

Admission of confessions in Uganda: Unpacking the theoretical, substantive and procedural considerations of the Supreme Court

Robert Doya Nanima

Abstract

The Uganda legal regime relies on the discretion of the courts in dealing with improperly obtained evidence. While various theories explain the need to exclude evidence, understanding their rationales sheds light on evaluating why the courts deal with this kind of evidence in the way they do. This article offers an assessment of selected decisions handed down by Uganda's Supreme Court between 1995 and 2015 with regard to evidence improperly obtained through confessions. It seeks to establish the underlying theoretical considerations of the decisions, how the courts address aspects of procedural and substantive justice, and whether there is a consistent developed jurisprudence. This analysis, therefore, supports the need for reform.

I. Introduction

The investigative function of law enforcement officers is as important to the criminal process as the criminal trial because their improprieties in obtaining evidence may taint the functioning of the courts.¹

The investigative function may be abused and, as a consequence, lead to improperly obtained evidence. This kind of evidence may be as a result of human rights violations or procedural impropriety.

For purposes of this article, improperly obtained evidence refers to the latter, with no taint of human rights violations.² This improperly obtained evidence may exist as a result of deceit, improper or unfair means without any additional illegality.³ Instances include a non-designated officer obtaining a confession⁴ or obtaining evidence in the course of an inadmissible confession.⁵

Other scenarios which are beyond the scope of this article include evidence obtained

¹ C. Fai, Illegally obtained evidence, 15 SINGAPORE LAW REVIEW (1994), at 98.

² D.T. ZEFFERT AND A.P. PAIZES, THE SOUTH AFRICA LAW OF EVIDENCE 2 (2009) 711; see also, Fai id., at 99.

³ A. Skeen, *Admissibility of Improperly Obtained Evidence in Criminal Trials*, 1 SAJCJ (1988), at 389.

⁴ *Nashaba v. Uganda* (Criminal Appeal No.39 of 2000) [2002] UGSC 17 (15 April 2002).

⁵ A. Choo, *Evidence Obtained in Consequence of an Inadmissible Confession*, 57 JOURNAL OF CRIMINAL LAW (1993), at 195-198.

through illegal searches and seizures,⁶ entrapments,⁷ and the use of undercover police investigations to obtain confessions.⁸ This article limits its scope to confessions obtained through improper means. First, it seeks to establish the theoretical considerations that may be used to understand the rationales of the decisions; secondly, it examines how the Supreme Court has applied the concepts of procedural and substantive justice; and thirdly, it assesses whether there is a consistent jurisprudence dealing with improperly obtained evidence.

II. Concept of improperly obtained evidence

Different jurisdictions attach different meanings to the term ‘improperly obtained evidence.’ This may be due to the existence of statutory law or judicial interpretation.⁹ Some jurisdictions use the terms ‘illegally’ and ‘improperly obtained evidence’ interchangeably subject to proof of violation of the rights of an accused.¹⁰

Other jurisdictions require that where procedural rules are not followed, a court may decline to admit the evidence.¹¹ In South Africa, for example, the constitutional directive refers to improperly or illegally obtained evidence and requires that it should be subjected to the constitutional test before it is excluded.¹²

The relevant section thus provides as follows:

Evidence obtained in a manner that violates any right in the bill of rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.¹³

This section requires that before the evidence is excluded there should be a violation of a constitutional right.¹⁴ In interpreting the above section, the South African courts have referred to this evidence as ‘improperly obtained evidence.’¹⁵ Notwithstanding the above, the South African courts still have the discretion under the common law to exclude improperly obtained evidence. The exclusion can be done in instances where there has been no violation of human rights in the course of obtaining the evidence.¹⁶

⁶ Fai, *supra note 1*, at 98.

⁷ S. Darren and W. Nicci, *The Exclusion of Evidence obtained by Entrapment: An Update*, THE ORBITER (2011), at 634.

⁸ B. Murphy and J.L. Anderson, *Confessions to Mr. Big A new rule of evidence?*, 20 INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF (2016), at 29-48.

⁹ See, section 35(5) of the Constitution of the Republic of South Africa 1996 (South African Constitution) and section 359a of the Dutch Code of criminal procedure (*Nederlandse Wetboek van Strafvordering* (Sv) to be discussed below.

¹⁰ See the subsequent discussion on South Africa.

¹¹ See the subsequent discussion on the Netherlands.

¹² For instance, section 35(5) of the South African Constitution; and *S v. Mthembu* [2008] ZASCA 51 where Cachalia J referred to the requirement to exclude improperly obtained evidence in terms of section 35(5). See also, Cameron J in *S v. Tandwa* [2007] SCA 34 (RSA) para. 116. See further section 24(2) of the Canadian Charter on Human Rights and Fundamental Freedoms

¹³ Section 35(5) of the South African Constitution 1996.

¹⁴ For a discussion of section 35(5) of the South African Constitution, see Zeffert & Paizes, *supra note 2*, at 721-775.

¹⁵ Zeffert & Paizes *id.*, at 721- 775.

¹⁶ For a discussion on the exclusionary rule in South Africa, see Van der Merwe *Unconstitutionally Obtained Evidence: Towards Compromise between the Common Law and the Exclusionary Rule*, 3 STELLEN L.R (1992), at 173-206.

In The Netherlands, The Dutch Code of Criminal Procedure, which regulates the assessment of illegally gathered evidence, provides:

1. If procedural rules prove to have been breached during the preliminary investigation, which breach can no longer be remedied, and the legal consequences of the breach are not apparent from statutory law, the court may rule that:
 - a). the severity of the punishment will be decreased in proportion to the gravity of the breach if the harm caused by the breach can be compensated in this way; b). the results of the investigation obtained through the breach may not contribute to the evidence of the offence charged; c). the Public Prosecution Service will be barred from prosecuting if the breach makes it impossible to hear the case in compliance with the principles of due process.¹⁷

This section allows a judicial officer discretion in how to deal with improperly obtained evidence. This evidence must have been obtained as a result of not following the procedural rules. The discretion is wide and is not limited to non-admission of improperly obtained evidence. The judicial officer may reduce the punishment due to the accused, or decline to admit the evidence, or bar the prosecution from prosecuting the accused. The section does not limit itself to only improperly obtained evidence. It may include violations of a procedure, which include human rights violations.¹⁸

III. Theoretical considerations in regard to admission of evidence

Various theories explain the rationale underlying the admission of evidence. The theories may lead to the inclusion or exclusion of evidence. A comparison of the tenets of these theories informs the decisions of the Supreme Court that are under review. These theories have been used by the Supreme Court and are classified into two groups: the forward-looking theories and the backward-looking theories.¹⁹ The forward-looking theories aim at ensuring that the persons who engage in obtaining evidence improperly are discouraged from doing so. At the forefront of these theories is the deterrent theory for exclusion of evidence. This theory requires that illegally or improperly obtained evidence must be excluded from admission to deter the perpetrators from committing future acts of obtaining evidence improperly.²⁰

The condonation theory, on the other hand, is based on the assumption that courts will exclude improperly obtained evidence so that they do not condone improper or illegal police or investigative behaviour.²¹ The backward-looking theories attempt to correct the harm

¹⁷ Section 359a of the Dutch Code of Criminal Procedure (*Nederlandse Wetboek van Strafvordering (Sv)*). See, M.J. Borgers and L. Stevens, *The Netherlands: Statutory Balancing and a Choice of Remedies*, in EXCLUSIONARY RULES IN COMPARATIVE LAW (S.C. Thaman, ed., 2015), at 185.

¹⁸ Borgers & Stevens *id.*, at 185.

¹⁹ M. Madden, *A Model Rule for Excluding Evidence*, 33 BERKELEY JOURNAL OF INTERNATIONAL LAW (2015), at 447.

²⁰ *Id.*, at 448.

²¹ R.M. Eugene, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 MILITARY LAW REVIEW (2012), at 239.

occasioned to the victims of the illegal or improper conduct.²²

The first theory is the compensatory theory which uses exclusion in order to recognise that rights have value, and that if the right is infringed the wrongdoer should provide alternative value to the rights holder.²³

This theory is, however, criticized because an accused who would have been convicted may avoid a penalty if his rights were infringed before he was brought to trial. This is because his rights, just like a victim's rights, have value attached to them. The other backward-looking theory is the vindication theory which affirms constitutional values through granting meaningful remedies.²⁴ It would appear that the vindication theory promotes the observance of a given right rather than ensuring that the perpetrators are brought to justice.

Another theory that may be used is the reliability theory. This theory provides that improperly obtained evidence may be as reliable as lawfully obtained evidence and may have a bearing on the innocence or guilt of an accused.²⁵ The South African courts also use the protective theory which provides that an accused should not suffer a disadvantage because of evidence obtained through human rights violations by investigators.²⁶ These theories create a balance in the admission of improperly obtained evidence and the courts' reasoning always leans to at least one of the theories.²⁷

A. Exclusionary Rule in Uganda

There is no direct rule of exclusion of improperly obtained evidence in Uganda. Like other former colonies of England, Uganda derives applicable common law and criminal law principles from England.²⁸ This rule informs the way court decides on confessions, and it is on this basis that the principles that govern it are discussed. The general principle in common law jurisdictions is that relevant evidence is admissible unless it falls within a category which is excluded by law, or it is excluded in the exercise of a judicial discretion.²⁹

The Evidence Act³⁰ provides guidance in dealing with relevance and admissibility of evidence. The Act provides:

Subject to any other law, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereafter declared to be relevant, and of no others.³¹

²² Madden, *supra* note 19, at 453.

²³ D.M. Pacciocco, Section 24(2): *Lottery or Law—The Appreciable Limits of Purposive Reasoning*, 58 CRIMINAL LAW QUARTERLY (2011), at 21.

²⁴ Madden, *supra* note 19, at 454.

²⁵ Zeffert & Paizes, *supra* note 2, at 712.

²⁶ *Id.*

²⁷ These theories will be used in the analysis of case law by the Supreme Court shortly.

²⁸ Section 1 of the Penal Code Act Cap 120 Laws of Uganda.

²⁹ W. Van-Caenegem, New trends in illegal evidence in criminal procedure: general report (Report of the World Congress of the International Association of Procedural Law, held in Salvador, Brazil, 2007), at 1

³⁰ Cap 6 Laws of Uganda.

³¹ Section 4 of the Evidence Act; see part II generally of the Evidence Act.

This section requires that for evidence to be admitted it has to be relevant to a fact in issue or it should relate to a fact in issue. The relevance of evidence depends on its ability to address a substantive issue of the case or a question in dispute.³² The failure of any piece of evidence to do the former is a yardstick for its non-admission. With regard to the admissibility of relevant evidence, a court has to deal with two questions. First, it deals with the question of relevance to a substantive fact in issue. The second question relates to relevance to the credibility of the evidence.³³ In *Uganda v. David Kamugisha*,³⁴ the accused sought to admit a letter into evidence that was purportedly signed by a prosecution witness and written to the accused. The admission of this evidence was supposed to rebut the evidence of the witness who had testified that: first, she could not write anything other than her name; secondly, she was not a girlfriend of the accused; and thirdly, she held a grudge against the accused.

The Court held that the admissibility of a piece of evidence depended on whether it was relevant to an issue before a court, otherwise the court record would be filled with evidence which was not sufficiently relevant and which had the effect of prolonging the trial because of immaterial matters. The letter turned out to be irrelevant to the substantive issues before the Court. The evidence sought to be admitted failed to pass the initial relevance test. If it had passed the test, then the relevance to the credibility of the evidence would have been put into consideration.

Furthermore, with regard to the requirement that the evidence must relate to a fact in issue, failure to prove this relationship is detrimental to any attempts to admit that piece of evidence. In *Struggle (U) Ltd v. Pan African Insurance Company Ltd*,³⁵ at the commencement of trial, counsel for the plaintiff laid evidence to show that the defendant's company did not exist. The defendant objected to this evidence on the ground that the pertinent issue before the Court was whether the defendant's company owned the premises and that therefore evidence to prove the non-existence of the defendant's company was irrelevant. The Court held that the issue of whether the defendant's company had ceased to exist was not a fact in issue as it was not pleaded and that therefore evidence to prove its non-existence was not admissible. The lack of a connection or failure by the plaintiff to show a connection between the evidence that the plaintiff sought to be admitted and the facts in issue was the reason why the evidence was not admitted.

If evidence is admissible, the manner of its procurement does not matter. It is on the basis of this rule that the exclusionary rule may be used. In *Kuruma s/o Kairu v. R*,³⁶ the appellant was convicted on a charge of being in unlawful possession of ammunition

³² J. Wanga, *Evidence Obtained from Remote- Electronic Traffic Devices: An Argument for Admissibility in Civil and Criminal Contexts*, 46 THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION (2010), at 102- 109.

³³ A. TERENCE, D. SCHUM AND W. TWINING, ANALYSIS OF EVIDENCE 2 (2006) 96.

³⁴ (1988 – 90) HCB 77.

³⁵ (1990-91) KARL 46.

³⁶ *Kuruma s/o Kairu v. R* (1955) AC 197, 203; A. Choo & S. Nash, *Improperly Obtained Evidence in the Commonwealth; lessons for England and Wales?*, 11 INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF (2007), at 78.

contrary to the Emergency Regulations.³⁷ The ammunition was found as a result of a search carried out by two police officers who were below the designated rank of assistant inspector of police. Although the officers had no power to search the appellant,³⁸ the evidence recovered was nevertheless admitted.³⁹ The ground of leave to appeal was that the evidence proving that the appellant was in possession of the ammunition had been illegally obtained and should not have been admitted.⁴⁰

The Court held that the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and a court is not concerned with how the evidence was obtained.⁴¹ The only exception to the rule was that a court has the discretion not to admit improperly obtained evidence if the strict rules of admissibility will operate unfairly against the accused.⁴² The rationale for this holding was that all relevant evidence was admissible, regardless of the manner in which it was obtained.⁴³ The Court stated that when it was a question of the admission of evidence, it was not about whether the mode of obtaining the evidence was tortuous but excusable; it was about whether the evidence obtained was relevant to the issue being tried.⁴⁴ Therefore, all evidence is admissible until an accused seeks to rebut this presumption.

B. Substantive and Procedural Justice

Substantive justice refers to justice that emerges out of a given process⁴⁵ which involves a value judgment about the content of law and its consequences.⁴⁶ For instance, where a criminal statute provides for imprisonment for life for the offence of defilement, substantive justice is used to find value through other circumstances, externalities such as morality, religion or culture,⁴⁷ and it evaluates the need to impose punishment which is proportionate to the crime to ensure that there is retribution or rehabilitation.

On the other hand, procedural justice finds value internally in the regular and consistent application of law. The judicial officer weighs the evidence, the circumstances relating to the commission of the offence, before deciding on liability for the commission of the offence and the sentence. In the same way, where factual issues arise about voluntariness in the recording of a confession, he has to weigh up the probative value of the evidence in the light of other corroborative evidence before making a decision on the admission of the confession.⁴⁸ Furthermore, a system of criminal law may dictate that punishment is

³⁷ *Kuruma v R*, *id.*, at 198.

³⁸ Regulation 29 of the Emergency Regulations.

³⁹ *Kuruma v R*, *supra* note 36, at 198.

⁴⁰ *Id.*

⁴¹ *Id.*, at 203.

⁴² *Id.*, at 204. The Court referred to *Noor Mohamed v. The King* [1919] AC 182 191-192 and *Harris v. The Director of Public Prosecutions* [1952] AC 694 707.

⁴³ *Kuruma v. R*, *supra* note 36, at 204.

⁴⁴ *Id.* The court referred to *Regina v. Leatham* (1861) 8 Cox CC 498 501 where Crompton J said: 'It matters not how you get it; if you steal it even, it would be "admissible".

⁴⁵ W. SADURSKI, GIVING DESERT ITS DUE: SOCIAL JUSTICE AND LEGAL THEORY (1985), at 49.

⁴⁶ N. Faso, *Civil disobedience in the Supreme Court: Retroactivity between compromise and formal Justice*, 75 ALBANY LAW REVIEW (2012), at 1614

⁴⁷ *Id.*

⁴⁸ See the analysis of the decisions of the Supreme Court below.

proportionate to the crime, or that punishment serves ends, such as retribution or rehabilitation. These are substantive goals and substantive justice would be achieved if these ends were met. Accordingly, substantive justice is achieved after an objective assessment and not a subjective assessment.

While substantive justice is referred to as the justice of the outcome, procedural justice is referred to as the justice of the process that brings about the outcome.⁴⁹ Procedural justice requires that all cases should be treated in the same way in accordance with the law, regardless of the circumstances of a particular case, without regard to the defects or virtues of the case.⁵⁰ In procedural law, therefore, justice is seen to be found in the form of the law and not in its content, and is delivered through adherence to its form.⁵¹ This is an indication that procedural justice may form part of substantive justice. Therefore, where a given law provides for the procedure to follow in recording confessions,⁵² the procedure is supposed to be followed if the evidence is to be admitted. It follows that if a police procedure is required to obtain particular evidence, it has to be shown to the satisfaction of the court that it has been followed before it is admitted.⁵³

By its nature, procedural justice imposes restraints on processes through which an outcome of substantive justice is obtained.⁵⁴ It is, therefore, expected that as courts adjudicate cases, they should ensure that the processes leading to the obtaining of evidence and filing of cases are followed to the letter. Substantive and procedural justice are interrelated in a way that the latter is required for the existence of the former.⁵⁵ The major question that arises out of this relationship is whether it can be said that where substantive and procedural rules are followed, one can attain the former.

Consider a hypothetical case where all the rules are followed in obtaining a confession but the interpreter misinterprets the story of the accused in the process of recording it, which becomes evident when it is read back to the accused before he appends his signature. A similar hypothetical case may arise where in the course of recording a confession, the procedure is not followed but the accused is identified as the person responsible for the acts that constitute part of the offence.

In the first hypothetical example, justice may not be seen to be served if the accused is convicted: but, justice may still not be seen to be done in the second scenario, if the accused is convicted on the basis of a flawed process. The two hypothetical situations raise the question of whether a system of procedural justice on its own produces substantive

⁴⁹ Sadurski, *supra* note 45.

⁵⁰ D. Lyons, *On Formal Justice*, 58 CORNELL LAW REVIEW (1973), at 833.

⁵¹ *Id.*

⁵² *Festo Androa Asenya v. Uganda*, Unreported Supreme Court case 1 of 1998 2 October 1998, at 26-30.

⁵³ See, *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v. Uganda* Unreported case 33 of 2001 20 February 2003 and *Walugembe Henry, Ssali Paul and Kamanzi Joseph v Uganda* unreported case 39 of 2003 1 November 2005.

⁵⁴ Sadurski, *supra* note 45.

⁵⁵ *Id.*

justice outcomes.⁵⁶ There is a possibility, therefore, that the presence of procedural justice does not lead to substantive justice.⁵⁷

It follows that an inquiry into the basis of the decisions by the Supreme Court will help to show whether it has enforced substantive justice, procedural justice, or a fusion of substantive and procedural justice.

C. Confessions

1. *Legislative provisions*—The recording of confessions in Uganda is regulated by the Evidence Act⁵⁸ and the Guidelines to Magistrates on Recording Confessions.⁵⁹

The Evidence Act provides:

- (1) No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of—
 - (a) a police officer of or above the rank of assistant inspector; or
 - (b) a magistrate...⁶⁰

The wording of the section does not require that it is only a police officer above the rank of assistant inspector of police who can record a confession. The requirement is that the confession should be made in the presence of a police officer who is at least assistant inspector of police. This is an indication that a police officer below the indicated rank may record a confession by an accused person if he is in the immediate presence of an officer at the level of inspector of police or of a higher rank.

A circular from the Chief Justice replicates the wording.⁶¹ It offers an explanation to the effect that the section is designed to ensure that any statement made by a person in police custody is voluntary. The rationale that can be deduced from the section and the circular is that they both require a space where an accused voluntarily offers his statement. In addition, the circular requires that the magistrate or officer may use an interpreter if the accused chooses to use a language with which he is not conversant.⁶² It is therefore prudent that the magistrate or a designated police officer record the statement, instead of having the statement recorded by another person, in his immediate presence. ‘Immediate presence’ should be interpreted literally to mean the physical presence of the magistrate or designated police officer in the room at the time of the recording of the confession.⁶³

⁵⁶ P. SELZNICK, THE MORAL COMMONWEALTH : SOCIAL THEORY AND THE PROMISE OF COMMUNITY (1994), at 437. See also, Faso, *supra* note 46.

⁵⁷ Faso *id.*

⁵⁸ Cap 6 Laws of Uganda.

⁵⁹ Instruction Reference C.J./c.b by the Chief Justice on Magistrates on Recording of extrajudicial statements dated 2 March 1973. The instruction offers direction to police officers as well. This nd circular was released after section 23 had been repealed by Decree 25 of 1974. The Evidence (Amendment) Act of 1985 did not save the operation of section 23 of the Evidence Act Cap 101(as it was then).

⁶⁰ See s. 23 (1) b of Cap 6 Laws of Uganda.

⁶¹ Note 59 par 1.

⁶² Note 59 Guideline 9.

⁶³ See, *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v. Uganda* Unreported case 33 of 2001 20 February 2003

The Evidence Act requires corroboration before an accused is convicted on the basis of a confession. Section 28 provides:

if court forms the opinion that the confession was involuntarily obtained. The protected from impropriety if at the time of making the confession, it appears to the court that having regard to the state of mind of the accused person and to all the circumstances, it was caused by violence, force, threat, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made.

From the above section, the opinion of the Court that the confession was involuntarily obtained raises a presumption that the confession is inadmissible. The Court has to be satisfied that the confession was obtained voluntarily.⁶⁴ This may be done by establishing the absence [or presence] of violence, force, threats, inducement or promise in the course of recording the confession.⁶⁵ It must be noted, however, that if the Court is satisfied that the impression that the confession was caused by any such violence, force, threat, inducement or promise is removed, it may proceed to have the confession admitted.⁶⁶

2. Analysis of case law—*In Namulobi Hasadi v. Uganda*,⁶⁷ the appellant sought to have the confession rejected because it was improperly obtained. The improprieties included the fact that he did not sign the confession,⁶⁸ that there was the insertion of a name of a detective on the confession,⁶⁹ and that the confession was recorded in a room full of other police officers and people doing other work.⁷⁰ The Court upheld the admission of the confession in evidence on the ground that it did not occasion any injustice to the appellant.⁷¹ With regard to the irregular recording of the confession, the Court stated first, although the recording of the confession took place in a room occupied by other people, they were busy with their own duties.⁷² The Court recognised the fact that the police do not usually have enough room for a recording officer to be alone with an accused,⁷³ and that the appellant never complained about the irregularity in the mode of recording the confession.⁷⁴ In addition, although the confession was recorded in a language the appellant did not understand, the fact that it was read back to him was proof that he voluntarily made it.⁷⁵

The appellant also informed the Court that the recording of the confession was not done in accordance with the Evidence (Statements to police officers) Rules⁷⁶ (hereinafter referred

⁶⁴ *Id.*

⁶⁵ See, Zeffert & Paizes, *supra* note 2, at 519, on the meaning of a threat or promise of advantage made to a recording officer.

⁶⁶ See, s. 25 of Cap 6 Laws of Uganda.

⁶⁷ *Namulobi Hasadi v. Uganda* Unreported case 16 of 1997 13 July 1998.

⁶⁸ *Id.*, at 3.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*, at 4 – 11.

⁷² *Id.*, at 4

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Evidence (Statements to police officers) Rules SI 6-1, Laws of Uganda*

to as the Rules) regarding the procedure of recording confessions.⁷⁷ The Court also noted that rule 7(a) of the Rules was repealed by the Evidence (Amendment) Decree 25 of 1971. Instead of relying on the improprieties, the Court laboured to justify the admission of the confession on the basis of the fact that the rights of the accused had not been violated. Therefore, to a great extent, the confession was admitted because the appellant's rights were not violated and notwithstanding the irregularities.⁷⁸

The Court set a precedent which upheld the notion of substantive justice over that of procedural justice. This is so because it used a proportionality test to determine the use of a confession that was recorded with a lot of glaring irregularities which could be explained as not being fatal to the final outcome. With the confession on the one side of the scale, the other side contained the facts that the appellant had been asked about the content of the confession and did not object thereto and also did not complain about the recording procedure. In addition, the appellant at the time of his arrest had cooperated with the police in recovering evidence that pointed to his role in the commission of the murder. He had in his possession items belonging to the victim. Furthermore, the procedural law upon which the appellant relied to justify his claims had been repealed. These facts outweighed any rationale that the Court would have had to prefer procedural justice over substantive justice, or to use procedural law in obtaining the confession, to arrive at substantive justice.

The court viewed the facts surrounding the recording of the confession in the light of other circumstances, such as the existence of other evidence, and the appellant's role in the investigation process, and held that the admission of the confession would not cause an injustice to the accused. While the Court handled a delicate matter properly, it ought to have denied the admission on grounds of failure to follow procedural laws by the police.

The Court condoned the excesses of the police because there was no law to stop them, and the appellant had co-operated with the police in the investigation. Although the accused was represented, his ignorance of the guidelines should not have been used as a ground to hold that there was no injustice occasioned to him. The Court was more interested in ensuring that any failure to meet procedural safeguards in recording confessions could be justified if no injustice was occasioned to the accused. This precedent that encouraged the admission of improperly obtained evidence when it did not occasion an injustice to the accused was wrong. It caused procedural injustice to the appellant. Four months later, the Supreme Court, in *Festo Androa Asenya v. Uganda*,⁷⁹ reproduced the rules passed for the recording of confessions. They require, firstly, that an accused be cautioned before a statement is made. Secondly, if the recording of the statement is made by a police officer, then he should be at the level of an Assistant Inspector of Police or higher. Thirdly, the confession should be recorded by the officer in a language that the accused understands, in a

⁷⁷ *Id.*, Rule 4.

⁷⁸ *Id.*

⁷⁹ *Festo Androa Asenya and Kakooza Dennis v. Uganda* Unreported Supreme Court case 1 of 1998 2 October 1998, at 26-30.

room which should have only two people unless an interpreter is required.⁸⁰ These rules set a standard which the Court hoped would reduce the improper recording of confessions by the police.

In *Nashaba Paddy v. Uganda*,⁸¹ the appellant and three others were involved in the commission of a robbery. When the appellant was arrested, he gave incriminating information to an inspector of police about himself and two other persons in the commission of the crime.⁸² After police had recovered the evidence on the basis of the information given, the appellant was taken to a Magistrate where he recorded an extra-judicial statement.⁸³ On appeal, the appellant claimed that the confession should not have been admitted because of irregularities and human rights violations in the recording of the statement. In reference to irregularities, it was contended that the appellant was not informed of the charges against him before the Magistrate, that the statement was not recorded in a language that the appellant spoke, and that the holding that the confession of the appellant was obtained voluntarily was not supported by evidence.⁸⁴ The recording of the confession was done by the Magistrate's clerk, and it was not recorded in the language the appellant spoke.⁸⁵

The Court showed a willingness to admit a statement, if the impropriety was not a material departure from the rules for recording a statement. In *Nashaba*, the confession involved various improprieties. First, the appellant was not informed of the charge against him. Secondly, the confession was recorded in a language he did not understand. Thirdly, the statement purportedly recorded by the Magistrate was in fact recorded by his clerk.⁸⁶ The Court held that the irregularities committed by the Magistrate were not prohibited by the law, and that the procedure adopted was not a material departure from the Guidelines for Recording Confessions.⁸⁷ The Court stated further that although the only omission was that of the Magistrate in not certifying the charge and caution statement, it was cured by the confirmation by the appellant that the recording was accurate.⁸⁸

The Court further held that the Chief Justice' Rules on Recording Confessions were rules of practice and not law, and as such a contravention thereof would not render the recording to be bad if the confession was found to be voluntary.⁸⁹ The rationale for the holding was the presence of voluntariness. If the Court could establish that the irregular recording of the confession was done voluntarily, it would admit it.⁹⁰

This case reiterates the position adopted in *Namulobi*, that the Court was inclined to admit an improperly obtained statement if the irregularity was shrouded in a cloak of

⁸⁰ *Id.*, at 27.

⁸¹ *Nashaba v. Uganda*, *supra* note 4.

⁸² *Id.*, at 2.

⁸³ *Id.*, at 3.

⁸⁴ *Id.*, at 4.

⁸⁵ *Id.*, at 6. The dialect the appellant understood was Runyakitara, which was not used in the recording of the confession.

⁸⁶ *Id.*, at 4-5.

⁸⁷ *Id.*, at 6.

⁸⁸ *Id.*, at 7.

⁸⁹ *Id.*.

⁹⁰ *Id.*, at 8.

voluntariness. The Court used substantive justice to maintain the admission of a confession despite the procedural irregularities in recording it. The Court used a subjective test of whether the accused was made to sign the confession involuntarily, and it was established that he signed it voluntarily. In addition, the extent of the Magistrates' non-adherence to the Rules of practice was not great enough to oust the voluntariness in the making of the confession. The Court gave the procedural rules a low grading because they were rules of practice and not rules of law. The admission of the confession was based on its subjective content with regard to the commission of the crime, and not on the procedural objective of following the rules. Despite the fact that the appellant sought to have the appeal allowed on the basis of the failure to follow the correct rules regarding the recording of confessions, unlike in Namulobi, the Court watered down the rules to mere rules of practice and not rules of law. This was an indication that substantive justice was more important than procedural justice.

While substantive justice was upheld as long as it did not occasion injustice to the appellant, the yardstick for measuring the injustice was the ability to regard the demands of substantive justice as being greater than those of procedural justice. Just as in Namulobi, Nashaba develops the principle that improperly obtained evidence may be admitted if it does not cause injustice to the accused. The question of injustice is for the courts to decide according to the circumstances of each case. In addition, the Supreme Court seemed to concretise its stance of being objective in following the subjective content of the confession instead of being objective in following the objective rules of recording confessions.

In *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v. Uganda*,⁹¹ the appellants appealed to the Supreme Court, claiming that the Court of Appeal erred in law when it admitted their retracted confessions.⁹² The first and second appellants contended that their confessions were recorded by the same investigating officer, which was an irregularity.⁹³ In addition, in the course of admitting the confession, the trial judge did not inquire from the defence as to whether it had any objection to the admission of the confessions, and his failure to do so was a failure of justice.⁹⁴

The Court agreed with the appellants and held that it was improper to admit the confessions, because the trial judge did not give the defence an opportunity to say anything about the nature of the confessions before they were admitted.⁹⁵ The High Court did not subject the admissibility of the confession to a trial within a trial, to test the voluntariness of the recording of the confessions.⁹⁶

With respect to the confessions, they were not admitted in evidence because of the procedural

⁹¹ *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v. Uganda* Unreported case 33 of 2001 20 February 2003.

⁹² *Id.*, at 4.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*, at 8.

⁹⁶ *Id.*, at 9-10.

improprieties that surrounded their making. It was a rule that had to be upheld by each judicial officer that all confessions had to be subjected to a trial within a trial.⁹⁷ The decision in Ssewankambo indicated a shift by the Court regarding the admission of improperly obtained confessions. It indicated that the Court would not admit evidence of confessions where the procedural rules were not followed. This case affected the consistency that the Court had created in its earlier decisions in Namulobi and Nashaba. The jurisprudence that had been created was put on a halt.

With regard to how the Court dealt with the principles of substantive justice vis-a-vis the principles of procedural justice or the balancing of the two principles, the Court used the procedural rules that govern the recording of confessions to arrive at substantive justice. The Court used a two-step approach by employing a fusion of procedural justice and substantive justice.

First, in the employment of procedural justice, the Court adopted a subjective stance by following the procedural rules relating to the letter, and that failure to do so would lead to the non-admission of the evidence. Secondly, the Court then used the procedural law findings to arrive at a value judgment based on the proportionality and objectivity of legal principles.

The Court, therefore, adopted a fusion of both procedural and substantive justice before it arrived at its decision. In addition, the Court also upheld the notion that it will not sustain an illegality once it is brought to its attention.⁹⁸ The Court deviated from the condonation theory applied in Namulobi and Nashaba to the deterrence theory in deciding whether to admit the confession. This forward-looking theory of deterrence was aimed at ensuring that the persons who engage in obtaining evidence improperly are discouraged from doing so.⁹⁹

It must be noted that in this case, apart from the procedural irregularities, the Court also looked at other factors, such as human rights violations in the course of obtaining the evidence. It may, therefore, be said that the existence of factors other than the improprieties in the recording of the evidence played a role in the decision of the Court.

In Mweru Ali, Abas Kalema, Sulaiman Senkumbi v. Uganda,¹⁰⁰ the appellants were charged with robbery and were convicted on the basis of confessions made by the first and second appellants.¹⁰¹ They appealed on the grounds that the confessions had been repudiated, and that it was wrong for the trial court judge to rely on confessions that had been irregularly obtained.¹⁰²

⁹⁷ *Id.*

⁹⁸ *Makula International v. Emmanuel Nsubuga* [1982] HCB 11. See also, *Francis Mpamizo v. Uganda Kabale High Court Criminal Revision Case* [2011] UGHC 30 3 4.

⁹⁹ Madden, *supra* note 19, at 448.

¹⁰⁰ *Mweru Ali, Abas Kalema, Sulaiman Senkumbi v. Uganda* Unreported Supreme Court case 33 of 2002 21 August 2003.

¹⁰¹ *Id.*, at 1.

¹⁰² *Id.*, at 2.

According to the first appellant, his confession was irregularly obtained in so far as it was not recorded voluntarily.¹⁰³ The Supreme Court rejected this ground of appeal and held that the confession was properly admitted. The rationale was that the first appellant willingly signed the charge and caution statement and that after recording the statement, it was read back to him before he countersigned it.¹⁰⁴ It was established further that the appellant offered a detailed explanation of his role in the commission of the robbery: his attendance at preparatory meetings, taking part in the robbery, and getting a share of the proceeds.¹⁰⁵ The retracted confession was corroborated by evidence of the discovery of the gun alluded to by the first appellant in the confession, the conduct of the appellant which led to the arrest of the other suspects, and the confession of the second appellant.¹⁰⁶ In addition, the first appellant was a former police officer, who ought to have insisted that the statement be subjected to a trial within a trial but decided not to do so; and his choices could not be used as reasons not to admit the confession.¹⁰⁷

In relation to the confession of the second appellant, he stated that his confession was not recorded in a language that he understood.¹⁰⁸ While the Court emphasised the need to record statements in accordance with the procedure set out by the Chief Justice's instructions dated 3 February 1973, it was persuaded that the recording of the confession in English did not occasion an injustice to the second appellant.¹⁰⁹ It was established that the officer who recorded the statement followed the correct procedure before and after recording the confession.¹¹⁰ It was established that the appellant actually feigned illiteracy so as to attempt to ensure that the confession was not admitted.¹¹¹ The appeals were therefore dismissed.

With regard to balancing substantive and procedural justice, the Court downplayed the failure to follow the rules of recording confessions since it found that the failure to test the one confession in a trial within a trial, or to record the other confession in a language the appellant understood, were not fatal to the appellants. In this case, the appellants were trying to benefit from the improprieties in recording the confessions that they had made voluntarily.

The Court adopted an approach that made any development in the jurisprudence inconsistent. While in the earlier case of Ssewankambo the Court decried the need to follow the procedure for recording confessions, it drifted back to the earlier principles in Namulobi and Nashaba. In a bid to prevent the appellants from benefitting from an illegality, the Court used the existence of other evidence, such as evidence of the recovery of a gun and the appellant's co-operation with the police, to arrive at a value judgment. The Court sacrificed procedural

¹⁰³ *Id.*, at 6.

¹⁰⁴ *Id.*, at 5.

¹⁰⁵ *Id.*, at 6.

¹⁰⁶ *Id.*, at 7.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*, at 8.

¹¹⁰ *Id.*

¹¹¹ *Id.*, at 9.

rules to arrive at substantive justice. This is an indication that procedural justice need not be attained before substantive justice is achieved.

The author differs from the view of the Court in this case and is of the view that the Court should have remained consistent in following the procedural aspects, and should have disregarded the confessions since they were not subjected to a trial within a trial or were not recorded in a language that an appellant understood. There was evidence that could be used to sustain the convictions. The identification of the first and second appellants in broad daylight at the scene of the crime by prosecution witnesses,¹¹² the recovery of the gun,¹¹³ and the evidence of the first appellant about his role in the robbery.

The Court could have followed the procedure to disregard the evidence of the confessions and still maintained the convictions of the accused persons. These pieces of evidence point to a subjective notion of justice which, if applied using the proportionality test, would still ensure that substantive justice was achieved. With regard to the theoretical considerations relating to the admission of evidence, the Court admitted the evidence on the basis of its reliability, despite the fact that it at the same time condoned the excesses of the police in recording the confessions. While the Court struck a balance between adducing reliable evidence at the cost of condoning improper police conduct,¹¹⁴ it created inconsistency in its jurisprudence dealing with evidence obtained through human rights violations.

In *Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph v. Uganda (Walugembe)*,¹¹⁵ the appellants sought to have their confessions struck off the record because of the irregularities in their recording. The first and second appellants informed the Court that their confessions were recorded in English rather than in the language that they understood.¹¹⁶

In addition, the confessions were recorded by the same police officer¹¹⁷ and the confession of the second appellant was recorded in the presence of the officer in charge of the police station. Other facts that were vital to the Court in making its decision were that the third appellant cooperated with the police in recovering the stolen items from a certain swamp,¹¹⁸ and that the first and second appellants stated that their confessions were obtained through torture.¹¹⁹

The Court in allowing the appeal stated that it was a misdirection to admit confessions with these irregularities, and without testing the voluntariness of the confessions.¹²⁰ The rationale for this holding was that where a police officer recorded a statement from an

¹¹² *Id.*, at 4

¹¹³ *Id.*

¹¹⁴ Eugene, *supra* note 21. See also, *R v. Collins* [1987] 1 SCR 265 para. 45.

¹¹⁵ *Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph v. Uganda* Unreported case 39 of 2003 1 November 2005.

¹¹⁶ *Id.*, at 5.

¹¹⁷ *Id.*, at 6.

¹¹⁸ *Id.*, at 2.

¹¹⁹ *Id.*, at 5.

¹²⁰ *Id.*, at 6.

accused person and went on to record another from a second accused, he would be tempted to use the information from the confession of the first accused in the confession of the second confession.¹²¹

Just like in Ssewankambo, the Court made use of procedural rules to arrive at substantive justice. Secondly, the Court leaned to the deterrence theory in deciding whether to admit the confession in order to ensure that persons who engage in obtaining evidence improperly are discouraged from doing so.¹²² This case also involved human rights violations in the course of obtaining the confessions.

IV. Conclusion

At the outset, it should be noted that the cases of Namulobi, Nashaba, Ssewankambo, Mweru and Walugembe involved irregularities in recording confessions. With particular regard to the recording of confessions in a language that the accused could not understand, the Court dealt with this question in the cases of Nashaba, Ssewankambo, Mweru, and Walugembe. It attached little significance on this. It attached little significance on this procedural issue in Nashaba and Mweru and upheld the admission of the confessions.

Conversely, it placed emphasis on the need to follow this rule of practice in Ssewankambo and Walugembe and this emphasis led to the non-admission of the confessions. In Ssewankambo and Mweru, the Court had evidence that, in addition to the improperly obtained evidence, there were violations of human rights in the process of obtaining the confessions.

This analysis identifies three points. First, that there is an inconsistent jurisprudence in dealing with evidence obtained through improper means. Secondly, the Court has not been consistent in following the procedural rules governing the recording of confessions and thereby has created the inconsistency. Thirdly, where the Court has insisted that procedural rules are followed in the recording of confessions, the confessions have not been admitted. Fourthly, where the Court has disregarded procedural rules, it has used substantive justice as a tool of proportionality and subjectivity in admitting the confessions.

Where failure to follow the procedural rules would not change the outcome of the process of recording the confessions, the Court disregarded the procedure and maintained that the confessions were properly admitted. This was dependent on the presence of other evidence that corroborated the guilt of the accused, such as: cooperation with the police in the investigations; reading of the confession to the accused before he signed it; the decision not to contest the admission of the confession in the court of the first instance; and the existence of deceit and a desire to abuse the process relating the recording of confessions.¹²³

¹²¹ *Id.*, at 9-10.

¹²² Madden, *supra* note 19, at 448.

¹²³ There is no recent decision of the Supreme Court after *Walugembe*. The most recent decisions where a Court reiterated that the

Conversely, where the failure to follow the procedural rules would greatly change the outcome of the process and the subsequent judgment, the Court would not allow the admission of the confession. In addition, the Court would not maintain the admission of the confession if the irregularities were marred by human rights violations. In all the circumstances stated above, the Court would then make a value judgment based on its decision on the confession and other relevant evidence. Thus, while the admission of the confessions was seen as a condonation of the excesses of the police, it was also taken to be a mode of ensuring that confessions with a high probative value are admitted, to enable the Court to arrive at a value judgment. The Courts seem to admit improperly obtained confessions if the probative value of the evidence is not impaired by the unlawful method used in acquiring such evidence, and if the relevance of such evidence cannot be affected by the mere fact that it was unlawfully procured.¹²⁴

In the cases discussed involving impropriety in obtaining confessions, the Court states that it admits confessions if they do not occasion an injustice to the accused. A question arises whether it is substantive injustice or procedural injustice. While substantive justice may mean an accused person suffering the consequences of his actions, procedural justice may mean that the outcome of the process would not change, even where a few rules were not followed. The injustice referred to seems to be a procedural injustice, for instance, where the accused is read the contents of the confession before he or she signs it, does not complain about it to the court, and later seeks to manipulate a rule that was not followed because the evidence may be used to incriminate him.

While the Court is trying to arrive at substantive justice, the law enforcement agencies ought to take responsibility to ensure that they follow the procedures to the letter so as to avoid placing the courts in an awkward position. In addition, the courts should be seen to be administering justice in a manner that is fair and consistent. The discretion should be exercised in a way that does not lead to an unfair trial or place the administration of justice into disrepute. It is for this reason that consistency is required to enable parties to have a fair idea of what the outcome of a case may be.

In the author's view, the varying reasons only buttress the effect of using discretion on a case-by-case basis to ensure justice. While discretion is paramount in ensuring that evidence admitted does not operate unfairly against the accused, consistency is also needed in the development of jurisprudence if procedural laws are to be used as handmaidens of justice. It follows, therefore, that a framework needs to be put in place to cater for evidence obtained through improper means to ensure that the accused is protected in deserving cases, and that a court is not seen to be condoning the excesses of the police. The courts should insist that the rules of practice for recording confessions are followed to the

presence of substantive evidence other than the confession is instructive to sustain a conviction, was by the Court of Appeal in *Baigana John Paul v. Uganda* Unreported case 08 of 2010 25 May 2016. All the decisions of the Supreme Court were obtained from <http://www.ulii.org/>.

¹²⁴ J.D. HEYDON, EVIDENCE: CASES AND MATERIALS 2ND EDN (1984), at 254; Kuruma, Son of Kaniu v R 1955 AC 197 203.

letter, such that consistency is developed.

The author proposes a framework which requires the courts to embrace the use of both procedural and substantive rules to arrive at substantive justice. While this is a diversion from Namulobi, Nashaba, and Mweru, where the Court disregarded procedural aspects in favour of substantive justice, it still leads one to the desired judgment. The substantive approach requires that a confession is corroborated before it is admitted. Since the evidence that corroborates a confession may be conclusive to sustain a conviction, the perception that procedural rules will lead to substantive injustice is of no consequence.

A dual approach should be used. First, where procedural rules with regard to the recording of a confession are not followed, it should not be admitted. Secondly, the evidence which would have been used to corroborate the confession is used to ensure a conviction. This approach enhances fairness at the trial, and the repute of the judiciary in the administration of justice.