THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 0079 OF 2019

(ARISING FROM CRIMINAL CASE NO. KLA-CR-CO- 1115/2018 AT THE CHIEF MAGISTRATE'S COURT OF KAMPALA AT BUGANDA ROAD)

DR. STELLA NYANZI ::APPELLANT

VERSUS

UGANDA :: RESPONDENT

BEFORE: THE HONOURABLE JUSTICE DR. HENRY PETER ADONYO

JUDGMENT

1. **Background:**

Dr Stella Nyanzi (herein referred to as the appellant), a Medical Anthropologist and a former Research Fellow at Makerere University, Kampala, Uganda was charged with two counts of offences before the Buganda Road Chief Magistrate's Court presided over by Her Worship Gladys Kamasanyu, a Magistrate Grade 1 (Hereinafter referred to as the Lower Trial Court).

In Count 1 the Appellant was charged with the offence of Cyber Harassment contrary to section 24(1), (2) (a) of the Computer Misuse Act, 2011 the particular of which are that:

> ***"....Stella Nyanzi on the 16th September 2018 at Kampala District or thereabout used a computer to post on her Facebook page 'Stella Nyanzi' wherein she made suggestions or proposals inter alia that "Yoweri...I wish the smelly and itchy cream-coloured candida festering in Esteri's cunt had suffocated you to death during birth"; "Yoweri...I wish the acidic pus flooding Esteri's cursed vaginal canal had burnt up on your unborn fetus"; "Yoweri...I wish the infectious dirty-brown discharge flooding Esteri's loose pussy had drowned you to death;*** **which suggestions are obscene, lewd or indecent".**

In Count 2 the Appellant was charged with the offence of Offensive Communications contrary to section 25 of the Computer Misuse Act, Act 2 of 2011, the particulars of which are that;

> ***"... Stella Nyanzi on the 16th September 2018 in Kampala District willfully and repeatedly used electronic communication to post messages offensive in nature via Facebook inter alia that "Yoweri...I wish the smelly and itchy cream-coloured candida festering in Esteri's cunt had suffocated you to death during birth"; "Yoweri...I wish the acidic pus flooding Esteri's cursed vaginal canal had burnt up your unborn fetus"; Yoweri...I wish***

the infectious dirty-brown discharge flooding Esteri's loose pussy had drowned you to death" which were transmitted over the internet to disturb the peace, quiet or right to privacy of his excellency the President of the Uganda Yoweri Kaguta Museveni with no purpose of legitimate communication..."

The Appellant pleaded not guilty to both charges.

The Appellant was tried and at the end of the trial the lower trial court delivered its judgment dated 1st August, 2019 and found the Appellant guilty of the offence of Cyber Harassment contrary to section 24(1), (2) (a) of the Computer Misuse Act, Act 2 of 2011 in Count 1.

The Appellant was acquitted of the offence of Offensive Communications contrary to section 25 of the Computer Misuse Act, Act 2 of 2011 charged in Count 2 of the charge sheet.

In finding the case against the Appellant on Count 1 of the offence of Cyber Harassment contrary to section 24(1), (2) (a) of the Computer Misuse Act of 2011 the lower trial court held that the statements made in the posts found on the Facebook account of the Appellant were obscene, lewd and indecent on the basis on the **Hicklin Test** for obscenity as established by the English case **Regina v. Hicklin[1868] LR 3, QB 360** where Lord Sir Alexander James Edmund Cockburn pointed out that the test of obscenity was*"... whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such influences and into*

whose hands a publication of that sort may fall…" with the Supreme of India while referring to this position the case of *Ranjit Udeshi vs. State Maharashtra [1965] 1 S.C.R 65* which restrictively applied the Hicklin Test noted that great strides have been made since this decision in the UK, United States as well as in India noting that it had in the case of *Director General, Directorate General of Doordarshan vs. Anand Patwardhan ,2006 (8) SCC 433*, noted that the law in the United States was that a material may be regarded as obscene if the average person applying other tests like contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary artistic, political, educational or scientific value.

The same court further went on to state that in its recent decision in the case of *Aveek Sarkar vs. The State of West Bengal, 2014 (4) SCC 257,* it had moved away from the Hicklin Test after referring to English , US and Canadian judgments and applied the Contemporary Community Standard Test *aka* Community Tolerance Test.

However, the lower trial court proceeded to use the Hicklin test stating and I quote; *"…there is a host of decisions, which I am citing hereunder, where courts have pronounced themselves on the issue of what is obscene or indecent. The Hicklin Test is the legal test for obscenity…"* in spite of the fact that **Shreya Singhal vs. Union of India Writ Petition (Criminal) No. 167 of 2012** had abandoned

the same meaning that had the police, prosecution and the lower court reviewed the impugned post in accordance with the contemporary community test the criminal proceedings would not have been instituted or endorsed by the lower court or alternatively they would have been withdrawn or set aside pursuant to the appellant's plea at pages 40-43 of the typed record of the lower court proceedings wherein the appellant reminded the court of the fact that the charges against her revealed illegality as was held in the case of ***Makula International Limited vs. His Eminence Cardinal Nsubuga and Anor Court of Appeal Civil Appeal No. 4 of 1981*** that a court of law cannot sanction that which is illegal with any illegality once brought to the attention of the court overriding all questions of pleading including any admission made thereon and that it was the duty of the court under Section 101 (now 98) of the Civil procedure Act to exercise of its inherent powers to prevent abuse of its process where orders sought before it were contrary to law.

This argument was reinforced by the citing of **Article 126 (2) (e) of the Constitution 126** which provides that the courts in adjudicating cases of both a civil and criminal nature shall administer substantive justice without undue regard to technicalities and therefore should have dismiss the charges against the and acquitting since the charges against her were not only illegal but was based on fundamentally defective charges which could not be saved by Section 132 (1) (b) Magistrates' Court Act.

Further the appellant argued that even under Section 6-1 Evidence (Police Officers) Rules the law makers intended that suspects should not have charges brought against them in a very casual manner as was suggested by the prosecutor where their rights are not observed, respected and promoted since those provisions were not merely suggestions but directives to the charging authorities with very strict and mandatory provisions governing the framing charges since these rules have a constitutional foundation and so must be obeyed.

In spite of the above , the lower trial court proceeded to convict the Appellant accordingly on 1st August 2019 on Count 1 of the offence of Cyber Harassment contrary to section 24(1), (2) (a) of the Computer Misuse Act of 2011 and 2nd August 2019 sentenced her to eighteen months in custody.

2. <u>Grounds of Appeal:</u>

Arising from the conviction and sentence of the lower trial court the appellant being dissatisfied and aggrieved by the judgment and orders of the lower trial court appealed to this first appellate citing ten (10) grounds of appeal as follows:

a) THAT the learned trial magistrate erred in law and fact when she entertained the case against the appellant yet the court had no jurisdiction.
b) THAT the learned trial magistrate erred in law and fact when she allowed the prosecution of the appellant on a charge that

was incurably defective, unacceptably vague, bad in law, and barred by law.

c) THAT the learned trial magistrate erred in law and fact when she failed to accord the appellant the necessary facilities to compel the attendance of defence witnesses, and thereby infringed on the appellant's right to a fair hearing.

d) THAT the learned trial magistrate erred in law and fact when she failed or refused to facilitate the compulsory attendance and examination of DW1 Mustapha B. Mugisa after he had absconded from court, and thereby infringed on the appellant's right to a fair hearing.

e) THAT the learned trial magistrate erred in law and fact when she prematurely closed the defence case.

f) THAT the learned trial magistrate committed a grave procedural irregularity when she deprived the appellant of the right to address the court after the close of the defence case and in reply or opposition to the written submissions of the prosecution which were concealed from the appellant.

g) THAT the learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record and thus arrived at a wrong decision in convicting the appellant of cyber harassment.

h) THAT the learned trial magistrate contravened Art 28(5) of the 1995 Constitution, Section 123 of the Magistrates Court Act, and the Judicature (Visual-Audio Link) Rules (2016) when she

purported to conduct proceedings on 2 August 2019 via Visual-Audio Link.

i) THAT the learned trial magistrate passed an illegal and disproportionate sentence.

j) THAT the learned trial magistrate was biased against the appellant throughout trial and thus failed to accord the appellant a fair hearing.

Arising from the above grounds of appeal, the Appellant prayed to this Honourable Court to allow her appeal, quash the conviction and set aside or vary the sentence against her.

3. <u>Representation:</u>

During the hearing of the appeal Mr. Isaac Semakadde, Mr Owiny Gerald and Mr. Brian Bazekuketta, all from Centre for Legal Aid Kampala represented the Appellant while Ms. Janet Kitimbo and Mr. Timothy Amerit, both state attorneys from the Office of the Directorate of Public Prosecutions appeared for the Respondent.

Both sides filed lengthy written submissions in addition to presenting in court lengthy submissions. The written and oral submissions are all on record.

4. <u>Legal Principles:</u>

Trials of a criminal nature are governed by established legal principles. These are the Burden and Standard of Proof. It is imperative that their mention be made at the onset here as they

guide criminal justice practices of a court of law. The legal principles are;

a. **Burden and Standard of Proof:**

In all criminal matters consideration must be had on the burden of proof of a criminal and the standard of proof. In regards to the burden of proof this lies with the prosecution while the standard of proof for one to be found guilty of an offence is that which is beyond reasonable doubt.

The principle of burden of proof is higher than in a civil matter and is grounded under **Article 28 (3) of the Constitution of the Republic of Uganda** which provides that;

"... every person who is charged with a criminal offence shall ...be presumed to be innocent until proved guilty or until that person has pleaded guilty..."

This principle was first articulated in the landmark case of **Woolmington vs DPP [1935] AC 462** in the House of Lords of the United Kingdom where the presumption of innocence was first articulated in the Commonwealth. In law the case is remembered for introducing the metaphorical ***"golden thread"*** running through the law relating to the presumption of innocence with emphasis being that an accused person can only be convicted by a court of law on the strength of the case as proved by the prosecution and not on weakness of the defence given by an accused.

In **Woolmington's case** cited above Violet Woolmington was married to Reginald Woolmington. She left him and went to live with her mother. He sought her out and shot her. Reginald Woolmington was convicted of murder. He appealed the case which reached the House of Lords (now the Supreme Court). The House of Lords quashed the conviction on appeal with **Viscount Sankey J** stating that;

> ***"... Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained..."***

Arising from the above since the case which was before the lower trial court was one which was criminal the burden of proof of the guilt of the accused is placed squarely on the Prosecution with that

burden resting upon it in respect of every element or essential fact that makes up the offence with which the accused has been charged. That burden never shifts to the accused. There is no obligation whatsoever on the accused to prove any fact or issue that is in dispute before court and it is of course **NOT *(Emphasis added)*** for the accused to prove his/her innocence but for the Prosecution.

On the other hand the standard of proof in a criminal case is one in which the Prosecution must prove an accused's guilt beyond reasonable doubt. That is the high standard of proof that the Prosecution must achieve before a court can convict an accused with the words meaning exactly what they say – *proof beyond reasonable doubt*.

Which means that a court at the end of considering the evidence in the trial and the submissions made to it by the parties must ask itself whether the prosecution has established the accused's guilt beyond reasonable doubt for as Lord Denning put it in **Miller vs Minister of Pensions [1947] 2 All ER 372**, the prosecution evidence should be of such standard as to leave no other logical explanation to be derived from the fact that indeed the accused committed the offence. **[See Also Woolmington vs DPP 1935] AC 462]** though the prosecution could negative a defence as not proof to absolute certainty as was held in the case of **Israel Epuku s/o Achietu vs R [1934] I 166** at page 167 nonetheless.

b. Duty of the Appellate Court:

An appellate courts at whatever level perform the primary function to review and correct errors made in the primary or trial courts and may evaluate and scrutinise the evidence given in the lower court and come to its own conclusion as was pointed by Kato J (as he then was) in **Kalange v Uganda Criminal Appeal No. 18/1994) [1996] UGHCCRD 2 of 22 January 1996,** a position which restated by the Supreme Court of Uganda in the celebrated case of **Kifamute Henry vs Uganda SCCA No. 10 of 1997** which pointed out that though a first appellate court has a duty to rehear the case and to reconsider the materials before the trial judge and make up its own mind it must not do so by disregarding the judgment appealed from but carefully weighing and considering it.

This position was reiterated also in the holding in the case of **Uganda vs Ngaswireki Paul and Kivumbi Awali (Criminal Appeal No. 3 of 2017 (Arising from Criminal Appeal No. 512 of 2009)** it was pointed that an appellate court has the duty to re-evaluate the evidence before the trial court, look at the manner in which the plea and evidence was taken and the procedure used there, look even at the preferred charges against an appellant and the ingredients of the offences levied against an appellant and finally consider whether the trial court applied the law to the facts properly before arriving at its decision and then appellate court may, depending on its findings, quash or uphold the decision of the lower court, come up with its own decision, address legal issues of unfairness or irregularity that are not contained in the memorandum of appeal but are glaring on the record which resulted into the miscarriage of

justice and or order for a retrial in the interests of justice with an appellate court only interfering with the decision of the lower court where there has been gross miscarriage of justice occasioned anyone party during proceedings.

5. Issues:

In resolving this appeal I have considered all the raised ten (10) grounds of the appeal in this matter but upon consideration of the submissions made thereto, I have collapsed the same to two issues which do resolves all the grounds;

(a) Whether the lower court had jurisdiction to hear the case against the appellant.
(b) Whether the Appellant was accorded fair trial rights.

6. Whether the lower trial court had jurisdiction to hear the case against the appellant:

The first ground of appeal raised the issue of whether the lower trial court had the jurisdiction to hear the case against the appellant.

The appellant raised the issue of jurisdiction questioning the authority of the lower trial court to try the case against her alluding to the fact that it is a primary requirement under the provisions of Section 24 (1) (2) (a) of the Computer Misuse Act, Act 2 of 2011.

The charges against the appellant were two and were as follows;

Ct. I: Statement of offence:

Cyber Harassment Contrary to Section 24 (1) (2) (a) of the Computer Misuse Act 2011

Particulars of Offence:

STELLA NYANZI on the 16th September 2018 at Kampala district or thereabout used a computer to post on her Facebook page *"Stella Nyanzi"* wherein she made suggestions or proposals inter alia that *"Yoweri .....I wish the smelly and itchy cream –coloured candida festering in Esiteri's cunt had suffocated you to death during birth"; "Yoweri.....I wish the acidic pus flooding Esiteri's cursed vaginal canal had burnt up on your unborn fetus"; Yoweri.....I wish the infectious dirty – brown discharge flooding Esiteri's loose pussy had drowned you to death";* which suggestions are obscene, lewd or indecent.

Ct. 2. Statement of Offence:

Offensive Communication Contrary to Section 25 of the Computer Misuse Act 2011

Particulars of Offence:

STELLA NYANZI on the 16th September 2018 in Kampala district willfully and repeatedly used electronic communication to post messages offensive in nature via Facebook inter alia that "*Yoweri.....I wish the smelly and itchy cream-coloured candida festering in Esiteri's cunt had suffocated you to death during birth"; "Yoweri.....I wish the acidic pus flooding Esiteri's cursed vaginal canal had burnt up your unborn fetus"; "Yoweri.....I wish the*

infectious dirty-brown discharge flooding Esiteri's loose fussy had drowned you to death" which were transmitted over the internet to disturb the peace, quiet or right of privacy of His Excellency The President of Uganda Yoweri Kaguta Museveni with no purpose of legitimate communication.

The provisions of the charges in Count One particularly relates to Cyber Harassment contrary to Section 24 (1) (2) (a) of the Computer Misuse Act whose provisions are that:

24. Cyber Harassment.

(1) A person who commits cyber harassment is liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both.

(2) For purposes of this section cyber harassment is the use of a computer for any of the following purposes—

(a) Making any request, suggestion or proposal which is obscene, lewd, lascivious or indecent.

The charges against the appellant in the lower trial court relates to the use of a computer to make requests, suggestions or proposals which were deemed obscene, lewd, lascivious or indecent. She was thus convicted accordingly and sentenced to eighteen months of the offence.

However, it is the contention of the appellant in Ground One of this appeal that the said court erred in law and fact when it entertained the case against her yet it had no jurisdiction.

The proceedings of the lower trial court, indicates that the appellant was found to have used a device while in Kampala, Uganda and posted materials onto her Facebook account which were offensive.

The Appellant contend that the prosecution did not proved that she committed the offence using a device located in Uganda at the material time.

The jurisdiction of a court to try an offence under the Computer Misuse Act of the Act is found in Section 30 of the said Act and it reads as follows;

Section 30 of the Act: Territorial Jurisdiction:

> ***(1) Subject to subsection (2), this Act shall have effect, in relation to any person, whatever his or her nationality or citizenship and whether he or she is within or outside Uganda.***
>
> ***(2) Where an offence under this Act, is committed by any person in any place outside Uganda, he or she may be dealt with as if the offence had been committed within Uganda***
>
> ***(3) For the purposes of this Act, this section applies if, for the offence in question—***
>
> ***(a) The accused was in Uganda at the material time; or***
>
> ***(b) The computer, program or data was in Uganda at the material time (Emphasis added)***

The term jurisdiction has been judicially defined in several decided cases is among them is the case of **Koboko District Local Government vs Okujjo Swali High Court Miscellaneous Application No. 001 of 2016** where jurisdiction was held to mean the authority conferred by the law upon the court to decide or adjudicate any dispute between the parties or pass judgment or order and that a court cannot adjudicate a matter in which it has no cause.

Similarly in the case of **Uganda vs Kassiano Wadri and 31 Others Criminal Revision No. 0002 of 2018** and quoting Nyarangi JA in the case of *Owners of Motor Vessel Lillian's' vs Caltex Oil Kenya Limited [1989] KLR 1* wherein the publication **Words and Phrases Legally Defined vol. 3 I-N page 13** was quoted, confirmed that the term "jurisdiction" meant;

> *'… The authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like means.*
>
> *If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court must inquire into the existence of the facts in order to decide whether it had jurisdiction…Where the court takes it upon itself to exercise a jurisdiction which it does not possess,*

its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.'

That a court has jurisdiction to try a case is was never addressed from the onset since the trial of the appellant went on until conviction and sentencing.

Jurisdiction of a court as it were is conferred upon it by statute and where a court acts outside its jurisdiction, then its action is an illegality and a nullity as was held in the case of **Pastoli vs Kabale District Local Government Council and Others [2008] 2 E.A 300** and **Makula International v. Cardinal Nsubuga [1985] HCB 11.**

My learned brother Mubiru Stephen J sublimely summed up the importance of jurisdiction of a court when in the case of **Uganda vs Kassiano Wadri and 31 others (supra)** he noted as follows;

" ... Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings..."

I do adopt wholly that position and in relating the above with what is on record in the record lower trial court, I note that three witnesses testified on behalf of the prosecution to prove its case against the appellant.

The main prosecution witness was, however, ASP Ndyamuhaki Bill (PW1), a detective police officer attached to the Uganda Police Force CID who investigated the case against the appellant.

PW1 in his testimony informed the lower trial court that he carried out investigations into the alleged crime by logging onto the Facebook website where he directed himself particularly to an account in the name *'Stella Nyanzi"* which he found active and which had been activated by a phone number ending with the numbers '17' and on perusal of what was contained therein he saw the impugned post and the fact that it had information relating to the information to an email address titled snyanzi@yahoo.com which he extracted screenshot thereof (PExh5) using his laptop, printed it and then sought for and obtained a court order (PExh1) which he used to obtain further the details and particulars of the sim-card registration number ending with '17' (PExh3) from MTN which established that it was registered in the name of one *'Stella Nyanzi'* using a passport biodata page (PExh4) and a national identity card number NIN C740241095AH, which information he noted were similar with what he had seen and extracted from a Facebook page in the names of *'Stella Nyanzi'* , which he had earlier had access to and noted that the two connected to the appellant whom he previously known.

PW1 further stated that on top of this information he secured another court order (PExh6) which he used to obtain additional biodata of the appellant whom he knew from Makerere University where she worked and that the information he got showed that an email address snyanzi@yahoo.com together with two telephone numbers of 256752885088 and 0771824117 which belonged to the appellant were similar to those used to activate a Facebook account

titled *'Stella Nyanzi'* and so his conclusion was that indeed the appellant owned the Facebook account wherein was the impugned post.

To prove that the Facebook page belonged to the appellant and was active and accessible from Kampala, PW1 demonstrated access to it using his laptop computer in the lower trial court.

According to the charge against the appellant in the lower court the key word used is the word "Computer" which is defined under Section 1 of the Computer Misuse Act as; *"… an electronic, magnetic, optical, electrochemical or other data processing device or a group of such interconnected or related devices, performing logical, arithmetic or storage functions; and includes any data storage facility or communications facility directly related to or operating in conjunction with such a device or group of such interconnected or related devices…".*

The essence of the charge against the appellant is that she used a computer to post obscene, lewd, lascivious or indecent to the detriment which is referred to as Cyber harassment.

ASP Ndyamuhaki who testified as PW1 did not, however, tender in evidence the phone itself admitting that he did not obtain the device's information or make any request to MTN or AIRTEL to furnish him with information as to the location, traffic data and other cell site location information for the cell number 0771824117 used on the 16/09/2018 at 4:08 hour so as to establish the Appellant's possession and control of the same.

PW1's testimony show that while it is true that a posting on a Facebook page was activated using a specific device not produced in court, it is possible to prove its actual possession and its use to make the impugned post.

This can be done by establishing the as "Digital Footprint" of the device used. Digital Footprint is defined Online Dictionary found at *www.dictionary.com* as one's unique set of digital activities, actions, and communications that leave a data trace on the Internet or on a computer or other digital device and can identify the particular user or device.

Though it was unfortunate that the mobile phone allegedly used to make the impugned post was neither recovered from the Appellant's person nor exhibited in court there are a number of ways that a mobile phone information can be identified.

In the case before the lower trial court the digital footprint and thus the domicile in Uganda of the device allegedly used in committing the offence could have been proven through a number of methods including using the device's International Mobile Equipment Identity (IMEI) number which according the website https://www.imei.info is the identity of a phone can be established through its International Mobile Equipment Identity (IMEI) number which is a number assigned to a specific device such that when that device is active, it can be tracked with precision using its IMEI since that number is its unique identifying 15-digit code thus confirming

that a particular mobile telephone number (sim-cards) was being used and by particular person.

This information actually could have been secured from Facebook itself as can be read from its Data Policy page found at : *https://www.facebook.com/policy.php* where it is provided the that the digital footprint left behind by a device on Facebook computers such as the operating system including the device's settings such as its GPS location, the name of mobile operators or ISP used , the language, the time zone, the mobile phone number, the IP address of the device, the connection speed of the device and in even information about other devices which were nearby could be secured from Facebook by law enforcement agencies upon request or upon a court order.

Indeed this share ability of information to pinpoint ownership and the location of a device used to post offensive materials by Facebook was noted as being a possibility upon legal authorisation as was observed by the Irish court in the case of **Fred Muwema vs Facebook Ireland Limited [2016 No. 4637 P]** where the court held that the details collected by Facebook relating to the identities and location of person (s) operating a Facebook page under the name ***'Tom Voltaire Okwalinga"*** could be secured from Facebook to prove the residency of the device used in making an alleged offensive posting and the identity of the person doing so when legally sought though in this particular instance the said court declined to issue the order for the release the information by

Facebook based on its obtaining evidence that there was the possibility of misuse of such information.

The other examples of how the courts have used a device's digital footprint to connect an accused person with the committal of an offence abounds. In the case of **Uganda vs Ssebuwufu Mohammed & 7 others, Criminal Session Case No. 0493 of 2015** where a witness exhibited the phones of four of the accused persons as well as the telephone print outs which showed the location of the accused persons as having been within the around the area of the crime scene at the material time, the court went on to hold that such evidence was *'capable of proving a proposition with the accuracy of mathematics.'*

Similarly in the case of **Godi vs Uganda Criminal Appeal No. 62 of 2011,** the Court of Appeal approved the use of cellular triangulation and the evidence of telephony call data print-outs to establish that the accused person was in possession and control of his mobile phone at the material time and place when the offence was committed for it held that;

> *"…We have made a fresh re-appraisal of the evidence that was adduced as regard the telephone calls and also considered the way the trial judge dealt with this evidence. We find that the judge properly dealt and analysed this evidence and arrived at the correct conclusions that the telephone number 0701131518 belonged to the deceased and that there was communication by the deceased's number with the appellant's number on*

04.12.08 between 6:00pm to 6:30pm from Karo House, Wandegeya, Kampala and also that it was possible for the appellant to have been in Mukono area. … The appellant, who was in possession and control of his telephone number 0782008595 at the material time gave no plausible explanation as to how his said telephone number came to communicate with that of the deceased on that day and at that material time and place.'

This same principle was approved in the recent case of **Uganda v. Hussein Hassan Agade & 12 Others HCCS No 1 of 2010** and **Uganda v. Kato Kajubi Cr App No 39 of 2010.**

In the case brought against the appellant in the trial court below, apart from PW1 tendering Exhibits PEx1 to PEx8 which relates to the posting and the ownership of a page where the obscene post was noted, no forensic report was presented in the court to pinpoint the precise location of the device or the person which was used or who committed the offence making thus falling short of the requirements established in the case of **Iwa Richard Okeny vs Obol George Okot, Miscellaneous Civil Application No. 063 of 2012** where the court noted that

"… it was incumbent upon an expert witness to furnish the court with the necessary scientific criteria for testing the accuracy of his or her conclusion to enable the court to form its independent judgment so that the criteria the criteria is applied to the facts which thus proves the evidence (emphasis added)

with same court going further to note that no court will not take the opinion of the expert as conclusive proof but must examine his or her evidence in light of the surrounding circumstances in order to satisfy itself about the findings made…"

The non-presentation in the lower court of a forensic report in the pointing to the location of both the device and the offender disadvantaged the lower trial court with the clarify as to whether it was seized with and could assume proper jurisdiction in terms of section 30 the Computer Misuse Act since the issue of jurisdiction go to the root of the case with the consequences that any lack of it would render the decisions of the court, however, technically correct or precise to be of no legal consequence and therefore void as was noted in the case of **Hassan Bassajjabalaba vs. Bernard Kakande, HCCR 2 of 2013**.

From the above, my conclusion is that the proof of the identity and the residency of the offending computer, program or data and the offender in relations to the committal of an offence as brought under the Computer Misuse Act is crucial before a court can purport to try a case brought under the said Act for section 30 of the s Act clearly directs in very clear provisions as to how a court seizes jurisdiction with any failure to determine the same from the onset rendering any trial conducted as a result of non-appreciation of this jurisdictional remit having serious consequences.

Arising from the above my finding is that the learned trial magistrate in the lower trial court did err in law and fact when she

entertained the case against the appellant yet her court had no jurisdiction with the illegal assumption of jurisdiction renders the trial in the lower court a nullity.

7. <u>Whether the Appellant was granted fair trial right:</u>

Grounds 2 to 10 in this appeal majorly dealt with complaints relating to issues of fair trial. I have thus considered them together here. It is the appellant's contention that she was not granted fair trial rights by the lower trial court with several instances cited which in her view resulted in gross violations of her constitutionally guaranteed rights.

The right to a Fair Trial emanates from the Universal Declaration of Human Rights which is a historic document that was adopted by the United Nations General Assembly at its Third Session on 10 December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France.

Article 10 of the Universal Declaration of Human Rights provides that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of any criminal charges levied against him or her.

See: https://www.un.org/en/universal-declaration-humanrihts/index.html.

The Right to a Fair Trial is recognised internationally as a fundamental human right and all democratic countries are required to respect them as its principles form the core of a fair and just

judicial system since it is presumed that every person accused of a crime ought to have their guilt or innocence determined by a fair and an effective legal process so that miscarriages of justice is prevented.

The right to a fair trial is not novel as it has long been recognised by the international community as a basic tenet of human right and since its abuse can result in devastating human and social consequences.

It should be noted that fair trial is not just about protecting suspects and perpetrators of offences but it is a representation of a safe and strong democratic society. Without fair trials, victims of crimes can have no confidence that justice will be done. Without fair trials, trust in the government by the governed and the rule of law collapses and then anarchy follows.

As the population of a country such as Uganda grows, the number of people directly affected by the criminal justice system also grow exponentially since new offences are created almost every day to create peaceful living conditions and such the numbers of persons ending up being jailed for violation of one or the other law keeps enlarging by leaps and bounds since the expansion of the criminal justice need to deal with challenges resulting from emerging issues such as globalization, free access to information and rapid travel in the face of global "war on terror" and sometimes inconsistent criminal justice systems makes human rights abuses continually increase and states tend to respond to such phenomenon by

developing swifter ways of imposing punishments to deal with large contraventions of the ever growing ranges of punishments.

This means that with each step taken in the direction of extending punishment for any transgression meticulous observance of a person's right to a fair trial must at all times be respected so as to avoid miscarriages of justice.

The Right to fair trial is fundamental principle anchored domestically in Uganda under **Article 28 of the Constitution of the Republic of Uganda** which provides as follows;

Article 28: Right to a fair hearing:

1. **In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.**

2. Nothing in clause (1) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society.

3. Every person who is charged with a criminal offence shall;

a. be presumed to be innocent until proved guilty or until that person has pleaded guilty;

b. be informed immediately, in a language that the person understands of the nature of the offence;

c. be given adequate time and facilities for the preparation of his or her defence;

d. be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice;

e. in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State;

f. be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial.

The above rights are non derogable and must be accorded to any person charged with a criminal offence in any court of law in Uganda.

The characteristics of a Fair Hearing is manifested as follows:

a) The accused's legal rights are safeguarded and respected by law;
b) A lawyer of the accused's choice looks after his defence unhindered;
c) There is compulsory attendance of the witnesses if need be;
d) Allowance is made of a reasonable time in the light of all prevailing circumstances to investigate, properly prepare and present one's defence;

e) An accused person's witnesses, himself, or his lawyer are not intimidated or obstructed in any improper manner;
f) No undue advantage is taken by the prosecutor or anyone else, by reason of technicality or employment of a statute as an engine of injustice;
g) Witnesses are permitted to testify under the rules of the court within proper bounds of judicial discretion and under the law governing testimony of witnesses; and
h) Litigation is open, justice is done, and justice is seen to be done by those who have eyes to see, free from secrecy, mystery and mystique.

These principles were well laid out a Kenyan case of **Juma and Others v Attorney-General (2003) AHRLR 179 (KeHC 2003)** and restated in Uganda by the High Court at Kampala per Elizabeth Musoke J (as she then was) in **High Court Civil Suit No. 78 of 2012 Alex Methodius Bwayo vs DFCU Bank Limited** and further confirmed by the Court of Appeal of Uganda sitting as a constitutional court in **Constitutional Reference No. 6 of 2007 Soon Yeon Kong Kim and Anor vs Attorney General** wherein Mpagi Bahigeine, JA (As she then was) iterated the importance of fair trial when she stated that;

> *"The accused must be given and afforded those opportunities and means so that the prosecution does not gain an undeserved or unfair advantage over the accused; and so that the accused is not impeded in any manner and does not suffer unfair*

disadvantage and prejudice in preparing his defence, confronting his accusers and arming himself in his defence and so that no miscarriage of justice is occasioned…"

A look at the instant matter and from the grounds of appeal setting in motion this appeal and the submissions received hereto, it the appellant's case that her constitutional rights to a fair hearing was trampled upon. To substantiate this allegation, the Appellant cited several incidents among those was an incident recorded on 26th June, 2019 when the appellant informed the learned trial court of her readiness to proceed with her defence and requested for witness summons be issued for a total 20 witnesses including His Excellency the President of Uganda Yoweri Kaguta Museveni allegedly the son of Esteri and complainant in the matter, Ms Grace Akullo (the Director CID Uganda Police Force), Associate Professor Dr Ronald Mayambala Kakungulu (a member of academic staff of Makerere University School of Law), Engineer Frank Kitumba (The Immediate past Director and Head of the Directorate of ICT Support at Makerere University), Mustapha B Mugisha (The Founder and CEO of Summit Consulting Ltd and Founder member of the Institute of Forensic and IT Security at Ntinda) and Dr Danson Sylvester Kahyana (Lecturer at the Department of Literature and currently Visiting Scholar at Kenyatta University among others who were required to appear in court to testify on her behalf as her witnesses but that instead of the summons being issued on that day , the lower trial court adjourned its ruling on the same 1st of July, 2019 but that come that her counsels citing biasness and

apparent preferential treatment accorded to the prosecutions counsel by the learned trial lower court sought for the recusal the trial magistrate from further handling the matter and thus informed the court that she was not in that vein ready to receive any ruling from the trial magistrate.

The learned trial magistrate upon hearing submissions for and against this fact proceeded to rule thus;

> *" … The grounds of the application as put up by counsel for the accused were to the fact that there was apparent bias by the court against the accused… Counsel however, did not give particulars of the preferential treatment that made him to believe that the prosecutors had been informed of change of schedule by court. Whereas it is true that this case was fixed to this day for ruling at 9am, this court was unaware that all courts around Kampala were scheduled to mention their capital cases using the video link system which this same case, proceedings are recorded on. The schedule was drawn while I was away and it was never brought to my attention. Since this case was fixed later, after the other courts and Luzira prison had scheduled to have the capital cases mentioned and all arrangements in prison were in place, the case could not be given a first priority but be called at a time when the system would be free which I was not certain of but also keep waiting.*
>
> *It was an oversight on the side of court when the defense attorneys were not officially informed this morning but although*

they were present in the same court room and watched the other courts mention their cases and Luzira prison online. I also want to make it clear that there was no official communication done by court to any of the prosecutors in this case in regard to postponement of the ruling to 2 pm.

In addition, the ruling was not postponed to 2:00 pm because I also kept waiting for when the courtroom would be free and it was only possible after midday but before 2:00 pm at which time I moved to the courtroom and the case was called.

The above notwithstanding, this court has always given priority to this case which the defence attorneys too must be aware of because it was in the beginning the defence counsel's pray to fast track the case and actually fast tracked it and given it very short adjournments and day to day hearings whenever it has been possible. What transpired today was beyond court's control, was not in any way intentional and to make matters worse, both the defence and prosecution suffered the same way and so was court. There was no preference accorded to the prosecution attorneys at all and none has save for being alleged, been proved by the defence before this court in this application and hence there was no judicial bias preferred at all to make me disqualify myself from presiding over this case. On the first ground, I hence find no sufficient grounds adduced to make me find it necessary to recuse myself.

2. The second ground was that the defence has observed on numerous occasions, court direct that children be removed from the courtroom prior to commencement of proceedings in the case which counsel started that the defence suspects springs from bias, a deep seated inclination within the presiding judicial officer that the post in issue has been determined to be harmful to children which they heard PW2 testify about.

It is so true that this court has several times especially during hearing of the prosecution case before commencement of proceedings inquired as opposed to directing that children be removed from the courtroom, as to whether there were children in the courtroom. This has not been done to show that the post complained of in this case is harmful but because the contents of the post include some words which children of some ages should not be exposed to. For example smelly and itchy cream-coloured Candida, cunt, vaginal canal and others that came up during the trial and would be mentioned by witnesses. For example vagina, penis, sex, sexual encounter and others. This court has a duty to protect children and that is why cases involving children are heard in camera to the exclusion of other court users. Court made all the inquiries on the occasions it did only to ensure that in the event some shin words had to be said during trial which could not fore tell, children were not exposed to them. This was not done to show that the post in itself was harmful but rather done in very good faith.

Besides, the defence attorney submits that he suspects, no proof of my mind has been put up before me to prove the alleged bias. I hence find that there was no bias proved at all to disqualify me from further proceeding with conduct of this case. Thus being the case, on ground two, I also decline to step down from conduct of this case…"

With the above ruling, the learned trial magistrate declined to step down from the trial and thus ordered the defence to proceed with its case.

The accused person, now the appellant upon receiving this ruling opted to remain silent throughout her trial but reserved the right to defend herself through witnesses which the prosecution side there and then sought orders from court to compel the accused/ appellant to give full disclosure of statements of her defence witnesses, the exhibits to be tendered in by her and all the pieces of evidence that she would rely on.

The appellant/ accused informed court that she could not give full disclosure to the prosecution side since the witnesses which she needed in her defence were those who were unwilling to voluntarily come to court and thus needed compelling by court as was provided for in the Magistrate's Court Act.

The learned trial magistrate upon hearing this explanation went on to deny full disclosure to the prosecution and proceeded to issue witness summons for the defence witnesses, however, bizarrely put the duty of summoning the defence witnesses on the accused

herself which act the appellant submitted was contrary to the clear provision of Article 28(3) (g) of the Constitution which put that upon the court itself for it provides thus **Article 28(3) (g) of the Constitution**: *"… Every person charged with a criminal offence shall- be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court…"* with the lower trial court proceeding to set the defence hearing on 3rd July 2019 when the appellant informed the court that it had not been possible to effect service of summons on the defence witnesses and sought for more time.

This plea was not objected to by the prosecution. The court granted an adjournment to 9th and 10th July, 2019 directing that all the defence to be brought to court and be heard on those two dates.

On 9th July 2019 one witness for defence called Mustapha Barnabas Mugisha (DW1) appeared in court but declined to testify citing obliviousness as to why he had summoned to appear in court to testify on behalf of the accused/ appellant and sought completely to be exempted from the whole process. Upon hearing what this witness was requesting counsel for the accused/ appellant sought the court's discretion to compel the witness to testify on her behalf as an expert witness, request which the prosecution/ respondent opposed arguing that the witness was merely competent and not compellable as per **Section 117 of the Magistrates' Court Act**. The lower trial court then went on to rule as follows;

" … I have heard from counsel for the accused, DW1 and the state prosecutor. 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, 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.

I am aware that the defence earlier informed court that they had 20 witnesses to call in this case but one of whom court

declined to allow them summon to court through court summons. Today, the defence had to present 10 witnesses but out of whom only one has shown up but who is even unable to testify at this time. This case was also fixed for tomorrow for defence hearing of the balance of the witnesses.

There have not been sufficient grounds as to why the other witnesses are not here. The defence is hence warned to produce all the witnesses that are meant to testify tomorrow before his court. The defence should also present witnesses with whom they have prepared for trial not those that have to be prepared by court since these are their witnesses whom they themselves identified and sought court to summon for them. Case adjourned to 10th of July 2019 for defence hearing at 9:00 am…"

Upon giving the above ruling which I found necessary to quote in full, the lower trial court adjourned hearing of defence case to next day of 10th July, 2019 at 9.00 am. On 10th July 2019 Mustapha Barnabas Mugisha (DW1) who had on the previous been in court and was warned to appear in court was absent. The court's attention was drawn to this fact by the counsel for the accused/appellant counsel who then requested the lower trial court to issue an arrest warrant for Mustapha Barnabas Mugisha (DW1) and also ample time to summon the other witnesses who had not appeared in court in addition to the request that resources facilitating the appearance of the defence be availed as was the duty

of the court to so do. After lengthy submissions thereto by both the prosecution and defence counsels the lower trial court adjourned the matter to 11th July, 2019. None of the facilities requested by the accused were offered by the court. On 11th July, 2019, the appellant seeing that the court was not willing to issue arrest warrant for Mustapha B Mugisha DW1 for time to identify, prepare and solicit other witnesses which was flatly rejected by the lower trial court with the learned trial magistrate stating in her own words at pages 248 lines 2 to 18 of the typed proceedings of the lower court as follows;

> *"... Court is under duty to accord her adequate time and facilities for the preparation of her defence. Court has gone ahead to accord adequate time to the accused to prepare and present her witnesses by adjourning the case for seven (7) times, and facilitated the accused to call her witnesses by issuing witness summons but no witnesses have up to now been brought to Court. The defence has only resorted to only raising applications for warrants to issue for the witnesses even when they are aware that there is no justification for such warrant as court ruled earlier.*
>
> *The defence has in other words chosen to use the accused's right to call witnesses to disarm this court of its duty to dispense justice that every man and woman that has eyes to see can see.*

The accused person has hence chosen to sit on her rights, but use it as a weapon to frustrate further proceedings in her case. She has hence voluntarily waived her own right to call witnesses and this court hence takes it that the accused has no witnesses to call in her defence.

Since the accused has opted for the said option, this court is left with no choice but to close the defence case. The defence case is accordingly hereby closed…"

With the above, the lower trial court closed the defence case. The act of premature closing of the appellant's case according to the appellant was not at grounded in law for under the provisions of Article 28 (3) (c) and (g) of the Constitution earlier cited and Section 95 of the Magistrates Court Act, the court had the duty to ensure that defence witnesses were in court.

Section 95 of the Magistrates Court Act provides that *"…if, without sufficient excuse, a witness does not appear in obedience to the summons, the court, on proof of the proper service of the summons a reasonable time before, may issue a warrant to bring the witness before the court at such time and place as shall be specified in the warrant."*

This provision of the law when read together with Article 28 (3) (c) and (g) of the Constitution implies that the court is obliged to ensure that witnesses of an accused person is brought to court even if it means arresting such a witness. According to the appellant this was an instance of denial non derogable rights to a fair trial.

The other incident cited as clearly violating the right of the appellant to a fair trial were where the lower trial court declined to avail Appellant's counsel with a typed copy of proceedings of the lower trial court which the appellant cited was in contravention to Article 28 (3) (c) of the Constitution which entails that an accused person shall be given adequate time and facilities to prepare his or her defence with such facilities including the giving to an accused the certified copy of the court proceedings to enable the accused to prepare her case even if the accused and her legal representatives had at all times fully attended the court proceedings yet this was denied while it is a tenet of fair trial.

The appellant cited other aspects such as being denied adequate facilities and time to exercise her right to reply the case against her when the court abruptly closed her case without and proceeded to reading its judgment against the appellant without giving her the opportunity to address court in addition to denial of a copy of the prosecution submissions so as to enable her make appropriate reply to the prosecution's case against her yet according to her **Section 131 (2) of the Magistrate Courts Act** was couched in mandatory terms for it provides that ;

Section 131 (2) of the Magistrate Courts Act:

Section 131 (2):

'… After the close of the accused person's case, the accused person shall be entitled to address the court, and the prosecutor SHALL (Emphasis added) then be entitled to reply; but if the

accused person adduces no evidence or no evidence other than evidence given by himself or herself, the accused person shall, subject to section 112 and subsection (3), be entitled to the right of reply..."

I have carefully perused the proceedings of the lower court and I note with disquiet that while it clear that the learned trial magistrate was alive to all legal requirements that ought to be followed in a criminal trial , the lower trial court adopted such bizarre proceedings in total disregard with a series of disregard of legal procedural safeguards ignored which I find totally contrary to the standard required for the proper conduct of judicial powers as elucidated by Article 126 (1) of the Constitution of the Republic of Uganda which entails the exercise of judicial powers by the courts to be in conformity with the law.

I would thus tend to agree with the appellant that her right to a fair trial was totally compromised by the lower trial court would automatically bring into play the provisions of **Section 11(2) of the Human Rights (Enforcement) Act of 2019** which provides;

Section 11 (2) (c) of the Human Rights (Enforcement) Act:

Derogation from Non derogable Rights and Freedoms:

Whenever, in any criminal proceedings-

(c) The competent court makes a finding that, any of the accused person's non derogable rights and freedom have been infringed upon,

the judge or magistrate presiding over the trial shall declare the trial a nullity and acquit the accused person.

Therefore, after having found that the proceedings in the lower trial court clearly violated the non derogable right of the appellant, my conclusion is that the said trial was a nullity and would entail acquit the appellant accordingly of all charges levied against her.

However , before I take leave of this matter I wish to note that during the proceedings of the lower court, there was introduced the novel procedure of handling some parts of the proceedings using audio- audio link system recently introduced in the Ugandan Judiciary by **The Judicature (Visual–Audio link) Rules, Statutory Instrument No 26 of 2016** whose objective under Rule 4 is for allowing the taking of evidence in any court of law by visual audio link and thus making it easier for witnesses to give evidence without physically appearing in court and or parties and or advocates and or accused persons to address court without physically appearing in court , among other objectives.

In the lower trial court this was done though my perusal of the proceedings of the lower court shows that the elaborate procedure provided to enable this latent procedure was not followed as it is clear from the record that the whole process was an ambush on the appellant who was excluded from physical presence in court without her having been either informed in advance that such a facility would be used in parts of her trial court yet it is a requirement that when such a facility is going to be used the court

may if deemed necessary give directions to all parties and notify them of the date and time of the hearing using such a facility and where any party objects to visual-audio link proceedings, he or she shall, within five days after receipt of notice of the application for visual-audio proceedings, file an objection by letter stating the reasons for the objection and shall serve a copy on the opposite party with the opposite party served with the objection within five days of receipt of the objection, filing a reply whereupon the court then gives its decision on the use or not without undue delay. This is the essence of the use of this system.

However, in the case of the appellant, no such procedure was followed. In fact the appellant was totally excluded from physical appearance in court without her consent or notification which in my view another instance of violation the appellant's rights under **Article 28 (3) (d) of the Constitution of the republic of Uganda** which guarantees the right of a person charged with a criminal offence to be permitted to appear before the court in person. The resolution of this issue resolves issues two to ten.

8. <u>Conclusion:</u>

In light of my finding on the foregoing two issues, this appeal would succeeds in whole.

9. <u>Orders:</u>

The following orders are thus issued;

a) The trial, procedure, judgment and all the findings of the lower court are hereby declared a nullity with the appellant, set aside and the appellant acquitted forthwith.
b) The conviction against the Appellant is also herby hereby quashed.
c) The Appellant is acquitted and ordered be released from custody unless being held for any other lawful charges.
d) Any right of appeal by any aggrieved party must be exercised within the meaning of appropriate law including Section 132 of the Trial on Indictment Act and any other relevant law including the Magistrates Court Act.

I do so order accordingly this 20th day of February, 2020 at the High Court of Uganda, Criminal Division sitting at Kololo.

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HON. DR. JUSTICE HENRY PETER ADONYO

JUDGE

20th FEBRUARY 2020