**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**(CRIMINAL DIVISION)**

**CRIMINAL REVISION NO. 024 OF 2019**

**(ARISING FROM CHIEF MAGISTRATES COURT OF BUGANDA ROAD CRIMINAL CASE NO.1115 OF 2018)**

**DR. STELLA NYANZI.....APPLICANT**

**VERSUS**

**UGANDA.....RESPONDENT**

**Before: The Hon. Lady Justice Jane Frances Abodo**

**REVISIONAL ORDER**

This is application for revision is governed by Sections 17 of the Judicature Act, Sections 48 and 50 of the Criminal Procedure Code Act. It arises from Criminal Case No. 1115 of 2018 in the Chief Magistrates Court at Buganda Road. It is an application for this court to examine the lower court record to determine the correctness, legality or propriety of the trial of the findings and orders recorded since 1st July, 2019.

At the hearing of the application, the Applicant is represented by a team of advocates that included learned Counsel Julius Galisonga, learned counsel Isabirye, learned counsel Semakadde and learned counsel Gerald Owiny, while State is represented by learned senior State Attorneys Ms Kitimbo and Mr Amerit from the Office of the Director of Public Prosecutions.

The grounds raised in this application are nine in number which I now reproduce below as follows;

1. The lower court acted illegally, irregularly and improperly when it excessively and inappropriately interfered with the autonomy of the accused person to decide which witnesses were to be called by the accused and in what order.

2. The lower court acted illegally, irregularly and improperly when it failed to afford the accused person the facilities of a prescribed officer and adequate time to effect proper service of summons and other lawful measures necessary to obtain the attendance of the witnesses before the court.
3. The lower court acted illegally, irregularly and improperly when it condemned the accused person and her advocates for the alleged inadvertence, negligence, mistakes or lack of diligence on the part of the officer of the court enjoined to effect service of summons on behalf of the accused person who is both indigent and in prison.
4. The lower court acted illegally, irregularly and improperly when it discharged the first defense witness Mr. Mustapha B. Mugisha, who having been sworn on the 9th July, 2019, unjustifiably refused to answer a question put to him and who unjustifiably failed to attend court after adjournment of the court despite having been ordered to return the following day.
5. The lower court acted illegally, irregularly and improperly when it failed or refused to facilitate the compulsory attendance of witnesses that the accused had consciously and conscientiously decided to call.
6. The lower court acted illegally, irregularly and improperly when it effectively ordered the accused to examine and obtain the attendance of only those witnesses who are known to her, partisan or personally interested or otherwise invested in the outcome of the accused's case and are willing to testify at behest of the accused without being compelled by the court.
7. The lower court acted illegally, irregularly and improperly when it closed the accused person's case without affording her the mandatory or necessary facilities to call any evidence.
8. The learned trial magistrate who presided over the impugned proceedings acted illegally, irregularly and improperly when she made in absolute terms and on several occasions extreme unbalanced findings and criticisms against the accused person and her advocates over their conduct of the defense case, among other unwarranted findings and comments, without leaving the door open for the possibility of some explanation when she heard evidence or submissions from the advocates of the accused, thereby giving rise to an impression of bias.
9. That the learned trial magistrate who presided over the impugned proceedings appeared to abandon her neutrality by descending into the arena when she excessively and inappropriately intervened in the examination of the first defense witness; Mr. Mustapha B. Mugisha, and the processing of the defence case generally, thereby making it really impossible for counsel for the accused to do their duty in properly representing the accused person's defence.

**Powers of the high court on revision**

**Section 17(1)** of the **Judicature Act. Cap 13** provides that the High Court shall exercise general powers of supervision over the magistrates' courts. This provision in essence has the rationale to confer upon the High Court supervisory jurisdiction in all actions and proceedings conducted in the subordinate courts.

Further, **Section 48 of the Criminal Procedure Code Act** provides that the High Court may call for and examine the record of any criminal proceedings before a magistrates Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed as to the regularity of any proceedings of the Magistrate court.

**Section 50(1) of the Criminal Procedure Code Act** brings out clearly that incase of any proceedings in the Magistrate court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in those proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may..... in case of any other order other than an order of acquittal alter or reverse the order.

**Section 50(2) of the Criminal Procedure Code Act** provides that no order under this section shall be made unless the Director for public Prosecution has had an opportunity of being heard and no order shall be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by an advocate in his or her defense.

Learned counsel Galisonga argued ground three, Learned counsel Isabirye argued ground two and five, learned counsel Semakadde argued grounds one, six, four, then eight and nine, finally learned defense counsel Gerald Owiny argued ground seven. On the Prosecution team learned state attorney Amerit Timothy argued all grounds except ground one and six which were presented by learned senior state attorney Ms. Kitimbo.

All respective counsel involved in this matter made submissions in support of their respective cases which I don't intend to reproduce in this ruling because they were quite lengthy. Several authorities were filed by the respective counsel for my assistance for which I found very resourceful, I thank you all. Suffice to mention that I have considered the application in its entirety. The oral submissions made by respective counsel and authorities cited by all parties.

With these authorities in mind, I now proceed to examine the record of the lower court.

**Issue 1**

**Whether the learned trial magistrate interfered in the accused person's autonomy in choosing the witnesses she wished to call and the order.**

Counsel for the applicant submitted on this that the trial magistrate descended onto the arena by giving directives on how the applicant should call her witnesses, on their part they had categorized their witnesses in batches and were ready to present them. The learned senior state Attorney argued that when the accused was put on her defense counsel first informed court that there were 5-7 witnesses, then later twenty, and none except one appeared in court.

In any criminal trial, when an accused person is put on their defense, they can opt to give their defense in any of the three ways; keep quiet, give their defense on oath or give unsworn testimony. The accused person also has the right to testify or may choose not to testify in their own case. The applicant herein was put on her defense on the 21st June, 2019 her advocate requested for an adjournment to enable the applicant make an appropriate selection of how to defend herself. They suggested 26/06/2019. The defense informed court they had about 5-7 witnesses and they needed only two days to prepare for defense (pg. 173) The learned trial magistrate gave the defense four dates that is 26th, 1st , 3rd and 5th June 2019.

The record of the 26th June, 2019 further reflects that the accused person was ready to call witnesses to testify in defense of her case and prayed for the court to issue witness summons and any other defence preparation. Under **Section 117 of the Evidence Act.6** All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. It is on record that court summons were issued for the attendance of the several court witnesses that the defence had, save for the minors whose particulars were withheld by defence counsel.

It is also on record that the accused person informed court that she would implore the option of applying to become a witness in her own case after the testimonies by her defence witnesses. In that regard, **Section 131** of the **Evidence Act Cap.6** states that a person who is charged with an offence who applies to be called as a witness shall not be excused from answering any

question that may tend to incriminate him or her as to the offence charged. From the reading of this section, there is no doubt that any person can be a witness.

In this case, the accused herself could become her own witness if so applied, thus entering into the witness box and then giving evidence in her own favor. I hasten to add that; the accused person will of course not be forced to become a witness against herself in view of the fundamental rights guaranteed in the Constitution.

As to the contention of the order of calling defence witnesses, **Section 134** of the **Evidence Act Cap 6** is to the effect that the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the court. However, **R. v. Smith, [1968] 1 W.L.R. 636 (C.A.)**, Cusack, J., in his judgment for the Court stated that the general rule of practice in criminal cases in England is that the accused person gives evidence before the witnesses whom he proposes to call to testify.

While an accused person may at times be given the option to call witnesses in any order as he/she wishes, when its witnesses testify before the accused does, it is a factor to be considered by the trial court of fact in weighing the evidence. This was considered in the case of **R. v. Smuk (1971), 3 C.C.C. (2d) 457** that when a witness, whether an accused or not, sits in court and hears the testimony of another witness on a subject matter as to which he later testifies, his evidence is open to the suggestion that it may have been made deliberately to conform. This it seems to me is a plain matter of common sense.

On the 1st of July the matter had been adjourned for a ruling, and counsel for the accused informed court that they were not ready to receive the ruling and instead made another application for recusal, which was strongly opposed by the prosecution citing wrong procedure, counsel for the accused in rejoinder cited section 11(2) of the MCA stating that court should forgive the breaches of procedure so as to offer remedies, which was entertained though the court noted the right procedure was not followed. The ruling was given and the trial magistrate declined to step down and cited her reasons. The case was adjourned to 3rd July for defense to present their witnesses, and in the words of court, ".....Witness summons will issue to the defense witnesses in the order as the defense will desire..."pg. 194 of the court proceedings.

On the 3rd of July the second date for the hearing of the defense case, counsel for the accused informed court that it was not possible to effect service on the first set of witnesses. Two witnesses received summons and stated they would be available the next week. "The other witnesses need to be properly served and

they had not done so."pg. 197 then counsel went on to submit that, "None of the twenty (20) witnesses are aware that they are defence witnesses. I am unable to tell court now what the witnesses are coming to say. We will also need summons to call the minors. At this stage, we don't want to state who they are and what they are coming to say. We want to first deal with adults. Most of them are parents. Even on 5th we are unable to have the witnesses in court."

Court then went ahead to make a ruling, I will reproduce her ruling for purposes of clarity, ".....I have heard from the defence attorney that their witnesses are up to now not aware that they may be needed as witnesses of the accused, and the contents of what they are likely to say are not yet ascertained by counsel for the accused. From all indications, the witnesses are not even said to know the accused or that there is a case in court in which they would be coming to defend the accused to let her off the hook – obtain an acquittal. The defence is hence at a guess work about who has what to say in the accused's defence." pg. 197

Then again during the testimony of DW1 when the witness protested that he did not know why he was in court even after the case was stood over to allow the defense interact with the witness, when the court intervened and adjourned the case, she made the following ruling, "....I note that Mr. Mustafa (DW1) was summoned by court on an application of counsel for the accused as a defence witness. The presumption was that the defence had met with their witnesses, knew who they are and the content of what they expect them to say before court. The defence attorneys are hence supposed to prepare for trial with their witnesses. From all indications, Mr. Mustafa (DW1) is not yet prepared to testify. The defence attorneys have not yet interacted with him whom they call their witness to prepare for trial. It is only fair for the witness to know why he is needed in court and the case before court and since he is called as a defence witness, the defence has a duty to inform him of all this. With such information, the witness is able to give more meaningful evidence and able to answer questions if any, in cross examination from the other party. In this case, it is so evident that the witness knows nothing about why he is in court. Much as he may be a

competent witness, as a citizen of Uganda he has a right to be informed of what he is expected of before this court, which he should be able to voluntarily put before court in the accused's case to help her secure an acquittal in this case. An adjournment is hence granted until 10th July 2019 for the defence to prepare for trial with the witness." Pg. 203.

Drawing from the record, I noted no irregularity so as to discredit the learned trial magistrate on this ground.

**Issue 2 and 3**

**Whether it was the duty of the court to effect service of summons on the defence witnesses**

The counsel for the applicants argued that Article 28 of the Uganda Constitution guarantees the applicant rights and that service of summons is the duty of court and court did not discharge its duty and that shouldn't have been visited on the applicant by closing her case. Court had the powers to arrest the witnesses which powers court did not exercise. The respondent argued that the warrant of arrest is issued for a good reason and that Mr. Lubanga who served summons was an officer of court being a certified court process server.

My examination of the record reveals that when summons were issued on the defence witnesses on the 3rdJuly, 2019 in the presence of the accused and her counsel, they both raised no objection or specifically brought it to the attention of the learned trial magistrate that the accused was constrained or that they were not in position to serve the said summons. There is however on record an affidavit of service deponed by a clerk who states that he is a High Court Process Server attached to Centre for Legal Aid as a law clerk. Assuming that that is the correct position, the question arises: Is a law clerk, who is presented by a law firm to court for approval as a court process server also an officer of court for the purposes of effecting service of court process? The answer to this in my view is a yes!

In other words, should a law clerk who is approved to be a court process server for a particular law firm that has been privately hired by an accused person to defend her case still expect to be facilitated for the purpose of service of court summons on the defence witnesses? And especially if counsel did not raise the issue of facilitation of Mr. Lubanga to serve summons.

The affidavit did state that he received the summons from court on the 5th July, 2019 to effect service on specific defence witnesses, which meant that he knew their addresses, having obtained from the accused person as being her witnesses. The said clerk receiving summons from court and even effecting service on some witnesses without counsel raising any objection indicated that counsel had chosen to use a clerk from his law firm to effect service.

The affidavit to support the position that proper service of summons was effected on some particular defence witnesses whom learned counsel was submitting had deliberately defied court summons therefore necessitating the learned trial Magistrate to issue warrants of arrest against. I hold the same position that the process server carried out no due diligence in searching for the defence witnesses. It is not stated anywhere in his affidavit that he ever made inquiries from any of the persons who were known to the defence witnesses for instance their employers. I have had the benefit of viewing the list of defence witnesses and strongly hold the view that some of the defence witnesses could have been known to the accused person therefore, being in the same institution where she used to work.

I need to point out that the summons in this case was issued by the trial magistrate on the 3rd July, 2019. Learned counsel for accused sought for an adjournment under Section 122 of Magistrates Courts Act and Article 28 (3) (c) of the Constitution to facilitate the processing of summons, service and further defence preparation. Similar submissions were made till 11th day of July, 2019 having failed to follow the schedule drawn for the hearing of the defence case, learned counsel still argued that ample time to serve summons had not been given to the defence.

There is evidence on the file that the defense chose to make service by themselves. They never for once raised that issue, It is only on the 10th July 2019 which was the last day given to the defense to bring their last batch of witnesses where defense counsel addressed court that other witnesses have not been served because of limited time and other necessary resources, and in addition, service of summons is the duty of court as per section 44 and 45 of the Magistrates Court Act.

I entirely agree with counsel for the applicant here that service of summons is supposed to be by a court that issues it. In this particular case it was done by Mr. Lubanga who is said to be a clerk in the firm of counsel for the applicant, however, his certificate which he attached on the summons shows he is a certified court process servicer, who is certified by this court.

Taking into consideration the foregoing, I now find that the trial court had no obligation to effect service of summons on the defence witnesses who were known to the accused and her counsel and whom the defense were effecting service through a court process server.

**Issue 4 and 5**

**Whether the trial court failed to facilitate the attendance of Defence witnesses.**

A strong defence is a vital component of a fair trial. This is because, the Defence team represents and protects the rights of the accused person who by all means is presumed innocent until proven guilty beyond reasonable doubt before the Court. It is actually impossible to overstate how important the right to a fair trial is. It is a basic human right. Fair trials are an essential part of a just society. Every person accused of a crime should have their guilt or innocence determined by a fair and effective legal process.

An accused person is entitled to public, fair proceedings conducted impartially and in full equality. The constitution grants the accused person specific rights, including: the right to be informed of the charges; to have adequate time and facilities to prepare for her defence; to be tried without undue delay; to freely choose a lawyer; to examine witnesses and present evidence to not be compelled to testify or to confess guilt; to remain silent; to receive from the Prosecutor evidence which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused; to be able to follow the proceedings in a language she fully understands, and therefore to have an interpreter and translations if required.

Witnesses may be called, or asked to give testimony for the Defence by the defence or by the judicial officer. These witnesses range from; fact witnesses who have knowledge and testify about what happened, insider witnesses who have a direct connection with the accused, Expert witnesses testifying about matters within the field of their expertise, for example, cyber experts and any other witness as may be required.

When there is cause, the normal practice is that various means of practical and logistical support is afforded to witnesses to enable them attend court. This may be in form of summoning the witnesses which was done in this case as seen on record. Facilitation of court process servers (those employed by court) to serve

the summons and any necessary documents, affording witness the familiarization with the court room, affording the witnesses some basic incidental allowances to cover their transport to court. Compensation for time lost for professionals / expert witnesses as a result of their absence from place of work for the purpose of their appearance before the Court. Protection of witnesses through video-link testimony for instance children to having testify in camera as opposed to being present in open court for their best interests as children.

In respect to these grounds the defense contention is that Article 28 of the Constitution guarantees the accused rights, to which is in no doubt, and that the prosecution took three months to present their case yet the defense was only given two days to present 20 witnesses, that the trial magistrate should have issued a warrant of arrest for the defense witnesses who did not attend court and finally that the court excused DW1 in a wrong way and discharged him and all other defense witnesses.

The Respondents argued for the two grounds that DW1 was never discharged by court, which court granted an opportunity for the defense to prepare the witness but they neglected to do so. Further that DW1 was not a competent witness as per section 43 and 49 of the Evidence Act.

DW 1 appeared in court on the 9th July 2019 and counsel for the applicant informed court that he had not met with the witness and asked for 45 minutes which he was granted. When the witness finally comes to the stand he protests the manner in which he was brought to court, he says he is an expert who comes to court after he has done investigations in a particular case and made a report, in the present situation he does not know why he is in court, he does not know the facts of the case, it is the first time he is meeting counsel for the accused, he even does not know the accused person it is his first time to see her and so on.

Counsel for the applicant interjected the witness and stated that, "he is invited to deliver an opinion processed through years of evidence. He will answer questions based on his standing as an expert...."pg. 201 Learned counsel went on further to state that the witness has similar qualifications as PW1, that he is "a true mirror of PW1, we just want his view here on exhibits and testimonies."

The court then made a ruling that the witness appears not to be ready and granted "an adjournment to 10th July for the defense to prepare for trial with the witness" and further warned the defense to produce the remaining witnesses as well, as no sufficient reason was given for the absence of the other witnesses.

PW1 testified as a cybercrime expert and investigating officer of the case. His testimony covers pages 45-127 of the record of proceedings. He testified that he analyzed the various Facebook accounts that had stellanyanzi. He took screen

shots and print screens of post extracted from Facebook page of stellanyanzi, Facebook activation code, number which activated the email address, subscriber registration form and photocopy of biodata for passport No B0890700. He stated that he is a certified forensic ethical hacker, however, he did not do any hacking in this case.

This was the witness the applicants counsel stated was a mirror of DW1 Mr. Mustafa B Mugisha.

If indeed this was a mirror of DW1, then one would have expected preparation of the witness, in terms of even just looking through the exhibits and statement of PW1 which was already disclosed to the defense! From what took place in court on the 9th July, it appears the witness was meeting counsel for the first time, and counsel was expecting court to force the witness to answer questions, and referred to section 102 of the MCA on refractory witnesses where court can commit the witness to prison for refusal to answer questions put on them. However, it should be noted that the court can only resort to that if no sufficient excuse is given by the witness. In the instant case the witness stated he does not know the case and it was his first time to see counsel for the accused and the accused. The trial magistrate found that was sufficient reason and granted an adjournment. I find that am unable to fault the learned trial magistrate on this. Court rightfully granted counsel an adjournment to allow them prepare the witness.

Counsel for the applicant on page 206 of the proceedings informed court that the witnesses were served but did not attend, and further that other witnesses have not been served because of limited time and other necessary resources. Then again on the 11th July, counsel states that they are not ready to proceed because there are no witnesses and that witnesses were excused by court. He further went on to state that they needed one month adjournment to enable the prisoner and her advocates to identify, approach, solicit resources and present any willing and voluntary witnesses as the twenty are not willing to come to court without being compelled, and further that the one month would allow them time to "conduct the exercise and also publish a notice in a newspaper of wide circulation inviting voluntary and willing witnesses to testify on behalf of the prisoner....."pg. 223-224 of the proceedings.

With all due respect to the defense team! This was the lowest the defense could sink! The defense at this point was like playing a game of chance and not conducting a serious defense. With such an advert, how many witnesses were going to come? When would the defense case end? Am aware that there is no limit to the number of witnesses one can call, but trials have to come to an end!

Counsel by his own admission stated that none of the twenty witnesses are aware that they are defense witnesses, and he goes on to state that he is unable to tell

court what the witnesses are coming to say and also that for the minors they do not want to state who they are and what they are coming to say, and finally informs court that even on the 5th July which court had reserved for the defense hearing no defense witness will be in court without disclosing to court the reasons for non-attendance. With the above submission the court then gave the applicant two days in which to summon all their twenty witnesses. I am aware that depending on what testimony a particular witness is coming to give, if the defense even summoned some and not the ten per day court would have been inclined to hear all the witnesses and grant adjournments when need arises.

It should be noted that, court can only grant an adjournment when a sound reason is given, the same goes for a warrant of arrest, sufficient cause has to be brought before court, so as to give a basis for the warrant of arrest. None was given by the defense team.

From my analysis of the record, the accused and her counsel deliberately declined to inform court as the nature of witnesses and the type of evidence that they were going to give. This issue is also resolved to the negative.

**Issue 6**

**Whether it was wrong for the trial court to order the accused to only obtain attendance of witnesses known to her, partisan or personally interested in the outcome of the accused person's case and willing to testify without being compelled by the court.**

The appellants' contention is that from the 1st July to the 16th July, the trial magistrate made about three rulings where she castigates the defense team and descends into the arena by informing the accused that she should call witnesses who are going to get her acquitted. Counsel for the appellant further submitted that they had categorized their witnesses and were going to call them in batches. On their part the respondents argued that the accused was given an opportunity to prepare their witnesses but they did not do so.

A criminal trial is an accusatorial process in which the prosecution bears the onus of proving the accused person's guilt beyond reasonable doubt. Unlike the state, the defence is usually under no obligation to give evidence or call witnesses. It is on record that the accused person chose to remain silent and opted to call witnesses to testify on her behalf. The defense informed court that the accused intended to call seven witnesses and later changed to twenty where the court made an order for witness summons to issue.

The defence were given seven adjournments, and they were not able to produce witnesses, the trial court having issued summons for the attendance of the

various defence witnesses listed by the accused and a court process server from the law firm operated by learned counsel for the accused person having attended to court to pick the said summons without raising unavailability of logistics to facilitate service.

On the other hand, learned counsel for the accused person declined to avail the names of four defence witnesses whom he stated were minors for the purpose of issuing of summons on them, despite several reminders from court, there was no way court could make an order for witness summons to issue to persons unknown to the court and whom learned counsel informed court that,"....at this stage we do not want to state who they are and what they are coming to say.....even on the 5th of July we are unable to have witnesses in court". This offends section 94 of the Magistrates Courts Act which is to the effect that," If it is made to appear that material evidence can be given by or is in possession of any person, a magistrates court having cognizance of any criminal cause or matter may issue a summons to that person....."

In light of the above, I find that learned trial magistrate was right in declining to issue arrest warrants in respect of the defence witnesses and ordering that witnesses known to the accused person as those interested in defending her case, in a way as to avoid any prejudice to the accused person's own case. The learned trial magistrate had even then made it clear that there was no proper service on some witnesses for whom the defence had sought the issuance of arrest warrants, hence this was against section 95 of the Magistrates courts Act. The practice would be for the accused person through her lawyer to contact the witnesses personally, brief them of their obligation to attend court and to ascertain the reason for their avoidance to appear and give evidence for the defence.

It was seen with DW1 who appeared in court and it seemed learned counsel for the accused person had not played his role in briefing the witness who upon examination in chief demanded to first be informed the reasons for what had brought him to court, despite learned counsel for the accused person having had the matter stood over for 45 minutes to brief the witness. It appears counsel neglected his duty of properly representing his client and now seeks to fault the learned trial magistrate. If a trial magistrate did no more than offer gratuitous advice to counsel on that the accused person calls witnesses known to her or interested in defending her case, this parse did not mean she was interfering with counsel and would not warrant any ground for ordering a revision. In a situation such as this where the defence cannot provide a clear explanation as to when the witnesses will be able to attend court, it is no longer in position to guarantee the accused an expeditious trial. For that reason, further adjournment of the case risks violation of the constitutional rights of the accused to a fair and expeditious trial, in which case it would amount to an abuse of court process. I

therefore invoke the provisions of section 17 (2) of The Judicature Act to conclude that the learned trial magistrate made no error in this regard.

**Issue 7**

**Whether the learned trial magistrate accorded the accused person a fair hearing under Article 28 of the Constitution.**

The counsel for the appellant argued that it was wrong for the learned trial magistrate to close the accused person's case without affording her the mandatory or necessary facilities to call any evidence, the accused person is entitled to a fair hearing. The respondents contended that the defense was given ample time to produce their witnesses and they failed to, hence they concluded that the accused was accorded a fair hearing.

The Constitution of Uganda does not have a concise definition of the phrase "the right to a fair hearing." It is therefore not safe to purport to give an all-inclusive definition of the phrase because human rights jurists have given the subject a wide and deep analysis so much so that it is impossible to give it a short definition. It follows therefore that the right to be heard is sacrosanct and non-derogable under **Article 28 (1)** and **44 (C)** of the Constitution of Uganda.

In **Halsbury's Laws of England 5th Edition 2010 Vol. 61 para 639**, It is stated as follows with regard to the right to be heard:

**"The rule that no person is to be condemned unless that person has been given prior notice of allegations against him/her and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice....."**

Supreme Court decision of **Charles Harry Twagira versus Uganda, Criminal Appeal No. 27 of 2003** which was referred to by both cousel stated that a fair trial or a fair hearing under this Article 28 of the Constitution means that a party should be afforded the opportunity to inter alia hear the witnesses of the other side testify openly; that he should, if he chooses, challenge those witnesses by way of cross examination; that he should be given an opportunity to give his own evidence, if he chooses to do so in his defence; that he should if he so wishes, call witnesses to support his case.

It was held further in the **Charles Harry Twagira *(supra)*** case that an accused person has a right not to say anything in defence and that Article 28 of the Constitution requires the appellant to be afforded a fair and speedy trial, yet the court noted that the steps taken by the appellant in Charles Harry Twagira in

making what they called "unnecessary application" appeared to hinder the speeding up of his trial.

The learned Justices of Supreme court called upon the lawyer to study that judgement and refrain from causing unnecessary delays of criminal trials by indulging in strings of appeals and (applications *emphasized*) which have no legal foundation.

In the application before me, it is on record that the accused person having chosen to remain silent was given several adjournments within which to produce her witnesses which she failed save for DW1 who appeared clueless of what had brought him to court on the 9th July, 2019, despite learned counsel for the accused person having prayed to court to have the matter stood over for 45 minutes for him to brief his witness because according to him he was just meeting him for the first time. What appears on record on the 26th day of June, 2019 is that learned counsel for the accused person prayed for two days within which to prepare for the defence case.

I also noted that on that same day, learned counsel for the accused had also requested to be availed with the typed record of proceedings to enable the accused person to obtain the attendance of her witnesses which the trial magistrate out rightly rejected, citing that it would encourage laziness of counsel and be the cause for delay in disposing the case and that the record of proceedings is voluminous and besides the two defense lawyers had always been present in court taking notes. In this regard, I hold the view that courts must always promote the spirit, the purpose and the objects of natural justice in adjudication of cases, in that it is a good practice to avail an accused person typed and certified proceedings where the resources allow and also considering the volume of proceedings and complexity of the case, this is helpful in preparing for their defense. Therefore, despite the accused person and her counsel having been present throughout the trial, justice would demand that they be vailed with the typed record of proceedings in preparation for their defence.

From the record, in as much as the defense were not given the typed proceedings, it was mitigated by the following: the learned trial court nonetheless gave the defence several adjournments within which to prepare. They had an opportunity to cross examine the three prosecution witnesses at length, and by the time the hearing of the case commenced the defense had full disclosure, they had all the statements of the witnesses including the exhibits.

On the 3rd July, 2019, the defence particularly informed court that they were not ready to proceed because it was impossible to effect service on the defence witnesses but declined to disclose to court the nature of the evidence the witnesses were coming to testify about. The defence also failed and or evaded to avail to the court with particulars of other witnesses who were said to be minors

for purposes of having the witness summons availed by court. But learned counsel instead prayed for a week whereof a trial schedule was drawn in the presence of all parties for the 9th, 10th and 11th July, 2019, learned counsel still informed court that they hadn't been given adequate time to prepare for their defence and even informed court that the defence witnesses were not even aware that they were required to testify in court which meant that the defense had not taken any steps to prepare for their defense.

It was therefore not proper for defence having failed to produce defence witnesses without any justifiable cause to instead shift the blame to the trial court and seeking to advertise for whoever was interested in defending the accused which was obviously bound to cause delay to the conclusion of the case.

It is trite law that any weakness in the defence case shall not be relied upon to bolster the prosecution case or to be a basis for convicting the accused person. Instead, where there is any doubt created by the prosecution evidence, that doubt is what must be resolved in favor of the accused person with an acquittal **(See Woolmington vs. D.P.P. (1935) A.C. 462)**.

*I now find that the learned trial magistrate's acts of closing the defence case after the defence was given seven different adjournments within which to prepare its case and produce defence witnesses did not in any way cause a miscarriage of justice on the case of the accused person.*

**Issue 8 and 9**

**Whether the trial Magistrate was biased against the accused person and descended into the arena during the trial in the impugned proceedings.**

Counsel for the applicant argued that the trial magistrate was biased and even declined to step down when the application for her recusal was made. The counsel contended that another magistrate should be given to try this matter. The respondents reply was that the applicants counsel was changing the reasons for recusal as opposed to what was stated in the lower court. His argument was that the trial magistrate was not biased and counsel used a wrong procedure for recusal, and that DW1 was not a competent witness and the trial magistrate rightfully intervened.

It is stated that the learned trial magistrate on several occasions made extreme unbalanced findings and criticisms against the accused person and her advocates' conduct of the defence case among other unwarranted findings and comments without leaving room for any possible explanations when she heard the evidence or submissions from counsel for the accused person, coupled with

her inappropriate intervention of the examination of the defense witness number one, Mr. Mustafa B Mugisha, thus giving rise to an impression of bias.

Justice Oder in **GM Combined Ltd v AK Detergents (U) Ltd Supreme Court Civil Appeal No.7 of 1998** referred with approval to Lord Denning's address to the question of bias in **"The Discipline of Law" (Butterworth, London, 1979 at pages 86- 87)** and to what Devlin J (as he then was) said in: **Exparte Barusley and District Licensed Valuers Association (1960) 2 QBJ. 169**, where he set out the standard to be applied on the question of bias:

**"In considering whether there was a real likelihood of bias, the court does not look at the Justice himself or at the mind of the Chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless fright minded persons would think that, in the circumstances, there was a real likelihood of bias, then he should not sit, and he does sit, his decision cannot stand. Nevertheless, there must appear to be real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the Justice, or Chairman as the case may be, would or did favour one side unfairly at the expense of the other:**

The record as supplied does indicate that the issue of bias was raised before the trial court when the case up on the 1st July, 2019 on the basis of alleged preferential treatment on the prosecution and on the directive by the learned trial magistrate to always have children removed from the court room prior to any hearings of this case.

The trail court pronounced itself in a ruling that the particulars of preferential treatment had no basis considering that no official communication had been made by the court to the prosecution regarding the postponement of the ruling to later that day. She went ahead to explain that the delay was caused by the fact that capital cases were being mentioned on that same day, using the same facilities, which she had not had prior notice at the time the case was fixed.

She then stated that she was a live to the prayer that had earlier been made by the defence to have the case fast tracked, given that the accused had opted not to apply for bail. She went on further to explain that the disparity in the scheduling for the sitting of court on that date was beyond the control of her court and that both parties suffered the same way and the same applied to the

court that had to wait till all the capital cases were mentioned before the recording facilities could be available.

The trial magistrate then stated that sending children out of open court on the numerous occasions when the matter came up was done to protect children from being exposed to certain harmful words that had previously come up during the trial, she then declined to step down from handling the case.

In the circumstances and drawing from the record, I find the allegation of bias against the trial magistrate unjustified. Bias unless specifically against a judicial officer cannot be assumed. I also find the observations and comments she made in the impugned proceeding as mere reactions towards the manner in which the defence conducted its case and not necessarily descending into the arena. This issue too fails.

In final result, this application fails and I order that the file be transmitted back to the trial magistrate to hear the above case conclusively within reasonable time so as to meet the ends of justice.

I SO ORDER!

**Dated at Kampala, this 31ST day of July, 2019. .....**

**Jane Frances ABODO**

**Judge**