approach can be seen in the various decisions relating the right to bail and its relation with the right to fair hearing (presumption of

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<sup>344</sup> The Constitution of the Republic of Uganda, 1995.

<sup>345</sup> *ibid.*

innocence, provision of time and facilities to prepare for defence and legal representation) in Magistrates Courts Act (jurisdiction and conditions for grant of bail) and Trial on Indictment Act on the right to bail.<sup>346</sup>

The actions of different government agencies including the judiciary has found themselves in the deficiencies of the legal provisions providing for observation of the right to fair hearing in criminal trials. The judiciary especially in the effort to apply article 274 and the constitution in general, have made the situation more complicated.

Courts have made decisions that are confusing and end up curtailing the constitutional efforts to observe the right to fair hearing in criminal trials. They have left accused persons more confused of the position of the law at a given time and left them without any remedy in the circumstance.<sup>347</sup> Besides the interpretations, Courts have tended to condemn accused persons before trial especially in their rulings of applications for bail pending trial or appeal. This has been in the disguise of protection of public interests.<sup>348</sup>

The other agencies have participated in the situation by attacking the judicial officers whenever they make decisions against their positions and this has been made worse whenever the head of state joins the chorus to attack the judiciary while handling criminal trials.<sup>349</sup>

All the foregoing actions has made the practice and efforts to observe the right to fair hearing in criminal trials an illusion to many accused persons who find themselves undergoing trial before the Courts of law in Uganda.

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<sup>346</sup> Foundation for Human Rights Initiative v Attorney General (2008) ULR 460; See also Uganda (DPP) V Dr. Kizza Besigye and 22 Others, Constitutional reference No. of 2006 (unreported).

<sup>347</sup> Foundation for Human Rights Initiative v Attorney General, Supreme Court Constitutional Appeal No. 03 of 2009.

<sup>348</sup> Gregory Mugisha v Uganda, Court of Appeal Miscellaneous Criminal Application No. of 5 of 2011(unreported); See also Juliet Kigongo, 'Court has duty to protect society from lawlessness-judge tells Kanyamunyu' *The Daily monitor* (Kampala 30 March 2017) retrieved from <https://www.monitor.co.ug> accessed on 4/6/2017.

<sup>349</sup> George W Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance*, (2<sup>nd</sup> impn. LawAfrica Publishing (U) Ltd 2010) 46 – 51; See also Samuel William Wako Wambuzi, *Securing Constitutionalism and the Rule of Law in Uganda: The Enduring Legacy of Benedicto Kiwanuka*, (2018) 8.

## 5.2 FINDINGS

The researcher based on the foregoing conclusions, made various findings on the legal framework and practice relating to observation of the right to fair hearing in criminal trials in Uganda. The Uganda's legal framework is two-fold. There Acts of Parliament that preceded the promulgation of the Constitution of the Republic of Uganda<sup>350</sup> and those Acts after its promulgation. However, the Constitution bridged the gap and updated the existing law under article 274<sup>351</sup> and took care of the law that preceded the promulgation of the Constitution. The researcher discovered the following;

### 1. Dispersed provisions in various Acts of Parliament

The law regulating observation of the right to fair hearing in criminal trials is found in the Constitution and various Acts of Parliament. The procedural law governing trials is found in the Magistrates Courts Act<sup>352</sup> and the Trial on Indictments Act.<sup>353</sup> Surprisingly the Criminal Procedure Code Act<sup>354</sup> which would be the central reference legislation to protect the accused persons' right to fair hearing in criminal trials is so narrow and does not cover much of the proceedings in criminal trials like the foregoing Acts.

Besides the above principle Acts, there is the Uganda Peoples Defence Act,<sup>355</sup> the Prisons Act,<sup>356</sup> The Police Act,<sup>357</sup> Children Act<sup>358</sup> as amended<sup>359</sup> all providing for legal representation, bail, presumption of innocence, time and facilities to prepare for defence among others.

All these Acts cause practitioners, judicial officers and the public in general a challenge to establish the law to assist the accused person, the judicial officer to make a fair and

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<sup>350</sup> 1995

<sup>351</sup> The Constitution of the Republic of Uganda, 1995.

<sup>352</sup> Cap. 16

<sup>353</sup> Cap. 23

<sup>354</sup> Cap. 116

<sup>355</sup> Cap. 59

<sup>356</sup> 2006

<sup>357</sup> Cap. 303 as amended

<sup>358</sup> Cap. 59

<sup>359</sup> The Children Amendment Act, 2016



just decision in time and the accused person to be able to claim his or her rights in the circumstances.

## **2. Inconsistencies and contradictions within the law**

The right of fair hearing is a non derogable right. However, the non-derogation does not extend to the right to liberty,<sup>360</sup> which by extension is part of the right to fair hearing.<sup>361</sup> The right to fair hearing focuses on preventing an accused person from suffering any sanction before due process has been carried out. The objective of article 28 can properly be protected if article 23 is read and considered together with the provisions of article 28 especially provisions relating to bail,<sup>362</sup> presumption of innocence,<sup>363</sup> time and facilities to prepare for defence<sup>364</sup> amongst others.

Further the constitution gives unfettered discretion to Courts to grant bail<sup>365</sup> which in practical terms derogates/fetters the provisions of article 28 specifically the provisions relating to presumption of innocence, no punishment before a fair trial, time and facilities to prepare for defence among others.

The process of trials in minor and capital offences are entirely similar except for jurisdiction, accused persons undergoing trial in the High Court and Chief Magistrates Courts for offences whose punishment is imprisonment for life or death sentence and are unable to afford legal representation for themselves are entitled to legal representation at the cost of the state.<sup>366</sup> This right is not available to an accused person where the offence doesn't fall in the category of article 28(3)(e) but faced with

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<sup>360</sup> The Constitution of the Republic of Uganda, 1995 article 23.

<sup>361</sup> *ibid* article 28.

<sup>362</sup> *ibid* article 23(6)

<sup>363</sup> *ibid* article 28(3)(a)

<sup>364</sup> *ibid* article 28(3)(c)

<sup>365</sup> *Uganda (DPP) v Dr. Kizza Besigye*, Constitutional reference No. 20 of 2005; See also *Foundation for Human Rights Initiative vs. Attorney General* (2008) ULR 460.

<sup>366</sup> The Constitution of the Republic of Uganda, 1995 article 28(3)(e).

trials where the state is represented by trained and professional State Attorneys and Prosecutors.<sup>367</sup>

The provisions in the Magistrates Courts Act regarding to costs except compensation are applicable to the state and private persons where it is discovered that there were no reasons to prosecute the person and the costs are limited to two hundred thousand only. Considering what accused persons go through, financially to defend themselves, the time spent on pretrial remand if never granted bail at times on trumped up charges initiated by the state go unpunished. State prosecutions are not covered under provision for compensation for initiating frivolous and vexatious charges. The provisions on compensation are therefore discriminatory and insufficient to retribute the loss in legal fees, time lost and psychological torture caused by frivolous and vexatious charges initiated by the state.<sup>368</sup>

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

### **3. Outdated laws and irrelevant provisions**

Legislations like the Habitual offenders (Preventive Detention) Act,<sup>369</sup> that grants Courts and the President of Uganda to impose an imprisonment sentence above what has been imposed after due process (criminal trial) based on one's antecedent criminal record which was not part of the charge he or she has been convicted of is unfair, arbitrary

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<sup>367</sup> Kazibwe John v Uganda HC Crim. Case No. 10 of 2014 (unreported); See also The Uganda Criminal Justice Bench Book (1st edn, The Law Development Centre, 2017)87-8; See also George W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance*, (2<sup>nd</sup> impn. LawAfrica Publishing (U) Ltd 2010) 54.

<sup>368</sup> The Magistrates Courts Act, Cap. 16, sections 195 and 196; see also the Trial on Indictment Act, Cap. 23, section 125, where the award of costs is limited to three thousand shillings only under section 125(2).

<sup>369</sup> Cap. 118, sections 1, 2, and 4.

and unconstitutional. This is against the spirit of article 28.<sup>370</sup> Even if article 274<sup>371</sup> is applied it cannot cure the shortcomings of such legislation.

Besides the legislation, provisions like the ones relating to committal proceedings whose scope and control is ambiguous are still enforced in Uganda during criminal trials.<sup>372</sup> An accused person charged with an offence under the exclusive jurisdiction of the High Court has to still go through the Magistrates Courts for committal to the High Court. This is process implemented by Courts without any power to grant pre-trial remedies but to remand accused person endlessly. This is a legalized abuse of Court process.<sup>373</sup>

#### **4. Isolative interpretation of the provisions of the law**

Ugandan Courts are the interpreters of legal provisions and statutes that govern criminal trials and provide for the rights of the accused persons during criminal trials. One of the principles/rules of constitutional interpretation is the rule of harmony, wherein provisions relating to a similar issue or principle of law are read together to avoid them contradicting or destroying each other.<sup>374</sup> The right to fair hearing in criminal trials especially the right to speedy trial, presumption of innocence and availing the accused time and facilities to prepare for defence can be realized by applying the principle of harmony and integral constitutional interpretation. This same principle should apply in the determination of the right to apply and grant of bail with the right to fair hearing.

Unfortunately, Courts in Uganda have continued to consider the right to bail singularly and in isolation to the right to fair hearing.<sup>375</sup> Whereas sometimes in determination for bail applications, the presumption of innocence is considered, there has not been much

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<sup>370</sup> The Constitution of the Republic of Uganda, 1995.

<sup>371</sup> *ibid.*

<sup>372</sup> The Magistrates Courts Act, Cap. 16, section 168; See also the Trial on Indictment Act, Cap. 23 section 1.

<sup>373</sup> *Shabahuria Matia V Uganda*, High Court Criminal Revisional Cause, No. MSK-00-Cr-0005 of 1999 (Arising From Criminal Case No. MMA. 435 of 1995) (unreported)

<sup>374</sup> *Paul Kawanga Ssemwogere v Attorney General*, Supreme Court Constitutional Appeal No. 1 of 2002 (unreported); See also *Attorney General v David Tinyefuza*, Supreme Court Constitutional petition No. 1 of 1997 (unreported); See also *The Uganda Civil Justice Bench Book* (1st edn, The Law development Centre, 2016) 353-4.

<sup>375</sup> *Uganda (DPP) v Dr. Kizza Besigye*, Constitutional reference No. 20 of 2005; See also *Foundation for Human Rights Initiative v Attorney General* (2008) ULR 460.

consideration of the right to be availed time and facilities to prepare for defence by an accused person being a factor for consideration of bail pending trial or appeal. The situation is further complicated by the unfettered discretion of Courts while determining bail applications.<sup>376</sup>

Further the Courts have held that the right to presumption of innocence is not extinguished until all the rights to appeal are exhausted,<sup>377</sup> on the other hand the same courts hold that a person who loses in the first criminal trial court does not benefit from the presumption of innocence in application for bail pending appeal.<sup>378</sup>

## **5. Governance, societal attitude and perception**

The formulation of policies, implementation and enforcement by the various institutions of the state is what is meant by governance in the context of this study. Issues of resource allocation to the judiciary, respect of judicial independence enshrined in the constitution and political will determine greatly the protection of the right to fair hearing in a democratic country like Uganda.

To begin with, there has been continued and pronounced gaps in funding to the judiciary, leading to less or no enough human resource in form of judicial officers and their support staff like interpreters among others.<sup>379</sup> Criminal sessions cannot be held regularly thereby causing backlog and denying accused persons speedy trials, quality interpretation to mention a few.<sup>380</sup>

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<sup>376</sup> *ibid.*

<sup>377</sup> *Kyeyune Mitala Julius v Uganda*, Supreme Court Criminal Miscellaneous Application No. 4 of 2017(unreported). Uganda; See also *Mugisha Gregory v. Uganda* Criminal Reference No 179 of 2011 (unreported).

<sup>378</sup> *Gregory Mugisha v Uganda*, Court of Appeal Miscellaneous Criminal Application No. of 5 of 2011(unreported).

<sup>379</sup> Justice Patrick Tabaro, *Alternative justice - a solution to backlog in Uganda's judicial system*, (The Observer, Kampala August 31, 2012), retrieved from <https://www.observer.ug>, on 30th September, 2018.

<sup>380</sup> Samuel William Wako Wambuzi, *Securing Constitutionalism and the Rule of Law in Uganda: The Enduring Legacy of Benedicto Kiwanuka*, (2018) 8.

Besides, the funding gaps, there is the abuse of the systems put in place to facilitate speedy trials. For example where criminal sessions are taken as sources of more income to judicial officers and certain individuals are the ones commonly assigned sessions.<sup>381</sup>

In addition to the above, policies like plea bargaining and criminal session system are implemented before adequate sensitization and public civic education for public ownership and appreciation of their value and procedure to make them benefit from them.<sup>382</sup>

The continued attack on the judiciary by the executive and its agents, have not spared the independence of the judiciary. Judicial officers have been denied an opportunity to determine criminal matters without interference by the state operatives. Accused persons rights have not been able to be guaranteed by Courts because of the interference by the executive.<sup>383</sup>

With the foregoing environment, judicial officers lose morale and reports of absenteeism and late coming are the order of the day.<sup>384</sup> The end result are that right to bail which is the bed rock of presumption of innocence has become a commodity to some judicial officers.<sup>385</sup> Accused persons on remand overstay and some are forced by circumstances to resort to plea bargaining to enable them close up their cases for the sake of moving away from the psychological torture over being imprisoned on remand for a long without hope of being released soon, but not because they are guilty or wanted to do so in the first place.<sup>386</sup>

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<sup>381</sup> The Judiciary, 'A report of the case backlog reduction committee' (29 March 2017) 39 retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017.

<sup>382</sup> Betty Amamukori, *We are being forced to sign plea bargain agreements*, (The newvision, Kampala 04 May, 2018), retrieved from <https://www.newvision.co.ug> on 03/11/2018; See also Michael Ntezza, *Chief Justice warns defence lawyers on neglecting suspects in plea bargaining*, (Chimpreports, Kampala 21 June, 2018), retrieved from <https://chimpreports.com> online newspaper on 03/11/2018.

<sup>383</sup> *ibid* (n 365) 6-7

<sup>384</sup> *ibid* (n 365) 45.

<sup>385</sup> Badru Walusansa, The judiciary must be free from corruption, Youth Voices Their Perspective, A youth Blog supported by The Commonwealth Youth programme, (May 15, 2017), retrieved from <https://www.yourcommonwealth.org>.

<sup>386</sup> Chimp Corps, Suspects are mistaking plea bargain, says Chief Justice (Chimpreports, Kampala 22 June 2018), retrieved from <https://www.chimpreports.com> online newspaper, on 03/11/2018.

Further in determination of criminal cases and applications, Courts have tended to focus on the public attitude and societal perceptions at the expense of individual accused persons rights. The worst of this approach is when courts are determining bail applications before trial and pending determination of appeals.<sup>387</sup>

The study found that Courts have suffocated the right to presumption of innocence and availing the accused time and facilities to prepare for their defence in consideration of public interest.<sup>388</sup> The situation has not been helped by senior government officials advocating for denial of bail to persons accused of capital offences.<sup>389</sup>

With Courts fear of the public sentiments and perception, they have made innocent persons serve illegal imprisonment sentences in the guise of remand or custody pending trial or determination of the appeals.

### **5.3 RECOMMENDATIONS**

In consideration of the foregoing findings and conclusions, the following recommendations were suggested by the researcher to the various stakeholders both in relation to the legal framework and the practice by different agencies concerned with the observation of the right to fair hearing in criminal trials in Uganda. The recommendations are here below are in relation to the legal framework and practice as follows;

#### **1. Consolidation**

The government through Parliament should enact a consolidated Act for criminal trial procedure covering the right to fair hearing at the same time. For example the Criminal Procedure Code Act, the Magistrates Courts Act (provisions relating to criminal trials and right to fair hearing), the Trial of Indictment Act, the Uganda Peoples Defence Act, the

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<sup>387</sup> Mugisha Gregory v Uganda Court of Appeal Miscellaneous Criminal Application No. 5 of 2011; See also Juliet Kigongo, 'Court has duty to protect society from lawlessness-judge tells Kanyamunyu' *The Daily monitor* (Kampala 30 March 2017) retrieved from <https://www.monitor.co.ug> accessed on 4/6/2017.

<sup>388</sup> *ibid.*

<sup>389</sup> Ivan Okuda, Why Museveni shouldn't lose sleep over bail, *The daily monitor* (Kampala 22 June 2018), retrieved from <https://www.monitor.co.ug>; See also President Museveni cautions judges on bail for capital offences (Kampala 28January 2014), retrieved from <https://www.statehouse.go.ug> on 03/11/2018.

Children Act among others can be consolidated to provide a one principal legislation on criminal trials and observation of the right to fair hearing in the process of conducting criminal trials in Uganda.

## **2. Amendment**

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

The legislations relating to observation of the right to fair hearing in criminal trials should be amended to actualize the various pronouncements by Courts of law where the provisions have been found to be in contradictions with the Constitution or where relevant provisions are not there or were removed without replacement.<sup>390</sup> For example since the SCU decision in the case of Salvatori Abuki on the unconstitutionality of banishment as a punishment, the Witchcraft Act has remained un-amended.<sup>391</sup>

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

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<sup>390</sup>Shabahuria Matia V Uganda, High Court Criminal Revisional Cause, No. MSK-00-Cr-0005 of 1999 (Arising From Criminal Case No. MMA. 435 of 1995) (unreported).

<sup>391</sup> *Salvatori Abuki V Attorney General, Constitutional Appeal No. 1 of 1998.*

defending him or herself and clearing his name soiled in a criminal trial in Uganda arising from frivolous and vexatious charges.

### **3. Repeal**

The Habitual Offenders (Preventive Detention) Act, sections of the Magistrates Courts Act and Trial on Indictment Act relating to committal proceedings. The Habitual Offenders (Preventive Detention) Act is against the spirit of article 28(7).<sup>392</sup> For committal proceedings, there are not relevant and there is no reason why an accused person should appear and be remanded by a Court that has no jurisdiction to determine the case or grant any other remedy in the same. In alternative amend the MCA to provide powers to the magistrates to grant remedies to accused persons and prevent abuse of court process.<sup>393</sup>

### **4. Enactment of new laws**

Further government through Parliament should enact laws concerning provision of free legal aid services to indigents undergoing criminal trials from Police investigations to appeal. In other jurisdictions it is called public defenders scheme. At the moment the same are provided by the Justice Centres Uganda, the Legal Aid and Pro bono project of the Uganda Law Society and the Law Development Centre mostly funded by donors not the state. The system does not have well-articulated statutory guidance and obligations to the service providers in the law. The quality and scope of the services provided is therefore inevitable and the same can be cured by enactment of a law to that effect.<sup>394</sup>

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<sup>392</sup> The Constitution of the Republic of Uganda, 1995.

<sup>393</sup> Shabahuria Matia V Uganda, High Court Criminal Revisional Cause, No. MSK-00-Cr-0005 of 1999 (Arising From Criminal Case No. MMA. 435 of 1995) (unreported), Egonda Ntende J as then was advised that the Magistrates Act needed such an amendment to grant them powers while handling committal proceedings which were removed in the Magistrates Courts (Amendment) Act, Act 4 of 1985..

<sup>394</sup> The Judiciary, 'A report of the case backlog reduction committee' (29 March 2017) 4-5 retrieved from <https://www.judiciary.go.ug> accessed 25 September 2017



## 5. Training and sensitization

The researcher observed that policies aimed at ensuring observation of the right to fair hearing have not realized their objectives because the stakeholders were not well inducted on the benefits and procedure of the policy under implementation. The case of plea bargaining and attitudes of the different stakeholders like private lawyers, state prosecutors and court officials themselves for lack of proper information about the objects and procedures have not made the accused persons properly benefit from the project from a point of knowledge. Therefore, there is need for training and continued sensitization of the judicial officers, private and state employed advocates and the general public on the different policies geared at improving the observation of the right to fair hearing during criminal trials in Uganda. Projects like the Chain linked of JLOS, plea bargaining, reduction of dialogue should be shared and stakeholders enlightened on their modus operandi before implementation phase.<sup>395</sup>

## 6. Judicial activism and political will.

Judicial officers should rise above the fear and interference of the different stakeholders while going about their judicial functions. Judicial officers should judiciously apply their discretion even when the current rules and legislations aren't available or relate to the situation faced by a judicial officer. They should make decisions without fear or favour as per the provisions of the Constitution to determine the various situations which are different and numerous. Judicial officers should reject any interference at all times. Be corrupt free and just all times.<sup>396</sup>

The executive and everyone who derives power from it should desist from undermining judicial authority provided under the constitution in the conduct of criminal trials to guarantee the right to fair hearing in the process. The executive should provide

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<sup>395</sup> Betty Amamukori, *We are being forced to sign plea bargain agreements*, (The newvision, Kampala 04 May, 2018), retrieved from <https://www.newvision.co.ug> on 03/11/2018; See also Michael Ntezza, *Chief Justice warns defence lawyers on neglecting suspects in plea bargaining*, (Chimpreports, Kampala 21 June, 2018), retrieved from <https://chimpreports.com> online newspaper on 03/11/2018.

<sup>396</sup> George W Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance*, (2<sup>nd</sup> impn. LawAfrica Publishing (U) Ltd 2010) 46 – 51; See also Samuel William Wako Wambuzi, *Securing Constitutionalism and the Rule of Law in Uganda: The Enduring Legacy of Benedicto Kiwanuka*, (2018).

adequate financial resources to run the judiciary (both operational and development), avoid reoccurrence of incidences like the attack on the High Court of Uganda by security officers dubbed the black mamba. Negative pronouncements and public attacks by senior military and government officers including the Head of State, disobedience of Court orders to be discouraged by any member of the public but to utilize all legal means to challenge Courts decisions as provided by the law rather than unfounded criticisms and ridicule of the judiciary as a whole.<sup>397</sup>

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