

The Accused's Right to be Tried in his/her Presence in Africa: Understanding the Constitutions of Different African Countries in the Light of Article 7(1)(c) of the African Charter on Human and Peoples' Rights

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Abstract

The African Charter on Human and Peoples' Rights does not provide for the accused's right to be tried in his/her presence. Article 7(1)(c) of the African Charter provides that an accused has 'the right to defence, including the right to be defended by counsel of their choice.' Article 7(1)(c) of the African Charter should be compared to Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) which provides that an accused has a right '[t]o be tried in his presence, and to defend himself in person or through legal assistance.' However, the African Court of Human and Peoples' Rights invoked Article 14(3)(d) of the ICCPR and jurisprudence from, *inter alia*, the Human Rights Committee, to hold that Article 7(1)(c) of the African Charter also provides for the accused's right to be tried in his or her presence. In some African countries, the constitutions explicitly provide for the accused's right to be tried in his/her presence, but the constitutions of the majority of African countries do not. These constitutions do, however, provide for the accused's right to defence. In a few African countries, the constitutions neither provide for the accused's right to defence nor the right to be tried in their presence. In this article the author argues, *inter alia*, that an accused has a right to be present at his or her trial even in countries where the constitutions are silent on this right. The author also highlights the circumstance in which an accused's trial may take place in his or her absence under the ICCPR, the African Charter and in different African countries.

Keywords: Presence at Trial; Absentia; Article 17(1)(c) of the African Charter; Article 14(3)(d) of the ICCPR; Re-trial; Constitution

Introduction

The African Charter on Human and Peoples' Rights (1981) does not provide for the accused's right to be tried in his/her presence. Article 7(1)(c) of the African Charter provides that an accused has 'the right to defence, including the right to be defended by counsel of his choice.' Article 7(1)(c) of the African Charter should be contrasted with Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR)(1966) which provides that an accused has a right

[t]o be tried in his presence, and to defend himself in person or through legal assistance' and where he cannot afford a lawyer, the right to free legal assistance at the expense of the state where the interests of justice so require.

In General Comment No. 32 (on Article 14), the Human Rights Committee observed that Article 14(3)(d) provides for three different rights. The first right is that 'accused persons are entitled to be present during their trial.'¹ Secondly, all accused persons have a right 'to defend themselves in person or through legal counsel of their own choosing and to be informed of this right.'² And finally, 'the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it.'

Although the African Charter is silent on the accused's right to be tried in his/her presence, the African Court of Human and Peoples' Rights has invoked Article 14(3)(d) of the ICCPR and jurisprudence from, *inter alia*, the Human Rights Committee, to hold that Article 7(1)(c) of the African Charter also provides for the accused's right to be tried in his or her presence. A study of the constitutions of all the African countries shows that they have adopted different approaches on the accused's right to be tried in his/her presence. The first approach, which is found in the constitutions of the majority of African countries, is to provide for the accused's right to defence without expressly mentioning the right to be present during their trial. The second approach is to expressly provide for the accused's right to be present at their trial. The third approach is for the constitutions to be silent on the right to defence and the right to be present during trial. In this article, it is argued, based on the jurisprudence of the African Court of Human and Peoples' Rights and the drafting history of Article 14(3)(d) of the ICCPR, that even in countries where the accused's right to be present at their trial is not explicitly mentioned in the constitutions, this right can be inferred from the right to defence. This article will start with a discussion of the right to be tried in one's presence under Article 14(3)(d) of the ICCPR and Article 7(1)(c) of the African Charter. The author will also discuss the circumstances in which an accused's trial may take place in absentia.

1 Human Rights Committee General Comment No 32 (23 Aug. 2007) (Art 14, Right to equality before courts and tribunals and to fair trial) (CCPR/C/GC/32) para 36.

2 *ibid* para 37.

The Accused's Trial in his Presence and in Absentia under the ICCPR and the African Charter

Since most African states have ratified the International Covenant on Civil and Political Rights³ and the African Charter on Human and Peoples' Rights,⁴ it is important to discuss how these instruments deal with the accused's right to be tried in his/her presence.⁵ The accused's right to be tried while present, is guaranteed under Article 14(3)(d) of the ICCPR. It is to the effect that an accused has a right:

To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

It is important to take a look at the drafting history of Article 14(3)(d) before demonstrating how the Human Rights Committee has interpreted this provision. The initial draft of the ICCPR did not include the accused's right to be tried in his/her presence. It provided that everyone charged with a penal offence has a right:

To defend himself in person or through legal assistance which shall include the right to legal assistance of his own choosing, or, if he does not have such, to be informed of his right and, if unobtainable by him, to have legal assistance assigned.⁶

As a result, when the Secretary-General of the United Nations called upon states to submit their written comments on the entire draft of the ICCPR, although different states suggested ways in which Article 14 could be amended, none suggested any amendment to Article 14(3)(d) as reproduced above.⁷ It was only later during the drafting of the ICCPR that the representative of Israel suggested that the accused's right to be present

3 With the exception of the Comoros, which signed but not yet ratified the ICCPR, all African countries have ratified the ICCPR. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 09 June 2021).

4 With the exception of Morocco, all African countries have ratified the African Charter on Human and Peoples' Rights.

5 Universal Declaration of Human Rights (1948) Art 11(1) provides that 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.'

6 Commission on Human Rights, Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles (Memorandum by the Secretary-General, 6th Session,) E/CN.4/365 (23 March 1950) 37.

7 *ibid* 37–41 (the six countries that suggested amendments to the draft Article 14 were: France, the Netherlands, Denmark, Philippines, United Kingdom, and the United States of America).

during his/her trial should be explicitly provided for in the ICCPR 'as it was essential to a fair trial.'⁸

The amendment by the Israel delegate was supported by the representative of Ceylon who submitted that '[t]he right of everyone charged with a criminal offence to be tried in his presence was very important, and the Israel amendment...to paragraph 2 (c) was fully justified.'⁹ Likewise, the representative of Burma (now Myanmar) also supported the Israel amendment because in her country '[a] person charged with a criminal offence was presumed innocent until he was proved guilty and the trial always took place in the presence of the accused.'¹⁰ The representative of the United Kingdom also supported the Israel amendment because '[t]he requirement that a person should be tried in his presence was fully in conformity with United Kingdom Law.'¹¹ It is thus evident that the amendment to explicitly mention the accused's right to be tried in his/her absence was not opposed by any state representative. Another issue which arose, albeit indirectly, during the drafting of Article 14(3)(d) was whether the accused's right to be present during his/her trial was absolute. In other words, were there circumstances in which the trial could take place in absentia? In his support for the Israel amendment, the Venezuelan representative submitted that the Israel amendment that an accused has a right to be tried in his/her presence was not conveyed in the Spanish text as '[t]he Spanish text implied that the person concerned had to be present at every phase of the proceedings, which was not necessarily the case.'¹²

Implied in this reasoning is that one of the drafters of Article 14(3)(d) contemplated circumstances in which a person's trial could take place in his/her absence. However, these circumstances were not elaborated upon. The amendment by Israel to insert the words 'to be tried in his presence' was adopted by 43 votes to 11, with 15 abstentions¹³ and it would later be included in the final draft of the ICCPR.¹⁴ The *travaux préparatoires* of the ICCPR are silent on the reasons why some state delegates voted against the amendment or abstained from voting. However, what is indisputable is that the vast majority of state delegates voted in favour of the amendment. Apart from the Venezuelan submission above, the drafting history of Article 14 is silent on the

8 UNGA AC-3 SR-961 (19 November 1959) 961st Meeting of the Third Committee para 13.

9 *ibid* para 5.

10 UNGA AC-3 SR-963 (20 November 1959) 963rd Meeting of the Third Committee para 1.

11 *ibid* para 31.

12 *ibid* para 13.

13 UNGA A/4299 (3 December 1959) Report of the Third Committee, Draft International Covenants on Human Rights 14th session 20.

14 See generally, UNGA Text of articles adopted by the Third Committee 17th session, Draft International Covenants on Human Rights 16th (25 September 1962) A/C.3/L.978; UNGA Draft International Covenants on Human Rights Third Committee 18th session Third Committee (24 September 1961) Text of articles adopted by the Third Committee at the 10th to 17th sessions A/C.3/L.1062; UNGA Draft International Covenants on Human Rights (note by the Secretary General) (20 May 1964) A/5705.

delegates' views on whether there are circumstances in which a person's trial may take place in his or her absence. Put differently, the drafting history of Article 14 is silent on whether the accused's right to be tried in his/her presence is absolute. This question has been answered by the Human Rights Committee.

In its General Comment on Article 14, the Human Rights Committee explained that as a general rule, the accused's trial should take place in his/her presence. However, the Committee also explained the circumstances in which a person's trial can take place in their absence. Thus, the Committee stated that Article 14(3)(d) requires, *inter alia*, that

[A]ccused persons are entitled to be present during their trial. Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.¹⁵

The Committee explained further that the right against double jeopardy under Article 14(7) of the ICCPR¹⁶ 'does not prohibit retrial of a person convicted in absentia who requests it, but applies to the second conviction.'¹⁷ It is thus evident that according to the Human Rights Committee, the accused's right to be tried in his/her presence is not absolute.

As is the case with the ICCPR, the African Charter on Human and Peoples' Rights provides for the right to a fair trial. Thus, Article 7(1) of the African Charter provides

15 General Comment No 32 (n 2) para 36. See also para 31 where the Committee emphasised that '[i]n the case of trials in absentia, article 14, paragraph 3 (a) requires that, notwithstanding the absence of the accused, all due steps have been taken to inform accused persons of the charges and to notify them of the proceedings.' The Committee also requires that in cases of trial in absentia, either the accused or his/her family should be informed of the date and place of the trial and 'request his attendance.' See for example, *Mukhammed Salikh (Salai Madaminov) v Uzbekistan* [2009] UNHRC 112; CCPR/C/95/D/1382/2005 (22 April 2009) para 9.4; *Ivan Osiyuk v Belarus* [2009] UNHRC 15; CCPR/C/96/D/1311/2004 (25 August 2009) para 8.2. Trials before the International Criminal Court should, as a general rule, take place in the presence of the accused. Article 63 of the Rome Statute of the International Criminal Court (1998) provides that '(1) The accused shall be present during the trial. (2) If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.'

16 Article 14(7) provides that 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'

17 General Comment No 32 (n 2) para 54.

that the right to a fair trial includes ‘the right to defence, including the right to be defended by counsel of his choice.’¹⁸

Unlike Article 14(3)(d) of the ICCPR, Article 7(1)(c) of the African Charter does not explicitly provide for the accused’s right to be tried in his/her presence. However, it provides for the accused’s ‘right to defence, including the right to be defended by counsel of his choice.’ Likewise, the African Charter on the Rights and Welfare of the Child provides for the right to defence but is silent on the right to be tried in one’s presence.¹⁹ The question that one has to answer is whether the right to defence is the same thing as the right to be present during one’s trial. To answer this question, one may have to resort to the drafting history of Article 14(3)(d) of the ICCPR. It has been illustrated above that the initial draft of the ICCPR did not explicitly provide for the accused’s right to be tried in his absence. In his motivation to amend the initial draft and explicitly provide for the accused’s right to be tried in his presence, the Israel representative argued, *inter alia*, that the accused’s right to be present at his or her trial was implied in their right to defence. Based on that submission, it can be argued that the right to be present during one’s trial is implied in the right to defence under Article 7 of the African Charter. Logically, a person is expected to be present at his/her trial to be able to defend him or herself. That discussion aside, there is jurisprudence from African human rights bodies dealing with the accused’s right to be tried in his or her presence.

Although there are cases in which the African Commission on Human and Peoples’ Rights has dealt with the right to defence generally,²⁰ it has also held that the accused’s right to be present at his/her trial is implied in the right to defence under Article 7(1)(c)

¹⁸ Article 7(1)(c).

¹⁹ Article 17(2)(c)(iii) provides that states parties shall ensure that every child ‘shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence.’

²⁰ In *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*, (Communication No 105/93, 128/94, 130/94, 152/96) (31 October 1998) para 88, the African Commission held that to be denied access to a lawyer is a violation of Article 7(1)(c). The African Commission also held that refusing an accused the right to be represented by a lawyer of his choice violates Article 7(1)(c), see *Law Office of Ghazi Suleiman v Sudan* (Communication No 222/98, 229/99) (29 May 2003) paras 59–60 (and the decisions discussed therein). In *Okiring & Anor v Republic of Uganda* (Communication 339/2007) [2018] ACHPR 133; (28 APRIL 2018) paras 132–135, the Commission held, *inter alia*, that the intimidation of lawyers by state security agents and the denial of the accused of the right to a violation amounted to violations the right to defence under Article 7(1)(c). In *Achutan and Others v Malawi* (Communication No. 64/92, 68/92, 78/92) [1994] ACHPR 10; (27 April 1994) para 10, the Commission held that the trial of the applicants before a traditional court where they were denied their right to counsel violated Article 7(1)(c). In *Centre for Free Speech v Nigeria* (Communication No 206/97) [1999] ACHPR 4; (15 November 1999) para 14, the Commission held that denying the applicant the right to communicate with his lawyer in confidence was a violation of Art 7(1)(c). In *Civil Liberties Organization and Others v Nigeria* (Communication No 218/98) [2001] ACHPR 30; (7 May 2001) para 31, the Commission held that the imposition of state lawyers on the accused violated their right to be represented by counsel of their choice.

of the African Charter on Human and Peoples' Rights.²¹ However, the African Commission is yet to deal with a communication explaining the circumstances in which an accused's trial can take place in absentia. Nonetheless, the African Commission has held that the accused's right to defence generally and the right to call witnesses in particular is not absolute and can be limited by a recognised ground under customary international law.²²

The African Court of Human and Peoples' Rights has also dealt with the meaning of the right to defence under Article 7(1)(c) generally²³ and accused's right to be present

21 In *Avocats Sans Frontiers v Burundi* (Communication No 231/99) [2000] ACHPR 21 (6 November 2000) para 28, the African Commission held that 'The right to defence also implies that at each stage of the criminal proceedings, the accused and his counsel be able to reply to the indictment of the public prosecutor and in any case, to be the last to intervene before the court retires for deliberations.' In *Tsikata v Ghana* (Communication No 322/2006) [2014] ACHPR 2 (14 October 2014) para 138, the African Commission held that the right to defence 'entails that the accused must be permitted by law and in practice to call the necessary witnesses and produce relevant documents or other evidence to advance his or her defence.' In *Constitutional Rights Project v Nigeria* (Communication No 143/95, 150/96) [1999] ACHPR 7; (15 November 1999) para 29, the African Commission held that detaining an individual incommunicado without access to a lawyer is contrary to Article 7(1)(c).

22 *Tsikata* case (n 21) para 145.

23 In *Abubakari v Tanzania*, Judgment, 007/2013 (ACtHPR, Jun. 03, 2016) para 121, the Court referred to the jurisprudence of the African Commission and held that the 'fact of not having access to a lawyer for a long period after arrest affects the victims' ability to effectively defend themselves, and constitutes a violation of Article 7(1)(c) of the Charter.' In *Mango v Tanzania*, Judgment, 005/2015 (ACtHPR, May. 11, 2018) paras 86–87, the Court held that failure by the state to provide free legal representation to an accused who is being prosecuted for a serious offence that attracts a heavy sentence is a violation of Article 7(1)(c). See also *Onyango v Tanzania*, Judgment, 006/2013 (ACtHPR, Mar. 18, 2016) 162 – 184; *Ivan v United Republic of Tanzania* (Application No 025/2016) [2019] AFCHPR 3; (28 March 2019) para 83; *Evarist v Tanzania* (027/2015) [2018] AFCHPR 12; (21 September 2018) paras 68 - 70; *Amir & Anor v Tanzania* (Application No 014/2015) [2019] AFCHPR 11; (28 November 2019); *Nganyi & Others v Tanzania* (006/2013) [2018] AFCHPR 36; (1 January 2013); *Goa Alias Vedastus v Tanzania* (Application No 025/2015) [2019] AFCHPR 20; (26 September 2019); *Amini Juma v Tanzania* (Application No 024/2016)(30 September 2021) para 90; *Ladislaus Onesmo v Tanzania* (Application No 047/2016)(30 September 2021) paras 66–71; *Bernard Balele v Tanzania* (Application No 026/2016)(30 September 2021) para 103; *Chrizostom Benyoma v Tanzania* (Application No 001/2016) (30 September 2021) para 95; *Sadick Marwa Kisase v Tanzania* (Application No 005/2016) (2 December 2021) para 77; *Hamis Shaban alias Hamis Ustadh v Tanzania* (Application No 026/2015) (2 December 2021) para 90; *Mhina Zuberi v Tanzania* (Application No 054/2016) (26 February 2021) para 61 (in which the Court interpreted Article 7(1)(c) of the African Charter and in the light of Article 14(3)(d) of the ICCPR and held that a person accused of committing a serious offence has a right to free legal representation and he/she does not have to apply for it). In *William v Tanzania* (016/2016) [2018] AFCHPR 13 (21 September 2018) para 62, the Court held that '[t]he right to effective defence includes, *inter alia*, the right to call witnesses for the defence.' The accused's right to free legal presentation is applicable not only during his trial but also during appeals before all appellate courts, *Mussa Zanzibar v Tanzania* (Application No 022/2016) (26 February 2021) para 73. See also *Guehi v United Republic of Tanzania* (Republic of Côte D'Ivoire Intervening) (Application No 001/2015) [2018] AFCHPR 7 (7 December 2018) (the right to defence includes the right to an interpreter if the accused does not understand the language

during his/her trial in particular. Because this court has dealt with the question of the accused's right to be tried in his/her presence comprehensively in one of its judgements, it is important to highlight the facts and that judgment in detail, as it explains how courts in African countries are expected to interpret the accused's right to be present during his/her trial.

In *Thomas v Tanzania*,²⁴ the applicant was convicted of armed robbery and sentenced to thirty years' imprisonment. The prosecution's case against him was heard in his presence. However, he was not present to conduct his defence.²⁵ Because of the applicant's absence, the prosecution applied to the magistrate to continue with the trial in his absence and also issued a warrant for the applicant's arrest for skipping bail.²⁶ This was the case although the applicant had been granted bail because of ill-health and his trial in absentia took place while he was hospitalised. The magistrate invoked section 226 of the Criminal Procedure Act which provides for trials in absentia.²⁷ His appeal against the conviction and sentence was dismissed by the High Court when it found that 'the Applicant did not appear when the case was fixed for the defence, he cannot blame the trial court for convicting him in absentia, on the strength of the prosecution's case.'²⁸ His appeal to the Court of Appeal was also dismissed.²⁹ This meant that he had exhausted the local remedies and therefore proceeded to the African Court of Human and Peoples' Rights. Before the African Court, the applicant argued that his trial had been contrary to Article 7 of the African Charter because, inter alia, 'he was not given the opportunity to present his defence.'³⁰ He added that 'he was denied the right to be heard and to defend himself because the trial court proceeded to hear the case in his absence.'³¹ He argued further that 'even after he was convicted in absentia, he was not allowed to provide the trial court with reasons for his absence' contrary to section 226

of the proceeding and the right to access consular services for foreign nationals); *Yahaya Zumo Makame And 3 Others v United Republic of Tanzania* (Application No 023/2016)(25 June 2021) para 90–91 (the right to defence includes the right to an interpreter). In *Evodius Rutechura v United Republic of Tanzania* (Application No 004/2016 (26 February 2021) para 73 the Court referred to Article 7(1)(c) and to the jurisprudence of the European Court of Human Rights and held that 'the right to be defended by counsel of one's choice is not absolute when the counsel is provided through a free legal assistance scheme. In this circumstance, the important consideration is whether the accused was given effective legal representation rather than whether he or she was allowed to be represented by a lawyer of their own choosing.' In *Léon Mugesera v Rwanda* (Application No 012/2017) (27 November 2020) para 58, the Court held that for the accused to be entitled to free legal representation, he/she must prove that he/she 'does not have the necessary means to pay for his own counsel.'

24 *Thomas v Tanzania* (001/2017) [2018] AFCHPR 22; (20 November 2015).

25 *ibid* para 25.

26 *ibid*.

27 *ibid* para 26.

28 *ibid* para 27.

29 *ibid* para 28–33.

30 *ibid* para 42.

31 *ibid* para 81.

of the Criminal Procedure Act.³² In reply, the respondent argued that the applicant's trial in absentia was in line with section 226 of the Criminal Procedure Act as he had no justifiable reason for his absence.³³

In resolving this issue, the court referred to Article 7(1)(c) of the African Charter and to Article 7 of its establishing Protocol. The latter provides that '[t]he Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the State concerned.' The court held that because Tanzania had ratified the ICCPR, 'in accordance with Article 7 of the Protocol, the Court can interpret Article 7(1)(c) of the Charter in light of the provisions of Article 14(3)(d) of the ICCPR.'³⁴ The court observed that 'Article 14(3)(d) of the ICCPR is more elaborate than Article 7(1)(c) of the Charter'³⁵ and explained the three different rights guaranteed under Article 14(3)(d).³⁶ Against that background, the court held that:

Article 7(1)(c) of the Charter and Article 14(3)(d) of the ICCPR required that the Applicant be present to defend himself. The Applicant was not physically able to defend himself during the hearing of [his case] ... as he had been granted bail by the trial magistrate on grounds of ill health and, according to the trial record, had been admitted to hospital at the time the defence was making its case on 24 and 25 June 1997.³⁷

The court added that there was compelling evidence to show that the magistrate was aware of the applicant's ill-health at the time of the trial in absentia.³⁸ It held further that:

Given the serious nature of the offence that the Applicant had been charged with, the fact that the magistrate had granted the Applicant bail on the basis of his serious ill health and that he was unrepresented, warranted the Court to have more consideration for the Applicant and adjourn the proceedings to give him the opportunity to defend himself.³⁹

The court referred to the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights to the effect that the accused's right to be present during his/her trial is a very important component of the right to a fair trial.⁴⁰ Against that background, the court held, unanimously, that Tanzania had violated

32 *ibid.*

33 *ibid* para 83–84.

34 *ibid* para 88.

35 *ibid* para 89.

36 *ibid* para 90.

37 *ibid* para 91.

38 *ibid* para 92 and 94.

39 *ibid* para 93.

40 *ibid* para 97–98.

Article 7(1)(c) of the African Charter and Article 14(3)(d) of the ICCPR because ‘the Applicant was denied the right to be heard and to defend himself.’⁴¹

This judgment raises a few important issues that should be emphasised. Firstly, the court relied on both Article 14(3)(d) of the ICCPR and Article 7(1)(c) of the African Charter to hold that the accused had a right to be present during his trial. This creates room for the argument that the court was not prepared, without resorting to Article 14(3)(d) of the ICCPR, to hold that the accused’s right to be present during his/her trial was implied in Article 7(1)(c) of the African Charter. It is argued, based on the drafting history of Article 14(3)(d) of the ICCPR, that the accused’s right to be present at his/her trial is implied in his/her right to defence and that there was no need for the court to resort to Article 14(3)(d) of the ICCPR to hold that an accused has a right to be present during his/her trial. A broad interpretation of Article 7(1)(c) leads to that conclusion. Because, for the accused to be able to defend himself, he is expected to be present at his trial. Another issue to note about the judgment is that the general rule that the accused’s trial should take place in their presence, was established. However, this rule is not absolute. A trial can take place in absentia if the accused can be blamed for non-appearance in court. However, courts should be reluctant to conduct trials in absentia when the accused is facing a serious charge. Another observation regarding the court’s judgement is that it appears to understand the accused’s right to be present at his trial to mean that he/she should be ‘physically able to defend himself during the hearing.’ This implies two things: he/she should be physically present in court and be in a state of health that enables him/her to defend him/herself. This implies that a trial in the presence of the accused’s lawyer but in the absence of the accused is contrary to Article 7(1)(c) unless where an accused has instructed a lawyer to conduct his defence in his absence. This could also explain why the court, in holding that the accused’s trial had been unfair, also emphasised the fact that the accused had not been represented.

Other decisions reiterate that for an accused to exercise his/her right to defence, they have to be present at their trial. For example, in *Ajavon v Benin*,⁴² the court held that the ‘domain of Article 7(1)(c) of the Charter applies to all stages of the proceedings in a case, from the preliminary investigation to the pronouncement of judgment, and is not limited solely to the conduct of hearings.’⁴³ The court added that ‘the exigency of the right to defend oneself also implies the possibility for the accused to adduce evidence contrary to that invoked by the other party, interrogate the witnesses brought against

41 *ibid* para 99.

42 *Ajavon v Benin* (Application No 013/2017) [2019] AFCHPR 1 (29 March 2019).

43 *ibid* para 149.

him or call his own witnesses.⁴⁴ The court has also held that much as an accused has a right to defence, he/she can waive that right. In *Paulo v Tanzania*⁴⁵ the court held that:

[T]he right for the Applicant to have his cause heard requires that he should be entitled to take part in all proceedings, and to adduce his arguments and evidence in accordance with the adversarial principle. However, the individual...has the right to choose whether or not to take part in proceedings, provided this waiver is unequivocally established.⁴⁶

This judgment demonstrates that before it can be argued that the accused waived the right to be tried in his presence, the trial court has to be convinced that the waiver is unequivocal. This would have to be established on a case-by-case basis. In *Masoud Rajabu v United Republic of Tanzania*⁴⁷ the court held that the accused's right to defence is one of the elements of his/her right to have his/her cause heard.⁴⁸ The court added that the

[R]ight to participate effectively in a criminal trial includes not only the right of an accused to be present but also to hear and follow the proceedings. This is to ensure the accused is treated as an autonomous part of the proceedings and not simply an object for imposition of punishment.⁴⁹

The discussion below illustrates the circumstances in which courts from some African countries have held that the accused waived the right to be tried in his presence. The above discussion shows how the Human Rights Committee, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights have interpreted the accused's right to be present during his trial. The discussion also shows the circumstances in which the accused's trial may take place in his absence. The next part of the article illustrates how the accused's right to be present during trial has been protected in the constitutions of all the African countries.

The Right to be Tried in One's Presence in the Constitutions of African Countries

African countries have adopted different approaches on the issue of the right to be tried in one's presence. The first approach is that the constitutions of the majority of African countries provide for the accused's right to defence (to defend himself/herself) but they do not explicitly mention the accused's right to be tried in his/her presence. They are also silent on the circumstances in which a person's trial can take place in absentia. For

44 *ibid* para 152. See also *Ivan v Tanzania* (merits and reparations) (2019) 3 AfCLR 48 paras 72–73.

45 *Paulo v Tanzania* (020/2016) [2018] AFCHPR 14 (21 September 2018).

46 *ibid* para 81.

47 *Masoud Rajabu v United Republic of Tanzania* (Application No 008/2016) (25 June 2021).

48 *ibid* paras 76–78.

49 *ibid* para 79.

example, Article 41 of the Constitution of Algeria⁵⁰ provides that ‘[e]very person shall be presumed innocent until proven guilty by an ordinary jurisdiction in accordance with a fair trial that ensures all the requisite guarantees for his defence.’ A provision to the same effect, that an accused has a right to defend himself, is included in the constitutions of the following African countries: Benin,⁵¹ Burkina Faso,⁵² Burundi,⁵³ Cape Verde,⁵⁴ Central African Republic,⁵⁵ Chad,⁵⁶ Comoros,⁵⁷ Democratic Republic of Congo,⁵⁸ Congo Brazzaville,⁵⁹ Ivory Coast,⁶⁰ Djibouti,⁶¹ Egypt,⁶² Equatorial Guinea,⁶³ Ethiopia,⁶⁴ Gabon,⁶⁵ the Gambia,⁶⁶ Guinea Bissau,⁶⁷ Liberia,⁶⁸ Libya,⁶⁹ Madagascar,⁷⁰ Malawi,⁷¹ Mauritius,⁷² Morocco,⁷³ Mozambique,⁷⁴ Namibia,⁷⁵ Niger,⁷⁶ Nigeria,⁷⁷ Rwanda,⁷⁸

50 Constitution of Algeria (2020).

51 Constitution of Benin (1990) Art 17(1) provides that ‘Any person accused of an unlawful act shall be presumed innocent until his culpability has been legally established in the course of a public lawsuit during which all guarantees necessary to his free defense shall have been assured to him.’

52 Constitution of Burkina Faso (2015) Art 4(3).

53 Constitution of Burundi (2018) Arts 39(3) and 40.

54 Constitution of Cape Verde (1992) Art 33(5) provides that ‘[t]he right to a hearing and the right to defense in criminal trials shall be inviolable and shall be assured to every defendant.’

55 Constitution of Central African Republic (2016) Art 4(3).

56 Constitution of Chad (2018) Art 25.

57 Constitution of Comoros (2018) Art 15.

58 Constitution of Democratic Republic of Congo (2005) Art 19.

59 Constitution of Congo Brazzaville (2015) Art 9.

60 Constitution of Ivory Coast (2016) Art 7.

61 Constitution of Djibouti (1992) Art 10(6).

62 Constitution of Egypt (2014) Art 96(1).

63 Constitution of Equatorial Guinea (1991) Art 13(1)(r).

64 Constitution of Ethiopia (1994) Art 20.

65 Constitution of Gabon (2011) Arts 1(4) and 23.

66 Constitution of the Gambia (1996) Art 24(4).

67 Constitution of Guinea Bissau (1996) Art 42(3).

68 Constitution of Liberia (1986) Art 21(i).

69 Constitution of Libya (2012) Art 31(2).

70 Constitution of Madagascar (2010) Art 13.

71 Constitution of Malawi (1994) s 42(2)(f)(v).

72 Constitution of Mauritius (1968) Art 10(2).

73 Constitution of Morocco (2011) Art 120.

74 Constitution of Mozambique (2004) Art 65(1).

75 Constitution of Namibia (1990).

76 Constitution of Niger (2010) Art 20(1).

77 Constitution of Nigeria (1999) Art 36(6). For a discussion of the circumstances in which an accused’s trial can take place in his absence in Nigeria, see *State Yanga* (2021) LPELR-53086(SC).

78 Constitution of Rwanda (2003) Art 29(1). Cases in which the accused have been tried in absentia include, *Prosecution v Habyarimana et al* (Case No RPA0154/13/CS)(RLR - V.3 -2018)(Supreme Court) para 10; *Prosecution v Habyarimana* [2015] 3 RLR para 2.

Senegal,⁷⁹ Sierra Leone,⁸⁰ Togo,⁸¹ and Tunisia.⁸² The mere fact that the constitutions of these countries do not explicitly mention the accused's right to be tried in his/her presence does not mean that he/she does not have such a right. The above discussion on the drafting history of Article 14(3)(d) of the ICCPR shows that central to the accused's right to defend himself/herself is the right to be present at his/her trial. Therefore, the right to be present at one's trial is implied in the right to defence. Although the constitutions of these countries do not expressly provide for the accused's right to be present at his/her trial, parliaments have enacted pieces of legislation providing not only that an accused's trial has to take place in his/her presence,⁸³ but also for the circumstances in which such a trial may take place in absentia.⁸⁴ In some of these countries, where the accused is not present at the commencement of his trial, the court will enter a plea of not guilty on his behalf.⁸⁵ In some countries, legislation also provides for the circumstances in which a court may set aside a conviction which took place in an accused's absence, if a sound reason for the absence can be provided.⁸⁶ In which case there will be a re-trial.⁸⁷

79 Constitution of Senegal (2001) Art 9.

80 Constitution of Sierra Leone (1991) Art 23(5)(a).

81 Constitution of Togo (1992) Art 18(1).

82 Constitution of Tunisia (2014) Art 27.

83 Article 127 of the Law relating to the criminal procedure (N° 027/2019 of 19/09/2019) (Rwanda); Criminal Procedure Act 51 of 1977(Namibia) s 158; Criminal Procedure Code 1970 (Liberia) s 2.4 (1); Criminal Procedure and Evidence Code (Chapter 8:01)(Malawi) s 162; Criminal Procedure Act (Cap 169 of 1853)(Mauritius) s 132; District and Intermediate Courts (Criminal Jurisdiction) Act (Cap 174 of 1888) (Mauritius) s 72; Administration of Criminal Justice Act 2015 (Nigeria) s 266; Criminal Procedure Act (1965) (Sierra Leone) s 111.

84 Law relating to the criminal procedure (N° 027/2019 of 19/09/2019) (Rwanda) Arts 128, 142, 162; Criminal Procedure Code (Ethiopia) (1969) Articles 161–163; Criminal Procedure Code Act No 26 of 1933 (The Gambia) s 163(1); Criminal Procedure Code 1970 (Liberia) s 2.4 (2); Criminal Procedure and Evidence Code (Chapter 8:01)(Malawi) s 248(1); District and Intermediate Courts (Criminal Jurisdiction) Act (Cap 174 of 1888) (Mauritius) s 69A; Administration of Criminal Justice Act 2015 (Nigeria) ss 135 and 266(a); Administration of Criminal Justice Act 2015 (Nigeria) section 266; Criminal Procedure Act (1965) (Sierra Leone) s 101(1) and Criminal Procedure Act 51 of 1977 (Namibia) s 159. In *Nowaseb v The State* (HC-MD-Criminali-App-CAL-2019/46) [2020] NAHCMD 78 (6 March 2020) (the Namibian High Court held an accused should be informed of the consequences of being tried in absentia before he is removed from court because of his misconduct). For a detailed discussion of s 159 of the Namibian Criminal Procedure Act, see *S v Khumalo* (3 of 1991) [1991] NAHC 3 (05 April 1991); *S v Kamwi and Others* (CC 32 of 2001) [2013] NAHCMD 286 (16 October 2013).

85 See for example, Criminal Procedure Code Act No 26 of 1933 (The Gambia) s 164(4).

86 Law Relating to the Criminal Procedure (N° 027/2019 of 19/09/2019) (Rwanda) Articles 173 and 176Criminal Procedure Code (Ethiopia) (1969) Arts 164, 197–202 of the; Criminal Procedure Code Act No 26 of 1933 (The Gambia) s 163(3); Criminal Procedure and Evidence Code (Chapter 8:01)(Malawi) s 248(2); section 101(2) of the Criminal Procedure Act (1965) (Sierra Leone).

87 Law relating to the criminal procedure (N° 027/2019 of 19/09/2019) (Rwanda) Art 179; Criminal Procedure Code (Ethiopia) (1969) Art 202.

The second approach is found in some countries where, although the constitutions provide for the right to a fair trial, they are silent on the accused's right to be tried in his/her presence and also the right to defence. This is the case, for example, in the constitutions of Eritrea,⁸⁸ Mauritania,⁸⁹ Cameroon,⁹⁰ and Tanzania.⁹¹ In these countries, one has to look for the right to defence and in particular the right to be tried in one's presence in legislation enacted by the respective parliaments and also in international human rights instruments ratified by these countries. Thus, the relevant pieces of legislation in Tanzania,⁹² Eritrea,⁹³ and Cameroon,⁹⁴ provide that an accused's trial has to take place in their presence and also in absentia⁹⁵

Regarding the circumstances in which an accused's trial may take place in absentia, pieces of legislation in some countries in this category have clarified further issues. In Tanzania, for example, the accused's trial can only take place in absentia after he/she fails to appear in court following an adjournment after the prosecution has closed its case.⁹⁶ Thus, the trial will commence in the accused's presence and will only continue in their absence after all the prosecution's evidence has been heard.⁹⁷ The Tanzanian

88 Constitution of Eritrea (1997) Art 17.

89 Constitution of Mauritania (1991) Art 13.

90 Constitution of Cameroon (1972).

91 Constitution of Tanzania (1977) Art 13(6).

92 Section 226 of the Criminal Procedure Act (Chapter 20) provides that '(1) If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present; and if the complainant does not appear, the court may dismiss the charge and acquit the accused with or without costs as the court thinks fit; (2) If the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit; and (3) Any sentence passed under subsection (1) shall be deemed to commence from the date of apprehension; the person effecting such apprehension, shall endorse the date thereof on the back of the warrant of commitment; and (4) The court, in its discretion, may refrain from convicting the accused in his absence, and in every such case the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.'

93 Articles 14 and 118(1) of the Criminal Procedure Code (2015) provides that '[a]n accused shall be present at all Court proceedings in his case unless he refuses or his behaviour makes it impossible to conduct the business of the Court and the Court finds that no alternative means are available to ensure the orderly conduct of the proceedings.'

94 Criminal Procedure Code (2005) ss 338 and 340.

95 Criminal Procedure Code (2005) (Cameroon) s 249–351; Criminal Procedure Code (2015)(Eritrea) Arts 14 and 118–120; Criminal Procedure Act (Chapter 20)(Tanzania) s 226.

96 Criminal Procedure Act (Tanzania) s 226 (Ch 20).

97 *ibid* s 226(1) (Chapter 20). In *Aryoba Machage v Republic* [1991] TZCA 3; (8 March 1991); 1991 TLR 39 (TZHC), the High Court of Tanzania referred to s 226 of the Criminal Procedure Act and held that 'those provisions can only be invoked in a situation whereby an accused person has had opportunity or occasion to appear in Court after arraignment and had the charge read to him and his plea taken and thereafter a hearing date set for his case. And then if he thereafter absconds and he does not appear in Court at the set hearing day, the provisions of section 226 of the said Criminal

High Court held that the accused's trial in absentia does not violate his/her right to defence or to call witnesses if they could not defend themselves because they have skipped bail after the prosecution closed its case in their presence.⁹⁸ The High Court also held that an accused who has absconded from his/her trial does not have a right to be represented by a lawyer at his/her trial in absentia.⁹⁹ Where an accused escapes before the prosecution has closed its case, the charge against him/her will be withdrawn.¹⁰⁰ Should the trial continue, the conviction and sentence will be set aside on appeal.¹⁰¹ Conducting a trial in the absence of the accused, when he/she was not even in court to enter a plea, is 'mockery of a trial.'¹⁰² Before the accused's trial is conducted in absentia, the presiding officer should first ascertain that the accused's absence is not attributable to factors beyond his/her control. The presiding officer should try to ensure that the accused attends his/her trial. These efforts include issuing a warrant of arrest against the accused and calling his/her sureties to show cause why they should not face legal action for the accused's failure to attend trial.¹⁰³ In Eritrea, legislation provides for a detailed list of conditions in which an accused's trial cannot take place in absentia.¹⁰⁴

Apart from domestic legislation, an accused's right to be tried in their presence is also provided for in the human rights instruments ratified by these countries. For example, the Constitution of Cameroon does not provide for the right to defend oneself, but the preamble to the Constitution states that the people of Cameroon '[a]ffirm our attachment

Procedure Act, 1985 could be invoked.' See also *Abayo s/o Isya Abayo v Republic* (Crim App 42 of 2019) [2020] TZHC 1092 (22 May 2020) and *Olympia Nicodemus Swai v Republic* (Crim App 53 of 2020) [2020] TZHC 4566 (11 December 2020) where the court held that the accused's trial in absentia was justified under s 226. In *Ibrahim Issa Ndiwesa v Republic* (Crim App 61 of 2019) [2020] TZHC 454 (25 March 2020), the court held that the accused's trial should not have taken place in his absence because he has reasons why he could not attend trial (he was out of the country to attend his brother's funeral and had asked one of his relatives to inform the court).

98 *Moses Mayunga v Republic* [1993] TZHC 6; (7 May 1993).

99 In *Marten Van Der Walt v Republic* (Civil Appl. 32 of 2019) [2020] TZHC 659 (24 April 2020) 6, the High Court held that 'the deliberate decision of the applicant to abscond in breach of his bail conditions to avoid trial on a serious charge justifies the inference that he had no intention of putting forward a defence at that trial and that therefore he did waive his right to defend himself and to legal representation.'

100 *Mrisho Salum v Republic* [1991] TZHC 25; (21 October 1991); *Republic v Elias Samwel & 2 others* (Criminal session no 107 of 2016) [2021] TZHC 2423 (24 March 2021).

101 *Olonyo Lemuna and Lekitoni Lemuna v Republic* [1993] TZCA 34 (15 November 1993).

102 *Naoche Ole Mbile v Republic* [1993] TZCA 29 (8 November 1993) 1993 TLR 253 (TZCA).

103 *Ghati Nyangi alias Chacha v Republic* (Criminal Appeal 200 of 2020) [2021] TZHC 3089 (5 May 2021) 6.

104 Article 118 of the Criminal Procedure Code (2015)(Eritrea) provides for several limitations on trials in absentia. They include, '(2) No young offender shall be tried in absentia. (3) No person shall be tried in absentia except if charged with Class 1 through Class 7 Serious Offences. (4) No person shall be tried in absentia except upon application by the Attorney General; (5) No person shall be tried in absentia unless the Supreme Court finds that the accused was properly informed of the date, time and place of his trial, and that the accused, without good cause, failed to appear for his trial.'

to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of United Nations and the African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto' and in particular the principle that 'the law shall ensure the right of every person to a fair hearing before the courts.'¹⁰⁵ All the countries in this category have ratified the ICCPR without reservation on Article 14.¹⁰⁶ The Constitutions of Cameroon¹⁰⁷ and Mauritania¹⁰⁸ provide that international treaties ratified by the state override domestic law. This means that they are required to give effect to the rights included therein. Even in countries such as Eritrea and Tanzania where the constitutions do not provide that the ratified treaties override domestic law, international law requires these states to give effect to their obligations in the ratified treaties.¹⁰⁹ This means, inter alia, that the right of the accused to be present at their trial has to be provided for in legislation as one of the core elements of the right to a fair trial. However, some courts are reluctant to refer to international human rights instruments when dealing with the accused's right to be tried in his/her presence.¹¹⁰

The third approach is found in countries where the constitutions provide explicitly that the accused's trial shall take place in his/her presence and also for the circumstances in which the trial may take place in absentia. However, even within this approach, there are five different categories. The first category is where the constitutions provide that the accused's trial can take place in their absence should they so consent or because of disruptive behaviour. For example, the Constitution of Botswana provides that:

except with his or her own consent the trial [of the accused] shall not take place in his or her absence unless he or she so conducts himself or herself as to render the continuance of the proceedings in his or her presence impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence.¹¹¹

¹⁰⁵ Constitution of Cameroon (1972).

¹⁰⁶ See generally, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec> (accessed 12 January 2022).

¹⁰⁷ Article 45 of the Constitution provides that '[d]uly approved or ratified treaties and international agreements shall, following the publication, override national laws, provided the other party implements the said treaty or agreement.'

¹⁰⁸ Article 80 of the Constitution provides that 'The treaties or agreements regularly ratified or approved have, on their publication, an authority superior to that of the laws, subject, for each agreement or treaty, to their application by the other party.'

¹⁰⁹ Article 26 of the Vienna Convention on the Law of Treaties (1969) provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'

¹¹⁰ For example, *Shija Ndali Matango v Republic* (DC Criminal Appeal No 14 of 2020) [2020] TZHC 4305; (4 December 2020) (the appellant argued that his trial in absentia was contrary to Art 14(3)(d) the ICCPR, Art 7(1)(c) of the African Charter, and Art 10 of the UDHR but the court did not refer to these instruments in its conclusion that his trial in absentia was in accordance with Tanzanian domestic law).

¹¹¹ Constitution of Botswana (2016) Art 10(2).

A provision to the same effect appears in the Constitutions of Swaziland,¹¹² Lesotho,¹¹³ Seychelles,¹¹⁴ Uganda,¹¹⁵ and Zambia.¹¹⁶ On the basis of the above provision, the accused's trial can take place in their absence in one of the two situations: (1) if he/she consents that it should take place in their absence; or (2) if his/her conduct renders the continuance of the proceedings in his/her presence impracticable. In this case, the court has to make an order that he/she should be removed. Only the accused can consent to a trial in absentia. Legislation in these countries also provides, *inter alia*, for the procedural steps to be followed in cases of trial in absentia.¹¹⁷ Where the constitution provides that an accused's trial may take place in his or her absence with consent, the accused must personally give consent and a lawyer may not do so on the client's behalf.¹¹⁸

Failure by a court to inform the accused of the new date for a trial and sentencing and then proceeds to convict in absentia is a violation of an accused's right to a fair trial and the conviction and sentence have to be set aside.¹¹⁹ In *Uganda v Gurindwa*¹²⁰ in which the accused jumped bail and absconded from trial after cross-examining state witnesses, the court held that his trial could continue in his absence because he was presumed to have waived the right to be tried in his presence. This is so because the prosecution, after failing to locate the accused, had published a notice in a national newspaper informing him of the time, date and venue of the trial. After reading this notice, he instructed his lawyer to represent him. When the court asked the lawyer to explain where her client was, she informed court that she didn't know where he was. In holding that his trial could continue in his absence, the High Court referred to, *inter alia*, Article 14(3)(d) of the ICCPR and to case law from the European Court of Human Rights and observed that:

[A] Defendant of full age and sound mind, who is properly notified of his trial and chooses to absent himself, as a result violates his obligation to attend court, deprives

112 Constitution of Swaziland (Eswatini) (2005) Art 21(3).

113 Constitution of Lesotho (1993) Art 12(3).

114 Constitution of Seychelles (1993) Art 19(2)(i).

115 Constitution of Uganda (1995) Art 28(5). In *Kawooya v Uganda* (Criminal Appeal 23 of 2013) [2013] UGHCCRD 29 (1 August 2013), the High Court held that the trial of the accused in his absence was a violation of his right to a fair trial. The lower court had not relied on Article 28(5) of the Constitution.

116 Constitution of Zambia (1991) Art 18(2)(f).

117 See for example, Criminal Procedure Code (Chapter 54)(1955) (Seychelles) s 180; Criminal Procedure Code Act (Chapter 88) (Zambia) s 203; Criminal Procedure and Evidence Act (Act 67 of 1938) (Swaziland) s 172; and Trial on Indictments Act (Uganda) s 54; Magistrates Courts Act (CHAPTER 16)(Uganda) s 123.

118 *R v Agathine* (CO 38/2005) [2006] SCSC 96 (26 October 2006) (Supreme Court of Seychelles).

119 *Ndyanabo v Uganda* (HCT-CR-CA-2016/4) [2016] UGHCCRD 116 (9 December 2016) (High Court of Uganda).

120 *Uganda v Gurindwa* (HCT-00-AC-CM-2015/5) [2015] UGHACAD 2 (27 March 2015).

himself of the right to be present, and when a criminal trial proceeds in his absence, he cannot come up and claim he had been denied his constitutional rights...[O]ne who voluntarily chooses not to exercise a right given to him by the constitution, cannot turn around and say he has lost the benefits he might have expected to enjoy had he exercised it.¹²¹

Likewise, in *Uganda v Kabafunzaki*,¹²² the accused jumped bail after the prosecution had brought compelling evidence against him. In justifying his conviction and sentence in absentia, the Ugandan High Court held that:

At the beginning of the trial, the accused denied the charges but jumped bail and abandoned the proceedings after the prosecution had led the evidence of 15 witnesses. The Court granted the state's application that the trial proceeds in the accused's absence since it would be against public policy to allow the frustration of court proceedings by the accused person who had chosen to abscond and therefore waived his right to be heard.¹²³

As mentioned above, Article 28(5) of the Constitution of Uganda provides that the accused's trial can take place in his/her absence in one of two scenarios: if he consents or 'conducts himself or herself as to render the continuance of the proceedings in the presence of that person impracticable and the Court makes an order for the person to be removed and the trial to proceed in the absence of that person.' Strictly interpreted, Article 28(5) requires the presence of the accused in court before a court can order his/her removal. Therefore, in cases where an accused has absconded from trial, it seems courts have concluded that they have, by implication, consented to the trial taking place in their absence. In other words, the second ground of Article 28(5) is not applicable because he/she is not in court to render the continuance of the proceedings in their presence impracticable and for the court to make an order for his/her removal.¹²⁴ In some

¹²¹ *ibid* 6.

¹²² *Uganda v Kabafunzaki* (Criminal Case 7 of 2017) [2021] UGHCACD 8 (8 October 2021).

¹²³ *ibid* 1.

¹²⁴ The drafting history of Art 28(5) of the Ugandan Constitution is silent on whether the consent has to be given expressly or otherwise. See *Proceedings of the Constituent Assembly* (1995) 1959–1965. Art 28(5) is one of the provisions that were never discussed during the drafting of the Constitution. It was substantially reproduced from the 1966 Constitution. Art 24(2)(g) of the Constitution of Uganda (1966) provided that 'except with his own consent, the trial shall not take place in his absence of that person unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.' In *Matsiko Edward v Uganda* (Crim App 75 of 1999) [1999] UGCA 18 (16 December 1999) the Court of Appeal held that the accused's right to be present at his trial is not limited to his presence in the courtroom. It also extends to his presence at the *locus in quo*. In *Steel and Tube Industries Limited v Awubwa Ibrahim and 36 Others* (Labour Dispute App 5 of 2019) [2021] UGIC 25 (26 February 2021) 5, the Industrial Court of Uganda held that the purpose of Art 28(5) of the Constitution 'is to allow a person to be heard before being condemned and to allow the victim to

countries, legislation provides that the accused's consent can be inferred from his conduct. For example, Article 19(12) of the Constitution of Seychelles provides that:

For the purposes of clause 2(i), a person who has, in accordance with law, been served with a summons or other process requiring the person to appear at the time and place appointed for the trial and who does not so appear shall be deemed to have consented to the trial taking place in the person's absence.

The Supreme Court of Seychelles held that a person who escapes from custody while being brought to court will be presumed to have consented to a trial in absentia on the basis of Article 19(12).¹²⁵ However, the court has to be convinced that the accused's absence from his trial was deliberate.¹²⁶ The accused may consent to a trial being held in absentia at the time of being granted bail. In this case, one of the bail conditions is that should bail be skipped, the trial will take place in absentia.¹²⁷

The second category, which is closely related to the first one, is where the constitution provides for the right of the accused's trial to take place in his presence and in addition, it also provides that an accused's trial can take place in his absence if he refuses to appear before court. Article 19(3) of the Constitution of Ghana (1992) provides that:

The trial of a person charged with a criminal offence shall take place in his presence unless - (a) he refuses to appear before the court for the trial to be conducted in his presence after he has been duly notified of the trial; or (b) he conducts himself in such a manner as to render the continuation of the proceedings in his presence impracticable and the court orders him to be removed for the trial to proceed in his absence.

Unlike in the constitutions of Botswana,¹²⁸ Swaziland,¹²⁹ Lesotho,¹³⁰ Seychelles,¹³¹ Uganda¹³² and Zambia¹³³ where an accused can consent to his/her trial taking place in absentia, the Constitution of Ghana does not provide the same. It could be argued that by refusing to appear in court for his trial or by misconducting himself or herself during the trial, the accused has by implication consented to his/her trial taking place in his/her absence. The Ghanaian Criminal Procedure Code also provides that an accused's trial

proceed in the absence of the offender where the offender seems to hold the court at ransom by avoiding or otherwise making it difficult for a hearing to proceed in his/her presence.'

125 *R v Eulentin and Another* (CO 31/2005) [2006] SCSC 82 (22 November 2006).

126 *In Re: R v Ladouceur; Ladouceur v R* (CO 49/2001) [2009] SCSC 47 (7 September 2009) (in this case the accused's boat broke down and he could not attend court and the court held that his trial in absentia was a violation of his right to a fair trial).

127 *Republic v Louange* (10 of 2000) [2006] SCSC 48 (21 June 2006 (Supreme Court of Seychelles).

128 Constitution of Botswana (2016) Art 10(2).

129 Constitution of Swaziland (Eswatini) (2005) Art 21(3).

130 Constitution of Lesotho (1993) Art 12(3).

131 Constitution of Seychelles (1993) Art 19(2)(i).

132 Constitution of Uganda (1995) Art 28(5).

133 Constitution of Zambia (1991) Art 18(2)(f).

can take place in his/her absence if he/she does not appear before court after an adjournment.¹³⁴ Thus, for a full picture of the circumstances in which an accused's trial can take place in his/her presence, a reading of the constitution and the relevant legislation is required.

The third category is found in the Constitution of Kenya. Article 50(2)(f) of the Constitution of Kenya (2010) provides that an accused has a right 'to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.' Unlike in the constitutions mentioned above where the accused's trial can take place in his absence based on his consent or his refusal, in Kenya the trial can only take place in the accused's absence if his conduct 'makes it impossible for the trial to proceed.'

Literally interpreted, this means that the accused must be in court and only be removed on the basis of disruptive behaviour. Article 50(2)(f) is complemented by legislation.¹³⁵ The High Court held that Article 50(2)(f) is only applicable after the accused has entered a plea and thereafter displays conduct which renders the trial impossible to continue with him or her being present.¹³⁶ In *Kelly Kesses Banjuka v Republic*¹³⁷ the High Court

134 Criminal Procedure Code, 1960 (Act 30) s 170(1) provides that 'If at the time or place to which the hearing or further hearing has been adjourned, the accused does not appear before the Court which made the order of adjournment, the Court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present.' Section 170(3) provides that: 'If the Court convicts the accused in his absence, it may set aside such conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.'

135 Criminal Procedure Code s 206 provides that: '(1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs. (2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits. (3) A sentence passed under subsection (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of commitment. (4) If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.' In *Republic v Galma Abagaro Shano* [2017] eKLR, the High Court held that s 206(1) was unconstitutional for failing to include all offences (felonies and misdemeanours). In *Republic v Wilfred Lerason Tapukai* [2021] eKLR; *James Maina Njuguna & Edwin Otieno Aura v State* [2021] eKLR, the High Court held that s 206 is applicable to misdemeanours only.

136 *Bramwel Juma Wanyalika v Director of Public Prosecution & 18 others* [2019] eKLR para 26–29.

137 *Kelly Kesses Banjuka v Republic* [2017] eKLR.

held that excluding the accused from his trial should be a measure of last resort¹³⁸ and that:

Being an exception to the general rule of presence of the accused in his trial, it should only be exercised for the gravest of conduct in court which makes impossible the proper conduct of proceedings in [his] trial. An accused should not be excluded for his trial merely because his conduct makes it difficult for the court to carry on the proceedings or he exhibits rudeness, unpleasantness or contempt towards the court: there are procedures for dealing with such eventualities without appearing to limit the fair trial rights of the accused, consistently with the less restrictive means principle of Article 24 of the Constitution.¹³⁹

The court added that before an accused is excluded from his trial, he should be given ‘an opportunity to show cause why he should not be excluded from his trial.’¹⁴⁰ On the basis of Article 50(2)(f), accused individuals have been removed from court for being violent¹⁴¹ or for being ‘rude and unruly.’¹⁴² On the basis of Article 50(3)(f), courts have also continued with the trial in the absence of the accused where they informed the court that they will not participate in the proceedings¹⁴³ or where they have skipped bail.¹⁴⁴ This implies that in effect they have implicitly consented to being tried in absentia although Article 50(3)(f) does not provide for consent as one of the grounds in which an accused’s trial may take place in his/her absence. The mere fact that the accused has questioned the impartiality of a presiding officer does not denote violence and they should, therefore, not be excluded from the proceedings.¹⁴⁵ People who have absconded from trial have been convicted and sentenced in their absence and courts have ordered that they will commence serving their sentences when arrested.¹⁴⁶ The court held that before an accused’s trial proceeds in absentia, the court should first ascertain the circumstances surrounding the accused’s absence.¹⁴⁷ If the court is not aware of the

¹³⁸ *ibid* para 22.

¹³⁹ *ibid* para 28. Emphasis in the original. However, the High Court also appears to have adopted a lower threshold in another case when it held that ‘[l]et the Applicant be warned that if he makes it difficult for the trial court to proceed with the hearing of the case, then he will be kept out of the proceedings.’ See *Paul Musyoka Kyangu v Republic* [2019] eKLR para 5.

¹⁴⁰ *Kelly Kesses Banjuka case* (n 137) para 22.

¹⁴¹ *Mark Saitti Omwongo v Republic* [2021] eKLR (the accused fought court orderlies and insulted the presiding officer); *Daniel Karuma alias Njalu v Republic* [2015] eKLR.

¹⁴² *Peter Kamonjo Njoroge v Republic* [2019] eKLR para 10.

¹⁴³ *Geofrey Muriithi alias Gikundi & another v Director of Public Prosecution* [2017] eKLR; *Jeremiah M Mwangangi v Republic* [2014] eKLR; *Joseph Kamau Githu v Director of Public Prosecution* [2013] eKLR.

¹⁴⁴ *Samson Kipyegon Chepkuto v Republic* [2021] eKLR.

¹⁴⁵ *Alex Shiunza Okusimba v Republic* [2018] eKLR.

¹⁴⁶ See for example, *Republic v Galma Abagaro Shano* [2017] eKLR (the accused was tried and convicted of manslaughter in absentia and sentenced to ten years’ imprisonment); *Republic v Robert Nyambura Njui & another* [2018] eKLR.

¹⁴⁷ *Republic v Galma Abagaro Shano* [2017] eKLR 5.

reason(s) for the accused's absence, the case should be adjourned and another date determined to enable the accused to attend instead of conducting the trial in absentia.¹⁴⁸ An accused's trial should not take place in his/her absence if there is evidence to show that the delay is not attributable to his/her deliberate conduct.¹⁴⁹ If the accused were tried and convicted in absentia and the appellate or review court is of the view that the sentence imposed was not proportionate to the offence, the sentence will be set aside and be replaced by one more appropriate.¹⁵⁰

In the fourth category one finds constitutions which provide for the accused's right to be present at his/her trial but are silent on the circumstances in which the trial may take place in his/her absence. This is the case with regard to the Constitutions of Somalia,¹⁵¹ South Africa¹⁵² and Zimbabwe.¹⁵³ However, this right is not absolute and the constitutions provide ways in which this right could be limited.¹⁵⁴ As a result, legislation has been enacted in these countries providing for circumstances in which the accused's trial may take place in absentia.¹⁵⁵

In the fifth category one finds constitutions in which the accused's right to be tried in his/her presence is guaranteed but the constitution empowers parliament to make legislation on the circumstances in which a trial may take place in absentia. For example, Article 19(6) of the Constitution of South Sudan (2011) provides that '[e]very accused person shall be entitled to be tried in his or her presence in any criminal trial without undue delay; the law shall regulate trial in absentia.' A provision to the same effect

148 *Republic v Omar Kipkemboi Cheruiyot & 4 others* [2020] eKLR.

149 *Republic v Joshua Chacha Moronge* [2019] eKLR para 6. Article 50(3)(f) is not applicable where the accused attended the trial and brought witnesses, *Mohamed Nyando Abdalla v Republic* [2019] eKLR.

150 See for example, *Grins Nyabate Matogo & another v State* [2020] eKLR (the sentences of imprisonment were replaced by that of probation). The accused were arrested after their conviction and sentence.

151 Constitution of Somalia (2012) Art 34(8) provides that '[t]he accused has the right to be present at their trial.'

152 Constitution of South Africa (1996) s 35(3)(e) provides that one of the rights of an accused person is 'to be present when being tried.'

153 Constitution of Zimbabwe (2013) Art 70 (1)(g) provides that an accused has a right 'to be present when being tried.' For the circumstances in which an accused may be sentenced in absentia in Zimbabwe, see *S v Muendawoga* (HH 10 of 2004) [2004] ZWHHC 10 (27 January 2004).

154 South African Constitution (1996) s 36; Constitution of Zimbabwe (2013) s 86; Constitution of Somalia (2012) Art 38.

155 Criminal Procedure Act, Act 51 of 1977 (South Africa) s 159; Criminal Procedure and Evidence Act (Chapter 9:07) (Zimbabwe) s 194(1) of the. For a discussion of s 159 of the South African Criminal Procedure Act, see *S v Kutwana* (A435/11) [2011] ZAWCHC 527 (18 November 2011); *S v Tsinyane* (1/2012) [2012] ZAFSHC 174 (20 September 2012) para 10; *Toona and Another v S* (A183/2018) [2019] ZAGPJHC 244 (20 June 2019) para 1; *Koch v S* (A35/2011) [2011] ZAWCHC 197 (15 April 2011).

appears in the Constitution of Sudan.¹⁵⁶ The relevant legislation provides for the circumstances in which evidence may be recorded in the absence of the accused. However, it does not state that an accused may be convicted in his absence.¹⁵⁷

Conclusion

In this article, the author has demonstrated how accused persons' right to be tried in their presence has been protected in the different pieces of legislation and constitutions of all the African countries. The author has also highlighted how this right has been protected in international human rights instruments. The discussion shows that the general rule in all African countries is that the accused's trial should take place in their presence. A trial in absentia is the exception. Even in cases where legislation permits trial in absentia, measures are in place to ensure that the accused is not unduly prejudiced. For example, a trial in absentia can only take place if the accused's conduct so necessitates it—he or she either consents to being tried in absentia or behaves in a manner which makes it impossible for the trial to continue with the accused being present. Even where a trial has taken place in absentia, the legislation in some countries provides that a conviction and sentence may be set aside if the convicted person convinces court of the reason why he or she was absent from the trial.¹⁵⁸ These measures are in line with Articles 14(1)(d) and 7(1)(c) of the ICCPR and the African Charter respectively. It has also been argued that even in countries where the accused's right to be tried in his/her presence is not expressly mentioned in the constitution, that right can

156 Constitution of Sudan (2019) Art 52(5) provides that '[e]very person has the right to be tried in their presence without unjustified delay on any criminal charge. The law shall regulate trials in absentia.'

157 See the Code of Criminal Procedure Act 5 s 214 of 2008 (South Sudan) which provides that '[i]f it is proved that an accused person has absconded and that there is no immediate prospect of arresting him or her, the Court may in his or her absence examine any witnesses produced on behalf of the prosecution and record their depositions. Any such deposition may on the arrest of such person be given in evidence against him or her at the trial for the offence with which he or she is charged, if the deponent is dead or incapable of giving evidence or his or her attendance cannot be procured without an amount of delay, expense or inconvenience which in the circumstances of the case would be unreasonable.' Likewise, section 163 of the Criminal Procedure Act, 1991 (Sudan) provides that 'Where it has been proved, to the court, that the accused has disappeared, and it not possible to arrest him, it may interrogate, in his absence, any prosecution witnesses, and record the testimony thereof on the record. Such testimony may be produced, as evidence against the accused, upon his being arrested, where the witness dies, is unable to adduce testimony or his appearance at the court is not possible.'

158 For example, this is the case in Tanzania. See the Criminal Procedure Act (Tanzania) s 266. See also *Shija Ndali Matango v Republic* (DC Criminal Appeal No 14 of 2020) [2020] TZHC 4305; (4 December 2020) (conviction for rape in absentia upheld because the appellant did not have a strong reason why he was absent at his trial). See also *Lucas Shedrack v The Republic* (HC Criminal Appeal No 87 of 2020) [2020] High Court of Tanzania 3207 (23 September 2020); *Idd Said Seken v Republic* (Criminal Appeal No 50 of 2018) [2020] TZHC 1919 (21 July 2020); *Elias Chepesi vs Republic* (Criminal Appeal 17 of 2021) [2021] TZHC 5878 (3 August 2021). It is also the case in Seychelles, see, for example, *The Republic v Danzi Pty Ltd* (7 of 2007) [2007] SCSC 41 (4 November 2007); *In Re: R v Ladouceur; Ladouceur case* (n 123).

be inferred from the international human rights instruments ratified by these countries. The discussion shows that in Africa, the right to be tried in one's presence has two origins: constitutional origin, where the right is explicitly provided for in the Constitution; and statutory origin, where the right is not provided for in the Constitution but rather in a statute. In both cases, international law has to be referred to when giving effect to this right in practice.

References

Cases

- Abayo s/o Isya Abayo v Republic* (Crim App 42 of 2019) [2020] TZHC 1092 (22 May 2020).
- Abubakari v Tanzania*, (Judgment), 007/2013 (ACtHPR, Jun. 03, 2016).
- Achutan and Others v Malawi* (Communication No. 64/92, 68/92, 78/92) [1994] ACHPR 10; (27 April 1994).
- Ajavon v Benin* (Application No 013/2017) [2019] AFCHPR 1 (29 March 2019).
- Alex Shiunza Okusimba v Republic* [2018] eKLR.
- Amini Juma v Tanzania* (Application No 024/2016) (30 September 2021).
- Amir & Anor v Tanzania* (Application No 014/2015) [2019] AFCHPR 11; (28 November 2019).
- Aryoba Machage v Republic* [1991] TZCA 3; (08 March 1991); 1991 TLR 39 (TZHC).
- Avocats Sans Frontiers v Burundi* (Communication No 231/99) [2000] ACHPR 21 (6 November 2000).
- Bernard Balele v Tanzania* (Application No 026/2016) (30 September 2021).
- Bramwel Juma Wanyalikha v Director of Public Prosecution & 18 others* [2019] eKLR.
- Centre for Free Speech v Nigeria* (Communication No 206/97) [1999] ACHPR 4; (15 November 1999).
- Chrizostom Benyoma v Tanzania* (Application No 001/2016) (30 September 2021).
- Civil Liberties Organization and Others v Nigeria* (Communication No 218/98) [2001] ACHPR 30; (7 May 2001).
- Constitutional Rights Project v Nigeria* (Communication No 143/95, 150/96) [1999] ACHPR 7; (15 November 1999).
- Daniel Karuma alias Njalu v Republic* [2015] eKLR.
- Elias Chepesi vs Republic* (Criminal Appeal 17 of 2021) [2021] TZHC 5878 (3 August 2021).
- Evarist v Tanzania* (027/2015) [2018] AFCHPR 12; (21 September 2018).

- Evodius Rutechura v United Republic of Tanzania* (Application No 004/2016 (26 February 2021).
- Geofrey Muriithi alias Gikundi & another v Director of Public Prosecution* [2017] eKLR.
- Ghati Nyangi alias Chacha v Republic* (Criminal Appeal 200 of 2020) [2021] TZHC 3089 (5 May 2021).
- Goa Alias Vedastus v Tanzania* (Application No 025/2015) [2019] AFCHPR 20; (26 September 2019).
- Grins Nyabate Matogo & another v State* [2020] eKLR.
- Guehi v United Republic of Tanzania* (Republic of Côte D'Ivoire Intervening) (Application No 001/2015) [2018] AFCHPR 7 (7 December 2018).
- Hamis Shaban alias Hamis Ustadh v Tanzania* (Application No 026/2015) (2 December 2021).
- Ibrahim Issa Ndiwesa v Republic* (Crim App 61 of 2019) [2020] TZHC 454 (25 March 2020).
- Idd Said Seken v Republic* (Criminal Appeal No 50 of 2018) [2020] TZHC 1919 (21 July 2020).
- Ivan Osiyuk v Belarus* [2009] UNHRC 15; CCPR/C/96/D/1311/2004 (25 August 2009).
- Ivan v Tanzania* (merits and reparations) (2019) 3 AfCLR 48.
- Ivan v United Republic of Tanzania* (Application No 025/2016) [2019] AFCHPR 3; (28 March 2019).
- James Maina Njuguna & Edwin Otieno Aura v State* [2021] eKLR.
- Jeremiah M Mwangangi v Republic* [2014] eKLR.
- Joseph Kamau Githu v Director of Public Prosecution* [2013] eKLR.
- Kawooya v Uganda* (Criminal Appeal 23 of 2013) [2013] UGHCCRD 29 (1 August 2013).
- Kelly Kesses Banjuka v Republic* [2017] eKLR.
- Koch v S* (A35/2011) [2011] ZAWCHC 197 (15 April 2011).
- Ladislaus Onesmo v Tanzania* (Application No 047/2016) (30 September 2021).
- Law Office of Ghazi Suleiman v Sudan* (Communication No 222/98, 229/99) (29 May 2003).

- Léon Mugesera v Rwanda* (Application No 012/2017) (27 November 2020).
- Lucas Shedrack v The Republic* (HC Criminal Appeal No 87 of 2020) [2020] High Court of Tanzania 3207 (23 September 2020).
- Mango v Tanzania*, (Judgment, 005/2015) (ACtHPR, May. 11, 2018).
- Mark Saitti Omwongo v Republic* [2021] eKLR.
- Marten Van Der Walt v Republic* (Civil Appl. 32 of 2019) [2020] TZHC 659 (24 April 2020).
- Masoud Rajabu v United Republic of Tanzania* (Application No 008/2016) (25 June 2021).
- Matsiko Edward v Uganda* (Crim App 75 of 1999) [1999] UGCA 18 (16 December 1999).
- Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*, (Communication No 105/93, 128/94, 130/94, 152/96) (31 October 1998).
- Mhina Zuberi v Tanzania* (Application No 054/2016) (26 February 2021).
- Mohamed Nyando Abdalla v Republic* [2019] eKLR.
- Moses Mayunga v Republic* [1993] TZHC 6; (7 May 1993).
- Mrisho Salum v Republic* [1991] TZHC 25; (21 October 1991).
- Mukhammed Salikh (Salai Madaminov) v Uzbekistan* [2009] UNHRC 112; CCPR/C/95/D/1382/2005 (22 April 2009).
- Mussa Zanzibar v Tanzania* (Application No 022/2016) (26 February 2021).
- Naoche Ole Mbile v Republic* [1993] TZCA 29 (8 November 1993) 1993 TLR 253 (TZCA).
- Ndyanabo v Uganda* (HCT-CR-CA-2016/4) [2016] UGHCCRD 116 (9 December 2016).
- Nganyi & Others v Tanzania* (Application No. 006/2013) [2018] AFCHPR 36; (1 January 2013).
- Nowaseb v The State* (HC-MD-Criminali-App-CAL-2019/46) [2020] NAHCMD 78 (6 March 2020).
- Okiring & Another v Republic of Uganda* (Communication 339/2007) [2018] ACHPR 133 (28 APRIL 2018).
- Olonyo Lemuna and Lekitoni Lemuna v Republic* [1993] TZCA 34 (15 November 1993).

- 675 *Olympia Nicodemas Swai v Republic* (Crim App 53 of 2020) [2020] TZHC 4566 (11
676 December 2020).
- 677
- 678 *Onyango v Tanzania*, (Judgment, 006/2013) (ACtHPR, Mar. 18, 2016).
- 679
- 680 *Paul Musyoka Kyangu v Republic* [2019] eKLR.
- 681
- 682 *Paulo v Tanzania* (Application 020/2016) [2018] AFCHPR 14 (21 September 2018).
- 683
- 684 *Peter Kamonjo Njoroge v Republic* [2019] eKLR.
- 685
- 686 *Prosecution v Habyarimana* [2015] 3 RLR.
- 687
- 688 *Prosecution v Habyarimana et al* (Case No RPA0154/13/CS)(RLR - V.3 - 2018).
- 689
- 690 *R v Agathine* (CO 38/2005) [2006] SCSC 96 (26 October 2006).
- 691
- 692 *R v Eulentin and Another* (CO 31/2005) [2006] SCSC 82 (22 November 2006).
- 693
- 694 *Re: R v Ladouceur; Ladouceur v R* (CO 49/2001) [2009] SCSC 47 (7 September 2009).
- 695
- 696 *Republic v Elias Samwel & two others* (Criminal session no 107 of 2016) [2021] TZHC 2423
697 (24 March 2021).
- 698
- 699 *Republic v Galma Abagaro Shano* [2017] eKLR.
- 700
- 701 *Republic v Joshua Chacha Moronge* [2019] eKLR.
- 702
- 703 *Republic v Louange* (10 of 2000) [2006] SCSC 48 (21 June 2006).
- 704
- 705 *Republic v Omar Kipkemboi Cheruiyot & 4 others* [2020] eKLR.
- 706
- 707 *Republic v Robert Nyambura Njui & another* [2018] eKLR.
- 708
- 709 *Republic v Wilfred Lerason Tapukai* [2021] eKLR.
- 710
- 711 *S v Kamwi and Others* (CC 32 of 2001) [2013] NAHCMD 286 (16 October 2013).
- 712
- 713 *S v Khumalo* (3 of 1991) [1991] NAHC 3 (05 April 1991).
- 714
- 715 *S v Kutwana* (A435/11) [2011] ZAWCHC 527 (18 November 2011).
- 716
- 717 *S v Muendawoga* (HH 10 of 2004) [2004] ZWHHC 10 (27 January 2004).
- 718
- 719 *S v Tsinyane* (1/2012) [2012] ZAFSHC 174 (20 September 2012).
- 720

- Sadick Marwa Kisase v Tanzania* (Application No 005/2016) (2 December 2021).
- Samson Kipyegon Chepkuto v Republic* [2021] eKLR.
- Shija Ndali Matango v Republic* (DC Criminal Appeal No 14 of 2020) [2020] TZHC 4305; (4 December 2020).
- State v Yanga* (2021) LPELR-53086(SC).
- Steel and Tube Industries Limited v Awubwa Ibrahim and 36 Others* (Labour Dispute Application 5 of 2019) [2021] UGIC 25 (26 February 2021).
- Thomas v Tanzania* (Application 001/2017) [2018] AFCHPR 22; (20 November 2015).
- Toona and Another v S* (A183/2018) [2019] ZAGPJHC 244 (20 June 2019).
- Tsikata v Ghana* (Communication No 322/2006) [2014] ACHPR 2 (14 October 2014).
- Uganda v Gurindwa* (HCT-00-AC-CM-2015/5) [2015] UGHACAD 2 (27 March 2015).
- Uganda v Kabafunzaki* (Criminal Case 7 of 2017) [2021] UGHACAD 8 (8 October 2021).
- William v Tanzania* (Application 016/2016) [2018] AFCHPR 13 (21 September 2018).
- Yahaya Zumo Makame and three Others v United Republic of Tanzania* (Application No 023/2016) (25 June 2021).

Constitutions

- Constitution of Algeria (2020).
- Constitution of Benin (1990).
- Constitution of Botswana (2016).
- Constitution of Burkina Faso (2015).
- Constitution of Burundi (2018).
- Constitution of Cameroon (1972).
- Constitution of Cape Verde (1992).
- Constitution of Central African Republic (2016).
- Constitution of Chad (2018).

765
766 Constitution of Comoros (2018).
767
768 Constitution of Congo Brazzaville (2015).
769
770 Constitution of Democratic Republic of Congo (2005).
771
772 Constitution of Djibouti (1992).
773
774 Constitution of Egypt (2014).
775
776 Constitution of Equatorial Guinea (1991).
777
778 Constitution of Eritrea (1997).
779
780 Constitution of Ethiopia (1994).
781
782 Constitution of Gabon (2011).
783
784 Constitution of Guinea Bissau (1996).
785
786 Constitution of Ivory Coast (2016).
787
788 Constitution of Lesotho (1993).
789
790 Constitution of Liberia (1986).
791
792 Constitution of Libya (2012).
793
794 Constitution of Madagascar (2010).
795
796 Constitution of Malawi (1994).
797
798 Constitution of Mauritania (1991).
799
800 Constitution of Mauritius (1968).
801
802 Constitution of Morocco (2011).
803
804 Constitution of Mozambique (2004).
805
806 Constitution of Namibia (1990).
807
808 Constitution of Niger (2010).
809
810 Constitution of Nigeria (1999).

- 811
- 812 Constitution of Rwanda (2003).
- 813
- 814 Constitution of Senegal (2001).
- 815
- 816 Constitution of Seychelles (1993).
- 817
- 818 Constitution of Sierra Leone (1991).
- 819
- 820 Constitution of Somalia (2012).
- 821
- 822 Constitution of South Africa (1996).
- 823
- 824 Constitution of Sudan (2019).
- 825
- 826 Constitution of Swaziland (Eswatini) (2005).
- 827
- 828 Constitution of Tanzania (1977).
- 829
- 830 Constitution of the Gambia (1996).
- 831
- 832 Constitution of Togo (1992).
- 833
- 834 Constitution of Tunisia (2014).
- 835
- 836 Constitution of Uganda (1995).
- 837
- 838 Constitution of Zambia (1991).
- 839
- 840 Constitution of Zimbabwe (2013).

841 Legislation

- 842 Administration of Criminal Justice Act 2015 (Nigeria).
- 843
- 844 Code of Criminal Procedure Act 5 2008 (South Sudan).
- 845
- 846 Criminal Procedure Act (1965) (Sierra Leone).
- 847
- 848 Criminal Procedure Act (Cap 169 of 1853) (Mauritius).
- 849
- 850 Criminal Procedure Act (Chapter 20) (Tanzania).
- 851
- 852 Criminal Procedure Act 51 of 1977 (Namibia).
- 853
- 854 Criminal Procedure Code (Ethiopia) (1969).

Criminal Procedure Act, 1991 (Sudan).

Criminal Procedure Act, Act 51 of 1977 (South Africa).

Criminal Procedure and Evidence Act (Act 67 of 1938) (Swaziland).

Criminal Procedure and Evidence Act (Chapter 9:07) (Zimbabwe).

Criminal Procedure and Evidence Code (Chapter 8:01) (Malawi).

Criminal Procedure Code (2005) (Cameroon).

Criminal Procedure Code (2015) (Eritrea).

Criminal Procedure Code (Chapter 54) (1955) (Seychelles).

Criminal Procedure Code (Ethiopia) (1969).

Criminal Procedure Code 1970 (Liberia).

Criminal Procedure Code Act (Chapter 88) (Zambia).

Criminal Procedure Code Act No 26 of 1933 (The Gambia).

District and Intermediate Courts (Criminal Jurisdiction) Act (Cap 174 of 1888) (Mauritius).

Law Relating to the Criminal Procedure (N° 027/2019 of 19/09/2019) (Rwanda).

Magistrates Courts Act (Chapter 16) (Uganda).

Trial on Indictments Act (Chapter 23) (Uganda).

International and Other Instruments

African Charter on Human and Peoples' Rights (1981).

Commission on Human Rights, Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles (Memorandum by the Secretary-General, 6th Session,) E/CN.4/365 (23 March 1950) 37.

Human Rights Committee General Comment No 32 (23 Aug. 2007) (Art 14, Right to equality before courts and tribunals and to fair trial) (CCPR/C/GC/32).

897 ICCPR ratification status,
898 <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en)
899 <[4&chapter=4&clang=_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en)> (accessed 09 June 2021).
900
901 International Covenant on Civil and Political Rights (1966).
902
903 Proceedings of the Constituent Assembly (1995), Uganda Constituent Assembly, Kampala,
904 1995.
905
906 Rome Statute of the International Criminal Court (1998).
907
908 UNGA AC-3 SR-963 (20 November 1959) 963rd Meeting of the Third Committee.
909
910 UNGA A/4299 (3 December 1959) Report of the Third Committee, Draft International
911 Covenants on Human Rights 14th session 20.
912
913 UNGA AC-3 SR-961 (19 November 1959) 961st Meeting of the Third Committee
914 UNGA Draft International Covenants on Human Rights (note by the Secretary General) (20
915 May 1964) A/5705.
916
917 UNGA Draft International Covenants on Human Rights Third Committee 18th session Third
918 Committee (24 September 1961) Text of articles adopted by the Third Committee at the
919 10th to 17th sessions A/C.3/L.1062.
920
921 UNGA Text of articles adopted by the Third Committee 17th session, Draft International
922 Covenants on Human Rights 16th (25 September 1962) A/C.3/L.978.
923
924 Universal Declaration of Human Rights (1948).
925
926 Vienna Convention on the Law of Treaties (1969).