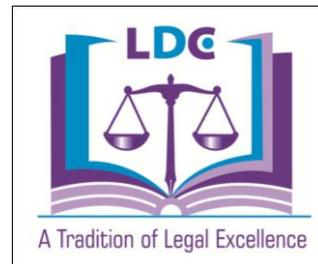


LAW DEVELOPMENT CENTRE



JUSTICE IN THE ERA OF A PANDEMIC; AN ANALYSIS OF THE IMPACT OF THE COVID-19 PANDEMIC ON UGANDA'S COURT OPERATIONS

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1.0 INTRODUCTION

When the WHO declared COVID-19 a pandemic in March 2020, the Ugandan government was swift to take the necessary measures to combat the spread of the virus.¹ The ministry of health issued standard operating measures to prevent the spread of the disease.² The pandemic has had a widespread impact on every aspect of society and how people live their everyday lives. The measures aimed at curtailing the spread of the coronavirus have without a doubt caused a total a disruption to normalcy. This article specifically looks at the impact of the COVID-19 pandemic and the incidental measures on the pursuit of justice through the court system in Uganda. It will highlight the various ways in which the courts have been affected by the COVID-19 measures and their response to the same.

2.0 UGANDA'S JUSTICE SYSTEM IN CONTEXT

The justice system is a pillar of any society and has been described as a reflection of the social contract in which the government guarantees the individual liberties of the citizenry. For civil justice, the government ensures that there is an avenue for people to resolve their disputes by enforcing the law. For the criminal justice system, the government goes beyond ensuring that there is a court system, to providing prosecutors who prosecute criminals on behalf of the victims and the Prisons department to keep those who are remanded and sentenced through the system. The justice system plays an important role in ensuring that disputes among members of society are resolved by impartial arbiters who apply the law to the facts of each case and in so doing guarantees that individual rights and obligations are observed. Uganda's national court system is established under chapter five of the 1995 constitution. It has a hierarchical set up that begins with the lower courts (the

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¹ WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020, <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>> Accessed 18th June 2020.

² Ministry of Health guidelines on avoiding the corona virus <<https://www.health.go.ug/covid/document/guidelines-on-avoiding-the-corona-virus/>> Accessed 20th June 2020.

magistrate Courts) at the bottom. The High Court which has unlimited original jurisdiction also serves as an appellate court for decisions from the magistrate courts. The Court of Appeal hears appeals from the high court while its own decisions are appealed to the Supreme Court.

Despite the hierarchical and jurisdictional aspects that delineate the matters courts get to handle, Uganda's justice system can generally be divided into two parallel processes; the criminal and civil proceedings.³ Both proceedings are adversarial in nature, requiring the plaintiff in the civil matters and the prosecutor in criminal matters to diligently prove their case to the standard required by the court. The incidental processes in both civil and criminal matters ordinarily require the services of many people and several institutions. The pursuit of justice in either of the proceedings requires the people involved to follow statutorily imposed processes that more often than not require face to face interaction, travelling from place to place and engaging several people along the progression of the same.

In civil matters, it is a requirement of the civil procedure rules that court documents have to be served on the adversary party or their lawyers. Responses need to be filed within a given time frame and to follow incidental matters such as payment of court fees through the bank system and the same have to be acknowledged by the responsible officers at the relevant court. When pleadings have been duly filed by all parties, the court mandated mediation is supposed to commence, involving the parties, a mediator and such other people they may find relevant in the process.

In criminal matters, the accused is presumed innocent until proved guilty and the prosecution bears the burden to prove the guilt of the accused beyond reasonable doubt.⁴ Due to the presumption of innocence, the accused person has a right to apply to be considered for the grant of bail to restore albeit temporarily, their individual liberty. The criminal justice system particularly involves an inter-play of various stakeholder institutions playing different roles. The accused is produced in court by the Police and prosecuted by the Directorate of Public prosecutions. The Uganda Prisons service plays an important role of keeping offenders in custody and ensuring their attendance of court as and when required. Accused persons may often be represented by counsel of their choice or if the matters are semi-capital or capital in nature, a lawyer on state brief. The court staff also play various roles right from registering the files, having them sent to the allocating judicial officer, recording payment proof for bail or fines right to the judicial officers handling the case.

It therefore goes without saying that the crisis created by the Corona virus affected much of the ordinary functioning of the court system, posing challenges in the administration of justice. The next part of this article will make effort to highlight some of the challenges the court system has had to deal with.

3.0 CHALLENGES TO THE ORDINARY FUNCTIONING OF THE COURT SYSTEM

³ Geoffrey Kiryabwire, *The Development of the Commercial Judicial System in Uganda: A Study of the Commercial Court Division, High Court of Uganda*, 2J. Bus. Entrepreneurship & L.iss. 2 (2009)

⁴ Article 28 of the 1995 Constitution of Uganda

3.1 Access To Courts - Working Nominally

The presidential issued directives on 25th March 2020 which together with the ministry of health guidelines suspended public transport and required only crucial staff to work in public offices. These were followed by the Chief Justice's contingency measures for the judiciary dated 26th March 2020. By the aforementioned measures, only skeletal staff were to work at court on a rotational basis to handle crucial operations. This had the effect of greatly limiting the ordinary functionality of the courts countrywide. Only matters deemed crucial by the skeletal staff would be handled. In the pursuit of justice, more often than not the people involved believe that their matters are so important that they need urgent attention. By courts working nominally, the vast number of court users were left helpless in their desire for either criminal or civil justice remedies.

On 27th May 2020, the chief justice issued revised contingency measures to prevent the spread of COVID-19 and allowed for partial court operations to be reinstated. By these measures, judicial officers are permitted to handle at least five civil cases a day while criminal cases are still limited to plea taking, bail application, plea bargains and appeals for the appellate courts. Meanwhile, the restraint on criminal hearing remains pending the ability to produce prisoners in courts. Without a doubt, the revised measures have made effort to make to open up courts for more than the nominal working schedules that were imposed during the complete lockdown.

There are still challenges that come with the inability of the courts to work fully such as the uncertainty with regard to execution of court orders in civil matters, pending executions where court warrants expired during the lockdown and the fact that normal functionality of court bailiffs may still be impeded. In criminal matters, the ban on production of prisoners to court has presented a challenge for both the prosecution and the courts. The courts are bound by constitutional safeguards to release suspects who have been on remand for more than sixty days without trial in cases handled by magistrate courts and one hundred eighty days for capital matters. COVID-19 Lockdown measures made it difficult for courts to function fully such that hearings could be conducted. Witnesses were unable to travel to report and even when they did, some could not be recorded as present in the court files since some judicial officers were unable to travel to work as well.

The question then arises as to whether it does not jeopardize the victims and their prosecutor when a remanded suspect is released in compliance with Constitutional safeguards while the witnesses in the case were ready and willing to testify against the accused but for the lockdown measures. From the human rights perspective, the accused's right to liberty needs to be restored since he or she were on remand for more than the constitutionally allowed period without trial.

On the other hand, it would appear that the prosecution was prevented by circumstances beyond their control and would be interested in the commencement of trial given the opportunity. In a perfect situation where the

accused person faithfully reports to court even after the grant of court bond, there would be no problem at all. The reality, however, is that more often than not, when accused persons are released on court bond, they do not return to court. In a few situations where they do not abscond from court's jurisdiction, the Police might re-arrest them and the case is able to commence to the fairness of the victims that came to court in search of justice. In the majority of the cases, however, the victim's cases may be closed pending the accused's arrest upon court issuing arrest warrants that police fails to execute. When that happens, for a victim that came to court in search of justice, it may appear that the justice system is rooted in favour of the person they accused. It may cause an erosion of public trust in the justice system as a whole where many criminal victims whose matters had just been filed in court at the onset of the COVID-19 lockdown measures never get to see their day in court. This, unfortunately may be one of the apparent effects of the COVID-19 on the criminal justice system.

3.2 Effects of the *Exclusion of public and private transport vehicles*

Whereas the limitation of court operations to only crucial matters during the lockdown affected access to judicial remedies for many people, their inability to access courts was another restraint. When the President issued other directives that put a ban on private transport, it was a further blow to those who had matters in courts. Not only did it completely affect court users, it was a hindrance to lawyers and a number of court staff, preventing them from accessing court. This meant that even where a matter was considerably urgent and the services of a legal practitioner were required, the lack of transport means would make accessing courts difficult and thereby greatly impeding the pursuit of justice. To make matters worse, legal services were not considered essential services so as to allow lawyers an exemption to use their private vehicles to travel to court.⁵ Advocates had to look for avenues to get permission to travel from Resident District Commissioners before they could access courts and their clients. While courts were open to handle urgent matters and the Uganda Police Force was diligently conducting investigations of criminal acts and producing suspects in court, many suspects were denied justice because they could not access counsel.

The presidential guideline no. 7, issued on 4th May 2020 that allowed the Uganda Law Society a quota of thirty lawyers at any given time to provide urgent legal services did not significantly ease the hardships suffered by accused persons. Considering the vast number of courts, suspects both from police and those on remand in Prisons all over the country, all with an entitlement to representation by counsel of their choice, a limitation on the number of advocates who could get permitted to travel at any given time was a nothing short of a fallacy in the quest for justice.

3.3 Production of Remanded Prisoners to Court

⁵ Advocates were not included on the list of exempted services in Rule 8 of S.I NO. 55 of 2020, the Public Health (control of COVID- 19)(NO.2) Rules

With the ease of the lockdown measures that saw the President allow the use of public and private transport vehicles, there has been a semblance of normalcy for lawyers, court staff and the general public that comprises of court users. The Uganda Prisons however, maintains their restraint on access to prisoners at the remand centres. This presents another limitation to lawyers' ability to access their clients and to get instructions to fight for the rights of the suspects. It is also hard for relatives of the accused persons who are in the custody of Uganda prisons to access them to establish their health situation. It remains a horrendous situation for people who need to instruct counsel or contact their relatives to prepare their applications for bail since they are barred from contacting anybody that is outside their places of remand.

It also contravenes the United Nation's Inter-Agency Standing Committee (IASC) interim guidance on COVID-19; Focus on Persons deprived of their liberty. The guidelines enjoin member states of the United Nations to ensure that measures that are put in place to *prevent outbreaks of COVID-19 respect human rights and more specifically, 'Ability to meet with legal counsel must be maintained, and prison or detention authorities should ensure that lawyers can speak with their client confidentially.'*⁶

In that regard, the High court in Human Rights Awareness and Promotion Forum (HRAPF) vs Attorney General and the Commissioner General of Prisons has held that prisons authorities violated the rights of accused persons by denying them access to their legal counsel and thereby violating their right to liberty guaranteed under article 23(5) of the 1995 Constitution.⁷ The court found that an imposed 40 day denial of access to counsel was unreasonable and unjustifiable.⁸

It goes without saying that the COVID-19 pandemic has disrupted the established way of doing things in most institutions. Whereas the responses to the situation have been diverse, it has taught some very basic lessons that will go a long way to shape action should a likelihood of the same occur in the future. With human rights leaning decisions as the aforementioned, JLOS institutions are bound to respect the rights of the vulnerable irrespective of whether the situation is the ordinary normal or they are forced to work within measures that seek to prevent the spread of disease whose impact is as volatile as the Coronavirus.

4.0 INITIATIVES TAKEN TO ENSURE JUSTICE IS REALISED DURING THE COVID-19 LOCKDOWN MEASURES

The COVID-19 pandemic has had a colossal impact on all sectors and the court

⁶United Nation's Inter-Agency Standing Committee referring to the Human Rights Committee General Comment No. 29

⁷High court Msc Cause No. 81 of 2020

⁸ ibid

system has not been an exception. It continues to present new challenges that will continuously shake and shape the normal court system as we have known for long. As with all crises, there are always lessons that the challenges teach. This part of the article will highlight some of the initiatives that have been employed to ensure that the pursuit of justice in Uganda's courts can still be realised.

4.1 Use Of Technology

If there is anything that the COVID-19 pandemic has taught, is that we need to embrace the electronic court system. The judiciary has since 2016 been launching its 'e-justice for all' initiatives that led to the passing of The Judicature (Visual-Audio Link) Rules, SI no. 26 of 2016. In 2019, the judiciary also embarked on a journey to put in place an electronic case management system that intends to reduce contact between litigants and court staff.⁹ While the use of technology in the administration of justice has been touted as greatly necessary, its relevance seemed far-fetched to an ordinary court user for whom the face-to face interaction was working so well. Then the COVID-19 pandemic happened! The reality hit that while the paper trail that has come to define Uganda's court case administration system might be agreeable to the vast majority of court users, there is need to embrace that which technology has to offer.

Not only is the use of technology important in the administration of justice, it is now apparently clear that it is needs to be part of the new normal. It has far –reaching benefits that include; saving the time court users spend on the road to file and receive court documents; creating a more transparent system that eliminates incidences of opportunistic corruption and reduces the logistical burden of transferring prisoners to and from court.¹⁰ It is also now clear that it would offer courts the opportunity to function optimally even in periods of crises just like the COVID-19 pandemic.

The Ugandan Judiciary has during the lockdown period, made use of the Audio-visual conferencing facilities in different courts to ensure that bail applications are heard while at the same time observing the standard operating procedures issued by the ministry of Health. In the courts where the conferencing facilities are possible, it has aptly ensured that the court process is not affected by the incidence of COVID-19 pandemic. The benefits of the audio-visual conferencing facilities notwithstanding, it is also the reality that they are at the moment only a preserve of a few courts particularly those located in the city. The vast numbers of courts countrywide need to be facilitated to make use of the technological advancement for the ease of their work and to the benefit of their court users.

4.2 – Co-operation between JLOS Institutions

The COVID-19 pandemic has also shown that it is imperative for the JLOS (Justice

⁹ Arthur Arnold Wadero, 'Judiciary unveils Shs9b digital system to track' <https://www.monitor.co.ug/News/National/Judiciary-unveils-Shs9b-digital-system-to-track-cases/688334-5275982-15ggha2z/index.htmlcases> Accessed 21st June 2020

¹⁰ DERRICK KIYONGA,< <https://www.unwantedwitness.org/ugandas-judicial-system-virtual-courts-are-here-but-no-laws-to-regulate-them/>> accessed 19th June 2020

Law and Order Sector) institutions need to continue to work together for the realisation of justice for all. There has been need for flexibility in the working relationships of the JLOS stakeholders to ensure that a semblance of normalcy is maintained despite the crisis. For instance, the Prisons officers are often at court to produce remanded suspects and in turn go back with those that are newly remanded by courts. Due to the lockdown, police officers have had to adapt to being responsible for the transportation of those remanded by courts to the respective prisons. The office of the Directorate of Public Prosecutions issued guidelines for their staff *interalia* urging them not to object to bail applications during the pandemic. This benefits the applicants for bail but also makes it easier for courts in the determination of bail applications. That kind of flexibility and co-operation, I believe has made it easy for stakeholders and court users alike during the difficult times.

5.0 Recommendations

Based on the discussion above, it is this article's recommendation that the government should roll out the audio-visual facilities to all courts around the country to ensure that all court users are able to access the services of court based technological approaches irrespective of their location. It is also this article's recommendation that the 'justice for all' initiatives of the Judiciary should be given more priority to ensure that all most of the court processes can be attained electronically right from filing of court documents to delivery of judgments. The Electronic Court Case Management (ECMIS) needs to become a reality in all court premises around the country to ensure that the courts are able to serve the public even in periods of crises.

6.0 CONCLUSION

This article has through a descriptive analysis based on practical observation of court processes, highlighted some of the challenges that have impeded the pursuit for justice in Uganda's court system during the COVID-19 pandemic and incidental measures. The article has shown that while the ordinary court system is dependent on physical interaction between court users on one hand, court staff and stakeholders in the JLOS on the other, the need to curb the spread of COVID-19 caused a disruption to normalcy. The article has shown that as a result of some of the measures imposed following the COVID-19 incidence, the ordinary court process was stalled and in some instances causing challenges for those who seek justice in the courts. The article has highlighted some of the measures that have enabled the pursuit of justice in courts to thrive amidst the hardships and made some recommendations that should be implemented as lessons from the COVID-19 pandemic.