IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

Reportable
Misc. Criminal Application No. 151 of 2020

In the matter between

KANYAMUNYU MATHEW MUYOGOMA **APPLICANT**

And

UGANDA **RESPONDENT**

Heard: 6 November, 2020.
Delivered: 9 November, 2020.

Criminal Procedure *— Adjournments — they are intended to enable a party to present his or her case as fully as necessary but within the limits of the law, or to respond fully to the evidence and arguments of other party — the duty of the court is to ensure that a party is given a reasonable opportunity to prepare his or her case. The court has no duty of ensuring that a party takes the best advantage of the opportunity to which he is entitled — The potential interference with the orderly progression of the trial should be considered — The court has to strike a balance between the interests of the applicant, that of avoiding unnecessary delay relating to the trial of the rest of the accused and the public interest in the efficient allocation of judicial resources, consistency of verdicts, convenience of witnesses and finality of litigation — The equality duty requires judicial officers, in the exercise of their functions, to avoid inequitable devotion of the resources available to court, to individual cases at the expense of others — Faced with time and other resource limitations, the court should not disproportionately devote more time and other resources than is absolutely necessary to the trial of a single case, at the expense of multiple others in waiting — many times, a party who seeks a delay will file an unnecessary motion raising one or more legal or procedural issues, or fail to comply with a deadline set by court — It is also not uncommon for such a party to change counsel at the eve of the hearing, to file constitutional references and petitions.*

Plea Bargaining *— while Criminal trials ensure that factual and legal issues are examined thoroughly and resolved through a process that guarantees the accused procedural safeguards, before the application of penal sanctions, on the other hand, plea bargains present a process where such factual and legal issues are resolved through a process of negotiation and inquisitorial proof, resulting in a counseled guilty plea, that is both voluntary and intelligent, which is an admission of factual guilt — A guilty plea is not equivalent to a confession — in some cases plea bargains may be delayed until late during the course of the trial, as the accused seeks to test the prosecution version of the events to the maximum — After the trial has begun, the rights guaranteed to an accused during the fact-finding phase of the criminal process can only be terminated by a change of plea; thereafter the scope of negotiation is restricted to determination of the appropriate penalty (or post-penalty), not a discussion of any of the rights accorded during the fact-finding phase of the criminal process — Rules 5 and 8 (3) of The Judicature (Plea Bargain) Rules, 2016 create an infinite number of potential bargaining options and outcomes throughout all stages of the trial. Unless regulated by court, the assortment of concessions that could be offered by an accused in return for a sentencing or charging consideration would be virtually unlimited and open to abuse — a judicial officer who has participated in a failed plea bargain negotiation in which he or she has not become privy to facts relating to the actual guilt of the accused in circumstances akin to a confession, need not recuse him or herself from the trial — the process of plea bargaining should not result in prolonging the trial but should rather abridge it — a party who elects to plea bargain after commencement of the trial ought to come with bona fide reasons to condone the delay.*

Constitutional Law *— Article 28 (1) of The Constitution of the Republic of Uganda, 1995 guarantees to each person accused of an offence, a fair, speedy and public hearing before an independent and impartial court established by law -— The most important right of the criminally accused is the right to a fair trial. Derogation from the enjoyment of this right is constitutionally prohibited — The guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place in a "speedy" manner — One aspect of a fair trial is the taking of reasonable steps to prevent avoidable delay so as to guarantee a speedy hearing — article 126 (1) of The Constitution of the Republic of Uganda, 1995 requires courts to administer justice "in conformity with law and with the values, norms and aspirations of the people" — The essential purpose of this provision is to bring broader social interests affecting the public at large into judicial consideration, so as to harmonise the pursuit of individual rights with the needs of the entire community for whose interests the courts are viewed as guardian. It is a reminder to the courts regarding the importance of changing social conditions to their decisions — since minds could easily differ over the contents of such values, norms and aspirations, their*

identification and application cannot be based on pure judicial intuition — the rule of thumb is that policy is a matter for the legislature and not for the courts, save in an area not covered by legislation in which the courts must revise old rules or formulate new ones — so long as human language remains imprecise and human capacity to predict the future limited, it will fall to judges to fill the gaps in the laws and rules. This though is not justification enough for transplanting policy into law or make decisions that virtually supplant the legislative enactments themselves — It is only when courts are confronted with a dispute for which there is no clear statutory answer, that they must render decisions in accordance with their own conceptions of justice, equity and good conscience — wherever existing legal authority proves inadequate, decisions ought to be based on sound legal principle and legal policy, because Law, at its very foundation, is conceived and derived from values — questions of legal right and liability should ordinarily be resolved by the application of the law and not the exercise of discretion — If the interpretative choice is between making a value judgment and applying a rule, a court exercising criminal jurisdiction should prefer the rule.

Traditional justice mechanisms *- Restorative justice is the process through which remorseful offenders accept responsibility for their misconduct to those injured and to the community that, in response allows the reintegration of the offender into the community — the processes are undertaken only after a person has admitted committing an offence — In its current form, mato oput has no effective system of regulation and review in place. It is shrouded in legal ambiguity and as a result its interface with formal criminal justice is opaque — resort to restorative justice approaches within the context of traditional justice rests on the assumption that there exists within the affected community adequate meso-social structures i.e. ordered sets of relationships, for example, residence, kinship, or lineage, that create the intra-societal power and coercion, which make dispute settlement possible — It presupposes that the disputants are part of the same moral / social community. That they live in close proximity to one another or are related to one another, and typically wish to continue living in the community — traditional justice has hitherto been adopted in relatively tight-knit and inter-dependent social settings to limit revenge, to prevent blood feuds, to prevent inter and intra-tribal wars, to welcome former child combatants in post-conflict Northern Uganda back into their local communities, all being situations in which accountability, healing, and reconciliation is key for peaceful and harmonious reintegration and co-existence — it is not empirically proved that traditional justice mechanisms can appropriately deal with ordinary crime allegedly committed hundreds of kilometres away, by persons who are not members of that local community — traditional justice should play a complementary role to the formal justice system, but not serve to displace, undermine or delay it..*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is a formal application made under section 53 of *The Trial on Indictments Act*, and Rule 2 of *The Judicature (Criminal Procedure) (Applications) Rules*, seeking an order suspending the main trial until the applicant has concluded an on-going traditional justice process and a likely plea bargain thereafter.

i. Procedural history leading to the application;

[2] The applicant stands jointly indicted with another, for the offence of Murder. It is alleged that the two accused on the 12th of November, 2016 along the Kampala-Jinja highway, near Malik Car Bond, opposite Uganda Manufacturers' Association main gate in Nakawa Division, Kampala District, murdered Akena Kenneth Watmon. The applicant was arrested on 12th November, 2016. He was charged on 22nd November, 2016 and remanded. He was on 31st January, 2017 committed to the High Court for trial. He was 4th October, 2017 granted bail pending trial. The case first came up on 18th December, 2018 for commencement of the trial. On that occasion, the applicant pleaded not guilty and the case was adjourned to 21st January, 2019 for hearing. When the case came up on that day, the State Attorney representing the prosecution applied for adjournment on ground that the prosecution had not complied yet with the requirement of pre-trial disclosure. The case was adjourned to the next convenient session for that purpose.

[3] Almost a year later on 11th December, 2019 the case came up next for fixing a hearing date. It was fixed for 8th January, 2020. On that day counsel for the accused sought an adjournment on ground that the third accused was indisposed, suffering from a kidney complication. In the interests of guaranteeing

a speedy trial for the applicant and his co-accused, the court directed a separate trial for the indisposed third co-accused under the provisions of section 52 (1) of *The Trial on Indictments Act*. The trial of the applicant and his co-accused thus commenced on that day and by 21st February, 2020 a total of thirteen prosecution witnesses had testified. The defence was unable to cross-examine the 13th prosecution witness as the session had come to an end. Thus the prosecution was unable to lead evidence of one witness supposed to be re-called for cross-examination and close its case, because the time allotted to the criminal session had elapsed. Further hearing of the case was adjourned to the next convenient session.

[4] When the case came up next on 27th October, 2020 the prosecution indicated that their 13th witness was present in court ready to be cross-examined by the defence. Instead counsel for the applicant sought an adjournment on grounds that they had filed the instant application whose purpose was likely to be compromised if the hearing proceeded before it was fixed and disposed of. After listening to both parties the court reluctantly granted an adjournment to 6th November, 2020 for purposes of continuation with the trial, and for the applicant to fix the application for hearing. The application has now been brought to the attention of the court for its consideration, together with the submissions filed by counsel for the applicant.

ii. <u>Nature of the application and the arguments in respect thereof</u>.

[5] By the application, the applicant seeks an order that the court adjourns or suspends the trial to enable the applicant conclude a process of reconciliation initiated under the Acholi traditional justice mechanism so as thereafter, to "enable a more meaningful and judicious plea bargain to be undertaken." In his affidavit supporting the application, the applicant states that he began a process of reconciliation with the family of the deceased before the trial began on 8th January, 2020. It is a very elaborate process that provides meaningful

reconciliation with the family of the victim. The applicant has completed the first three of the four phased process, i.e. truth telling, forgiveness, restitution and reconciliation. He could not gain audience with the mediator Rwot David Onen Acana II until 26th July, 2020. He participated in the truth telling and forgiveness phase (*Nyang Lok / Tito Lok*) on 12th September, 2020. He participated in the reconciliation process (*Culo Kwor*) on 13th September, 2020. He could not complete the last phase (*Mato Oput*) due to the illness and death of the mother of the deceased on 9th October, 2020. It is necessary to promote reconciliation and the culture of cooperation, understanding, appreciation, tolerance and respect for each other's customs, traditions and beliefs guaranteed by *The Constitution of the Republic of Uganda, 1995*.

[6] He avers further that on 23rd October, 2020 he began a plea bargain process but the prosecution indicated that the trial should continue until the applicant opts to plea bargain. The applicant indicated that it was important to conclude the traditional reconciliation process before engaging in a meaningful plea negotiations. Pre-trial publicity surrounding the case projected the applicant in negative light in a manner that was inflammatory and divisive along tribal lines, which is damaging to national unity and his successful re-integration into society at the end of the trial. The on-going traditional process may help in restoring inter-tribal unity between the people of Ankole and those of Acholi. The three processes of trial, plea bargain and cultural reconciliation can be mutually supportive. Useful lessons could be learned from a successful completion of the cultural reconciliation in a manner that does not undermine the trial or plea bargain process. He is prejudiced at the moment for having to participate in all three processes at the same time. It is therefore necessary to suspend the trial for such a time as is reasonably necessary for completion of the other two processes.

[7] The application is supported further by the affidavit of Mr. David Okello the mediator and coordinator of the traditional reconciliation process on behalf of the

victim's family. He witnessed the applicant give an honest narration of what led to the unfortunate incident of the death of the victim. On 12th September, 2020 he witnessed the applicant kneel down and ask for sincere forgiveness from the victim's family and the Acholi mediation and Blood Compensation Committee. On 13th September, 2020 he witnessed the applicant pay blood compensation to the Acholi mediation and Blood Compensation Committee for causing the victim's' loss of life. The applicant has undergone the most important and binding phase but is yet to undergo the crowning ceremony of drinking the bitter herb and sharing a first meal with the victim's family as the symbolic seal of principled reconciliation between the two families and peoples. It is of utmost importance that both families complete that process as a means of restoring harmony between the applicant's family, clan and people with the victim's family, clan and people. Continuation of the trial will greatly hinder the process of traditional reconciliation.

[8] Further support for the application is offered by the affidavit of Mr. Olaa Ambrose the Prime Minister of the *Ker Kwaro Acholi*, the supreme cultural institution of the Acholi. He verifies the traditional and cultural processes that have been undertaken this far in pursuit of justice and reconciliation between the family of the applicant and that of the victim. The applicant participated in the dialogue (*Laro Lok*) and fact telling (*Tito Tyen Lok*) phase of the process on 12th September, 2020 during which he gave a satisfactory account of the events that led to the death of the victim. He participated in the reconciliation process (*Culo Kwor*) on 13th September, 2020 and paid the necessary compensation to the Acholi Traditional Mediation and Blood Compensation Committee. The proceedings were thereafter adjourned indefinitely to a date to be communicated by the *Ker Kwaro Acholi* in consultation with the family of the victim. The system does not seek to replace the criminal proceedings in court but only to handle its reconciliatory aspects and thereby enhance the court's ability to dispense justice. Media sensationalism surrounding the case provoked sentiments of tribalism that

run contrary to the national goals of peace and unity. The “Mato Oput” will help in healing those divisions and the case will serve as a reference in future disputes.

iii. Submissions by counsel for the applicant;

[9] Counsel for the applicant filed written submissions in which they argued that the applicant initiated a process of *mato oput* that is on-going, which is expected to be concluded before the end of December, 2020. This will be followed by a plea bargain process of which the Director of Public Prosecution has already been notified. The process of plea bargain will benefit the accused, the victims and the state. Constitutional provisions require the court to administer justice in conformity with the law, the values, norms and aspirations of the people as well as to promote reconciliation between the parties. It is on that account that the court ought to accommodate the on-going reconciliatory informal justice *mato oput* by suspending or adjourning the trial.

iv. Submissions by counsel for the respondent;

[10] The learned Chief State Attorney representing the prosecution responded that the application seeks for an adjournment of the main trial to permit the future consideration for a possible plea bargain, subject to the anticipated cultural reconciliation process in the Acholi Tradition. The law governing adjournment is section 53 of *The Trial on Indictments Act*. The reasons being advanced are not among those envisaged in law. They submitted that the court cannot be as asked to adjourn a trial in anticipation of future events. The reasons being advanced in the application are speculative. They are aimed at defeating the right to a fair and speedy trial as enshrined in the constitution. The right to a fair and speedy trial applies not only to the accused but all parties affected by the case. This case has been in the judicial system since February, 2016. Before today’s session it had come up in two previous sessions. Even in this session this is the second time it comes up. They prayed that the court exercises its duty to curtail delays and

dismiss the application. It has the potential of resulting into a mistrial; hence the application should be dismissed to ensure that the integrity of the trial is preserved.

v. Principles that guide the grant of adjournments in criminal trials;

[11] In applications of this nature, the court must consider all of the circumstances bearing on a motion to adjourn or suspend the trial. The potential interference with the orderly progression of the trial, however, is one such circumstance. According to section 53 of *The Trial on Indictments Act*, adjournments to be granted on account of two situations, namely; the absence of a witness, and / or other reasonable causes. The paramount consideration when granting a prayer for adjournment is to enable a party to present his or her case as fully as necessary and within the limits of the law, or to respond fully to the evidence and arguments of other party.

[12] The factors which might guide court in the determination of whether or not to grant the application for an adjournment include; (a) the reasons for the adjournment; (b) the timeliness of the application and the length of the adjournment sought; (c) where the reason for the application is a legal issue which is scheduled for adjudication in the future, the prospects of that issue being resolved in a manner favourable to the applicant; (d) whether the applicant would suffer prejudice if an adjournment were refused and whether that prejudice could be mitigated by the court making a particular order; (e) whether refusal of an adjournment would be contrary to the rules of natural justice or undermine a fair trial; (f) whether an adjournment would undermine or frustrate the objects of any applicable legislation; (g) whether the circumstances giving rise to the need for an adjournment were self-induced or involved any misconduct by the applicant; (h) the desirability of resolving criminal proceedings expeditiously and avoiding any fragmentation; (i) the need for finality in litigation; and (j) the interests of justice.

[13] In deciding on a motion for adjournment, the court should consider such factors as the duration of the proposed adjournment, whether the party moving for adjournment was diligent in light of the reasons justifying the motion, whether the other party and the court had prior notice of the intention to seek the adjournment, whether the applicant seeks an improper tactical advantage, and whether the adjournment will actually improve the ability to prosecute the case or the accused to respond to the case against them and thereby enhance the overall fairness of the trial. Likewise, the court must also consider the risk of prejudice to the accused and the extent to which such prejudice may be cured by methods other than denying the adjournment, such as granting a short stand over or permitting the accused to recall witnesses for cross-examination. The above list is not exhaustive; particular cases may present different circumstances that also bear on the proposed adjournment. One aspect of a fair trial is the taking of reasonable steps to prevent avoidable delay so as to guarantee a speedy hearing.

[14] The court should not lose sight of the paramount consideration of the right guaranteed by Article 28 (1) of *The Constitution of the Republic of Uganda, 1995* which guarantees to each person accused of an offence, a fair, speedy and public hearing before an independent and impartial court established by law. This guarantee requires that criminal trials should be conducted and concluded in the shortest appropriate period of time. The guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place in a “speedy” manner.

[15] According to The African Commission on Human and Peoples’ Rights’ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Afric*a, *2003*, the key attributes of a fair trial include;- (i) an independent, competent and impartial court; (ii) a public trial where proceedings are held in public and judgment given in public; (iii) the presumption of innocence until one is proved or pleads guilty; (iv) the right to be informed of the nature and cause of the charge

against him or her, promptly, in detail, and in a language which he or she understands; (v) the accused must be given adequate time and facilities to prepare a defence and to communicate with counsel of his or her own choosing; (vi) the accused must be tried without undue delay; (vii) the accused must be tried in his or her presence, and defend himself in person or through legal assistance of his or her own choosing, or to have legal assistance assigned to him or her, in any case where the interests of justice so require; (viii) the right or opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his or her own behalf under the same conditions as witnesses against him or her; (ix) the right to free assistance of an interpreter if he or she cannot understand or speak the language used in court; (x) the right not to be compelled to testify against himself or herself or to confess guilt; (xi) the right not to be tried or punished again for an offence for which one has already been finally convicted or acquitted in accordance with the law and penal procedure; (xii) the right to appeal.

[16] Principle 5 of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Afric*a, explains that the right to a trial without undue delay means the right to a trial which produces a final judgement and, if appropriate a sentence without undue delay. Factors relevant to what constitutes undue delay include; - the complexity of the case, the conduct of the parties, the conduct of other relevant authorities, whether an accused is detained pending proceedings, and the interest of the person at stake in the proceedings. In principle 6 (b) it is noted that the accused is entitled to a hearing in which his or her individual culpability is determined. It is further observed that group trials in which many persons are involved may violate the person's right to a fair hearing.

[17] Since one of the reasons advanced for the adjournment is to create an opportunity for a plea bargain negotiation, the court also ought to be mindful of Rule 5 of *The Judicature (Plea Bargain) Rules, 2016,* by which a plea bargain may be initiated orally or in writing by the accused or the prosecution at any

stage of the proceedings, before sentence is passed. The court now proceeds to consider the grounds advanced for seeking the adjournment.

vi. Resort to traditional justice mechanisms as a justification for halting a criminal trial.

[18] The most important right of the criminally accused is the right to a fair trial. Derogation from the enjoyment of this right is constitutionally prohibited (see article 44 (c) of *The Constitution of the Republic of Uganda, 1995*). Criminal trials ensure that factual and legal issues are examined thoroughly and resolved through a process that guarantees the accused procedural safeguards, before the application of penal sanctions. On the other hand, plea bargains present a process where such factual and legal issues are resolved through a process of negotiation and inquisitorial proof, resulting in a counselled guilty plea, that is both voluntary and intelligent, which is an admission of factual guilt. By entering a plea bargain, the accused waives almost all the procedural rights, guaranteed by the right to a fair trial.

[19] Models of justice are commonly divided into three main categories: retributive, deterrent and restorative. Retributive justice focuses on the moral dimension of justice. It emphasizes the notion that perpetrators of a crime or those who fail to abide by laws or customary norms “deserve” to be punished for their wrongdoing. On the other hand, a deterrent view of justice focuses on the instrumental dimension of justice. It emphasises that punishment for wrongdoing is necessary to prevent further violations of the law and to signal the boundaries of socially acceptable behaviour. Finally, the restorative view of justice focuses on the need to rebuild or restore relationships and / or socio-economic status. This form of justice includes scope for compensation as a way of correcting wrongdoing and achieving justice.

[20] The contemporary criminal justice system in Uganda is driven by the retributive objective of punishment. This traditional penal approach to crime views the state as the primary offended party or victim of the criminal offence and places those harmed by the offence, and the community, in passive or subsidiary roles as witnesses or assessors. The penal or retributive criminal proceeding aims at determining guilt and imposing an appropriate punishment. Retributive justice aims to impose punishment or deprivation proportionate to the offence which was committed. It is not that the system entirely ignores the effect on the victim of the offender's conduct; instead this effect on the individual victim may be considered in determining the category of the offence or the seriousness of the legal violation. The system therefore opts for mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, with the minimum stress on the participants and will defer to alternative mechanisms only where they provide more expeditious options to the traditional criminal trial processes.

[21] On the other hand, restorative justice is a way of seeing crime as more than breaking the law; it also causes harm to people, relationships, and the community. One of the stated goals of restorative justice is to promote reconciliation so as to build and rebuild relationships. Restorative Justice is a theory of justice that emphasises repairing the harm caused by criminal behaviour. It is best accomplished through cooperative processes that allow all willing stakeholders to meet. Restorative justice is thus a process through which remorseful offenders accept responsibility for their misconduct to those injured and to the community that, in response allows the reintegration of the offender into the community. The emphasis is on restoration: restoration of the offender in terms of his or her self-respect, restoration of the relationship between offender and victims, as well as restoration of both offenders and victims within the community. What constitutes appropriate reparation is decided through a process of negotiation involving not only the offender and the victim but the respective families and social networks who have also been harmed by the criminal act.

[22] From the restorative justice perspective, crime is understood as harm to individuals and communities, rather than simply a violation of abstract laws against the state. Those most directly affected by crime, i.e. victims, community members and offenders, are therefore encouraged to play an active role in the justice process. Rather than focus on offender punishment, it focuses on restoration of the emotional and material losses resulting from crime. The offenders therefore must be willing to be accountable for their actions, which includes; (i) a full and free acknowledgment of their part in what happened and the harm that their actions have (or may have) caused to specific persons and / or communities; (ii) expressions of genuine remorse for their actions; and (iii) a willingness to make amends or repair the harm they have caused. To be successful, participation in the process should be voluntary for each person, which includes ensuring that they are not coerced, pressured, or induced by unfair means.

[23] The contention that traditional justice mechanisms facilitate reconciliation should be viewed in the context of a broader debate seen in transitional justice literature regarding the relationship between retributive justice and peace / reconciliation. Many of the discussions on this topic, however, are merely theoretical and not empirically grounded. It is further not entirely clear, what the applicant advances as reconciliation or who he is seeking to reconcile with; individuals, communities, or the whole society. More importantly, it is necessary to question just how realistic or achievable that is. Noble as the goal may be, courts have never been equipped nor had sufficient resources to fully achieve the peace-building role. If the court is to aid reconciliation in the manner suggested by the applicant, it is essential that it is well informed about *mato oput* and understands its processes, yet there is very little published data concerning this traditional justice mechanism.

[24] It is in the context of the 2007 *Juba Agreement on Accountability and Reconciliation* that *mato Oput* first gained concerted national and international

publicity. It was stipulated in that agreement that traditional justice measures and institutions should be promoted alongside formal legal arrangements to ensure justice and reconciliation. It was agreed that traditional justice systems should more appropriately be viewed as parallel to formal justice, rather than as an alternative. The Agreement specifically mentioned traditional justice mechanisms such as *Culo Kwor* (among the Acholi and Langi for homicide), *Mato Oput* (among the Acholi)*, Kayo Cuk* (among the Langi), *Ailuc, Tonu ci Koka* and others practiced in communities affected by the conflict. This culminated in *The National Transitional Justice Policy* (adopted on 17th June 2019) which is designed to address the justice, accountability and reconciliation needs of post-conflict Uganda, though a range of processes and mechanisms associated with society's attempt to come to terms with a legacy of large-scale past abuses and human rights violations in order to ensure accountability, serve justice and achieve reconciliation. Transitional Justice consists of both judicial and non-judicial processes and mechanisms including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof.

[25] It is the applicant's contention that he has undergone the first three phases of the process and is only left with the final stage of that traditional justice process. The process left has been outlined as follows;

> **A. Preparation:**
> Preparing the reconciliation mix to drink is done by an elderly person (senior of all in age). The elder prepares from the roots, *opwut*. The roots are dug up and pounded on a stone to form some sort of powder. The powder is mixed up with the fruit juice in a new calabash carefully placed on the ground.
>
> **B. Short rite of purification:**
> Before the family of Otim sets to go to the designated village site of reconciliation, a brief rite of purification is performed by simply spitting into the mouth of the reconciliation sheep. Otim holds open the mouth of the sheep he is leading and spits some saliva into it. That done, he then leads the black sheep to the farmyard of the

mother of Okeny. On reaching the farmyard, the sheep is laid on its back on the ground and its head in the north direction. The sheep is then stabbed by one of the elderly persons, master of the ceremony with a sharp knife. Successively another of the elderly persons lay another reddish-white sheep on its back on the ground, its head in the opposite south direction. This sheep is presented to the elderly persons by the family of Okeny killed. The elder then stabs it also with a sharp knife. The close relatives of Otim gather in the north direction of their slain sheep and likewise the close relatives of Okeny gather on the side of their sheep. The two opposite direction, north and south of the heads of the ritual sheep signify the diversification of enmity which must be brought close together and the families of the two will no longer entertain hostilities but become reconciled and live in peace.

C. Drinking the reconciliation mix (*matto opwut*).

The elderly person, master of ceremony, will take the blood of the two slaughtered sheep and pour it into the *opwut* and *acuga* mix to form a single mix of reconciliation drink. The close relatives of the person killed and those of the killer come close to each other and converge on the mixed juice from their opposite directions in a gesture signifying end to hostilities and beginning of reconciliation. Having converged on the calabash containing the mix of the reconciliation drink, the killer and a close relative of the one killed begin to drink. They both kneel down and close on to the calabash, their hands are folded behind, as seen from the photo) and they bend on to drink from the calabash without holding it by hands. In this way they drink from the calabash three times and then leave way to their close relatives who have come to witness the ritual ceremony. Otim will start to drink followed by the relative, father of slain Okeny. The mother of the one killed always stands by bitterly weeping her slain son or daughter. The elders will always keep her company in an effort to show kindness and affection and restrain her from excessive mourning which could otherwise provoke the close relatives of the slain into revenge. They also invite her to partake of the *opwut* reconciliation mix. Meanwhile the carcass of the sacrificial sheep is cooking on fire.

D. Consuming the liver of the sacrificial sheep

The liver of the two sheep is roasted, cut into pieces and put on the fresh hides of the slaughtered sheep and then eaten. Otim takes a piece of liver and feeds it into the mouth of the close relative of the slain Okeny who consumes it. Likewise the close relative of the slain takes a piece of liver and feeds it into the mouth of the killer who consumes it. The rest of the meat of the sheep is cooked for consumption.

E. Examination of and blessing the indemnity

Meanwhile the meat is cooking in the fire some elders come up to examine the indemnity which the family of the killer must pay to the family of the slain person. They are two fat and healthy cows which have become substitute of paying indemnity with a person namely a girl. When accepted, the elders bless the indemnity by smearing the chest of each person present with the content of the entrails of the sheep. The content is put on the chest of all persons present saying:

"Let these cows produce many and only female off-springs.
We all do mistakes,
May peace and calm now return among us".

E. Celebrating the reconciliation:

In this way reconciliation rite is accomplished. An older person begins to drum from the royal *bwola* drum. The women shout ululations and clan mottos while an old man drums. On hearing the drums sounded the people from all over the neighbourhood come and join in the happy dance and merry making. The feasting continues even for a second day when more bulls are slaughtered to feed the people who have witnessed the reconciliation.

(See The Uganda Coalition for the International Criminal Court's working paper; *Approaching National Reconciliation in Uganda; Perspectives on Applicable Justice systems* (2007).

[26] There may be variations in details of the reconciliation rite but essentially the rite includes purification, making confession, making compensation and finally coming together in a joyful celebration which must involve eating together from the same dish and drinking from the same calabash, but all of these activities

occur only after a person has admitted committing an offence. In the instant application, the applicant has not adverted to the question whether or not he admits having committed the offence. The application is completely silent on this perspective, yet it is what triggers the reconciliatory part of the process. He has only adverted to having made a genuine exposition of the events that led to the death of the accused. This creates a degree of scepticism regarding the genuineness of that process.

[27] On the other hand, despite the adoption of the Transitional Justice Policy, the traditional justice principles and processes have not been detailed and developed further. As a result, there may be a gap between the ideals or aspirations for restorative justice and actual practices. Without established rule-based safeguards or method of adjudication, during that process;- victims may attempt to shame the offender, the offender may be inhibited in his or her expression for fear of upsetting the victims, an offender may be dealt with in a harsh and discriminatory manner without recourse to any oversight organ, there are no mechanisms to address the concern that political, financial or other external influences may corrupt the process hence rendering such a process vulnerable to undue influences, distinctions along the lines of family, wealth or gender may play a greater role there than in the formal court system, lack of established enforcement measures, it may not have been fully scoured of inconsistencies with basic principles of human rights as to make it consistent with constitutional standards, it may not be possible to have equity or proportionality across outcomes, there is no procedure for transferring the case to the formal courts at the request of the accused, etc. In its current form, *mato oput* has no effective system of regulation and review in place. It is shrouded in legal ambiguity and as a result its interface with formal criminal justice is opaque.

[28] That aside, despite the extent to which the ceremony of *mato oput* has become known both inside and outside Uganda, its performance is relatively rare in contemporary Acholi, especially in the reintegration of former LRA combatants

(see Thomas Harlacher, Francis Xavier Okot, eta al; *Traditional ways of Coping in Acholi, Cultural provisions for reconciliation and healing from War*, (2006) Caritas Gulu Archdiocese). There is no empirical evidence, outside occasional anecdotal narratives, to support the effectiveness of that process.

[29] It is not in doubt though that traditional and informal actors rarely extend beyond their highly localised sphere of influence. Application of restorative justice approaches within the context of traditional justice thus rests on the assumption that there exists within the affected community adequate meso-social structures i.e. ordered sets of relationships, for example, residence, kinship, or lineage, that create the intra-societal power and coercion, which make dispute settlement possible. Secondly, it presupposes that the disputants are part of the same moral / social community. That they live in close proximity to one another or are related to one another, and typically wish to continue living in the community.

[30] In this application, *mato oput* has been romanticised as a kind of magic bullet to resolve virtually any type of crime. It is not clear though to this court as to how this traditional justice practice, that has hitherto been adopted in relatively tight-knit and inter-dependent social settings to limit revenge, to prevent blood feuds, to prevent inter and intra-tribal wars, to welcome former child combatants in post-conflict Northern Uganda back into their local communities, all being situations in which accountability, healing, and reconciliation is key for peaceful and harmonious reintegration and co-existence, can appropriately deal with ordinary crime allegedly committed hundreds of kilometres away, by persons who are not members of that local community.

[31] At the policy level, traditional criminal justice might serve as an alternative to formal criminal justice. In other cases, the two might work in a complementary manner with, for example, the former dealing with less serious offences, and the latter with more serious offences. Then again, traditional criminal justice might under certain circumstances serve to undermine formal criminal justice (and vice

versa) by proclaiming simultaneous jurisdiction and thereby confusing parties as to which is the appropriate forum. All these are policy considerations on which Parliament is yet to declare itself, yet the rule of thumb is that policy is a matter for the legislature and not for the courts, save in an area not covered by legislation in which the courts must revise old rules or formulate new ones. It is only in the latter situation that policy, in the sense of the motivating equitable and practical reasons behind the development of legal principles, legitimately plays a constant although usually imperceptible role in the decisional process.

[32] Courts apply pre-existing rules (statutes) formulated by Parliament and other legislative bodies. For practical purposes, all primary legislation and most secondary legislation is about giving effect to policies for change. But not all such change requires legislation. In applying legislation, courts must also interpret them, typically transforming the rules from generalities to specifics and sometimes filling gaps to cover situations never addressed by lawmakers when the legislation was first drafted. So long as human language remains imprecise and human capacity to predict the future limited, it will fall to judges to fill the gaps in the laws and rules. This though is not justification enough for transplanting policy into law or make decisions that virtually supplant the legislative enactments themselves. It is only when courts are confronted with a dispute for which there is no clear statutory answer, that they must render decisions in accordance with their own conceptions of justice, equity and good conscience (see section 14 (2) (c) of *The Judicature Act*). The bottom line though is that traditional justice should play a complementary role to the formal justice system, but not serve to displace, undermine or delay it.

[33] Legal systems cannot be built or sustained by reference only to generally expressed values. Neither, however, can they be built upon strict textually-rooted rules alone. It is in light of this that article 126 (1) of *The Constitution of the Republic of Uganda, 1995* requires courts to administer justice “in conformity with law and with the values, norms and aspirations of the people.” These values,

norms and aspirations find their expression not only in the formal law, but also in societal expectations, behaviour and actions (which may, in time, also come to be reflected or incorporated within the law, but which, in any event, do not require formal legal expression for society to understand their correctness or importance). The provision therefore is acknowledgement that although the law is stable, it cannot stand still. The essential purpose of this provision is to bring broader social interests affecting the public at large into judicial consideration, so as to harmonise the pursuit of individual rights with the needs of the entire community for whose interests the courts are viewed as guardian. It is a reminder to the courts regarding the importance of changing social conditions to their decisions.

[34] Although a court should not shrink from applying the values, norms and aspirations of the people to any new and extraordinary case that may arise, however, since minds could easily differ over the contents of such values, norms and aspirations, their identification and application cannot be based on pure judicial intuition. It brings to mind the proverbial metaphor of the "very unruly horse and when once astride it you never know where it will carry you" (see *Richardson v. Mellish (1824) 2 Bing 229*, per Burrough J., at 252; 130 E.R. 294 at 303). It would be wrong for a judge to set out in pursuit of a personal policy agenda and hang the law.

[35] There is an important balance to be struck. Values, norms and aspirations are not clearly identifiable separate entities, but expressions along a gradation of particularity. “The proper balance to be struck must recognise the requirement that rule and principle conform to moral standards as the gauge of the law’s flexibility and as its avenue for growth, and in order to accommodate changes in society’s conceptions of the application of unchanged values. The balance must also recognise the danger of absence of adequate rules that may confound law by a drift into a formless void of sentiment and intuition” (see Chief Justice of the Federal Court of Australia, James Allsop; *Values in Law: How they Influence and*

Shape Rules and the Application of Law, 2016 Hochelaga Lecture, Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong). Therefore, wherever existing legal authority proves inadequate, decisions ought to be based on sound legal principle and legal policy, because Law, at its very foundation, is conceived and derived from values.

[36] Moreover, any single constitutional right is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously to the general constitutional order. While article 28 (1) of *The Constitution of the Republic of Uganda, 1995* spells out specific legal principles, article 126 (2) (d) thereof states broad values and ideals, the application of which might make criminal law very uncertain, yet questions of legal right and liability should ordinarily be resolved by the application of the law and not the exercise of discretion. The court cannot resolve the issue at hand as a matter of judicial discretion. It would be contrary to the rule of law and contrary to the principles of legal certainty.

[37] The ideal of legal certainty has long shaped views of the judicial role. Courts should minimise the distress, uncertainty and confusion of parties affected by criminal law. Criminal law and procedure should be certain, so that it can be easily enforced and so that people can know where they stand. In the context of criminal trials, and particularly at the point of ascertaining criminal liability, it has thus been said that "the operation of the criminal law should be as certain as possible. If the interpretative choice is between making a value judgment and applying a rule, a court exercising criminal jurisdiction should prefer the rule" (see *Taikato v. The Queen [1996] HCA 28; 186 CLR 454 at 466* per Brennan CJ, Toohey, McHugh and Gummow JJ).

[38] International, regional and domestic instruments provide for fair trial guarantees in criminal cases. Whereas article 126 (2) (d) of *The Constitution of the Republic*

of Uganda, 1995 requires courts to promote reconciliation between parties when adjudicating cases of a criminal nature, this has to be done "subject to the law." In the instant case, asking court to defer to traditional justice mechanisms by advancing an argument largely premised on the court's duty to uphold the values, norms and aspirations of the people in the administration of justice, the applicant seeks to halt a trial that is at an advanced stage, a trial that is governed by well-established substantive and procedural laws, in preference for a reconciliatory traditional justice mechanism that currently has no regulatory framework for ensuring that it complies with domestic, regional and international human rights standards relating to criminal trials.

[39] The applicant has not produced any empirical evidence of the reconciliatory potential of *mato oput.* It has not been demonstrated that the applicant has the leverage nor that the persons in charge of the *mato oput* have the skills and clout necessary to curb an inclination to delay the process, when it arises. The process is not regulated by any laws, rules or standard guidelines and thus lacks proper mechanisms for accountability. Deferring the continuation of the trial to such a process would occasion a miscarriage of justice. That part of the argument fails.

vii. <u>Resort to plea bargaining as a justification for halting a criminal trial.</u>

[40] The most eminent explanation usually offered for the inevitability of plea bargaining is the theory of case load pressure. The idea is that plea bargaining is essential to clear case backlog without the enormous costs and delays which would be generated if the system relied on trial alone. *The Judicature (Plea Bargain) Rules, 2016* are primarily designed to obviate lengthy hearings thereby enabling our criminal justice system to cope with an ever increasing number of registered criminal cases and in order to avoid a growing backlog of pending cases. Plea bargaining was primarily instituted to decongest court and improve court efficiency, and has resulted in the reduction of cases aged over three years

old from 24% in 2017 to 17% in 2019 (see Uganda's Budget Speech, 2020, para. 24).

[41] Rule 3 of *The Judicature (Plea Bargain) Rules, 2016,* states the overall objectives of plea bargaining as being; - (a) to enhance the efficiency of the criminal justice system for the orderly, predictable, uniform, consistent and timely resolution of criminal matters; (b) to enable the accused and the prosecution in consultation with the victim, to reach an amicable agreement on an appropriate punishment; (c) to facilitate reduction in case backlog and prison congestion; (d) to provide quick relief from the anxiety of criminal prosecution; (e) to encourage accused persons to own up to their criminal responsibility; and (f) to involve the victim in the adjudication process.

[42] Rule 4 of *The Judicature (Plea Bargain) Rules, 2016* defines plea bargaining as the process between an accused person and the prosecution, in which the accused person agrees to plead guilty in exchange for an agreement by the prosecutor to drop one or more charges, reduce a charge to a less serious offence, or recommend a particular sentence acceptable to the accused subject to approval by Court. Sentence bargaining is a method of plea bargaining in which the prosecutor agrees to recommend a lighter sentence for specific charges if the accused pleads guilty or no contest to them. Charge bargaining is a method where prosecutors agree to drop some charges or reduce a charge to a less serious offence in exchange for a plea by the accused. In order for an agreement to plead guilty to be valid, the accused must (i) accept the plea bargain in full awareness of the facts of the case; (ii) accept the plea bargain with full awareness of the legal consequences; and (iii) accept the plea bargain in a genuinely voluntary manner. The bargain must not run counter to any important public interest.

[43] Plea bargains involve compromise, the accused agrees not to take his or her case to trial; the prosecution agrees to a less severe punishment than the law

might allow. Most plea negotiations are primarily discussions of the merits of the case, in which defence counsel point out legal, evidentiary, or practical weaknesses in the prosecution case, or mitigating circumstances that merit lenience, and argue based on these considerations that the accused is entitled to a more lenient disposition than that originally proposed by the seriousness of the offence charged. One needs though to analyse what exactly is traded off in the process.

[44] On the one hand, the prosecution stands to benefit in a number of ways, including; - the fact that prosecution resources do not allow for a high trial rate, a lightened caseload, assurance of a conviction since no case is a foregone conclusion, in return for damaging testimony against another accused, not having to deal with emotionally traumatised witnesses, etc. On the other hand, the accused stands to benefit by way of; having opportunity for a more lenient sentence than if convicted at trial, trade risk of chances of acquittal at trial for certainty, avoiding the stigma of a public trial and the attendant media attention, avoiding undue anxiety by resolving the issue as quickly as possible and moving on, avoiding expense and exposure that can be exceptionally draining on an accused since the longer a trial takes, the more expensive it tends to be, damning evidence is not disclosed, etc.

[45] One fact is assured in all cases; when the offence occurs, the facts are set and cannot change. It is only perspectives and interpretation of the facts that may vary as each side of the trial seeks to persuade the court to decide in its favour. It is thus understandable why in some cases plea bargains may be delayed until late during the course of the trial, as the accused seeks to test the prosecution version of the events to the maximum. This may change when the accused realises the prospects of his or her version succeeding are not as high as initially thought. At that point, a plea bargain may present the accused with the most advantageous way out. Regarding the timing of plea bargains, in *Inensiko Adams v. Uganda, H.C. Criminal Appeal No. 004 of 2017*, cited with approval in *Luwaga*

Suleman Alias Katongole v. Uganda, *C.A Criminal Appeal No. 858 of 2014*, it was stated that:

> "…ideally plea bargain should be at the time of plea taking to enable the state, the accused and defence counsel agree on amending the charge sheet or indictment where necessary with a view of dropping some counts if they are multiple, reducing the charge to a minor cognate offence, using accused as state witness or taking responsibility of the criminal conduct early enough etc. …..The court is obliged under the rules to embrace plea bargain any time before sentence when either party before it expresses interest in the process unless it is intended to pervert the cause of justice." (Emphasis added).

[46] *The Judicature (Plea Bargain) Rules, 2016* are necessarily predicated upon a determination that the constitutional right to a fair trial may be waived in exchange for inducements such as a reduction in the charge or sentence. While the objectives of plea bargaining envisage the right of the accused to a speedy trial, plea bargaining raises a general concern as to whether the accused enters into a plea bargain and pleads guilty to the charged offence voluntarily or not. Without a fact-finding or investigating mechanism, the process is essentially concerned with what the outcome should be after a person has admitted committing an offence, rather than address the question whether the accused is "guilty" of the crime or not.

[47] A guilty plea thus is not equivalent to a confession. The reasons people plead guilty after plea bargaining are numerous, and actual guilt may or may not have a bearing on the decision to plea bargain. Even an innocent accused person may rationally prefer a specified lenient sentence to the risk of a much harsher sentence resulting from a wrongful conviction at trial. It is thus not inconceivable that some accused may in some cases enter into plea bargaining involuntarily, primarily due to insurmountable coercive circumstances they might be going through at the time, such as the pursuit of expedited release or escape from pre-trial indeterminate detention, among others.

[48] By entering a plea of guilty, the accused forfeits a broad range of potential legal and constitutional procedural safeguards that would otherwise have been available had the case gone to trial. All attributes of the right to a fair trial are equally important and are non-severable from each other. The accused cannot bargain away or waive some of the attributes. When an accused has solemnly admitted in open court that he or she is in fact guilty of the offence with which he or she is charged, he or she may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

[49] Since all attributes of the right to a fair trial are equally important and are non-severable from each other, the timing of a plea bargain becomes of crucial importance. Before the trial commences, waiver of the right would potentially attract a reduction in the charge or sentence, or both. From the outset, the accused chooses to plead guilty pursuant to a plea agreement in which he or she trades off his or her full package of trial rights for a reduction in the charge or for a reduced sentence for forfeiture of his or her rights guaranteed during the fact-finding phase of the criminal process. After the trial begins, all procedural attributes of the fair trial right kick in and theoretically are no longer part of the negotiation.

[50] After the trial has begun, the rights guaranteed to an accused during the fact-finding phase of the criminal process can only be terminated by a change of plea; thereafter the scope of negotiation is restricted to determination of the appropriate penalty (or post-penalty), not a discussion of any of the rights accorded during the fact-finding phase of the criminal process. Although Rule 5 of *The Judicature (Plea Bargain) Rules, 2016,* states that a plea bargain may be initiated at any stage of the proceedings, before sentence is passed, yet on the other hand Rule 8 (3) of the Rules requires a judicial officer who has participated in a failed plea bargain negotiation to recuse him or herself from the trial.

[51] When the two provisions are read together, they open up an infinite number of potential bargaining options and outcomes throughout all stages of the trial. Unless regulated by court, the assortment of concessions that could be offered by an accused in return for a sentencing or charging consideration would be virtually unlimited and open to abuse. Ridiculous proposals could be made with the sinister motive of forum shopping and frustration of the trial. The potential for abuse can be mitigated in a number of ways though.

[52] Firstly, since a guilty plea is not equivalent to a confession, a judicial officer who has participated in a failed plea bargain negotiation in which he or she has not become privy to facts relating to the actual guilt of the accused in circumstances akin to a confession, need not recuse him or herself from the trial.

[53] Secondly, it is the trial rather than plea bargaining that is the official baseline system proclaimed in the Constitution as the mode of resolving criminal cases. Plea bargaining is best seen as complementary and not an alternative to a trial system. Since plea bargaining primarily aims to end the trial for the accused by prioritising its procedural expediency, the process of plea bargaining should not result in prolonging the trial but should rather abridge it. Resort to plea bargaining should therefore only be considered if the time required to conclude it is shorter than the time it would otherwise take to conclude the trial. In the instant case, the trial can be concluded within five days of day-today sittings, yet the applicant seeks a more than two months' adjournment to plea bargain. The request runs counter to objectives (c) and (d) of the Rules which aim to facilitate reduction in case backlog and prison congestion and to provide quick relief from the anxiety of criminal prosecution.

[54] Thirdly, a party who elects to plea bargain after commencement of the trial ought to come with bona fide reasons to condone the delay. If electing to plea bargain necessitates an adjournment as a result of a lack of diligence on the part of the

party requesting it, the court may be justified in refusing to grant the adjournment if doing so will only result in prolonging the trial unnecessarily.

[55] It is the duty of court to balance public interest in the efficient administration of criminal justice against the individual's constitutional rights. The court has to strike a balance between the interests of the applicant, that of avoiding unnecessary delay relating to the trial of the rest of the accused and the public interest in the efficient allocation of judicial resources, consistency of verdicts, convenience of witnesses and finality of litigation. There is a distinction though between expeditiousness and expedience. The court accepts that as between a speedy trial and an equitable trial preference should be given to the latter. But the two are not necessarily opposed to each other: a trial is inequitable if it is too long drawn out. Speed, in the sense of expeditiousness, is an element of an equitable trial. The aspiration must be for a system where it is exceptional for a case whose trial has begun and progressed this far, to have its progression suddenly halted to enable the accused make up his or her mind as to whether or not he or she should plea bargain. Allowing this application in the circumstances of this particular case would be tantamount to deferring to expedience at the expense of expeditiousness.

[56] Since plea bargaining is a voluntary process, there is little doubt that one or both parties can exert enough control over the process to slow it down. A party may have a variety of reasons for doing so. If the parties are left to their design, the plea bargaining process may be an avenue to the eventual failure of a trial. Although the court accepts that making up one’s mind whether to plea bargain or not can reasonably require a lengthy period of time, every effort should be made to bring cases to trial as expeditiously as possible. Consequently, adjourning a trial that has advanced this much, in which the prosecution is almost closing its case, for purposes of enabling the accused decide when and on what terms he will negotiate a plea bargain more than month into the future, should occur in very exceptional and rare cases.

[57] It is not in doubt that the processes used to achieve the restorative justice objective can intersect with the formal criminal justice system or institutions in a number of ways. The minimum elements of a restorative justice require a process in which the victims and their offender(s) meet face-to-face and that they come to some understanding, which constitutes the outcome that they have determined, currently it is primarily through plea bargaining.

[58] However, Article 21 (1) of *The Constitution of the Republic of Uganda, 1995* stipulates that all persons are equal before and under the law. Principle 5 of *The Uganda Code of Judicial Conduct, 2003* requires judicial officers to accord equal treatment to all persons who appear in court, without distinction on unjust discrimination. As the words of the judicial oath make it clear, the principles of exercising equality and fairness of treatment have always been fundamental to the role and conduct of judicial officers. The equality duty requires judicial officers, in the exercise of their functions, to avoid inequitable devotion of the resources available to court, to individual cases at the expense of others. Resource allocation is a key factor that projects the perceived fairness of, equality and efficiency of the criminal justice system.

[59] The court should not only have regard to the interests of the litigants, but should also take into account the effect of an adjournment on court resources, and the public interest in achieving the most efficient use of court resources. Decisions on applications for adjournment call for the court's consideration of the promotion of judicial economy in which efficiency and equity are often inextricably related. Faced with time and other resource limitations, the court should not disproportionately devote more time and other resources than is absolutely necessary to the trial of a single case, at the expense of multiple others in waiting. One of the biggest contributors to delays is the number of procedural matters requiring the court's intervention that take up valuable court time and other judicial resources.

[60] The ideal in the management of case progression is reflected in section 122 of *The Magistrates Courts Act* which states that "….when the hearing of evidence has first begun the trial shall be continued from day-to-day until the trial is concluded, unless the court finds the adjournment of the trial beyond the following day to be necessary…" There is no doubt that lengthy delays can give rise to serious questions regarding fairness to the accused. Therefore, the continued momentum of the case needs to be maintained, especially at this critical stage, which requires strong judicial intervention. Case management and progression requires that the court ought not to be unjustifiably diverted to focus on activities and processes occurring outside the courtroom.

[61] It is not in doubt that an accused cannot be blamed for trying to take full advantage of the resources afforded by the law in their defence as long as his or her conduct is not obstructive. Although the court should not presume that an application for adjournment is made with the design to deliberately delay the trial or on account of *mala fides*, however a relatively belated application for adjournment in order to consider the possibility of an election to plea bargain raises concerns of a possible abuse of the process by using it as a delaying tactic. It has been in the past a not uncommon practice for persons charged with criminal offences to attempt to put off the evil day for as long as possible, first by seeking adjournments of the trial and later, by constitutional references and petitions coupled with orders of suspension of the trial.

[62] A delaying tactic is any reason or excuse given to intentionally prevent a trial from proceeding at an ideal pace. The usual purpose of delaying tactics is to postpone the resolution of the case or to confuse the court about the merits of the case, or trigger a reason for its eventual stay. Because delaying tactics are contrary to one of the goals of a trial (an expeditious resolution of the case), they tend to be perceived negatively. By prolonging the process, they increase costs and expenses and often the anxiety of all participants. When delaying tactics are used, there is usually little doubt of their occurrence.

[63] Most of the time, a party who seeks a delay will file an unnecessary motion raising one or more legal or procedural issues, or fail to comply with a deadline set by court. The court must then rule on the motion or address the noncompliance before the process can continue. It is also not uncommon for such a party to change counsel at the eve of the hearing, to file constitutional references and petitions. Some of these occurrences have already manifested themselves in the current proceedings as a result of which the case has traversed three previous sessions and now threatens to spill over into a fourth, yet during that time, multitudes of other cases of a similar import have been decided by this court. It should be a very exceptional reason that would justify the kind of adjournment sought.

[64] It is important to remember that the duty of the court is to ensure that a party is given a reasonable opportunity to prepare his or her case. The court has no duty of ensuring that a party takes the best advantage of the opportunity to which he is entitled (see *Sullivan v. Department of Transport (1978) 20 ALR 323*). Justice delayed is justice denied. Lengthy trials and multiple adjournments are particularly hard on victims and their families, as well as on accused persons, whose stress can be worsened as the time between the laying of charges and the end of the trial stretches out month after month or year after year.

[65] When these delays become very lengthy, the court may find that the accused's constitutional right to a speedy trial (as guaranteed by article 28 (1) of *The Constitution of the Republic of Uganda, 1995*) has been breached. If this happens, the only judicial remedy available in Uganda is an order for a stay of proceedings (see *Uganda v. Shabahuria Matia, H. C. Criminal Revisional Cause No. Msk-00-CR-0005 of 1999 (unreported)*, which ends the process without a completed trial on the merits of the case. Stays can have a harsh impact on victims and affect public confidence in the criminal justice system. When stays are granted in cases involving allegations of serious criminal offences, such as murder, it shocks the conscience of the rightful thinking members of society.

They represent a failure to properly prosecute crimes and thereby protect our society. The reputation of our criminal justice system is at stake.

[66] The right to an expeditious trial as a right guaranteed to all accused by article 28 (1) of *The Constitution of the Republic of Uganda, 1995* is of paramount consideration for the court in balancing whether or not to proceed. Decisions that improperly or unjustifiably prolong the trial should be avoided. Thus the trial court's duty to ensure the fairness and expeditiousness of the trial proceedings entails a delicate balancing of interests, including the public's and victims' interests in seeing a trial on the merits of the case, and that of the accused to a speedy and equitable trial, particularly in cases, as in the present one, where there is more than one accused person. In joint trials, each accused is accorded the same rights as if he or she were being tried separately. An adjournment of the nature proposed would prejudice the co-accused who does not stand to benefit at all from that process, by exerting undue emotional and mental stress from having the charges hanging over her for so long.

[67] Furthermore, the pace of the trial is largely determined by the size (in terms of number of accused, the quantity of evidence and witnesses involved) and the complexity of the facts and of the law. This is not a particularly complex case in light of the number of counts, allegations, and nature of the crime charged such that the prosecution was able to present almost all its witnesses at twelve sittings; as follows;- 8th January, 2020 - 4 witnesses; 9th January, 2020 – 1 witness; 4th February, 2020 – 2 witnesses; 6th February, 2020 – 2 witnesses; 11th February, 2020 – continuation with the testimony of P.W.9; 12th February, 2020 – 1 witness; 13th February, 2020 – 1 witness; 14th February, 2020 – continuation with the testimony of P.W.11; 18th February, 2020 – a trial within a trial involving – 4 witnesses; 19th February, 2020 – continuation with the testimony of P.W.11; 20th February, 2020 – 1 witness; 21st February, 2020 – 1 witness.

[68] The majority of the prosecution witnesses have given relatively short, uncomplicated testimony. Given that the prosecution is left with one or two witnesses to close its case, the adjournment sought will lead to an unduly prolonged trial in violation of the right of both accused to a fair and speedy trial. The extent of the proposed period of trial delay disproportionately exceeds the time reasonable for a case of such a relatively limited scope and scale as to constitute prejudice. In light of the right to a fair hearing, which right is non-derogable, a trial is not a measure of last resort.

Order:

[69] In the circumstances of this case, the court is not satisfied that the applicant's intention to plea-bargain upon conclusion of the on-going process of *mato oput*, which is speculatively expected to be concluded before the end of December, 2020 in light of the inevitable indeterminate delay that will be occasioned by the adjournment or suspension sought, is sufficient to outweigh the constitutional right of the accused to an expeditious trial. The application is accordingly dismissed;

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Stephen Mubiru

Session Judge

Appearances

For the Applicant : Mr. Kabega MacDusman, Mr. Caleb Alaka and Mr. Evans Ochieng.

For the Respondent : Mr. Jonathan Muwaganya, CSA and Ms. Anna Kiiza, CSA.