PREPARATION AND HANDLING OF CRIMINAL TRIALS IN THE HIGH COURT

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Background

As a judicial officer, always exercise your mandate in conformity with Article 126 (2) of **the Constitution of The Republic Of Uganda** which stipulates that**:**

(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, ***apply the following principles***—

(a) justice shall be done to all irrespective of their social or economic status;

(b) justice shall not be delayed;

(c) adequate compensation shall be awarded to victims of wrongs;

(d) reconciliation between parties shall be promoted; and

(e) substantive justice shall be administered without undue regard to technicalities.

Background *cont'd*

Criminal case trials in the High Court are handled by session

[see Section 4 (1) of the **Trial On Indictments Act**]

This paper will examine the Pre-Trial and The Trial stage all the way to the acquittal or conviction of the accused.

The High Court has **Unlimited Jurisdiction** and can entertain any matter of a criminal nature that is *properly* brought before it.

Pre-Trial

Cause-listing

Court

1. The process is Managed by the Court
2. Find all the Court files
3. Inform and Coordinate all stakeholders
4. Ensure equity and fairness in cause listing. Ordinarily cases are heard on a first in first out basis.
5. Confirm that accused persons on bail are reporting and available for trial

Cause-listing *cont'd*

Uganda Prison Service

1. Liaise with The Court
2. Confirm the status of the inmates – healthy, on bail, escaped, deceased, breast feeding mothers
3. Location of which prison holds inmate

Cause-listing *cont'd*

Prosecution

1. Coordinate with Court
2. Ensure all police files for the cause listed files are available
3. Opportunity to weed out matters that have no merit and cannot be prosecuted successfully
4. Trace suspects who have jumped bail

Pre – Session Meeting (For sessions)

- It is essential that before hearing commences a pre - session meeting is convened.
- Every stakeholder participating in the session should either be invited or be represented.
- Include the prosecution, defence, prisons, court clerks, probation officers, in charge remand home, process servers, police commanders, local government.
- Each stakeholder should make a presentation on their level of preparedness.
- The meeting is aimed at ensuring parties resolve any critical issues in order to ensure success of the session.
- The Court will use the occasion to ascertain that disclosures have been made (see ***Soon Yeon Kim vs AG Constitutional Ref 6 of 2007***).

Trial

Preliminary Matters

1. **Indictment**
   - Resolve all questions relating to the Indictment. Any objections made should be determined by an order of the Court (Sec 50 of **Trial on Indictments Act**).
   - The Court should not allow an alteration that is not disclosed by the evidence in the summary of the case.
   - The accused should be invited to plead to the indictment after any alteration or amendment is made (Sec 51 of the **TIA**).
   - A note of such alteration or amendment should be made by the Judge on the court record and the Indictment. It is good practice to counter sign it. (Sec 50 (3) of the **TIA**)

Preliminary Matters cont'd

- Where an accused person has died, escaped, or for any other reason failed to report for trial, then the charges against them should be dropped and the Indictment amended accordingly.
- Ideally The DPP ought to enter a *Nolle Prosequi*

Plea

- The accused person will be invited to take plea. The substance of the charge is read to the accused. The court should take care to establish that the accused understands the proceedings e.g. watch for disease of mind or the need for proper translation.
- Always record the language the accused person elects to use.
- It must always be the accused who responds, not his counsel or other representative, like a parent, in case of a juvenile.
- A Plea of 'Not Guilty' is entered where the accused denies the charges, stands mute, gives a detailed explanation etc. In that case, the matter shall proceed to a full trial.

Taking Plea as Recommended in *Adan vs Republic [1973] 1 EA 445*

When a person is charged, the charge and the particulars should be **read out to him**, so far as possible **in his own language**, but if that is not possible, then **in a language which he can speak and understand**. The magistrate should then **explain** to the accused person **all the essential ingredients of the offence** charged. If the accused then **admits all those essential elements**, the **magistrate should record** what the accused has said, as nearly as possible **in his own words**, and then formally **enter a plea of guilty**.

The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded

Plea cont'd

This elaborate procedure helps to ensure that the plea of guilty is indeed unequivocal and avoids challenge on the legality of the courts finding.

The Court must ensure the plea is entered and a conviction is recorded otherwise the proceedings are a nullity.

A sentencing hearing will be held after the conviction.

A failure to follow this process is a valid ground of appeal

Other Pleas

Pardon

Autrefois acquit or Autrefois convict

Amnesty under the Amnesty Act, for defined acts during a specified period

Pleas *cont'd*

Change of Plea

An accused person may at anytime during trial, but before the passing of sentence, change plea, or offer to plead guilty to a lesser offence e.g. from Aggravated Defilement to Simple Defilement or Murder to Manslaughter. In that case:

- The Court should establish whether the State Attorney would accept a change of plea to a lesser offence.
- If the offer is accepted by the State Attorney, the Indictment is accordingly amended to reflect the lesser offence and endorsed by the Court.
- The accused is then invited to take plea on the lesser offence and the rest of the procedure earlier laid out for a plea of guilty follows.

Pleas *cont'd*

- Where there are several accused persons, each should individually be invited to take plea on each count charged.
- Each accused person's plea should then be recorded in turn
- Omnibus pleas are illegal and will be set aside.
- Sentencing on each count, for each accused person, shall follow the conviction.

Fitness to take Plea

- If in the course of taking plea or evidence, it appears to the court that the accused is of unsound mind and unable to understand the proceedings, the court should inquire into the capacity of the accused.
- The Court may opt to wait until the close of the prosecution case before making this inquiry. If it is established that there is no case against the accused then the inquiry shall not be made.
- Evidence must be called, particularly from a medical professional, and evaluated before such a finding is made. The prosecution calls evidence to prove the accused has the capacity to understand proceedings.

Fitness to take Plea

- If the medical officer finds that the accused is of sound mental health and can follow proceedings the DDP shall be informed and the matter shall then proceed.
- Where it is shown that the accused is laboring under disease of mind the court shall order for his detention and transmit the proceedings to the Minister of Justice for his order.
- The Minister then makes orders for the detention and treatment of the accused. When the accused person heals the court shall be notified to determine whether the matter starts de novo or continues from where proceedings stopped.

(Sections 45 – 47 TIA)

Bail

Is defined as a temporary release of an accused person after providing security for future appearance in court on such conditions as the court considers reasonable (see **The Constitution (Bail Guidelines For Courts of Judicature) (Practice) Directions, 2022)**

The right to apply for bail stems from the presumption of innocence which the accused person enjoys under Art 28 (3) (a) of the Constitution.

Bail may be granted at any stage in the proceedings, both before and after committal.

Bail may also, for good cause, be granted in the course of hearing (Section 53 (4) TIA)

Some considerations when determining bail

- the gravity of the offence and the nature of the severity of the punishment which conviction might entail;
- the nature of the offence/accusation;
- the possibility of a substantial delay of the trial;
- the applicant's age, physical and mental condition;
- the likelihood of the applicant to attend court;
- the stage of the proceedings;
- the likelihood of the applicant interfering with witnesses;
- the safety of the applicant, the community and complainants;
- whether the applicant has a fixed place of abode within of the Courts jurisdiction;
- whether the applicant has sufficient sureties within Uganda to undertake that the applicant shall comply with the conditions of his or her bail;
- whether the applicant has, on a previous occasion when released on bail, failed to comply with his or her bail terms;
- whether there are any other charges pending against the applicant;

Bail (the role of the victim)

Under Clause 13 (2) of the guidelines the court may give the complainant/victim an opportunity to submit any information the Court may take into consideration. The Court will before taking a decision on the matter grant the applicant an opportunity to rebut the above.

The implication is that the Court is entitled to receive evidence on any of the named considerations to inform its decision on whether or not to exercise its discretion to grant bail. Care should be had to avoid bias in the trial of the accused.

Be mindful that Bail must never be refused mechanically or granted as a matter of course. It is always a considered judicial decision.

Mandatory Bail

- Where a person is charged with an offence only triable by the High Court, and has been on remand for one hundred and eighty days before committal on the High Court, then that person shall be released on bail on such conditions as the court considers reasonable.
- The Magistrate's Court shall immediately refer the file to the High Court.
- Mandatory bail shall only be granted by the High Court.

The Procedure for applying for Mandatory Bail

- An application for mandatory bail in the High Court shall be by notice of motion supported by affidavit.
- Upon disposal of the bail application, the file shall be returned to the Magistrate's Court to enable the court to proceed with the committal process.

Sureties

Under Clause 15 of the Guidelines the factors you may take into consideration when determining the suitability of a surety include:

i. the age of the surety;

ii. work and residence (address) of the surety;

iii. character and antecedents of the surety;

iv. relationship to the accused person;

v. and any other factor as the court may deem fit.

Preliminary Hearing

The Court may hold a preliminary hearing after plea to consider matters that will promote an expeditious hearing (Section 66 of the **TIA**).

At this stage, matters considered uncontested may be admitted e.g. medical examination reports like post mortem, PF 3, PF 24, evidence of arrest.

The evidence is tendered in Court and properly explained to the accused person(s) in the language they understand. The Court will thereafter prepare a memorandum detailing all the agreed evidence.

After the explanation, all parties and the Judge will append their signatures to the memorandum.

All facts admitted at this stage are considered proved.

Caution

While it is a good case management tool, the judge may realise at the stage of judgment writing, that the evidence needed farther explanation.

It is therefore better to have experts testify and explain their findings

The memorandum should be recorded in the absence of the assessors and read to them after they have sworn in

Assessors

After the preliminary hearing, the Court will choose assessors from the assessors rota. Any of the parties may challenge an assessor for cause (see S. 68 of **TIA**).

The chosen assessors shall then take oath and assume their place and sit throughout the trial.

It is advisable where a particular case may take long, such as cases from the ICD, that the Court use three assessors. In the event any one of them gets indisposed, it will not affect the hearing.

An assessor who is indisposed cannot re-join the hearing at a later stage. That assessor is discharged.

If all assessors get indisposed the matter shall be heard *de novo*

Assessors

Be mindful of the Regulations. Although the assessors rota is maintained by the Registrar, the trial Judge has complete control over the process of choosing who serves as an assessor during trial. Note that only persons proficient in English and aged between 21 – 60 years can serve as assessors.

The following categories of persons are exempt from serving as assessors:

i. persons actively discharging the duties of priests or ministers of their respective religions;

ii. medical practitioners, dentists and pharmacists in active practice;

iii. legal practitioners in active practice;

iv. members of the armed forces on full pay;

v. members of the police forces or of the prison services;

vi. persons exempted from personal appearance in court under the provisions of any written law for the time being in force, relating to civil procedure;

vii. persons disabled by mental or bodily infirmity;

Where the assessor does not take oath, the trial is a nullity

Hearing

The trial opens with the prosecution calling its evidence.

All persons are competent to testify unless the Court determines that owing to tender years, infirmity of mind, extreme old age etc the persons are unable to answer questions put to them, or to give rational or intelligible answers.

Evidence is recorded in first person narrative.

All evidence shall be given on oath or affirmation. The evidence of a witness not received on oath may be rejected on appeal.

Hearing

Ordinarily the prosecution will open its case by calling its witnesses.

If a *prima facie case* is established, then the defence shall follow with the defence case.

Witnesses will be examined, cross examined and re examined.

Leading questions may be asked in cross examination, to introduce uncontested matters or witnesses. If objected to, leading questions may not be asked in examination in chief and re-examination

Hearing

There is a growing but mistaken perception that only witnesses who make police statements may testify. The perception is based on the requirement for disclosure. However all persons, with known exceptions, are competent witnesses. The trial judge may allow such witnesses to testify but ensure that the accused is not prejudiced by making sure (s)he is allowed sufficient time to prepare for cross examination.

The parties may therefore be given leave to cross examine such witnesses.

The trial judge has the power to call (or re-call) any person as a witness to provide evidence for purposes of meeting the ends of justice.

Deaf and Dumb Witnesses

The Court may receive the evidence of deaf and dumb witnesses either in writing or by use of sign language (Section 118 of ***The Evidence Act***).

The challenge is where they are illiterate in the international sign language and can only be understood by close relatives who may also be witnesses and interested parties.

Mentally Challenged witnesses

A mentally challenged person is a competent witness, unless he or she is prevented by disease of mind from understanding the questions put to him or her, and giving rational answers to them.

(see Section 117 of **Evidence Act**)

Spouses

A Spouse is a competent but not compellable witness (Art 28 (11) of **the Constitution**)

However a spouse is both a competent and compellable witness for the defence. See Section 120 (b) of ***the Evidence Act.***

> *… the better practices is for the Court to inform the witness of his(her) privilege before receiving his evidence although there is no statutory obligation so to do …* (**Sesawo s/o Kermesi v Ug CoA 8 of 1978**)

Accomplices

In a criminal trial, a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial (**Nassolo V Ug [2003] EA 181**).

The accomplice is a competent witness against an accused and a conviction is not illegal merely because it is based on the uncorroborated evidence of an accomplice (S. 132 **Evidence Act**).

It is dangerous to proceed on the uncorroborated evidence of an accomplice without corroboration. This is a rule of practice that now has the force of law (**Ayor and anor vs Ug [1968] 303).**

Children

The Court must conduct a voire dire for a child of tender years (approx. 14 and below) to determine that:

a. The child is possessed of sufficient intelligence to testify

b. Understands the duty to tell the truth

c. Appreciates the nature of an oath

The child's evidence may be received unsworn but there is a statutory requirement for corroboration of that evidence [Section 40 (3) **TIA**]

Whether or not the child testifies on oath, he/she must be cross examined.

Recording the Voire Dire

The first method is for the Judicial officer to make a record of the questions and answers given by the child.

The other way is to put questions to the child and record the answers that the child gives

Thereafter the Court makes a finding as stated before.

Failure to conduct a voire dire may be determined to cause a miscarriage of justice

The question of whether a child is of tender years arises only at the time of trial

Extra Judicial Statements

An accused person may challenge the admissibility of a confession statement (repudiation or retraction) as having been extracted by use of violence, force, threat, inducement etc causing him to make a statement which was untrue.

The defence should inform the prosecution of the intention to contest the statement.

The Court will conduct a Trial within a Trial to determine the question of admissibility.

Both sides will call evidence before the court makes a ruling on whether it finds the statement was made voluntarily.

If admitted, the witness will then put in the confession. Court should be mindful not to record or admit this evidence before.

***Rashidi v Republic* [1969] EA 138; *Ezekia v Republic* [1972] EA 427**

The assessors need not withdraw during TWT (Section 81 of **TIA**).

Detailed procedure for conducting a Trial Within A Trial set out in *Ezekia V R [1972] E.A. 427)*.

Immediately it is known that the admissibility of a statement is to be challenged, the assessors should be asked to retire. This should, whenever possible, happen before any mention of a statement has been made, the usual procedure being for defence counsel to inform the court that a question of law needs to be considered. The prosecution then calls all the witnesses available to prove that the statement was made voluntarily and according to law, including the person to whom the statement was made, the interpreter, if any, and any other persons who can give relevant evidence. The defence has the right to cross-examine these witnesses in the usual way. The accused then has the right to give evidence or to make a statement from the dock, and to call witnesses, whose evidence will be limited to the issue of the admissibility of the statement. On this issue, the burden of proof is wholly on the prosecution. The judge gives his ruling in the absence of the assessors, who then return to court. If the statement has been held to be admissible, the prosecution evidence regarding it is given again and the witnesses are again cross-examined, because, although the issue of admissibility has been decided, the circumstances in which the statement was taken may affect the weight to be attached to it and for this reason the assessors are concerned with them.

Close of Prosecution Case

At the close of the prosecution case the Court shall make a determination on whether there is a case to answer or a prima facie case is proved.

The finding must be made irrespective of whether the defence make a submission on a 'No Case to Answer'

A definition of a prima facie case was given in the celebrated case of **Ramanlal T. Bhatt v R (1957) E.A 332** at **335** as:

> ***'It may not be easy to define what is meant by a prima facie case, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.'***

Close of Prosecution Case

The ruling is not to determine whether the offence has been proved beyond reasonable doubt, which is only done at the close of the trial, but whether a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence. This ruling need not be detailed and could be a single line.

If the Court determines that there is No Case to Answer it will acquit the accused at this stage.

Close of Prosecution Case

In **Kato Kajubi V Ug Cr App 39/2010** the Court of appeal cited with approval the following holding,

> *it has been held that the test of a prima facie case is objective and that a prima facie case is made out if a reasonable tribunal might convict on the evidence so far adduced. Although the court is not required at this stage to decide whether the evidence is worth of credit or whether if believed is weighty enough to prove the case conclusively, a mere scintilla of evidence can never be enough nor any amount of worthless discredited evidence. But it must be emphasised that a prima facie case does not mean a case proved beyond reasonable doubt (**Wibiro v R. (1960) E.A. 184)***

Defence

If the accused is placed on his defence, then the options open to him are explained.

The accused person(s) may:

- Give sworn evidence (will be cross examined)
- Give unsworn evidence (will not be cross examined)
- Keep quiet

Whichever option is taken the accused is at liberty to call witnesses

Defence

Court has a duty to protect the fair trial rights of the accused [Article 28 (3) of **the Constitution**].

The Court should also ensure that the accused has met with and properly instructed Defence Counsel especially counsel on state brief.

Every accused person shall be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court Art 28 (3) (g)

The Court should step in to avail facilitation for the witnesses that the accused persons wishes to call especially where it is established the accused is indigent.

Summing Up

i. When the parties on both sides have closed their cases and made their final submissions, you are required to sum up the law and the evidence in the case to the assessors.

ii. Thereafter each assessor will give their opinion orally and the court will take a record of that the opinion.

iii. The judge is required to keep a record of the summing up notes on the Court record (Section 82 [1] **TIA**).

Note

Where there are unreasonable delays resulting in injustice, the court may invoke its inherent powers under Section 17 (2) of **the Judicature Act**, to either dismiss the matter outright, or close the prosecution case.

Judgment

- The judgment is the reasoned pronouncement by the judicial officer on a disputed legal or factual question, which has been presented before him or her by the parties.
- If the court finds the accused guilty, it should convict him. It must state the offence and the section under which the Conviction is entered
- Where the court arrives at a finding of Not Guilty the Court must state so and acquit the accused.
- The right of appeal should be properly explained

Four things belong to a judge:
To hear courteously;
to answer wisely;
to consider soberly;
and to decide impartially.

Socrates

The End