



**ANALYSIS OF THE RIGHT OF A FAIR HEARING IN COURTS OF
JUDICATURE**

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OCTOBER

DECLARATION.

I **kasingye Stuart** hereby declare that this is my own original work and it has never been submitted by any student for any academic award. Where other people's works have been quoted, they have been duly acknowledged. I also declare that this work has never been submitted to any institution whatsoever for any academic award of any kind.

Signed



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Date

19/10/2012

APPROVAL

The following Research paper by KASINGYE STUART titled “ANALYSIS OF THE RIGHT TO A FAIR HEARING IN COURTS OF JUDICATURE IN UGANDA” has been done under my supervision, and is now ready for submission with my approval

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Signed.....

Date: 19/10/2012

DEDICATION

I dedicate this success to my beloved father late **kamu kasingye** and my beloved mothers **kasingye grace** and **kasingye Mary**. I also dedicate it to my beloved sisters **Kushemererwa Agnes** and **komurara Monica**.

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CHAPTER ONE

1.0 INTRODUCTION

The right to fair hearing is a principle of natural justice expressed in a Latin maxim as **Audi alteram partem** meaning that hear the other side. Justice means fair and proper administration of laws¹. Access to justice exists if the people especially the poor and vulnerable suffering from violation have the ability to make their grievances be listened to and obtain proper treatment from the institutions charged with the duty to dispense justice in accordance with the rule of law². The right to a fair hearing generally means that no one shall be penalized by a decision of an administrative authority or tribunal unless he or she has been given prior notice of the charge or case he or she has to meet, a fair opportunity to answer the case against him or her and to put his or her own case. The right to a fair hearing also means that the Court must be independent and **impartial** in terms of Article 128 of the constitution³. It further means that no man can be a judge in his cause. It means that the adjudicator must not have any financial or proprietary interests in the outcome of the proceedings. An adjudicator must not show a real like hood of bias. The right to a fair hearing also means that the accused must be presumed innocent until proven guilty or pleads guilty⁴. The underlying premise of the right to a fair hearing is to accord fairness to both parties before a Court and to ensure that principles of natural justice are upheld thus it is correct for one to say that there is a close relationship between the right to a fair hearing and principles of natural justice. The right is therefore to ensure that there is equal treatment to both parties before the law. All people are equal before and under the law.⁵

¹ Blacks law dictionary.

² According to Bibawa- Nsubugwa Christine, National Coordinator of justice centers' in Uganda a project of JLOS. New vision 14 march 2012.

³ 1995 constitution of Uganda.

⁴ Article 128 of 1995 constitution of Uganda.

⁵ Article 21 of the 1995 constitution of Uganda.

1.1 BACKGROUND

Uganda's road to securing the right to a fair hearing has passed through numerous tests and experiments. In a society where Rule of law and democracy dictate it was necessary to enact laws guaranteeing the right to a fair hearing. The right to a fair hearing traces its origin from Biblical Adam and Eve in Genesis in a chapter that talks about **'the fall of man'** where Adam and Eve ate fruits from the forbidden tree. After man's disobedience to **God, the Lord had to give each of them a chance to present his side of case before punishing them.** God asked Adam, **have you eaten from the tree from which I commanded you not to eat?** The man said, **"the woman you put here with me - she gave me some fruit from The Tree and I ate it"**. Then the Lord God said to the woman **what is this you have done?** The woman said **"the serpent deceived me, and I ate"**.⁶ Thus God passed a judgment after hearing from both sides.

The right to a fair hearing is a principle of Natural Justice which justifies the theory that Human Rights are God given and not granted by the State basing on the fact that God gave Adam and Eve an opportunity to present their side of cases before penalizing him. Thus one is correct to argue that Human rights are inherent and not granted by the state⁷ basing on the fact that God gave Adam and Eve an opportunity to present their sides of the case before penalizing them as seen in Genesis. It is important to note that the right to fair hearing is applicable to both courts and tribunals as well as to administrative bodies in light of Article 42⁸. The right is applicable with respect to both Civil and criminal matters notwithstanding the fact that the majority of the guarantees of a fair trial in Article 28 relate to criminal matters⁹. It is also sad to note that people at the grassroots of society were not accessing justice. It was believed that the poor could not access justice not only because lawyers are expensive but also Court proceedings are not only in English but also highly technical.

⁶ Genesis chapter 3; 6-14

⁷ Article 20 of 1995 constitution of Uganda

⁸ 1995 constitution of Uganda.

⁹ Article 28 of the 1995 constitution of Uganda.

1.2 STATEMENT OF THE PROBLEM

Despite the clear provisions of the constitution of Uganda guaranteeing the right to a fair hearing in courts of judicature, the provisions are not implemented thus accessing justice in courts of judicature is like **squeezing water out of stone**. The right to a fair hearing as guaranteed under Article 28 of the constitution¹⁰ of Uganda is not upheld.

There are inequalities before and under the law in courts of judicature despite the provisions of the constitution¹¹ of Uganda guaranteeing equality and freedom from discrimination. The people at the grass root level do not know the law and their rights.

There is corruption in the judiciary denying people access justice. Justice is sold out to those who can afford it through bribery. This in turn affects right to a fair hearing thus accessing justice by the poor is like squeezing water out of the stone.

1.3 RESEARCH QUESTIONS

What is the meaning of the principle fair hearing?

Is the right to a fair hearing respected and upheld in Uganda as guaranteed under the constitution of Uganda?

What are the factors hindering the realization of the right to a fair hearing in courts of judicature?

What should be done to ensure that the right to a fair hearing is respected and upheld in courts of judicature in Uganda?

¹⁰ 1995 constitution

¹¹ Article 21 of the 1995 constitution

1.4 OBJECTIVES OF THE STUDY

General objective.

The core objective of the study is to critically examine how the right to a fair hearing as guaranteed under the constitution of Uganda has been realized in courts of judicature.

Specific objective

To critically analyze the extent to which the right to a fair hearing is observed in courts of judicature in Uganda.

To identify factors hindering the observance of the right to a fair hearing in courts of judicature.

To examine the extent to which an accused is informed of the nature of the charge against him or her and the right to an interpreter.

To identify the possible measures that can be taken to promote and respect the accused's right to a fair trial.

1.4 HYPOTHESIS

Ignorance of the law denies people of their right to fair hearing.

Accessing justice in courts of judicature has been hindered by corruption.

Inequality before and under the law has denied people of their right to fair hearing in courts of judicature.

Corruption in the judiciary has been accelerated by low salaries and allowances.

There is a negative relationship between the level of education and access to right to fair hearing in courts of judicature in Uganda.

1.5 SCOPE OF THE STUDY

The study cover the period 1995 to date being the post 1995 constitution of Uganda that guarantees the right to a fair hearing and participation of the people in the administration of justice.

I chose this period because it is the period in which peoples rights are being infringed. It is the period in which the current government says it has restored the rule of law and democracy in the country. This period has seen people denied of their right to a fair hearing most especially the right to appear before an independent and impartial court.

The study is focused on courts of judicature in their hierarchy. The area of concentration will be Kampala since it is where the head offices of the judiciary and human rights are situated. It is where Supreme and Court of Appeal are found. Kampala is the district with a number of universities and most importantly the Law Development Centre.

1.6 JUSTIFICATIONS OF THE STUDY

The study was prompted by the feeling about the way courts judicature operate and exposes the hindrances encountered by the judiciary and factors which deny people of their right to a fair hearing and to find solutions to the same.

The study is aimed at contributing towards a body of knowledge pertaining to the rule of law, democracy, and constitutionalism in Uganda. Further the study will be relevant to the entire citizenry to know how the right to a fair hearing should be availed to them and to understand the essence of the right to fair hearing.

The study will help the people to realize the importance of the right to a fair trial in administration of justice by courts of judicature in Uganda.

It is therefore hoped that recommendations will help to respect and uphold the right to fair hearing in courts of law and ensure that people are treated equally before and under the law in light of the constitution of Uganda¹².

1.7 SYNOPSIS.

This chapter shows what is contained in every chapter. Chapter one deals with introduction, Background, statement of the problem, research questions, objectives of the study, hypothesis, scope of the study, justifications of the study and methods to be used in collecting data.

Chapter two deals with literature review and with methodology. This part shows what other people have written about fair hearing and independence of courts of law. It will also show the methods used in the collection of data.

Chapter three deals with the laws guaranteeing the right to a fair hearing. It shows both international and national legal frame work. It also shows what courts have held regarding the right to a fair hearing. The chapter further shows the provisions on hierarchy and constitution of courts of judicature in Uganda. Chapter four deals with summary, recommendations and conclusion.

¹² Article 21 of 1995 constitution

CHAPTER TWO:

LITERATURE REVIEW AND METHODOLOGY

2.1 LITERATURE REVIEW

The right to a fair hearing as a principle of natural justice and a basic of rule of law and democracy has attracted the attention from both legal circles and outside legal circles which has made many people to give their views as to what the right to fair hearing means. A number of authors have written about the contents of the right to fair hearing because of a contradiction that exists between laws guaranteeing the right and practice. A number of authors have argued that these laws are not worth the ink used to write them and the papers on which they are written since writing laws and implementing them to some extent seem to be on two parallel lines. According to **professor cram stone** in his book¹³ human rights are inherent entitlements that accrue to every human being merely for being human

Many authors have written about the contents of the right to fair hearing such as the right to be given opportunity to present his side of case, right to appear before an independent and impartial court, right to be presumed innocent until proven guilty or pleads guilty, right to be tried within a reasonable time, right to legal representation, right not be convicted under retroactive penal law, right to be present at the trial, right not to be charged unless the offence defined and the penalty prescribed by the law, right against double jeopardy, right to assistance of an interpreter, right to be given adequate time and facilities to prepare defense among others as hereunder.

The Dakar Declaration on the right to fair trial in Africa¹⁴. The right to a fair trial is a fundamental right, non-observance of which undermines all other human rights. Therefore the right is a non derogable right especially as the African charter does not expressly allow for any

¹³ What are Human Rights(1993)

¹⁴ The Dakar declaration on the right to a fair trial adopted in November 1999 at its 26th ordinary session in Kigali.

derogation from the right it enshrines. The realization of this right is dependent on the existence of certain conditions and is impeded by certain practices. These include among others:

(a) Rule of law, democracy, and fair trial.

The right to fair trial can only be fully respected in an environment in which there is respect for rule of law and fundamental rights and freedoms. The rule of law includes the existence of fully accountable political institutions.

(b) Independence and impartiality of the judiciary

While there are constitutional and legal provisions which provide for the independence of courts of law in most African countries, the existence of these provisions alone does not ensure the independence and impartiality of the judiciary or courts of law.

2.1.2 Right to appear before an independent and impartial court of law.

It is important to note that even where different authors have tended to define and explain the concept of independence of the judiciary or courts of law, they have ended up importing the same notion.

Reckoning on **Odoki**, he quotes the definition of the judiciary by the international commission of jurists at its meeting in New Delhi in 1959 in these remarks; “an independent judiciary is an indispensable requisite of a free society under the rule of law independence of the judiciary here implies to freedom from interference by the executive or legislature with exercise of the judicial function. Independence does not mean that the judge is entitled to act in arbitrary manner; his duty is to interpret the law and the fundamental assumptions which underlie it to the best of his abilities and in accordance with the dictates of his own conscience”¹⁵.

Writing on the importance of the judiciary **odoki** says “**the basic importance of the judiciary is the impartial administration of disputes between the citizens and the state in accordance with the law and the constitution**”.¹⁶

¹⁵ B. J odoki op cit p,1

¹⁶ ibid

Outside the legal circles, people have tried to define the concept of the independence of the courts of law. **Paul Ld. Wiebe and P. Dodge** asserted that “the custodians of law and justice reside in the institution of judiciary. As an arm of state the judiciary is supposed to be independent and unencumbered by the whims of policy makers and implementers”.¹⁷

Mukubwa, while giving his view on how independence of the judiciary to be a reality says “the judiciary should be free from any sort of pressure be it within the judiciary itself say from those in administrative positions like the principal judge pressurizing magistrate on how to deliver a judgment in which he has an interest”. However **Mukubwa** does not show what should be done to avoid pressure from the judiciary itself or those in administrative positions.¹⁸

2.1.3. The right to trial within a reasonable time.

‘in determination of civil rights and obligations or any criminal charge a person shall be entitled to a fair speedy and public hearing before an independent and impartial court or tribunal established by law’.¹⁹

According to justice **Ntabgoba** in his article “it’s now not a secret that our prisons country wide are congested with prisoners most of whom are awaiting trials. They spend longer periods in prisons during police investigation because they are prematurely detained. According to him such a practice is a clear manifestation of the violation of the right to a fair hearing despite being a constitutional right.

M. Ssekana referring to case of *Bell vs. DPP and A.G*²⁰ writes on the right to a trial within a reasonable time that ‘the courts have inherent jurisdiction to prevent a trial due to unreasonable delay’.²¹ However **Ssekana** does not show the length of time after which will court prevent a trial due to areasonable delay and in which offences.

¹⁷ Beyond crisis: development issues Uganda, op cit pg. 17

¹⁸ Okumuwengi: founding the constitution of Uganda: 1994, pg. 199

¹⁹ Article 28 of 1995 constitution of Uganda

²⁰ [1985] 2 All ER 58, 589.

²¹ Criminal procedure and practice in Uganda at pg 43

In the case of **Musoke vs. Uganda**²² the court found that the constitutional right of the appellant to be brought to trial within a reasonable time or released had been infringed and the court further noted that it is only in complicated cases that could not be brought to trial within six months. The right to trial within a reasonable time is based on notion that **justice delayed is justice denied**, however it is also true that to rush justice is to deny justice.

Ssekana in his book²³ asserts that the right to a fair hearing seeks to protect three interests that are to protect the security of the person by seeking to minimize anxiety, concern and stigma of exposure to criminal proceedings. To minimize exposure to the restrictions on liberty which result from pretrial, incarceration and restructure bail conditions. To ensure that proceedings take place while evidence is available and fresh.

2.1.4. The right to be presumed innocent until proved guilty.

B.J Odoki, chief justice of Uganda says ‘presumption of innocence means that the burden of proof lies on the prosecution to prove their cases beyond reasonable doubt. That there is no such burden on the accused to prove their innocence. He further writes that it would have been too harsh if there was presumption of guilt for it would have been the duty of the accused to prove their Innocence and as it is generally accepted that it is more difficult to prove negative than a positive’.²⁴ However Odoki only shows presumption of innocence in only criminal matters since it is only in criminal cases where the standard of proof is beyond reasonable doubt differing from Civil matters where the standard of proof is on balance of probabilities. He does not also show cases where there are reverse - onus clauses that are where the laws place the onus on the accused for instance in cases where certain facts are proved and the law presumes or deems a conclusion. Under the Fire Arms Act it is provided that ‘in any prosecution under this Act the burden of proof that any accused person is entitled to purchase acquire or have in possession any firearm or ammunition by virtue of an exemption shall lie on the accused person’.²⁵

²²[1972] EA 137.

²³ Criminal procedure and practice in Uganda at pg. 44

²⁴ A guide to criminal procedure in Uganda at pg. 100

²⁵ Section 40 The fire Arms Act cap 299

Dickson CJC²⁶ describes the importance of the presumption of innocence ‘the presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from community, as well as other social psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that the state proves an accused’s guilt beyond reasonable doubt, he or she is innocent. This is essential in a society committed of fairness and social justice. This presumption of innocence confirms our faith in human kind; it reflects our belief that individuals are descent and law abiding members of community until proven otherwise’

Percy Tuhaise on Human Rights in Uganda and the 1995 constitution²⁷ in this article, **Tuhaise** argues that one of the major impediments to the enjoyment of human rights under the 1995 constitution in Uganda is the failure to respect the presumption of innocence accorded to suspects by the constitution. According to her, failure to observe this right clearly leaves no doubt that the accused persons rights will continue to be violated with impunity.

2.1.5 Right to information of nature of the charge.

As provided under Article 28[3] [b] **Odoki** in his book A guide to criminal procedure in Uganda at page 101 writes that when a person has been arrested for having committed an offence, it is only fair that they should be informed of the particulars of the charge against them, and I concur with him that while the police will no doubt formally charge them with offence, it is also necessary that the accused should be brought before a magistrate within 48 hours of arrest so that he or she can formally plead to the charge by denying it or pleading guilty to it. However **Odoki** does not show whether the right to fair trial includes the right of access to a police file since information in the police file is necessary to enable the accused to prepare a proper defense.

²⁶R vs. Oakes (1986) 26 DLR (4th) 200.

²⁷ (1998) 1 (1) Uganda law focus

2.1.6 The right to have adequate time and facilities to prepare a defense.

M Ssekana writes in his book criminal procedure and practice in Uganda²⁸ that the accused may invoke the right to justify a postponement or adjournment if more time is required for purposes of preparing a defense. **Odoki** writes that adequate time may amount to give accused person reasonable notice of the offence against him or her as well as when the trial will begin. However he does not clearly show what adequate time is and facilities for the preparation of the defense can be given to the accused.²⁹

2.1.7 Right not be convicted except when the offence is defined and its punishment prescribed by the law.

As provided under article 28(12), that except for the contempt of court no one shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed by the law, according to **Ssekana**, the offence should be ascertained from the provisions or sections to be referred to in a charge sheet.³⁰ Writing about the offence of contempt of court, **Ssekana** says that the offence is derived from the inherent powers of court to punish all types of contempt whether committed in or outside court; he says that it does not violate Article 28(12) and the right to be informed of the charge.³¹ **M Ssekana** however does not write the essence of contempt of court. To me the rule against unwritten criminal offences is essential to give a degree of predictability and certainty to the criminal law while the essence of offence of contempt of court is to ensure that people give respect to court whenever they are called upon to appear in court and be orderly whenever court proceedings are going on.

²⁸ At page 59

²⁹ A guide to criminal procedure in Uganda at pg. 101

³⁰ Criminal procedure and practice in Uganda

³¹ *ibid*

2.1.8 Right against double jeopardy

This is the gist of article 28(9) of the 1995 constitution of Uganda. **Benjamin Odoki** in his book a guide to criminal procedure in Uganda writes the essence of the rule against double jeopardy where he asserts that the rationale for this rule is that a person should not be put in peril twice for the same offence or the offence for which he or she could have been tried at the previous trial. To **Ssekana** the notion that persons should be protected from double jeopardy is that the state with all its resources and powers should not be allowed to make repeated attempts to convict an individual for all alleged offence, that such attempts would moreover enhance the possibility that an innocent person could finally be convicted.³² However both **Odoki** and **Ssekana** do not define what constitutes the same crime or offence for double jeopardy.

2.1.9 Right to assistance of an interpreter.

The right of an interpreter in the language the accused understands is necessary to enable the accused exercise most of the rights, such as the right to cross-examine and presenting defense. That the reason for interpretation arises because whereas the official language of the courts is English, the majority of the populations in Uganda do not understand or speak English³³ and in this regard I concur with him. The right to interpretation was observed in the Buganda Road court in Kampala when one of the Bulgarians who allegedly forged Stanbic bank ATM cards declined to take plea until a translator is provided by court.³⁴

2.2 RESEARCH METHODOLOGY

With a view of implementing the study objectives the following methods were employed to obtain data from the field. It further describes and defines research methods used in obtaining

³² Criminal procedure and practice in Uganda

³³ A guide to criminal procedure in Uganda at pg. 102

³⁴ According to Daily monitor of Thursday, September 13' 2012

data from the field. Due to limited time in which the research had to be completed, scarce financial resource, my case study was Kampala district only. The research is heavily dependent on prior published documents such as newspapers, textbooks, law reports and journals from libraries such as that of Law Development Centre, Kampala International University and conventions such as the international convention on civil and political rights and European convention on human and people's rights.

2.2.1 Research design

Qualitative method of data collection was used since I mostly relied on library research and other written materials.

LIBRARY RESEARCH

References were made to already existing data for instance, text books, and scholarly works and debates on the subject matter, Journals and newspapers to access the required information to enlighten throughout the research process. This is because it is easily available and it has more information on the subject matter than primary data like interviews.

2.2.4 Limitation of the study.

There were several obstacles that constrained me in carrying out the research. These included time factors, financial constraints, and disappointments among others. The time allocated to this study was short for instance the time to be spent to collect and analyze data and final presentation of the report among others. There was lack of financial and logistics to facilitate me during the exercise and catering for expenses such as printing, transport, photocopying among others.

CHAPTER THREE

THE INTERNATIONAL, REGIONAL AND DOMESTIC LEGAL FRAME WORK THAT UPHOLDS THE RIGHT TO A FAIR HEARING.

3.0 Introduction.

There are a number of international and regional instruments that are aimed at promoting and upholding the right to a fair hearing. These instruments are binding on Uganda by virtue of it being a signatory. These include ICCPR which in its preamble states that “in accordance with the principles proclaimed in the charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Considering the obligation of states under the charter of the United Nations to promote universal respect for and observance of human rights and freedoms...”, the states are under a duty to observe and recognize the rights in the present covenant. Article 14 of the ICCPR provides that all persons shall be equal before the courts and tribunals in the determination of any criminal charge against him or his rights and obligations in a suit at law, every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law

3.1.1 Right to presumption of innocence. In article 6(2) of the European convention on human and people’s rights has been held to constitute one of the elements of a fair criminal trial that is required by paragraph 1 of that article and is a right which like other rights contained in the convention must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to the theoretical and illusory Article 28 (3) (a) of the constitution³⁵ of Uganda guarantees the right to be presumed innocent. This shows that the provisions of the European convention on human and people’s rights guaranteeing the right to be presumed innocent were also incorporated in the constitution of Uganda.

³⁵ 1995 constitution

3.1.2 The right against double jeopardy.

Article 14(7) (a) of the ICCPR contains the prohibition of double jeopardy according to which “no one shall be liable to be tried or punished twice for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. **Protocol NO 7** to the European convention provides in its article 4(1) that no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state. The constitution of Uganda 1995 also clearly guarantees the right against double jeopardy under article 28((9).

3.1.3 Right to be informed of the charges in a language one understands.

Under article 14(3) of the ICCPR its provided that everyone shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him. Article 6(3) (a) of the European convention is similarly worded while according to article 8(2) (b) of the American convention on human right the accused is entitled to prior notification in detail ... of the charges against him. Article 28(3)³⁶ b too provides for the right to be informed of the nature of the charge against him.

3.2.0 CASE LAW

3.2.1 Regarding a speedy hearing, in the case of **Bell VS DPP**³⁷ the Privy Council observed that there was a need to balance the trial with a reasonable time and the public interest in the attainment of justice in a context of the prevailing system of legal administration and economic, social and cultural conditions to be found in the country.

³⁶ 1995 constitution of Uganda

³⁷ (1986) LRC 392

In the case of **DPP VS Donkei**,³⁸ where the appellants were charged with assault and actual bodily harm in early 1982, the proceedings were between the period of February 1982 and march 1986 adjourned on 28 occasions. The trial finally got under way and the respondents were finally convicted in July 1986. They filed appeals against the conviction and the appeal was finally heard between 1988 to 1994. The issue was whether the long delays in bringing the accused persons for trial and determination of the appeals constituted a violation of the right to trial within a reasonable time. The Privy Council found that the period had been excessively long that it was an abuse of the right to fair trial. The court ordered the indictment to be quashed.

3.2.2 Right to an interpreter in Andrea vs. republic³⁹ the appellants had been tried before a magistrate's court and convicted of the offence of possession of prohibited literature. On appeal it transpired that the trial was conducted in English and yet the appellants only understood Portuguese and his native Mozambique language. The Kenyan high court held that there was a violation of the right to a fair trial since he was not afforded the service of an interpreter.

3.2.3 Right to legal representation, in the case **Endvervy Town FC Ltd vs. Footballassociation**⁴⁰ court held that denial of legal representation is not necessarily a breach of natural justice. Court has to look at the practice normally adopted by the administrative authority, where it has been allowing legal representation; it should do so to everybody.

3.2.4 Right against unwritten laws in light of article 28(12) of the 1995 constitution of Uganda.

This was illustrated in the case of **Salvatori Abuki vs. A.G**⁴¹ where the constitutional court had considered the offence of witchcraft under Witchcraft Act as incapable of precise definition as to offend article 28(12) of the constitution. The supreme court held by a majority of six to one **Oder JSC** dissenting that section 2 and 3 of the witchcraft Act that create the offence of practicing witchcraft amply define the offences created and these sections were not vague as the offences are defined by exclusion that it is witchcraft does not include bonafide spirit, worship or bonafide manufacture, supply, or sale of native medicine. Secondly since the offences are

³⁸ (1996)2 LRC314

³⁹ (1970) EA 26

⁴⁰ (1979) 3 WLR 1021

⁴¹ Constitution case No. 1/1997

defined and not vague, the respondents trial for and conviction of the said offences was not contrary to article 28(12) of the 1995 constitution of Uganda.

3.2.5 Right against penalty that is severe in degree or description than the maximum penalty that could have been imposed at the time when it was committed.

This was illustrated in the case of **Lapy vs. Uganda**⁴². In this case a magistrate convicted the three appellants and sentenced them to seven years and immediately two of them insulted the magistrate and he increased the sentence to seven and a half years. On appeal, the alteration was held to be null and void and infringing their constitutional right.

3.2.6 Right against retrospective legislation as provided for under 1995 constitution of Uganda.

In the case of **Waddington vs. Miah**⁴³, it was observed that the constitutional prohibition must also extend to changes in the definition of the offence which would add a new element to an existing offence retroactively. Thus to add an element of intent where not previously requested, might be seen to lighten the severity of the offence. That the retroactive removal of mens rea had been an element of the crime at the time of its commission.

In **Uganda vs. kirya**⁴⁴ & others where the amendments to the penal code extended to cover acts committed between 1981 and 1982, court held in allowing the application that the constitution of Uganda (1967) article 15(4) applied to preclude the retrospective application would have transformed into an offence acts which were not criminal when they were committed. That however since the promulgation of the 1995 constitution, this provision has not yet come under judicial scrutiny which truly leaves a lot to be desired.

⁴² MB 88/65

⁴³ (1974) 2 All ER 3777

⁴⁴ (1984) HCB 51

3.2.7 Right to be present at the trial.

In **Zakary kataryeba and others vs. Uganda (supra)**⁴⁵ where a magistrate entered a plea of guilty in respect of not only the accused that had been brought to court but also three other accused charged jointly but not in court on that day. The High Court on appeal held that the magistrate failed to address in his mind to article 28(5) which entitled an accused person to be present at his trial.

In **Matsiko vs. Uganda**,⁴⁶ the court visited the locus but the accused was not taken and was not present at the scene of crime. It was found that since the appellant's absence had not been ordered by court, his absence was a violation of his constitutional right and a retrial was ordered.

3.2.8 Right to a fair and impartial hearing. Any person charged with an offence must be afforded a hearing by an independent and impartial court or tribunal established by law. The right applies to both criminal and civil rights as elaborated by article 28(1). This article embodies the principles of natural justice that no one shall be a judge in his cause. The point here is that a person is entitled to object being tried by a judge whom he considers to be biased. On the other hand, the judge who knows that he is likely to be biased should disqualify himself from trying the case. The right to impartial hearing is therefore observed in all courts of law and it is a useful tool in helping the court arrives at the truth as far as it can be humanly.

3.2.9 Right to call and cross-examine. In **juma vs. A.G**⁴⁷ regarding whether the refusal to give witness statements or exhibits was a violation of the accused constitutional right, it was resolved that the provisions of the constitution under consideration can only have life and practical meaning only if accused persons are provided with copies of statements made to police by persons who will or may be called to testify as witnesses for the prosecution as well as the copies of exhibits which are to be offered as in evidence for the prosecutions.

3.2.10 Right to have adequate time and facilities to prepare a defense, a gist of article 28(3) (g) of the 1995 constitution of Uganda. In **Essau vs. Uganda**⁴⁸, the witness was found guilty of perjury and had no chance to prepare a defense, he certainly did not have the opportunity to call

⁴⁵ No. 30

⁴⁶ (1999) 1 EA 323

⁴⁷ (2003) 2 EA 461.

⁴⁸ Criminal App. No. 32/1991 (1993) 5 constitution

witnesses and cross examine those of the opposite party which is an essential aspect of the right under the constitution of Uganda.

In the case of **Zachary and others vs. Uganda**⁴⁹ where the appellants had sought an adjournment of trial so as to engage another advocate after their counsel withdrew from the case, court refused to adjourn the case. It was held by High court that the refusal of the trial magistrate to grant adjournment violated not only the right to adequate time and facilities to prepare a defense but also the right to legal representative.

3.2.1 Right to be presumed innocent. In the case of **Omaria vs. Uganda**⁵⁰, court held that where there is “no guilty plea”, the accused is entitled to a full trial of the facts in issue including the prejudicial evidence in confession.

According to the case of **Svs. Bhulwana**⁵¹, the essence of the right to be presumed is that it cast the burden of on the prosecution. That a reverse of presumption of innocence inevitably impairs the presumption of innocence because it relieves the prosecution of the overall onus to prove the guilt of the accused.

It is important to note that the right to a fair hearing is not absolute thus it may be curtailed where factors such as agency come into play as provided under article 28(2) and article 23 of the constitution of Uganda. Thus article 28(2) is an ouster clause that at times makes it impossible for people to realize the right to a fair hearing. In the case of **White vs. Rodfern**⁵² the right to a fair hearing was excluded due to urgent need to cease and destroy bad food that were exposed for sale.

⁴⁹ Above no. 28.

⁵⁰ Criminal appeal No 23/ 2001 (sc) (un reported) pg. 9

⁵¹ (1996) (1) SA 388 (CC).

⁵² (1870) 5 Q.B 15

3.3 THE HIERACHY OF COURTS OF JUDICATURE IN UGANDA, THEIR JURISDICTION AND POWERS:

In Uganda there exists a unitary system of courts which have differing jurisdiction and grades. It is because of this reason that if an offence is committed it must be tried by a court which has power or jurisdiction to try the case. The single hierarchy of courts of judicature and their jurisdiction is hereunder;

(a) The supreme court of Uganda.

The Supreme Court is established by article 129 (1) (a) of the constitution of Uganda.⁵³ The court is composed of the chief justice and not less than six justices of the Supreme Court. The quorum of the court when hearing a case is supposed to be composed of uneven number but in any case not less than five of the members of the court by virtue of article 131 of Uganda.⁵⁴

The Supreme Court is a superior court of record. It is an appellate court that deals with first and second appeals from the court of appeal, the constitutional court except in relation to third appeals that originate from a chief or Grade 1 magistrate's judgment, However the accused or DPP⁵⁵ if any has to first obtain a certificate from the court of Appeal to enable him lodge a third appeal with the supreme court.⁵⁶ The supreme court in hearing and determining an appeal has all powers and authority of original jurisdiction.⁵⁷ The court can uphold a decision, reverse, or vary it or give a declaratory judgment.

(b) Court of Appeal of Uganda.

The court of Appeal of Uganda is also a superior court of record.⁵⁸ It is an appellate court dealing with first appeals from the High Court decisions. The court can also entertain second appeals from the chief magistrate and Grade 1 courts. The court can confirm, reverse or vary a decision

⁵³ 1995 Constitution of Uganda.

⁵⁴ *ibid*

⁵⁵ Director of Public Prosecutions.

⁵⁶ Section 6(5) of the judicature Act, cap 13.

⁵⁷ Section 8 of judicature Act, cap 13.

⁵⁸ Article 129(2).

of the lower court. In determining an appeal, it has all powers, authority and jurisdiction of the court of original jurisdiction.⁵⁹

(c) The constitutional court.

Whenever a constitutional matter arises, the court of Appeal sits as a constitutional court. The court has original jurisdiction and determines any question relating to any act or omission or act of parliament or any other law or anything done under the authority of any law which is inconsistent with the provisions of the constitution.⁶⁰

(d) The High Court of Uganda.

The high court of Uganda is established by article 138 of the constitution. The court is composed of the principal judge and not less than six judges. The court is however duly constituted by a single judge when hearing criminal cases. The judge is required to sit with lay assessors when trying an accused person on an indictment. The High Court has original jurisdiction. It has jurisdiction to try any offence under any written law.⁶¹ The High Court may pass any lawful sentence combining any of the sentences which it is authorized by law to pass. The court entertains appeals from decisions of chief magistrate's court, Grade 1 magistrate as well second appeals from chief magistrate's court. The High court has revisionary powers under sections 48-54 of the CPC,⁶² confirmation of sentences and transfer of cases under section 173 of M. C. A.⁶³ the court can also hear election petitions by virtue of article 140 (1).⁶⁴

(e) Magistrate's court

The magistrates' courts are established by Magistrates Court Act.⁶⁵ There are three grades of magistrates and are chief magistrate, magistrate Grade 1 and magistrate grade II.

⁵⁹ Section 12 of judicature Act, cap 13.

⁶⁰ Article 137(4) of the constitution of Uganda.

⁶¹ Article 139 of the constitution of Uganda.

⁶² Criminal procedure code Act cap 116.

⁶³ Magistrate's court Act, Cap. 16

⁶⁴ Of the 1995 constitution of Uganda.

⁶⁵ Section 3 of the Magistrates court Act, Cap. 16.

(1) Chief magistrate's court

The chief magistrate court has original jurisdiction governed by section 161(1)(a) of the M.C.A. the chief magistrate may try any offence other than an offence punishable by death penalty. The chief magistrate cannot try cases involving attempts to commit, aiding, abetting or inciting the commission of that offence.⁶⁶ The chief magistrate may pass any sentence authorized by law thus he can pass a maximum sentence of life. There is no limit on amount he may impose.

Regarding appeals, he hears appeals from decisions of magistrate Grade II. The court also hears appeals from the family and children court.⁶⁷ The chief magistrate has general supervisory powers over all magistrates within his or her jurisdiction. A chief magistrate may transfer a case from him to another or from another to himself.

(2) Magistrate Grade I Court

A magistrate grade I has original jurisdiction and can try any offence except offences that is punishable by death or life imprisonment. The maximum sentencing powers of Grade I magistrate is ten years or a fine not exceeding one million shillings only or both imprisonment and fine.

(3) Magistrate grade II Court

The Grade II magistrate can try any offence under any written law save for the offences and provisions in schedule I of the MCA⁶⁸. The sentencing powers of the Grade II magistrate are limited as they do not exceed three years imprisonment.⁶⁹

⁶⁶Section 161(2) of magistrates court Act, Cap. 16

⁶⁷ Section 106(c) of children Act, Cap 59

⁶⁸ Magistrates Court Act, Cap 16

⁶⁹ Section 162(c) of magistrates court Act, Cap 16

CHAPTERFOUR

SUMMARY, RECOMMENDATION AND CONCLUSION

The study was undertaken to critically analyze the right to a fair hearing and its observance in courts of judicature in Uganda. Broadly stated the right to a fair hearing means that both parties to the dispute are treated equally.

The study revealed that there is a difference between the laws guaranteeing the right to a fair hearing and implementation of the laws. This is because written laws without implementation are of no use as obsolete laws. The study revealed that the provisions of the constitution guaranteeing the right to a fair hearing are not worth the ink used to write them.

The study revealed that the right to a fair hearing is closely associated to impartiality of courts of law and equality before and the law. The study revealed that if impartiality of courts is strictly observed and equality of all people before the law, the right to a fair hearing would be availed to everyone and justice would be accessed by every citizen.

The study further revealed that in Uganda the right to a fair hearing is enshrined in the 1995 constitution of Uganda which incorporates provisions on the concept of equality⁷⁰ and independence of the judiciary as essential means of protecting people's rights. The study revealed that the constitution of Uganda clearly outlines the elements of the right to a fair hearing specifically.⁷¹ The wording of the constitution of Uganda shows clearly that the right to a fair hearing is inviolable and non derogable.⁷²

The focal point of our discussion has been to critically analyze and evaluate variables underlying the undermining of the right to a fair hearing in courts of judicature. The study has revealed that

⁷⁰Article 21 of the 1995 constitution of Uganda.

⁷¹Article 28 of the 1995 constitution of Uganda.

⁷²Article 44 of the constitution of Uganda.

ignorance of the law and inequality before the law have significantly contributed to the whittling away of the right to a fair hearing in Uganda.

The study revealed that the judiciary is the most corrupt public sector. "The judiciary and land services attracted the highest actual amount of bribe per respondent".⁷³ The study further revealed that the extra and illegal levies on the judiciary in particular may result to lower access to judicial services and diminished confidence on the institution.⁷⁴

The study revealed that the survey of the Transparency International upholds similar findings of the Uganda's own inspectorate of Governments second Annual Report on corruption trends in 2011 in Uganda which ranked the judiciary second to only police in bribery rates in Uganda.⁷⁵ The study revealed that justice is sold out to those who can afford it through bribery which affects the right to a fair hearing before an independent and impartial court.⁷⁶

RECOMMENDATIONS

In light of the conclusions of this study, the following recommendations stated herein below may not be a panacea to the challenges regarding the respect of the right to a fair hearing in courts of judicature in Uganda face, but it is hoped they will be a starting point in the quest for the respect of the right to a fair hearing. The onus is on the entire citizenry, policy makers and other concerned parties to prudently and analytically study their viability, independence for a democratic and peace full state.

The doctrine of separation of powers should be strictly applied thereby de lining the judiciary from the executive and legislature. It is therefore recommended that the executive and legislature should not interfere with the duties of judiciary when hearing cases.

Members who have any interest whether proprietary or of whatever nature should be exempted from hearing cases. A strict rule against judicial officers with interests in dispute should be put in

⁷³ According to East African Bribery index compiled by transparency international, Daily monitor of Friday, august 31, 2012.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ According to lecturer Muchuma Caroline while referring to the case of Uganda vs. Ndifuna criminal case no. 004/2009 where a magistrate was caught taking a bribe of 200000 in order to arm twist justice.

place. Justices, judges and magistrates who deny people of their right to a fair hearing should be punished harshly and exemplary.

The provisions of the constitution of Uganda guaranteeing the concepts of equality before and under the law and impartiality of courts should be strictly implemented. A law punishing members of the judiciary who discriminate should be drafted and the offenders penalized.

Regarding public awareness, efforts should be made to create and sustain public awareness of the provisions of the constitution on the fundamental law of the land. This will help to educate the citizens how to defend the constitution and the right to a fair hearing in courts of law. Civic education is essential in the creation of public awareness about the law, the administration of justice and basic human rights. The public are stakeholders and beneficiaries of the rule of law. Hence there is a need to create both human rights culture and respect for the rule of law.

The state should provide adequate funds to institutions that are responsible to promote the right to fair hearing that is the judiciary. This will reduce corruption in courts of law and also motivate people responsible for dispensing justice. The legislature should amend provisions that are not clear as far as the promotion of the right to a fair hearing is concerned and also draft other pieces supporting the right to a fair hearing.

The study also revealed that if the salaries and allowances of the judicial officers are increased, the rate of corruption will reduce which will enable the entire citizenry to access justice.⁷⁷

Finally it is recommended that the onus to promote the right to a fair hearing should not be on judiciary alone. Other institutions such as Human Rights Commission should participate in the struggle to promote and respect the right to a fair hearing. Such institutions should offer education to the entire citizenry and should criticize cases involving the violation of the right to a fair hearing. If all the above recommendations are effectively done, it is hoped that the right to a fair hearing will be respected and realized in Uganda.

⁷⁷ According to Aleku Christopher in a discussion on 05/06/2012

CONCLUSION.

In conclusion, all people have a right to a fair hearing. This applies to both criminal and civil proceedings. The right is non derogable and has to be respected in both courts of judicature, administrative tribunals and local council courts and entire citizenry. The bodies responsible for administering justice should abide by the existing laws on the right to a fair hearing and adhere to the principles of natural justice if the right to a fair hearing is to be a reality in Uganda. It is therefore the responsibility of the entire citizenry to promote and respect rule of law and Democracy by protecting the constitution of Uganda since it provides for right to a fair trial as inviolable right.

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