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A right to a fair trial in Uganda’s Judicature (Visual-Audio Link) Rules: embracing the challenges in the era of Covid-19

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The application of the Uganda Judicature (Visual-Audio Link) Rules does not contextualise the complete protection of an accused’s right to a fair trial during emergencies. A contextualisation of the right to a fair trial in international law and under Uganda’s domestic law is done. An evaluation of the application of the Visual-Audio Rules in the context of its objectives and circumstances follows. The contribution proposes an accused-centred approach in the application of the Visual-Audio Rules. A conclusion and recommendations follow.

1. Introduction

At the dawn of the Covid-19 pandemic, an academic evaluation of the restrictions by the approaches to contain Covid-19 was seen as an irrational endeavour.¹ After four months, an evaluation of the responses that States have engaged has shown various commitments to the promotion and protection of human rights.² This has created a platform to deal with issues of State accountability. It is discernible from the various State responses to the Covid-19 pandemic that the existence of an emergency does not call for a suspension but rather the need to fulfil human rights obligations.³ Various organisations have hastened to remind States to promote and protect human rights during the era of Covid-19.⁴ In the context of the right to a fair trial, courts cannot shut down completely because they are an essential service.⁵ They continue to face the challenges of vulnerable persons in

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¹For cautious and critical insights on Uganda, see Busingye Kabumba, ‘The 1995 Constitution and Covid-19’ (2020) <<https://bit.ly/3etiy7r>> accessed 17 April 2020.

²B Michelle <<https://www.unhcr.org/news/latest/2020/3/5e69eea54/coronavirus-out-break-test-systems-values-humanity.html>> accessed 22 April 2020. D McGoldrick, ‘The Interface Between Public Emergency Powers and International Law’ (2004) 2(2) International Journal of Constitutional Law 380–429, 388.

³The rights may be limited under international human rights law, but not completely suspended. See discussion below on the derogations and limitations of rights during emergencies.

⁴Human Rights Watch, ‘Human Rights Dimensions of COVID-19 Response’ <<https://bit.ly/34MRRGn>> accessed 1 April 2020.

⁵No court shutdown over coronavirus, chief justice says <<https://bit.ly/2Ksaaag>> accessed 22 April 2020.

detention, like migrants, unaccompanied or refugee children.⁶ In some jurisdictions, while the public has been directed to stay away from courts, particular criteria is used to ensure that litigants who meet it may come to court.⁷ The greatest opportunity or challenge lies in the extent to which virtual or online courts may be used to ensure that courts continue operating normally.⁸

Some countries have legislation that governs the running of online courts. Uganda is not an exception to this, having adopted the Judicature (Visual Audio Link) Rules (VA Rules).⁹ It is important to evaluate the extent to which these rules may be used to ensure the right to a fair trial. This contribution argues that the VA Rules do not contextualise the holistic enjoyment of the right to a fair trial during emergencies. First, the article contextualises the right to a fair trial in both international law and domestic law, looking at the context of the right, the meaning of facilities and the position of limiting rights or using derogations. Secondly, it evaluates the VA Rules in light of its circumstances and objectives. Thirdly, the contribution proposes an approach that places the accused at the centre of the VA Rules in the era of Covid 19 and suggests possible logical engagements. A conclusion on the proposed improvement of Uganda's position is done.

This study takes on a desktop research methodology that evaluates primary sources such as international law, domestic legislation; and secondary data like available academic literature, jurisprudence from international human rights bodies, case law from Uganda courts and other relevant documents. The use of both international and domestic law is a not comparative methodology per se, but the use of two experiences to which Uganda has human rights obligations.

1.1. Setting the scene

In December 2019, the outbreak of the coronavirus spread from Wuhan, China to the entire globe.¹⁰ According to the World Health Organisation, as of 27 July 2020, approximately 16,096,741 people were infected and 646,384 were deceased.¹¹ Furthermore, Uganda had confirmed 1,115 cases with only 2 deaths

⁶This has led to the enactment of a technical note on how to deal with vulnerable persons like children by international organisations like Save the Children, Unicef. See 'Technical Note: COVID-19 and Children Deprived of their Liberty' <<https://bit.ly/3cCVmBM>> accessed 22 April 2020.

⁷In South Africa, Gazette 43168 of 26 March 2020 and Gazette 43199 of 2 April 2020 and Gazette 43232 of 16 April 2020 identify courts as an essential service. See full list at Essential services - Coronavirus COVID-19 <<https://www.gov.za/Coronavirus/essential-services>> accessed 22 April 2020.

⁸The experience in South Africa has been to amend the regulations time and again to cater for instances that were not anticipated at the drafting of the guidelines. See Essential services - Coronavirus COVID-19 <<https://www.gov.za/Coronavirus/essential-services>> accessed 22 April 2020.

⁹The Judicature (Visual-Audio Link) Rules SI 26 of 2016.

¹⁰C Huang, W Yeming, L Xingwang, R Lili, Z Jianping, H Yi, Z Li, 'Clinical features of patients infected with 2019 novel coronavirus in Wuhan, China' (2020) 395 (10223) *The Lancet* 497–506.

¹¹'Coronavirus disease 2019 (COVID-19) Situation Report' <<https://bit.ly/3bkpiCn>> accessed 22 April 2020.

so far.¹² There was, however, a continuing rise in these numbers in other heavily affected countries like the United States, Brazil, India, Russia, South Africa, Mexico, Peru and Chile.¹³ Various efforts like lockdowns have affected the enjoyment of human rights like life, human dignity, freedom of movement, health and education.¹⁴ In Uganda, there is little emphasis on the holistic enjoyment of the right to a fair trial in the context of full hearing for the accused and the victims. As such, an evaluation of the application of the VA Rules at a time such as this is done to identify the challenges as well as the opportunities it presents.

Following the outbreak of the Covid-19 pandemic, Uganda did not declare a state of emergency. It opted for a declaration of a notification of disease under the Public Health Act. Herein, the Minister of Health notified the public that Covid-19 disease had been identified and she engaged measures to mitigate its spread.¹⁵ Following the identification of the disease, the minister passed rules and regulations to counter the spread of the said disease.¹⁶ This led to the enactment of the Public Health (Notification of COVID-19) Order¹⁷ and various rules to curb the spread of the disease from within and from outside Uganda.¹⁸ The missing link in these rules was the lack of a list that identified the essential services that are expected to continue running during the lockdown. This predicament was left to the subjective evaluation of the task force that involved ministers of health and the presidency. However, there was no mention of the working of the courts. The judiciary took the initiative to streamline its work through a circular stating that

1. All court hearings and appearances are hereby suspended for the period of 32 days with effect from 20th March, 2020. For cases at the stage of submissions, the respective courts may advise the counsel/parties to file written submissions.
2. During this time, prisoners and remandees will not be presented to court. Where possible proceedings may be conducted using video link.¹⁹

This reiterates the position that while the courts are closed, the use of the video link is expected to continue operating. This was stated by a similar circular from the Office of the Directorate of Public Prosecutions stating that

The staff at the courts with visual-audio facilities shall continue to operate if the court decides to proceed.²⁰

¹²‘Coronavirus disease updates’ <<https://bit.ly/2S0GLbn>> accessed 22 April 2020.

¹³‘COVID-19 coronavirus: top ten most-affected States’ <<https://bit.ly/39uxDDB>> accessed 1 April 2020.

¹⁴This will be engaged in the discussions below.

¹⁵The Public Health Act Cap 281, sec 10.

¹⁶*ibid*, sec 11.

¹⁷Order 45 of 2020.

¹⁸These include the Public Health (Control of COVID-19) Rules 52 of 2020, 2020; Public Health (Prohibition of Entry into Uganda) Order, 53 of 2020; and the Public Health (Prevention of COVID - 19) (Requirements and Conditions of Entry into Uganda) Order, 46 of 2020.

¹⁹‘Paragraphs 1 and 2 of the Circular. Recent guidelines following the lifting of the lockdown may be found here’ <<https://bit.ly/3f279dx>> accessed 27 July 2020.

²⁰‘Operating procedures for the office of the Director of Public Prosecutions (ODPP) during the Covid-19 Lockdown’ <<https://bit.ly/34YSYma>> accessed 22 April 2020.

A literal and contextual interpretation of the provision indicates that it is only prisoners and remandees who may use the video-audio link. However, a general interpretation that inculcates the entire circular may lead to the conclusion that the use of the video link extends to all hearings and appearances that are not physical but rather virtual. For a benefit of doubt, it is prudent that one takes the latter interpretation which prohibits physical court hearings and appearances but allows the use of the video link. The author is not aware of the renewal of the circular extending the limited operation of the courts beyond 23 April following the initial expiry of the 32 days.

The judiciary procured permits for a few Magistrate Courts to continue operating to handle only criminal cases like the Chief Magistrates' Courts of Buganda Road, Nakawa, Nabweru and Makindye.²¹ The administration of the courts that have handled a few faces to face sessions continued practising social distancing and sanitizing for court users.²² These courts were not sufficient to handle all the criminal cases in the central region in Kampala, speaking to a larger problem of limited adjudication of criminal cases in other busy magisterial areas like Mbale, Mbarara, Gulu, Lira and Arua districts. The question remains- how the Visual-Audio Link option could be used effectively to ensure the right to a fair trial during emergencies. To this end, it is argued that the objectives and the circumstances that inform the application of the Uganda Judicature (Visual-Audio Link) Rules do not contextualise the complete protection of an accused's right to a fair trial during emergencies. To achieve this, the article contextualises the right to a fair trial, through an evaluation of its application in both international and domestic law. An evaluation of the application of the VA Rules with an emphasis on the objectives and circumstances follows. The final step proposes an accused-centred approach in the application of the VA Rules and possible logical engagements. A conclusion and recommendations follow.

1.2. Statement of the problem

Various laws are being used during the lockdown to aid the use of online or virtual courts. These include the Constitution,²³ the Data Protection and Privacy Act,²⁴ the Computer Misuse Act,²⁵ the Electronic Signatures Act,²⁶ the Electronic Transactions Act,²⁷ the Judicature (Visual-Audio Link) Rules,²⁸ the Constitution (Integration of ICT into Adjudication Processes for Courts of Judicature) (Practice) Directions,²⁹ and the Guidelines for online Hearings in the Judiciary of

²¹Andante Okanya, Farooq Kasule, 'COVID-19: judiciary to handle only criminal cases' (2020) <<https://bit.ly/2KrcNt7>> accessed 23 April 2020.

²²'Nateete and Buganda Road Courts' interventions to curb COVID-19' <<https://bit.ly/3cAtcYa>> accessed 24 April 2020.

²³Constitution of the Republic of Uganda 1995.

²⁴Data Protection and Privacy Act 2019.

²⁵The Computer Misuse Act, 2011.

²⁶Constitution (n 23).

²⁷The Electronic Transactions Act, 2011.

²⁸The Judicature (Visual-Audio Link) Rules, Statutory Instrument 26 of 2016.

²⁹The Constitution (Integration of ICT into Adjudication Processes for Courts of Judicature) (Practice) Directions Legal Notice 6 of 2019.

Uganda.³⁰ The Electronic Transactions Act and the Electronic Signatures Act, both of 2011 are instructive as they allow the use of electronic signatures, records and transactions.³¹ However, these laws do not envisage the accused's enjoyment of the right to a fair trial during emergencies. This right has to be looked at as one that is enjoyed through the actual hearing of cases and the provision of facilities to an accused to adequately present his or her case. This tests Uganda's resolve to uphold the right to a fair trial at a time where limitations to human rights are the most viable way to mitigate the spread of Covid-19.

If this study is not done, the value addition that the virtual court brings to the Ugandan society, especially in emergencies will not be appreciated. This study evaluates whether the failure to adequately engage the virtual court is a missed opportunity at ensuring the right to a fair trial during an emergency. The identification of grey areas in the application of the VA Rules offers guidance on how the use of the virtual courts may be used to ensure the right to a fair trial at all times, including emergencies.

2. The right to a fair trial

The right to a fair trial is indubitably wide and cannot be given adequate consideration in this article. However, in the context of this paper, a few aspects may be engaged to enable a fair evaluation of the right in Uganda's domestic context. Besides, the article by design looks at particular aspects of the right as regards the accused person. These include the right to examine witnesses and to adduce his or her evidence. This thus begs the need to limit the aspects to look at to be; the context of the right to call witnesses, adduce evidence collectively referred to as facilities accorded to enable one prepare and offer his or her defence and the position of derogations and limitations.

2.1. The right under international law

Various international instruments provide for the right to a fair trial.³² The right to examine the witness and to adduce his evidence is provided for in the ICCPR. The relevant article provides that

'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.'³³

³⁰Guidelines for online Hearings in the Judiciary of Uganda, Office Instrument Number 2 of 2020, dated 29 April 2020.

³¹For similar views on this matter, see MURUNGI E and Tusiime DT (2020) COVID-19: Law and technology – why an electronic case management system is a necessity in Uganda' <<https://bit.ly/2WEsGC1>> accessed 5 May 2020.

³²The International Covenant on Civil and Political Rights (1966) 999 UNTS 171 (ICCPR), Article 14; Convention on the Rights of the Child, (1989) 1577 UNTS 3, Article 40; Convention on the Rights of Persons with Disabilities, (2007) 2515 UNTS 3, (CRPD) Article 13. This is beyond the scope of this section. This is engaged later.

³³ICCPR, (n 32) Article 14(b) See also the Constitution of the Republic of Kenya 2010, Article 50(1)(c).

These facilities are further described by the Human Rights Committee to include access to documents and other evidence that the prosecution plans to offer in court against the accused or that is exculpatory.³⁴ This points to the fact that this instance has to be engaged right before the trial starts and not during the defence of the accused.³⁵ This means that these facilities embrace all matters that arise once the trial commences like the admission of evidence and the examination of witnesses. The question is, to what extent these facilities that speak to the accused' ability to examine witnesses and at the same time to adduce evidence in support of his or her case. The General Comment provides for the term 'facilities' thrice. First, facilities include the attendance of members of the public, within reasonable limits, where they have a potential interest in the case.³⁶ Secondly, facilities include the provision of adequate time to prepare a defence and to communicate with counsel of one's choosing.³⁷ Thirdly, the General Comment defines 'adequate facilities' to include access to documents and other evidence; that the prosecution intends to rely on at the hearing.³⁸ While all these descriptions add a rich perspective on the concept of facilities, they do not refer to the term in the context of emergencies. So it is possible to interpret the term facilities in a limited manner under the ICCPR.

While the Right to a fair trial is not listed as a derogable right under Article 4, some procedures that speak to the right to a fair trial may be derogated from. The General Comment on the Right to a fair trial reiterates the need to uphold the right to a fair trial even in periods of emergencies. It states that

States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of a fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.³⁹

In line with Article 4 on derogations, the General Comment reiterates the fact that the right to a fair trial is non- derogable. It should be recalled that under the ICCPR, a State may derogate from its obligations in light of the exigencies of the

³⁴General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, para 33' <<https://www.refworld.org/docid/478b2b2f2.html>> accessed 28 April 2020. See Concluding Observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13. See also *Harward v Norway*, HRC Communication 451 of 1991 para 9.5.

³⁵This is an indication that the facilities should include an enabling environment that allows for the accused to question the evidence brought against him in the course of the trial. Any position to the contrary has to be looked at as a limitation to the holistic enjoyment of this right.

³⁶General comment (n 34) para 28. See also *Van Meurs v The Netherlands* CCPR Communication No. 215/1986, para. 6.2.

³⁷General comment (n 34) para 32. See also *Smith v Jamaica* , CCPR Communication No. 282/1988, para. 10.4.

³⁸General comment (n 34) para 33. See also Concluding Observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13.

³⁹*Ibid*, para 6.

situation.⁴⁰ These measures should, however not be inconsistent with other international law obligations like the prohibition of torture⁴¹ and the right against discrimination.⁴² As noted earlier, this position from the Human Right's Committee's General Comment shows that some of the procedures concerning the right to a fair trial like the collection of evidence, the prohibition of torture or cruel, inhuman and degrading treatment during the collection of evidence may be derogated from. As such one has to evaluate the extent to which a State may engage these derogations from the various processes. This danger is exacerbated by the nature of the Covid-19 pandemic that requires engaging various public health initiatives that may lead to the closure of physical courts, limited work by the investigative and prosecutory bodies. Consequently, a derogation from the right to a fair trial to some extent would seem to be the obvious choice.

A couple of rules that govern derogations provide guarantees that may accord protection to the procedures that would otherwise lead to a derogation from the right to a fair trial. The rules state that

... no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred.⁴³

This protects evidence that is going to be used at the trial. However, it falls short of protecting or ensuring the attendance of witnesses and adducing of evidence during times of emergencies like having physical courts during periods of emergencies.

Furthermore, it adds that

Deviating from fundamental principles of a fair trial, including the presumption of innocence, is prohibited at all times.⁴⁴

Other procedural rules that govern derogations by States are provided for in a recent public document released on derogations during the Covid-19 pandemic provides insights to this position.⁴⁵ The rules require that a State follows General Comment 29 on States of Emergency (2001), which require the State does or has each of the following:

1. the official proclamation of a state of emergency;

⁴⁰See ICCPR (n 32) Article 4(1). See CCPR General Comment No. 29: Article 4: Derogations *during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, paras 4–6.

⁴¹Convention against Torture, Article 2.

⁴²See ICCPR (n 32) Article 4(1). See CCPR General Comment (n 40) paras 8 and 13 generally.

⁴³General comment (n 34) para 6.

⁴⁴General comment (n 34) para 6.

⁴⁵CCPR - Human Rights Committee - Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2' (24 April 2020), Available <<https://bit.ly/3gicXRX>> accessed 27 July 2020.

2. formal notification to the Secretary-General of the UN;
3. strict necessity and proportionality of any derogating measure taken;
4. conformity of measures taken with other international obligations;
5. non-discrimination; and
6. the prohibition on derogating from certain non-derogable rights.⁴⁶

It should be noted further that where a State has not opted to invoke the derogation clause, it may instead limit the enjoyment of certain rights. The Human Rights Committee advises that the limitations should be prescribed by law, and should be necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.⁴⁷ In *Victor Liven v Kazakhstan*, the Human Rights Committee stated that, first, a limitation has to be interpreted strictly according to its prescribed purpose, directly related to and proportionate to the specific predicated need. Besides, the interpretation has to be a focus on ensuring the enjoyment of the right to equality and freedom from non-discrimination.⁴⁸ Besides, the limitation has to be proportional to the legitimate purpose sought to serve.⁴⁹ The State should prove to the court that an objective standard informs the limitation and not just a subjective evaluation of the limitation.

In the interim, an engagement of international law shows that it provides adequate insight on the need to have adequate facilities for the accused to prepare and conduct his or her defence. However, there is a grey area concerning to what extent these would apply in an emergency. Secondly, despite the non-derogation from the right to a fair trial, other procedure may be affected and lead to perceived derogations from the same. Also, the rule governing derogations in international law offers a good framework to use. However, there is still need to realign this frame to a domestic setting like Uganda to establish where it aids the use of the VA Rules in the promotion of the right to a fair trial at a time such as this. Also, one still needs to evaluate the application of the limitation's clause in Uganda's context to draw insights on what extent the VA Rules offer complete protection to the right to a fair trial during emergencies.

2.2. *The right in Uganda's context*

In Uganda, this right is provided for in the Constitution's Bill of Rights.⁵⁰ This section examines the context of the right to a fair trial and the guarantees that it provides for the accused. It emphasises Article 28(3)(g) and underscores the peculiarity of this provision concerning the bigger picture of virtual courts. Uganda's Constitution provides for the right to a fair trial in its Bill of Rights.⁵¹ In part, the Constitution provides that

⁴⁶*Ibid*, para 2.

⁴⁷*Ibid*, para 8. See the ICCPR (n 17), Article 18(3).

⁴⁸*Victor Liven v Kazakhstan* CCPR Communication No. 2131/2012, para 9.3.

⁴⁹*Ibid*, para 9.4.

⁵⁰Constitution (n 23), Article 28.

⁵¹*Ibid*, Article 28. Uganda has ratified international instruments that provide of the right to a fair trial. These include the International Covenant on Civil and Political Rights (1966) 999 UNTS 171, The Universal Declaration on Human Rights General Assembly Resolution 217A (III), U.N. Doc A/810 at 71 (1948).

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.⁵²

Other guarantees to this right are provided for in Article 28(3) (a)- (g). The Supreme Court has reiterated that these provisions of a fair trial under Article 28 are not an exhaustive list.⁵³ This means that other aspects that speak to a fair trial, though not necessarily provided for herein, may be included to the right. For purposes of this contribution, the author latches on Article 28(1) that requires a fair, speedy and public hearing and the need for an accused person to be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.⁵⁴

The word ‘facilities’ needs to be visited under Article 28 of the Constitution. This word presents two contexts as it is mentioned twice under Article 28. The first time it is mentioned, it refers to the provision of adequate time and *facilities* to the accused to prepare his or her defence.⁵⁵ This has been interpreted to refer to adequate time before the trial or the court hearing starts. Also, the use of these facilities comes up in the context of preparing a defence. First, it inculcates adequacy of time to prepare a defence, and secondly, the use of legal representation where possible.⁵⁶ This means that the facilities referred to here are before the hearing of the case. It has been argued by the prosecution before that this scenario refers to instances before the accused gives his defence other than before the trial begins.⁵⁷ In *Soon Yeon kong kim and Another v Attorney General*, the prosecution argued that Article 28(3)(c) referred to ‘adequate time and facilities for the preparation of his or her defence ... [because] defence comes after plea and not before’.⁵⁸ The Court stated that facilitation under 26(3)(c) and (g) covers both pre-trial and the trial period.⁵⁹ In this vein, the author argues that for an accused to be able to establish the witnesses of the prosecution from the copies of statements on the police file or docket, or copy of the exhibits to be produced at trial, this facilitation has to start before trial and not necessarily before his defence.⁶⁰ The Ugandan courts have gone ahead to adopt the definition of ‘facilities’ as

⁵²Constitution (n 23), Article 28 (1) and (2).

⁵³*Uganda Law Society & Anor v The Attorney General* [2009] UGCC 1 (4 February 2009).

⁵⁴Constitution (n 23), Article 28(3)(g)

⁵⁵*Ibid*, Article 28(3)(c).

⁵⁶*Vincent L'Okucha Emoru v Attorney General* (Constitutional Petition No. 5 of 1998) [1999] UGCC 1 (30 March 1999), 13.

⁵⁷*Soon Yeon kong kim and Another v Attorney General* (Constitutional Reference No. 6 of 2007) [2008] UGCC 2 (6 March 2008), 4.

⁵⁸*Ibid*, *Soon Yeon kong kim* (2007) 4.

⁵⁹*Ibid*, *Soon Yeon kong kim* (2007) 9.

⁶⁰The court referred to the same principle, save that it was holding on the matter of disclosure.

‘the resources, conveniences or means which makes it easier to achieve or purchase; unimpeded opportunity of doing something, favourable conditions for the easier performance of something, means or opportunities that renders anything readily possible. Its verb is to “facilitate” and means to render easy or easier the performance or doing of something or to attain a result, to promote, help forward, assist, aid or lessen the labour of one’.⁶¹

This would follow that the provision of adequate time to an accused to prepare his defence falls within the facilitation under Art 28(3)(c).⁶² This follows similar definitions adopted by the courts.⁶³

The second instance on ‘facilities’ under the right to a fair trial requires that an accused person be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.⁶⁴ It is argued that to a great extent, this refers to the period during the trial. For purposes of context, the relevant part of the article provides the need for an accused person to

‘be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.’⁶⁵

This means that these facilities embrace all matters that arise once the trial commences like the admission of evidence and the examination of witnesses. Before this provision is analysed, it should be noted that its wording is peculiar to the Ugandan Constitution that is not evident in some Constitutions. The Constitution of the Republic of Kenya is silent on the provision of facilities to enable an accused to examine witnesses.⁶⁶ The Constitution of South Africa is rather broad as it provides an accused with the right to adduce and challenge evidence.⁶⁷ Concerning South Africa, while this may mean the possible use of online or virtual courts, this is regulated by subsidiary legislation that is limited to the use of intermediaries⁶⁸ or closed-circuit television.⁶⁹

It is argued that in addition to the ousting of this Article’s peculiarity under Uganda’s Constitution, the lack of the word ‘facilities’ in Article 28(3)(g) would restrict the application of the clause. A detailed discussion of this peculiarity is beyond the scope of this article. It is argued that the wording of the provision is instructive to interpreting the scope of the VA Rules.

⁶¹*Soon Yeon kong kim* (2007). The definition was adopted from the Kenyan case of *Juma and others v Attorney General of Kenya* (2003)2 EA 461.

⁶²*Katusime v Uganda* [2012] UGHC 176 (18 August 2012). See also *Uganda (DPP) v Mpanga & 6 Others* [2014] UGHCCRD 33 (20 June 2014);

⁶³*Soon Yeon kong kim* (2007) 4. The definition was adopted from the Kenyan case of *Juma and others v Attorney General of Kenya* (2003)2 EA 461.

⁶⁴Constitution (n 23), Article 28(3)(g).

⁶⁵*Ibid*, Article 28(3)(g)

⁶⁶*Ibid*, Article 50 thereof is silent on the provision of facilities to examine witnesses.

⁶⁷The Constitution of the Republic of South Africa, 1996, section 35(3)(i).

⁶⁸The Criminal Procedure Act 55 of 1971, section 170A. See also *S v Peyani* 2014 (2) SACR 127 (GP) and *S v Mokoena en ander, S v Mokeona; S v Phaswane* 2008 (2) SACR 216 (T).

⁶⁹The Criminal Procedure Act 55 of 1971, 158(2) (a) and 153. See also *S v Staggie* 2012 (2) SACR 311 (SCA).

The question under the second instance of facilitation relates to the extent that the Visual-Audio Rules ease the hearing to ensure the right to a fair trial. Further questions emerge; first, whether the visual-audio courts can be recognised as public courts and secondly, what is their context of affording facilities to enable the accused to examine the witness and obtain his own to testify in court.

Concerning the first question, the VA Rules give the answers. The purpose of the facilities is to enable the adjudication of criminal cases at both the High and Magisterial courts.⁷⁰ This provision does not create a new court of record in the form of virtual courts but rather uses the video-audio link as a platform to ensure the continuity of proceedings in the already established Courts of Judicature. This is confirmed by the exclusion of the virtual courts as part of the hierarchy of courts in Uganda's Constitution.⁷¹

Concerning the second question, scholars have attached different meaning to 'facilities'. To some, 'adequate facilities include a functional record that fully and effectively represents the proceedings.'⁷² The record is particularly important in situations of appeal, a change of counsel, a change of the adjudicator, and to refresh the memory of the adjudicator(s) at the time judgment is to be made'.⁷³ As such, the proceedings in the court have to be recorded to enable the accused or the State to be able to make an informed decision following the judgment handed down by a court.⁷⁴ This meaning in context, therefore, does not aid our argument. To others, the 'use of facilities' may refer to proper management of case files and security of evidence.⁷⁵ Furthermore, the term "facilities" also relates to access to information, whereby the accused person is entitled to all the evidence that the prosecution shall use to prepare his defence.⁷⁶ According to Steytler, the accused shows a particular need for a particular facility that relates to the preparation of a defence. At this point, then the Court will determine whether the particular facility is adequate or not.⁷⁷ This raises other questions such as the admission of evidence and the rules that govern this principle in the Visual-Audio Court. South African courts have described 'facilities' to mean the 'art of facilitating or making easier the performance of an action'.⁷⁸ It would appear that the performance of this action gives the accused person the utmost importance of liberty to exercise his or her right to a fair trial.⁷⁹ This leads to the conclusion that where the court finds that the fairness of the trial has been compromised, it cannot convict based

⁷⁰CJ Launches Video Conferencing System Linking Buganda Court to Luzira' <<https://bit.ly/2Xy8WC0>> accessed 11 April 2020.

⁷¹Constitution (n 23), Article 129 provides for the Supreme Court, Court of Appeal, the High Court and subordinate courts thereto.

⁷²CS Namakula, 'The court record and the right to a fair trial: Botswana and Uganda' (2016) 16 African Human Rights Law Journal 175–203, 193.

⁷³Namakula (n 72) 193.

⁷⁴Namakula (n 72) 193. See also *James Mutoigo t/a Juris Law Office v Shell (U) Ltd* HCT-00-CC-MA-0068-2007. [2007] UGCommC 35

⁷⁵Namakula (n 72) 193.

⁷⁶Namakula (n 72) 193.

⁷⁷N Steytler *Constitutional criminal procedure* (2015) 235-236.

⁷⁸*S v Nkabinde* 1998 (8) BCLR 996 (N).

⁷⁹*Ibid.*

on taints like irregularities and unfairness.⁸⁰ As such, this calls for an expansive definition that allows an accused to speak to State witnesses, access evidence and question expert witnesses.⁸¹

It is thus important to contextualise the meaning of ‘facilities’ under the VA Rules to establish how it can enable one to appreciate the context of Article 28(3)(g) of the Constitution. It is also important to adopt a procedure that does not take an accused person by ambush or surprise concerning his right to a fair trial.⁸² The term ‘facility’ appears ten times in the VA Rules; requiring suitability of the facilities,⁸³ the rules on commencement of the proceedings,⁸⁴ admission of documentary evidence⁸⁵ and the fees payable.⁸⁶ However, these instances all refer to the use of the physical facility as an online platform that connects court users. One may argue that the context of these facilities may not necessarily refer to the facilities referred to in the constitution. This potential dangerous perception is solved in the interpretation section. To this end, a video-audio link is referred to as a

‘facility enabling the giving or receiving of evidence through electronic means without a person physically appearing in court’.

First, the video-audio link offers a facility to aid the reception of evidence without their physical presence in court. Secondly, once this facility is accorded to the accused, he should be able to examine witnesses and to obtain the attendance of other witnesses using the link within the meaning of Article 28(3)(g). On this basis, it is prudent to examine the role of this facility in affording facilities to the accused to examine witnesses and to obtain the attendance of other witnesses before the court.

Under domestic law, derogations are governed under Article 44 of the Constitution. It should be noted from the onset that the right to a fair trial is a non-derogable right. The relevant article provides that

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms

...

(c) the right to fair hearing.⁸⁷

This is an indication that among rights that may be derogated from, the right to a fair trial does not make it to that list. Be that as it may, it is important to

⁸⁰*Ibid.*

⁸¹See <<http://uir.unisa.ac.za/bitstream/handle/10500/1840/07chapter7.pdf>> accessed 22 April 2020.

⁸²*Juma and others VS Attorney General of Kenya* (2003)2 EA 461.

⁸³See (n 28), Rule 7.

⁸⁴*Ibid.*, Rule 9.

⁸⁵*Ibid.*, Rule 11.

⁸⁶*Ibid.*, Rule 14.

⁸⁷*Ibid.*, Article 44 (c).

reflect on the instances that would call for a derogation from rights. An extensive discussion has been done and need not be redone here.⁸⁸ In brief, the Constitution provides in part that,

The President may, in consultation with the Cabinet, by proclamation, declare that a state of emergency exists in Uganda, or any part of Uganda if the President is satisfied that circumstances exist in Uganda or in that part of Uganda

....

(c) which render necessary the taking of measures which are required for securing the public safety, the defence of Uganda and the maintenance of public order and supplies and services essential to the life of the community.⁸⁹

This calls for an extensive procedure that requires that first, the president consult with cabinet, lay the proposal before Parliament for approval within 14 days.⁹⁰ It requires that the state of emergency has to run for a period not exceeding three months and can only be renewed after this lapse for a further period not longer than three months.⁹¹ This would indicate engaging a procedure to reinstate the state of emergency after the lapse. The challenge lies in the legality of the restrictions from the time of expiry until the reinstatement of the state of emergency. What is important to this contribution is the requirements that Uganda would have to engage at the international level in terms of the affected rights. Most on the discussions on the need to use declare a state of emergency in Uganda, are to enable the government to legally transfer resources to aid the parts of the country that are most affected by the emergency,⁹² and to avert a pandemic.⁹³ The need to protect the right to a fair trial has not been critically engaged.⁹⁴

As indicated, Uganda has to communicate the declaration of a state of emergency to the Human Rights Committee and state the obligations it is derogating from and for a specific period.⁹⁵ First, Uganda would show that it has followed its constitutional and domestic laws that govern the emergency powers.⁹⁶ This would

⁸⁸Busingye (n 1).

⁸⁹Constitution (n 23) Article 110(1) (c).

⁹⁰*Ibid*, Article 110(3).

⁹¹*Ibid*, Article 110(2).

⁹²'MPs call for declaration of state of emergency' <<https://bit.ly/2YI6gm6>>. accessed 5 May 2020.

⁹³'COVID-19: Is lock-down equivalent to state of emergency?' <<https://bit.ly/2YOzU9s>> accessed 5 May 2020. 'COVID-19: Why Gov't Would Declare a State of Emergency' <<https://bit.ly/35VeJEd>>. accessed 5 May 2020.

⁹⁴Kabumba's critical insights in 'The 1995 Constitution and Covid-19' (n 1) reiterate the general position of human rights in the Covid-19 era, while Murungi and Tusiime (2020) look at the need for technological advances to ensure the smooth operation of the online courts.

⁹⁵CPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11. Although the African Charter on Human and Peoples' Rights does not include a derogation clause, most States parties' constitutions contain derogation clauses.

⁹⁶Paragraph 2.

mean that Article 44(c) that provides for the non-derogation from the right to a fair trial would be applied. Secondly, the right to a fair trial as such would not form part of the list of derogable rights, even though the right to a fair trial is not listed as a derogable right by the Human Rights Committee.⁹⁷

It should be recalled that the right to a fair trial starts from the investigation, through the trial, the appellate processes, until the final judgement is handed down.⁹⁸ In the interim, under the current regime, the derogation is not expected to affect the enjoyment of the right to a fair trial. The question of limitations, now one turns.

Human rights may be limited through the use of restrictive measures to achieve a legal purpose.⁹⁹ As such, any limitation on the right to a fair trial has to be in particular instances that are evident in the wording of the legal provisions. For instance, under the ICCPR, the press and the public may be excluded from all or part of a trial for various reasons like morals, public order, national security, the privacy of the parties, or possible prejudice to the interests of justice.¹⁰⁰ This limitation, as such does not speak to the substantive enjoyment of the rights of an accused as a person per se. In some jurisdictions like Australia, the position of limitations on the right is not settled. Some courts have stated that the right to a fair hearing depends on the circumstances of the case.¹⁰¹ Others have indicated that the right is unqualified.¹⁰² It is in this regard that a look at national laws comes in handy.

According to the Constitution,

‘Public interest under this article shall not permit; ...

c. any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.’¹⁰³

This provision indicates that any limitation to any right has to be 1) acceptable and demonstrably justifiable, 2) in a free and democratic society. This is reiterated in *Andrew Mujuni Mwenda & Another v Attorney General*,¹⁰⁴ where the court states that Article 43 generally provides that the limitations of the enjoyment of the rights and freedoms of an individual include those which prejudice

⁹⁷Paragraph 7.

⁹⁸See RD Nanima ‘A critique of the jurisprudence of the African commission regarding evidence in relation to human rights violations: A need for reform?’ Unpublished University of the Western Cape PhD Thesis (2018) 197.

⁹⁹The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.

¹⁰⁰See ICCPR (n 32), Article 14(1).

¹⁰¹*Knight v Wise* [2014] VSC 76, para 36; *Slaveski v Smith* [2012] VSCA 25 para 52.

¹⁰²*DPP v Mokbel (Orbital & Quills Ruling No 1)* [2010] VSC 331 para 113-14; *Montgomery v Her Majesty’s Advocate* [2001] 2 WLR 779.

¹⁰³Constitution (n 23), Article 43(2)(c).

¹⁰⁴Constitutional Petition No.12 of 2005) [2010] UGCC 5 (25 August 2010). See also *Charles Onyango Obbo & another Vs Attorney General SCC NO. 2 of 2002*.

fundamental or other human rights and freedoms of others, public interest, or beyond what is acceptable and demonstrably justifiable in a free and democratic society.¹⁰⁵ In this context, the first question to be answered is whether the right to a fair trial should be limited. In the interim, this is already answered by the outbreak of Covid-19, and the dangers it presents to the health of Uganda as a nation. The key questions to answer should be whether the limitation is 1) acceptable and demonstrably justifiable, 2) in a free and democratic society. The nature of the limitation is the inability to have physical trials during the subsistence of the Covid-19 pandemic. It is argued that the acceptability of this limitation lies in the fact that a restriction of the movement of persons and the need for social distancing mitigate the rate of infection of Covid-19.¹⁰⁶ This limitation is justified by the existence of a law that enables the use of technology to have remote proceedings. A ‘free and democratic society’ has to be placed into context. In *Andrew Mujuni Mwenda v Attorney General*, the court noted that a free and democratic society is characterised by the recognition of fundamental rights, including tolerance of expression which does not conform to the views of the majority.¹⁰⁷ While the case referred to sedition, it indicates that the respect of the dignity of an individual and the rule of law to ensure the protection of rights informs this ‘free and democratic society’. Other jurisdictions have used the term ‘open and democratic society’ to infer a society based on human dignity, equality and freedom.¹⁰⁸ Against this background, the limitations should be in tandem with public interest.

While public interest is not defined under Article 43, the parameters call for a balancing of the nature of a right, the nature of the restriction and the balancing or the use of a proportionality inquiry to justify the limitation. First, it is clear from the discussion above that the right to a fair trial among other reasons calls for the provision of facilities to enable an accused to give his or her defence.¹⁰⁹ According to the circular issued by the Chief justice, the nature of the restriction in the face of Covid-19 calls for the closure of courts to avoid infections.¹¹⁰ This approach aids the use of public health interventions like social distancing to avert the spread of Covid-19.¹¹¹ Secondly, the balancing of the restriction is in the continued use of skeletal and, what is particularly important here, is the use of the online courts for trial. It is argued that the limitation to the accused’s right to a fair trial is balanced in part. The challenge arises in the hearing of cases using the online platform. An evaluation of the application of the VA Rules on the right to a fair trial, we now turn.

¹⁰⁵Constitutional Petition No.12 of 2005 [2010] UGCC 5 (25 August 2010).

¹⁰⁶Public Health (Notification of COVID-19) Order Order 45 of 2020.

¹⁰⁷Constitutional Petition No.12 of 2005 [2010] UGCC 5 (25 August 2010). See also *Charles Onyango Obbo & another Vs Attorney General* SCC NO. 2 of 2002.

¹⁰⁸See *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5 para 65.

¹⁰⁹Constitution (n 23), Article 28(3)(g).

¹¹⁰Circular CJ/C-7 dated 19 March 2020 on administrative and contingency measures to prevent and mitigate the spread of corona virus (Covid-19) by the judiciary’ <<https://bit.ly/2RXDIdy>>. accessed 22 April 2020.

¹¹¹See Order 45 of 2020.

In relation to the right to a fair trial in Uganda, the Constitution provides for the concept of facilities to mean the possible provision of an online platform that an accused may use to facilitate the hearing of his or her case. This is yet to be confirmed through an evaluation of the objectives and circumstances of the VA Rules. In addition, Uganda's VA Rules and the Guidelines offer insights into the enjoyment of the right to a fair trial through the various circulars that have been adopted showing limitations to the rights of individuals concerning the right to a fair trial.

The evaluation of the right to a fair trial under Uganda's laws reveals that the concept of facilities is peculiar to Uganda's jurisprudence as far as it relates to facilities engaged before trial, and those that other facilities in the context of an on-going trial. In light of a trial during the Covid-19 era, the VA Rules need to provide facilities that enable the accused to be able to call a witness and adduce all forms of evidence as part of the holistic enjoyment of the right to a fair trial. The concept of derogations does not arise in Uganda's context as far as there was no declaration of a state of emergency. However, the limitation of rights can be used to question the relevance of the VA Rules in offering an opportunity or challenges in enjoying the right to a fair trial. An evaluation of the VA Rules, the article now turns.

3. An evaluation of the Judicature (Visual-Audio Link) Rules

The VA Rules provide a mode of receiving evidence from remote locations. It provides for the location to mean the place of the visual-audio link conferencing facilities.¹¹² This definition needs one to contextualise the position of the right to a fair trial during emergencies, or periods of disaster. At the launch of the use of the VA Rules, it was stated that the facilities had been set up at High Courts of Kampala, Gulu and Fort Portal.¹¹³ Similar facilities were to be installed in other High Court Circuits of Mbale, Mbarara, Arua and Masindi.¹¹⁴ These facilities have since been extended to incarceration centres like Luzira prison,¹¹⁵ to enable the adjudication of criminal cases at both the High Courts, and magisterial court like Buganda Road Chief Magistrates' Court.¹¹⁶ The enactment of the VA Rules as such is a welcome development.

It is important to look at its use beyond the initial object of the Rules. While the VA Rules do not have any drafting history, a look at the perspectives of the Judiciary and UNICEF as the key benefactors to this project shows the reasons behind their enactment. The VA Rules would help in reducing the delays and costs associated with hearing cases, especially from vulnerable witnesses like

¹¹²See (n 28), Rule 3.

¹¹³'CJ Launches Court Audio-Video Link Technology' <<https://bit.ly/2K2nXUS>> accessed 11 April 2020.

¹¹⁴'CJ Launches Court Audio-Video Link Technology' <<https://bit.ly/2yYcIdU>> accessed 11 April 2020.

¹¹⁵'CJ Launches Video Conferencing System to Luzira Prison' <<https://bit.ly/3a8YjBw>> accessed 11 April 2020.

¹¹⁶'CJ Launches Video Conferencing System Linking Buganda Court to Luzira' <<https://bit.ly/2Xy8WC0>> accessed 11 April 2020.

children, the elderly and whistle-blowers.¹¹⁷ The use of these rules requires dictates of common sense that require a location to have the facilities installed. In the context of ensuring the right to a fair trial, simple questions like the use of other modes to use the virtual court system Skype or Zoom from an individual's phone or computer comes into perspective. As such the meaning of a visual-audio link as a facility that enables the 'giving or receiving of evidence through electronic means without a person physically appearing in court',¹¹⁸ should have a more purposeful meaning that may refer to other means of linking to the virtual court, other than moving to the location where the installed facilities are located. As such, the VA Rules in the interim present an option that would greatly mitigate the limitation on the right to a fair trial. It is evident from the ongoing cases at the city magistrates' court like Buganda Road where zoom is being used as the platform for the hearing of cases.

3.1. Objectives of the rules

A look at the objectives, as earlier indicated shows that the VA Rules reduce the delays and costs associated with hearing cases, especially from vulnerable witnesses like children, the elderly and whistle-blowers.¹¹⁹ The overall objective is to enable the hearing of cases online.¹²⁰ Other jurisdictions like Kenya have been able to deliver over 7000 judgments online, since the outbreak of Covid-19.¹²¹ The need to use the online platform has also gained traction in other parts of the globe like the United States, the United Kingdom and Australia.¹²² As such, these experiences may in the interim point to the possibility of hearing cases and adducing evidence on the online platforms. This is further, confirmed by the detailed objectives under Rule 4 that 'provide for the taking of evidence in court by visual-audio link.'¹²³

3.1.1. Hearing of cases

One would argue that the guidelines limit their operation to pre-trial proceedings, judgements and similar proceedings. However, it is argued that a close reading of the guidelines states that

¹¹⁷'CJ Launches Court Audio-Video Link Technology' <<https://bit.ly/2xjIDWW>> accessed 11 April 2020.

¹¹⁸See (n 28), Rule 3.

¹¹⁹'CJ Launches Court Audio-Video Link Technology' <<https://bit.ly/2xjIDWW>> accessed 11 April 2020. See also Nabatanzi M 'UNICEF supports installation of audio-visual technology at Ugandan Courts for witness protection Protecting the rights of child witnesses' <<https://uni.cf/3b5NS9X>> accessed 11 April 2020.

¹²⁰Guidelines (n 30), preambular paragraph (b) of the Guidelines.

¹²¹A Wambulwa, 'Courts have delivered 7,000 rulings since Covid-19 struck' (2020) <<https://bit.ly/3boMajD>>. accessed 8 May 2020.

¹²²H Justin, 'Victoria races to scale up virtual courts amid coronavirus outbreak' (2020) <<https://bit.ly/35HRXiW>> accessed 8 May 2020. See also Norton Rose Fulbright, 'COVID-19 and the global approach to further court proceedings, hearings' (2020) <<https://bit.ly/2zr3Ihn>> accessed 8 May 2020. The United Kingdom has enacted the Corona Act 2020 to be used alongside the Criminal Justice Act 2003 to deal with online cases. See 'Remote Courts Worldwide' (2020) <<https://remotecourts.org>> accessed 8 May 2020.

¹²³See (n 28), Rule 4 (a).

‘An online hearing tool may be used for any of, but not limited to the following:

- i. Delivery of judgment;
- ii. Delivery of Rulings
- iii. Hearing of Applications:
 - a. Bail
 - b. Mentions
 - c. Interlocutories’ [sic]¹²⁴

It can be discerned from the above that the hearing of matters on the online platform is not limited to these applications. This is further confirmed by the purpose of the guidelines, that is, to enable the on-line hearing of cases.¹²⁵ Even if the hearing is limited to this list, the right to a fair trial still arises. One ex-convict who takes issue with the process has raised issues that may still violate one’s right to a fair trial even at the delivery of a judgment.¹²⁶ Various procedural issues may arise. These include confirmation of one’s consent to appear on the online court, access to legal counsel, explanation to the accused concerning the use of the online gadgets, the ability to communicate with the court among other reasons.¹²⁷ As such it raises serious issues where these anomalies take place during the actual hearing of the case.

3.1.2. Admission of evidence

The Ugandan legal system recognises various kinds of evidence such as real, documentary evidence, video, photographic and electronic evidence.¹²⁸ To establish the extent to which all these aspects of evidence are dealt with present a general silence on most of these specifics. However, a reading of rule 11 speaks to documentary evidence. Sub-rule (2) states that

‘Where a document is to be adduced by either party, the party adducing the document shall serve the other party and the court before the proceedings ...’

This is an indication that documentary evidence has to be subjected to a particular procedure before the virtual court convenes for the hearing. This raises questions on other types of evidence, especially real evidence, for instance, a gun used in a robbery; at what point does the accused look at the real evidence, or how does the court proceed if the request for the admission of such evidence is not in the same physical room where the judicial officer is seated? Supposing the

¹²⁴Guidelines (n 30), 2(a)(i)–(iii).

¹²⁵*Ibid*, preambular paragraph (b).

¹²⁶S Nyanzi, ‘From Stella Nyanzi to Bart Katureebe, with pain: open letter to chief justice on abuse of prisoners’ human rights in electronic courts’(2020) <<https://bit.ly/2SQ2oLW>> accessed 8 May 2020.

¹²⁷S Nyanzi, ‘From Stella Nyanzi to Bart Katureebe, with pain: open letter to chief justice on abuse of prisoners’ human rights in electronic courts (2020) <<https://bit.ly/2SQ2oLW>> accessed 8 May 2020.

¹²⁸See the Evidence Act, cap 100 Laws of Uganda generally.

graphic rendering affects the visual quality of the real evidence? Such questions are not dealt with in the Rules. It would mean that another procedure to examine the physical attributes of a given kind of evidence can be done. This would require that the normal rules of evidence are used to admit such evidence. The question to which one turns is whether the conventional rules of admission of evidence offer answers.

According to the Evidence Act, for evidence to be admitted, it has to be relevant and admissible.¹²⁹ As such the use of the conventional rules of admission of real evidence does not offer answers concerning their admission in the virtual court, more so in the wake of a Covid 19 outbreak.

3.1.3. Witnesses

Concerning witnesses, the VA Rules make it easier for witnesses to give evidence without physically appearing in court.¹³⁰ This satisfies the need to reduce the resources that would otherwise be used in the hearing of offences. However, a close reading of the sub-rule shows that the objective is for a witness to testify. This has to be juxtaposed with the position of an accused case' being heard through the video-audio link. As such where the case has no witnesses who fall within the bracket of testifying using the VA Rules, then the case cannot be heard. This goes against the tenet of a fair trial to wit an accused has the right to have his case heard at the expense of the State, especially if it is a capital offence. Reports from the magistrates' courts indicate that no hearings are taking place at the moment.¹³¹ However, be that as it may, the fact that witnesses can communicate with the court using the online platform, it should be possible for them to testify once they are checks in place to ensure that witnesses can understand the procedures that surround giving evidence. The current application of the VA Rules is limited to a few magistrates' courts in the country- an indication of a non-optimal use of the VA Rules. This affects the reduction of case backlog and the enforcement of the right to a fair trial. This is more important where the cases are in the High Court. The challenge currently, is the use of the online platform at only designated places with the facility. As such this creates a queue where all courts supposed to have online matters have to follow a queue to use the limited physical facilities.

In addition, the Rules

... facilitate speedy trials,¹³² [and] promote witness protection.¹³³

The facilitation of these trials has to be in the context of taking documentary evidence, making it easier for witnesses to testify, to enable advocates and the accused to attend court virtually, to provide relief from the anxiety of giving

¹²⁹Evidence Act cap 100 Laws of Uganda, Part II. *Kuruma s/o Kanui v R* 1955 AC 157, 159.

¹³⁰See (n 28), Rule 4 (b).

¹³¹Discussion with selected State Attorneys from the Directorate of Public Prosecutions on the application of the VA Rules during lockdown, dated 7 May 2020.

¹³²See (n 28), Rule 4 (e).

¹³³*Ibid*, Rule 4(g).

evidence in open court, to reduce the cost of litigation and the promote witness protection.¹³⁴ It would be preferred that this ‘combo’ enables the accused and witnesses to testify. As earlier indicated, the cumulative engagement of these various objectives leads to the protection of vulnerable witnesses. While it is not in doubt that witnesses may need protection, the era of Covid 19, places a greater obligation on the State to ensure that an accused person has a right to a fair trial, especially at a time when civil and political liberties have been greatly compromised. As such, the current objectives of the VA Rules do not speak to all the vagaries of the Covid 19 pandemic.

3.2. Circumstances for the use of the rules

The VA Rules provides for the circumstances under which they may be used, the process of their approval, and other rules relating to the proceedings in the virtual case.¹³⁵ A total of six instances are offered for the circumstances under which the Rules may be engaged. This section looks at four of these rules and evaluates them in the context of the Covid 19 outbreak.

From a general perspective, they point to the distinct and elevated position of the witness as the guiding factors to the convening of the virtual court. The relevant Rule states that

A court may hear a case by a visual-audio link in the following circumstances—

- a. where a witness lives outside Uganda;
- b. where proceedings relate to sexual or violent offences;
- c. for security reasons;
- d. for the safety of witnesses;
- e. for infirmity or health reasons; or
- f. for any other reason that the Court deems necessary and appropriate for a witness to give evidence through the visual audio link.¹³⁶

All the sub-rules under here relate to the geographical location of the witness, the nature of offence where they are supposed to testify, to guarantee the security or health of the witnesses or to justify any other reasons advanced by the court before the hearing of the witnesses. In the context of the protection of witnesses, a detailed engagement of these circumstances is evaluated below.

First, the audio link may be used where the witness leaves outside Uganda.¹³⁷ This is fortified in the Rules in Appendix B to the Rules that require the witness to give information as regards his or her address outside the country. The law is silent on witnesses in Uganda who cannot make it to the court during a period of emergency/disaster. Consider a hypothetical where the witness who wishes to

¹³⁴*Ibid*, Rule 4.

¹³⁵*Ibid*, Part II.

¹³⁶*Ibid*, Rule 5(a)-(f).

¹³⁷*Ibid*, Rule 5(a).

testify is within the bounds of the country. Then (s)he has to fall within the bounds of other circumstances to be able to testify in the virtual courtroom.¹³⁸ The first requirement is that proceedings should relate to sexual or violent offences.¹³⁹ This requirement is already problematic especially at a time such as this when various cases need to be adjudicated although they are neither sexual nor violent offences. Cases such as corruption, bribery, abuse of office; despite their effect on society fall short of benefits under the Rules due to their lack of sexual or violent nature.¹⁴⁰ On account of this, the right to a fair trial in the era of Covid 19 is denied based on the nature of the offence. A limited application of the Rules goes against the spirit of the Constitution of the Republic of Uganda that states that

All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.¹⁴¹

It follows that qualified usage of the VA Rules that does not apply to all people amounts to discrimination. It is unlikely that an argument to the contrary would pass the constitutional muster. Besides, this rule does not include other cases where vulnerable people require justice, especially where they may not be expected to testify. For instance, where adults would be expected to testify in cases involving children in various contexts, like adoption, custody, maintenance, divorce proceedings, are excluded. This goes to the root of the use of the child-based approach in terms of the hearing of these cases to ensure that the child's best interest are taken into consideration.

The second requirement is that proceedings may for the sake of the infirmity or health reasons of a witness use the VA Rules.¹⁴² This is limited to the physical or mental weakness of the person who is supposed to attend court as opposed to using the rules to protect the General Public.

Thirdly, the court may take on any other reason to ensure that evidence is admitted.¹⁴³ This covers any other instances like the current situation of the Covid 19 outbreak. But its use would appear to be linked to the existence of a witness testifying. Other aspects of a fair trial need to be placed into consideration before the witnesses take to the stand e.g., bail application, submissions, other applications, plea taking etc. One may argue that the actual hearing in a case is but one aspect that informs the right to a fair trial.

It is imperative to look at the method of approval of the use of a visual-audio link. The Rules state that

Where a party seeks to proceed by visual-audio link, he or she shall apply to court, for approval of the venue, time and person or institution to facilitate or

¹³⁸*Ibid*, Rule 5(b)-(f).

¹³⁹*Ibid*, Rule 5(b).

¹⁴⁰Some of these cases are provided for in the Prevention of Corruption Act, Act 6 of 2009 and the Penal Code Act Cap 120 Laws of Uganda.

¹⁴¹Constitution (n 23) Article 21(1).

¹⁴²See (n 28), Rule 5(e).

¹⁴³See (n 28), Rule 5(f).

assist in the proceedings away from the Court in accordance with these Rules.¹⁴⁴

This calls for the use of a physical application to the courts for the VA Rule to be used. It is argued that this defeats the purpose for the use of an online system if one has to engage with the court physically to be able to use it virtually.

4. Way forward

The research has identified a limited application of the VA Rules in Uganda in the era of Covid-19. This practical application is indeed in line with the provisions of the VA Rules and Guidelines. It is also possible that the VA Rules could be applied to the hearing of offences during the lockdown. Some legal principles from an ester while unrelated source can be used here. Durojaye and Oluduro carry out research to evaluate the African Commission's jurisprudence on the rights of women.¹⁴⁵ They argue that in the development of jurisprudence on the rights of women, one should not just ask the 'woman question' but the 'African woman question'.¹⁴⁶ Concerning this contribution, the interventions should shift from witness protection to inculcation of the accused person. This would aid the accused's enjoyment of the right to a fair trial. In the instant case, once an accused is placed at the centre of the application of the VA Rules, the key question is how the VA Rules may be used to enable the accused to examine witnesses and to obtain the attendance of other witnesses before the court.

In principle, the VA Rules may be used to adduce evidence, have witnesses heard and ensure hearing at a trial. These aspects are greatly tilted in favour of aiding the testimonies of vulnerable witnesses within Uganda, or those outside jurisdictions, hearing of specific cases and admission of particular kinds of evidence. In the context of criminal law, this selective approach supports vulnerable populations and the protection of witnesses to the exclusion of the accused. As such, the placement of the accused at the centre in the context of Article 28(3)(g) presents various reflections: The ability of the platform to cater for full trials, adducing of evidence, embracing all categories of witnesses, and ensuring that an online other than a physical application the rules is used. It is argued that subject to the requisite amendments to the VA Rules to cater to the accused's right to a fair trial, these reflections can be engaged.

5. Conclusion and recommendations

The study has shown that the objectives and the circumstances that inform the application of the VA Rules do not contextualise the holistic picture of the right to a fair trial. In the era of Covi-19, these rules have been a missed opportunity at developing jurisprudence that speaks to the use of online courts to have full hearings. In juxtaposition, Uganda has quite developed laws on online courts that may

¹⁴⁴*Ibid*, Rule 6(1).

¹⁴⁵E Durojaye & O Oluduro, 'The African Commission on Human and People's Rights and the woman question' (2016) 24(3) *Feminist Legal Studies* 315–336.

¹⁴⁶*Ibid*, 315.

be used to guide the hearing of cases. An intersection of the position in of the VA Rules and the requirements for the right to a fair trial presents a challenge, especially for the accused.

The right to a fair trial under Uganda's Constitution presents a peculiar position that requires an accused to be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.¹⁴⁷ This places a constitutional mandate on the Courts and the prosecution to accord a witness these facilities. It is argued that while this right is non-derogable, it may be subject to limitations that are acceptable and demonstrably justifiable in a free and democratic society. The limit to the physical appearance in courts and the closure of courts in the era of Covid-19 is acceptable and justifiable. This limitation, however, can be balanced through the use of the online courts to aid the enjoyment of the right to a fair trial. An evaluation of the VA Rules shows that the challenges in its use are in the wording that guides its applicability.

First, while it allows the hearing of cases, the Guidelines limit the hearings to the delivery of judgments, rulings, applications, bail, mentions and Interlocutories.¹⁴⁸ Secondly, the rules are used on a limited category of witnesses, thus, those in danger on account of safety and security, those who are unable to come to court due to health reasons, or where the witness is outside the jurisdiction of the court or the country. Thirdly, while admission of evidence is allowed, it is limited to documentary evidence. There are no insights on the possible admission or conditional admission of other forms of evidence like real evidence. It is submitted that these challenges are not fatal, as there are various ways through which the VA Rules may be used to have a complete hearing. An application of the accused centred approach in the preceding section offers various recommendations.

Concerning the hearing of cases, the VA Rules provide a platform to hear witnesses in line with the constitutional requirement under Article 28(3)(g) to accord accused with facilities to examine witnesses and to obtain the attendance of other witnesses before the court. The closure of the physical court during emergencies should be used to explore the use of the online courts to continue operating. The limited admission of evidence to documentary evidence can still be used in the hearing of cases. To this end, cases that do not require the use of real evidence need to be heard and digital copies of the evidence are tendered remotely. In cases of real evidence, the court may still admit photographic evidence as conditional admission of real evidence. In due course, the court may order the procuring of physical items to court for purposes of tendering it in court as evidence. This may be a special session for tendering evidence, following the hearing of various cases online.

Some interim measures may be used on the issue of witnesses. It is proposed that closed list of witnesses in Rule 5 be extended to include witnesses who would otherwise testify in a criminal trial. A purposive reading of Rule 5(f) may be used

¹⁴⁷Constitution (n 23) Article 28(3)(g).

¹⁴⁸Guidelines (n 30), 2(a)(i)-(iii). For instance, the taking of pleas and consideration of bail applications has been done online. See *Wesaka A and Kigongo J 'Gen Tumukunde granted bail, ordered to deposit passport in court'* <<https://bit.ly/3bpyDbg>> accessed 11 May 2020.

to conduct the hearing of any witness under the VA Rules if the Court is satisfied that there are necessary and appropriate reasons for any witness to give evidence through the visual-audio link.

Concerning the circumstances of the application of the VA Rules, there should be the use of online facilities to ensure the use of the online means to the facility. There should be a use of an online system to enable the application of and confirmation of the use of the online court without violating the public health considerations of social distancing to curb the spread of Covid-19.

In the long run, a law that is subjected to legislative drafting procedure and scrutiny needs to be drafted such that the challenges in the application of the VA Rules are addressed. Besides the extension of the visual-audio link facilities to all high court circuits in the country need to be done. In the interim, the court and prosecution are urged to use the VA Rules to hear criminal cases.

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