



AMERICAN **BAR** ASSOCIATION

Center for Human Rights



Uganda
v.
Stella Nyanzi

February 2020

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE

ABOUT THE AUTHOR:

Staff at the American Bar Association Center for Human Rights drafted this report. The **American Bar Association** (ABA) is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The **ABA Center for Human Rights** has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries. The Center is an implementing partner in the Clooney Foundation for Justice's TrialWatch initiative.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the **Clooney Foundation for Justice** focused on monitoring and responding to trials around the world that pose a high risk of human rights violations. TrialWatch is global in scope and focused on trials targeting journalists, LGBTQ persons, women and girls, religious minorities, and human rights defenders. It works to expose injustice and rally support to secure justice for defendants whose rights have been violated.

The statements and analysis expressed have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and do not represent the position or policy of the American Bar Association. Furthermore, nothing in this report should be considered legal advice for specific cases. Additionally, the views expressed in this report are not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY



ABA Center for Human Rights staff who are members of the TrialWatch Experts Panel assigned this trial a grade of D:

The trial entailed serious violations of international standards that affected the outcome and resulted in significant harm to Dr. Nyanzi. Namely, Dr. Nyanzi was prosecuted and sentenced to prison for exercising her right to freedom of expression. The grade of D is based solely on the violation of Dr. Nyanzi's right to freedom of expression and not on the identified fair trial violations, which may not have affected the outcome.

From March to August 2019, the American Bar Association (ABA) Center for Human Rights monitored the criminal trial of academic and prominent women's and LGBTQ rights activist Dr. Stella Nyanzi in Uganda as part of the Clooney Foundation for Justice's TrialWatch initiative. The prosecution and conviction of Dr. Nyanzi for political speech constituted a violation of her right to freedom of expression. Additionally, the proceedings were marred by fair trial violations: in particular, the failure to provide the defense with adequate time to call and present witnesses.

In July 2019, following the court's closure of the defense case, the Center released preliminary conclusions raising concerns about potential violations of Dr. Nyanzi's right to prepare a defense. Prior to issuing final reports on cases, the Center routinely issues preliminary reports in response to noteworthy developments. The present report on Dr. Nyanzi's case, which is based on the complete set of monitors' notes as well as on court transcripts, replaces the preliminary report. To the extent that anything in this final report elaborates on or refines the preliminary report's conclusions, this report is dispositive.

Dr. Nyanzi is an outspoken critic of President Museveni's administration and regularly invokes the philosophy of "radical rudeness", a tactic developed by Ugandan activists under colonial rule. Radical rudeness typically involves the use of public insult to criticize those in power. In 2018, Dr. Nyanzi was charged with cyber harassment and offensive communication under the Computer Misuse Act on the basis of a poem she had posted on Facebook. The poem, in line with radical rudeness precepts, employed graphic language to proclaim that Uganda would have been better served if President Museveni had died in the womb.

At the pretrial stage, proceedings were generally compliant with due process rights, excepting that the authorities reportedly detained Dr. Nyanzi for approximately four days before bringing her before a court for assessment of the legitimacy of her detention. Under

international law, 48 hours is the maximum period that an accused may be held in custody prior to judicial review absent exceptional circumstances.

Once the trial started, the court allocated just two to three weeks¹ for the presentation of the defense's entire case while providing the prosecution with approximately three months. When the defense was unable to secure witnesses' attendance, the court - in the face of defence requests for more time and for court compulsion of certain witnesses' presence - closed the defense case, proceeding to judgment without the defense having completed examination of a single witness. Although the court explained that this decision was based on the defense's insufficient preparation for trial, the disparities between the time given to the prosecution and that given to the defense violated Dr. Nyanzi's right to call and examine witnesses and, correspondingly, her right to adequate time and facilities to prepare her defense.

Finally, the prosecution and conviction of Dr. Nyanzi under the Computer Misuse Act contravened her right to freedom of expression. In accordance with the International Covenant on Civil and Political Rights and the African Charter, restrictions on the right to freedom of expression must (i) be prescribed by law, (ii) serve a legitimate objective and (iii) be necessary to achieve and proportionate to that objective. Speech critical of public figures, particularly when part of ongoing public dialogue, is worthy of the highest level of protection. While the proceedings against Dr. Nyanzi may have been geared towards safeguarding the rights and reputation of the President and his family, the President is the quintessential public figure and Dr. Nyanzi's poem was political commentary situated within a larger public debate on the President's policies. As such, the graphic nature of the poem was insufficient justification to remove it from the ambit of free speech protection and into the criminal justice system. Furthermore, under the principle of proportionality a jail sentence far exceeds the permissible range of penalties for speech offenses: imprisonment is reserved for "serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people."² Dr. Nyanzi's comments clearly do not rise to the prescribed level of severity.

More broadly, the Computer Misuse Act's criminalization of language such as Dr. Nyanzi's raises serious concerns. Affording the judiciary unfettered discretion to jail individuals for speech perceived as offensive and/or obscene will undoubtedly chill public debate and criticism, eroding the democratic fabric.

¹ As will be discussed below, this number depends on how the starting date is calculated.

² African Court on Human and Peoples' Rights, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, December 5, 2014, para. 165.

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

The trial of Dr. Stella Nyanzi is consistent with a broader pattern of suppression of civil and political rights in Uganda. According to Freedom House's 2019 Freedom in the World report, which measures countries' protection and promotion of political rights and civil liberties, Uganda's status has been downgraded from "partly free" to "not free."³ A recent U.S. State Department Country Human Rights Practices report on Uganda likewise identified "significant human rights issues" ranging from harsh prison conditions and arbitrary detention to restrictions on freedoms of press, expression, assembly, and political participation.⁴

Despite the fact that Uganda is a constitutional democracy, the country is facing oppressive government rule under President Yoweri Museveni. Museveni - head of state for more than 33 years - has increasingly stifled dissent and consolidated his power.⁵ During the general elections for President in 2016, for example, the Museveni administration partially blocked access to social media.⁶ The election - in which Museveni triumphed - was plagued by allegations of voter intimidation and disenfranchisement as well as by a general lack of transparency.⁷

The government has significantly restricted the right to freedom of expression in recent years. The Computer Misuse Act (or, the "Act") - under which Dr. Nyanzi was prosecuted - was enacted in 2011. To date, several individuals have been charged pursuant to the Act for public statements made against government officials. In 2015, for example, Robert Shaka, an information and security analyst with USAID, was arrested and charged with violations of the Act for Facebook posts criticizing President Museveni and his wife.⁸

³ Freedom House, "Freedom in the World Report on Uganda", 2019. Available at <https://freedomhouse.org/report/freedom-world/2019/uganda>.

⁴ Bureau of Democracy, Human Rights, and Labor, "2017 Country Human Rights Practices Report: Uganda", 2018, pg. 1. Available at <https://www.state.gov/wp-content/uploads/2019/01/Uganda.pdf>.

⁵ See Human Rights Watch, "Uganda Tightens Clampdown on Media: Authorities Also Repressing Political Opposition Events", October 14, 2019. Available at <https://www.hrw.org/news/2019/10/14/uganda-tightens-clampdown-media>; Freedom House, "Freedom in the World Report on Uganda", 2019; The Economist, "Uganda and Its President: A Leader Who Cannot Bear to Retire", October 12, 2013. Available at <https://www.economist.com/middle-east-and-africa/2013/10/12/a-leader-who-cannot-bear-to-retire>; Bureau of Democracy, Human Rights, and Labor, "2017 Country Human Rights Practices Report: Uganda", 2018, pg. 1.

⁶ Reuters, "Uganda blocks social media, clamps down before president sworn in", May 12, 2016. Available at <https://af.reuters.com/article/topNews/idAFKCN0Y30YC>.

⁷ The Guardian, "Ugandan elections marred by shambolic polls and claims of fraud", February 22, 2016. Available at <https://www.theguardian.com/global-development/2016/feb/22/ugandan-elections-polls-fraud-yoweri-museveni>; The Global Observatory, "Uganda's 2016 Elections: Another Setback for Democracy in Africa", February 24, 2016. Available at <https://theglobalobservatory.org/2016/02/ugandas-2016-elections-another-setback-for-democracy-in-africa/>.

⁸ See Human Rights Watch, "Keep the people uninformed: Pre-election threats to free expression and association in Uganda", 2016, pgs. 33-34. Available at https://www.hrw.org/sites/default/files/report_pdf/uganda0116web.pdf.

The following year, the local chairperson of Uganda's Forum for Democratic Change political party, Swaibu Nsamba Gwoyolonga, was arrested and charged under the Act for posting a Photoshopped photo of President Museveni in a coffin on Facebook.⁹ And in 2017 a musician and music producer were arrested and charged with violating the Act after posting a song that was critical of President Museveni online.¹⁰

Additional measures taken by the government that suppress the right to freedom of expression include the banning of certain forms of expression and the institution of a "social media tax."¹¹ In 2018, for instance, security officials in Northern Uganda prohibited a song by Ugandan artist Bosmic Otim from being played on local radio stations because the lyrics disparaged four government parliamentarians.¹² The social media tax was implemented that same year and requires users of social media - including WhatsApp and Facebook - to pay a daily fee in order to access the platforms. Critics have stated that the measure weakens freedom of expression and disproportionately affects low-income individuals.¹³

It was in this climate of increasing hostility towards dissent and criticism that the Ugandan authorities pursued Dr. Nyanzi's case.

B. CASE HISTORY

Dr. Stella Nyanzi is a prominent Ugandan academic and was formerly a research fellow at the Makerere Institute of Social Research. Dr. Nyanzi's work and advocacy is focused on women's and LGBTQ rights. She is an outspoken critic of President Museveni's administration and regularly invokes the philosophy of "radical rudeness," a tactic that was developed by Ugandan activists under colonial rule.¹⁴ Radical rudeness generally involves the use of public insult to criticize those in power.¹⁵

In the spring of 2017, Dr. Nyanzi was questioned by the police regarding a Facebook post that criticized President Museveni's wife for failing to follow through on a promise to make

⁹ The Daily Monitor, "FDC chairperson arrested over posting Museveni in coffin on Facebook", December 13, 2016. Available at <http://bit.ly/2jll1TD>.

¹⁰ The Daily Monitor, "Artist remanded for annoying Museveni", December 5, 2017. Available at <https://www.monitor.co.ug/News/National/Artiste-remanded-annoying-Museveni/688334-4215916-format-xhtml-t1e83s/index.html>.

¹¹ See The Guardian, "Millions of Ugandans quit internet services as social media tax takes effect", February 27, 2019. Available at <https://www.theguardian.com/global-development/2019/feb/27/millions-of-ugandans-quit-internet-after-introduction-of-social-media-tax-free-speech>.

¹² Human Rights Watch, "Uganda: Events of 2018", 2019. Available at <https://www.hrw.org/world-report/2019/country-chapters/uganda>.

¹³ See The Guardian, "Millions of Ugandans quit internet services as social media tax takes effect", February 27, 2019.

¹⁴ CNN, "She wrote a poem about a vagina. It landed her in jail", July 7, 2019. Available at <https://edition.cnn.com/2019/07/07/africa/stella-nyanzi-as-equals-intl/index.html>.

¹⁵ Id.

sanitary pads accessible to schoolgirls.¹⁶ Dr. Nyanzi was then arrested for another post in which she referred to President Museveni as a “pair of buttocks,”¹⁷ charged with cyber harassment and offensive communication under the Computer Misuse Act, and detained for over a month.¹⁸ That case against her is ongoing. After Dr. Nyanzi was released on bail, she started a successful crowdsourcing campaign to raise money to provide sanitary pads for schoolgirls.¹⁹

On September 16, 2018, Dr. Nyanzi posted a poem on Facebook about President Museveni and his mother, Esiteri. Per radical rudeness principles, the poem used graphic language to argue that Uganda would have been better off if Museveni had died in his mother’s womb. The poem reads in part:

Yoweri, they say it was your birthday yesterday.

How nauseatingly disgusting a day!

*I wish the acidic pus flooding Esiteri’s cursed
vaginal canal had burnt up your unborn fetus.*

*Burnt you up as badly as you have corroded all
morality and professionalism out of our public
institutions in Uganda.*

Yoweri, they say it was your birthday yesterday.

How horrifically cancerous a day!

*I wish the infectious dirty-brown discharge
flooding Esiteri’s loose pussy had drowned you to
death.²⁰*

Dr. Nyanzi was arrested on November 2, 2018, and again charged with cyber harassment and offensive communication under the Computer Misuse Act for posting the poem. The

¹⁶ See The Guardian, “How Insults and a Campaign Over Sanitary Towels Landed Activist in Jail”, April 23, 2017. Available at <https://www.theguardian.com/world/2017/apr/22/activist-uganda-president-buttocks-jail-stella-nyanzi>.

¹⁷ Id.

¹⁸ Human Rights Watch, “Uganda: Events of 2017”, 2018. Available at <https://www.hrw.org/world-report/2018/country-chapters/uganda>.

¹⁹ National Public Radio, “She Strips, She Swears, She Goes to Jail ... For the Good of Her Country”, May 8, 2018. Available at <https://www.npr.org/sections/goatsandsoda/2018/05/08/609390039/she-strips-she-swears-she-goes-to-jail-for-the-good-of-her-country>.

²⁰ African Exponent, “The Poem ‘Insulting Yoweri Museveni’s Late Mother’ That Landed Dr. Stella Nyanzi in Jail”, July 8, 2019. Available at <https://www.africanexponent.com/post/10524-the-poem-that-landed-dr-stella-nyanzi-in-jail-for-insulting-president-yoweris-late-mother>.

prosecution alleged that her words were “obscene, lewd or indecent.”²¹ Dr. Nyanzi chose not to post bail and remained in Luzira Women’s Prison for the duration of the proceedings against her. She has stated that she suffered a miscarriage while in prison.²² Dr. Nyanzi also lost her job as a research fellow at the Makerere Institute of Social Research.²³

The hearing of witnesses commenced on March 20, 2019 before the Buganda Road Magistrate Court. The prosecution called three witnesses: two investigating police officers and a member of the pornographic control committee of the Uganda Law Society. No witnesses testified for the defense. On August 1, 2019, the Buganda Road Magistrate Court convicted Dr. Nyanzi of cyber harassment and acquitted her of offensive communication. The following day, she was sentenced to 18 months in prison, reduced by nine months due to her time in pretrial detention.

²¹ Stella Nyanzi Indictment, November 6, 2018.

²² The Independent, “Stella Nyanzi: Ugandan Academic Jailed for ‘Creative Flair’ in Lewd Poem Criticizing President”, August 3, 2019. Available at <https://www.independent.co.uk/news/world/africa/stella-nyanzi-jailed-uganda-president-poem-vagina-metaphor-facebook-a9037736.html>.

²³ Id.

METHODOLOGY



A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice's TrialWatch initiative, the ABA Center for Human Rights deployed several monitors to the trial of Stella Nyanzi before the Buganda Road Magistrate Court in Kampala. The trial was in English and the monitors were able to follow the proceedings. Prior to the trial, Center staff conducted background research, consulted with country experts, and prepared a memorandum for monitors outlining the case's procedural history and the political/legal context in Uganda.

The monitors did not experience any impediments in entering the courtroom and were present for the entirety of the trial. The monitors used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendant's fair trial rights were respected.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, staff at the ABA Center for Human Rights reviewed responses to the standardized questionnaire (collected via the CFJ TrialWatch App), notes taken during the proceedings, and a draft transcript of the proceedings. The Center has relied on the draft transcript for an account of preliminary hearings, at which it was not present, as well as to supplement monitors' notes.

Center staff found that the court's imposition of a truncated timeline on Dr. Nyanzi's defense violated her right to call and examine witnesses and right to adequate preparation. Further, not only did the prosecution and conviction of Dr. Nyanzi violate her right to freedom of expression but the provisions of the Computer Misuse Act under which she was tried contravene relevant ICCPR and African Charter standards.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (the “ICCPR”); jurisprudence from the United Nations Human Rights Committee (the “HRC”), tasked with monitoring implementation of the ICCPR; the African Charter on Human and Peoples’ Rights (the “African Charter”); jurisprudence from the African Commission on Human and Peoples’ Rights (the “African Commission”), tasked with interpreting the Charter and considering individual complaints of Charter violations; jurisprudence from the African Court on Human and Peoples’ Rights (the “African Court”), which - complementing the African Commission’s work - is tasked with interpreting and applying the African Charter; the African Commission’s Resolution on the Right to Recourse and Fair Trial (the “Fair Trial Resolution”); and the African Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the “Fair Trial Guidelines”).

The African Court has “jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples’ Rights (the Charter), the Protocol [on the Court’s establishment] and any other relevant human rights instrument ratified by the States concerned.”²⁴ Uganda ratified the African Charter in 1986 and the Protocol in 2001.²⁵ Notably, the African Court has frequently relied on jurisprudence from both the European Court of Human Rights and the Inter-American Court of Human Rights, noting that the two bodies have analogous jurisdiction and are guided by instruments similar to the African Charter.²⁶ The Court has also stated that where the ICCPR provides for broader rights than those of the Charter, it can apply the ICCPR if the country under consideration has already acceded to or ratified it.²⁷ Uganda acceded to the ICCPR in 1995.²⁸

The African Commission adopted the Fair Trial Resolution in 1992 to clarify State obligations regarding fair trial rights provided by the African Charter. In 2003, the Commission further elaborated on fair trial rights in its Fair Trial Guidelines, which address

²⁴ African Court on Human and Peoples’ Rights, “Welcome to the African Court”. Available at <https://en.african-court.org/>.

²⁵ African Union, “List of Countries which have signed, ratified/acceded to the Protocol of the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights”. Available at https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf.

²⁶ See Jamil Ddamulira Mujuzi, “The African Court on Human and Peoples’ Rights and Its Protection of the Right to a Fair Trial”, *The Law and Practice of International Courts and Tribunals*, December 5, 2017, pg. 193. Available at https://brill.com/abstract/journals/lape/16/2/article-p187_187.xml.

²⁷ African Court on Human and Peoples’ Rights, *Alex Thomas v. Tanzania*, App. No. 005/2013, November 20, 2015, paras. 88-89; African Court on Human and Peoples’ Rights, *Wilfred Onyango Nganyani et al v. Tanzania*, App. No. 006/2013, March 18, 2016, paras. 165-166.

²⁸ United Nations Treaty Collection, “ICCPR Status as of August 23, 2019”. Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

the rights, procedures, and safeguards owed defendants at every stage of criminal proceedings.

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Right to Judicial Review of Detention

Dr. Nyanzi was reportedly detained for approximately four days before receiving judicial review: she was arrested and placed in custody on November 2, 2018, and brought before a judge on November 7, 2018.²⁹ Under Article 9(3) of the ICCPR, individuals held in custody pursuant to an arrest must “be brought promptly before a judge or other officer authorized by law to exercise judicial power.” According to the UN Human Rights Committee, this “requirement applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity.”³⁰

The time between arrest and a judicial hearing should not exceed 48 hours unless the circumstances are “exceptional.”³¹ In *Borisenko v. Hungary*, the Human Rights Committee held that the accused’s unexplained detention for three days prior to presentation before a judicial officer violated Article 9(3) of the ICCPR.³² Similarly, there is no indication that Dr. Nyanzi’s case presented “exceptional” circumstances that would justify the four day delay.

Under the African Charter - as is the case under the ICCPR - a detained person is entitled to prompt judicial review. Article 6 of the Charter provides that “no one may be arbitrarily arrested or detained.” Principle M(3) of the Fair Trial Guidelines elaborates on this requirement, stating that those arrested or detained have the right to receive prompt judicial review: “[a]nyone who is arrested or detained on a criminal charge shall be brought before a judicial officer authorized by law to exercise judicial power.”³³

The African Commission has clarified that presentation before a court or judicial officer serves a number of purposes, including assessment of whether there is a sufficient legal reason for the arrest and/or detention; assessment of whether bail should be granted; and safeguarding of the given individual’s rights and well-being.³⁴ Article 6 of the Charter

²⁹ See Draft Trial Transcript, pgs. 1, 106. The transcript shows that November 7, 2018 was the first date that Dr. Nyanzi was brought before a court for the reading of charges. Defense counsel confirmed that Dr. Nyanzi was not brought before a court prior to November 7.

³⁰ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 32.

³¹ *Id.* at para. 33.

³² Human Rights Committee, *Rostislav Borisenko v. Hungary*, U.N. Doc. CCPR/C/76/D/852/1999, October 14, 2002, para. 7.4. See also Human Rights Committee, *Kovsh v. Belarus*, U.N. Doc. CCPR/C/99/D/1369/2005, July 5, 2013, paras. 7.2-7.5.

³³ African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, Principle M(3)(a).

³⁴ *Id.* at Principle M(3)(b).

and corresponding provisions in other African instruments ensure that judicial authorities exercise control over detention.

As such, the period of approximately four days between Dr. Nyanzi's arrest on November 2 and appearance before a court on November 7 fails to fulfil the promptness requirements set forth above, violating Uganda's obligations under the ICCPR and the African Charter. Notably, the Constitution of Uganda likewise establishes a 48 hour maximum between a defendant's arrest and appearance before a court.³⁵

C. VIOLATIONS AT TRIAL

Right to Obtain Attendance and Examination of Witnesses

Under Article 14(3)(e) of the ICCPR, criminal defendants are entitled to "examine, or have examined, the witnesses against [them] and to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them]." Based on the principle of equality of arms, this right "is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution."³⁶

In the African system, Section 2(e)(iii) of the Fair Trial Resolution specifies that Article 7 of the Charter entitles defendants to "[e]xamine or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them."³⁷ Principle N(6)(f) of the Fair Trial Guidelines uses parallel language. Notably, the African Court has held that States shall be proactive "in ascertaining whether the [a]pplicant no longer intended to call his witnesses either because he did not actually want them to appear on his behalf or because he did not have the means to obtain their attendance."³⁸ If the defense does not have the means to obtain witnesses' attendance, the court must attempt to facilitate attendance.³⁹

The present case entailed a violation of Dr. Nyanzi's right to call and examine witnesses. On June 21, 2019, the court ruled that the defense had a case to answer. On that same day, the defense stated that it had about five to seven witnesses to call on its behalf and requested an adjournment to facilitate witness consultations.⁴⁰ The court granted an

³⁵ Constitution of the Republic of Uganda, 1995, Article 23(4)(b). Available at <https://ulii.org/ug/legislation/consolidated-act/0>.

³⁶ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/35, August 23, 2007, para. 39.

³⁷ African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial, 1992, Section 2(e)(iii).

³⁸ African Court on Human and People's Rights, In the Matter of Diocles William v. United Republic of Tanzania, App. No. 016/2016, September 21, 2018, paras. 63-67.

³⁹ *Id.*

⁴⁰ Monitor's Notes, June 21, 2019; Draft Trial Transcript, June 21, 2019, pg. 166.

adjournment until June 26, 2019, allocating June 26 and July 1, 3, and 5 for the defense examination of witnesses.⁴¹

On June 26, 2019, the defense informed the court of its intention to call twenty witnesses.⁴² Counsel listed sixteen names. The remainder were minors, whose names the defense did not disclose. The defense then requested an adjournment in order to secure the witnesses' attendance.⁴³ Although the prosecution did not object to the defense's application to issue witness summonses and to adjourn the proceedings, it submitted a procedural objection regarding Dr. Nyanzi's refusal to inform the court whether she would take the stand (Dr. Nyanzi stated that she would reserve the right to make that decision at a later point).⁴⁴ Subsequently, the court adjourned the proceedings to July 1, 2019.

On July 1, the defense submitted that it was not ready to receive a ruling on the prosecution's objections. Instead, it applied for the recusal of the presiding magistrate. The defense presented two arguments in support of its request for recusal: (1) a breach of equality of arms, alleging that the court had informed only the prosecution that the hearing that day had been delayed and moved from 9 am to 2 pm, and (2) that the defense had observed the magistrate order children to leave the courtroom on multiple occasions throughout the proceedings, indicating - absent any other explanation - that the magistrate had already concluded that the case involved offensive, harmful material.⁴⁵ The magistrate discussed these two arguments and refused to recuse herself.⁴⁶

On the same day, the magistrate agreed to issue summonses and ordered the defense to ensure its first set of witnesses' appearance at the next court session, on July 3, 2019.⁴⁷ The court reportedly issued summonses for the witnesses on July 2, giving the defense less than 24 hours to procure their witnesses' attendance.⁴⁸

None of the potential defense witnesses appeared in court on July 3, 2019. The defense submitted that its witnesses would not appear on July 5 either, noting that it had not had sufficient time to effect service on witnesses.⁴⁹ The court ordered the defense to ensure its witnesses' presence on July 9-10, allocating just those two days for the examination of all defense witnesses.⁵⁰

⁴¹ Monitor's Notes, June 21, 2019.

⁴² Monitor's Notes, June 26, 2019. This number was eventually reduced to 19, as the defense was not allowed to call one of the witnesses, President Museveni.

⁴³ Id.

⁴⁴ Id; Draft Trial Transcript, June 26, 2019, pgs. 176-177.

⁴⁵ Monitor's Notes, July 1, 2019.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Monitor's Notes, July 3, 2019; Interview with Defense Counsel. There was a disagreement about the language that could be included in the summonses, with the result that the summonses were issued on July 2, 2019.

⁴⁹ Monitor's Notes, July 3, 2019.

⁵⁰ Id.

Only one of nineteen witnesses identified by the defense appeared during this two-day period: on July 9. The witness - DW 1 - requested that the court excuse him, stating that he had not been informed as to why he had been summoned to testify.⁵¹ The defense responded that DW 1, a member of the Institute of Forensics and ICT Security, would “answer questions based on his standing as an expert.”⁵² DW 1, however, noted that in order to provide his expert opinion he would first need to investigate the matter and write a report: with respect to Dr. Nyanzi, he had no time for preparation.⁵³ The court adjourned the proceedings to allow the defense to prepare DW 1.

On July 10, 2019, DW 1 did not return and the defense had no other witnesses in court. The defense stated that it had been able to serve summons on only three witnesses, DW 1 included.⁵⁴ With regard to one of these three witnesses, the court noted that there had not been acknowledgement of service of summons. The court also observed that it was unclear if the defense had in fact contacted DW 1 for preparation after the conclusion of proceedings on July 9.⁵⁵

The court further stated that “[t]here had not been proof adduced to show that there was even any attempt to serve any other witness.”⁵⁶ The defense explained that it had not had sufficient time to contact the other witnesses and urged the court to issue arrest warrants to compel the attendance of the three witnesses, including DW 1, who had not responded to summonses.⁵⁷ The court declined to issue arrest warrants, finding that the defense had failed to demonstrate that the witnesses purportedly summoned were unjustifiably absent.⁵⁸ The court noted that it would close the case if no defense witnesses appeared at the next hearing, on July 11.⁵⁹

On July 11, 2019, the defense still had no witnesses in court and complained of the general inequality between the defense and the prosecution: “[u]nlike the prosecution, the prisoner has no police, no coercive power of the State and no consolidated fund from which to draw funds or any competently skilled personnel at her disposal to appear and testify willingly.”⁶⁰ The defense requested a month “to identify, approach, solicit resources and present any willing and voluntary witnesses,” as well as to “publish a notice in a newspaper of wide circulation inviting voluntary willing witnesses to testify” on Dr. Nyanzi’s behalf.⁶¹

⁵¹ Monitor’s Notes, July 9, 2019.

⁵² Id; Draft Trial Transcript, July 9, 2019, pg. 199.

⁵³ Monitor’s Notes, July 9, 2019.

⁵⁴ Monitor’s Notes, July 10, 2019.

⁵⁵ Id; Draft Trial Transcript, July 10, 2019, pgs. 218-219.

⁵⁶ Draft Trial Transcript, July 10, 2019, pg. 217.

⁵⁷ Monitor’s Notes, July 10, 2019.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Draft Trial Transcript, July 11, 2019, pg. 221.

⁶¹ Id at pg. 222.

On July 11, 2019, the court - without offering the defense further assistance and citing the defense's failure to produce witnesses - concluded that Dr. Nyanzi had waived her right to call witnesses and stated that the defense case was closed.⁶² Among other things, the court emphasized that nine of the identified witnesses were professors and doctors based at Makerere University, and that all but one of the proposed witnesses resided in Kampala.⁶³ The court adjourned the case until July 15 for a formal ruling. On July 15, the allotted courtroom was unavailable and the ruling was postponed to the next day.⁶⁴ On July 16, the court officially closed the case.

It is important to note that, in the view of the court, the defense appeared inadequately prepared for the case. Per the court's statements on July 11, 2019, the defense had "not taken trouble to identify and liaise with any person that may be a witness for the accused i.e. one that has relevant facts about the case who could give evidence in favour of the accused."⁶⁵ In the court's words: "save for [the defence] informing Court that the accused would remain silent as a form of defence, no single witness has been called at all to say anything ... The defence has only resorted to raising applications for warrant to issue for the witnesses ... [using] the accused's right to call witnesses to disarm this Court of its duty to dispense justice."⁶⁶ Correspondingly, the defense proposed an unorthodox means of procuring witness attendance: publication of a notice in the newspaper, potentially further indication of the lack of preparation referenced by the court.

Nevertheless, the length of time allocated to the defense falls far below the length of time allocated to the prosecution. Namely, the defense was given seven days over a period of approximately two-three weeks⁶⁷ to make its case with 19 proposed witnesses,⁶⁸ whereas the prosecution obtained the attendance of 3 witnesses who testified in court for seven days over a period of approximately three months.⁶⁹ The examination of the prosecution's

⁶² Monitor's Notes, July 11, 2019.

⁶³ Draft Trial Transcript, July 11, 2019, pg. 241.

⁶⁴ Monitor's Notes, July 15, 2019.

⁶⁵ Draft Trial Transcript, July 11, 2019, pg. 241.

⁶⁶ Id at pgs. 244-246.

⁶⁷ The court used the time frame of March 20-June 19 (the hearing of the prosecution's first witness to the closure of the prosecution's case) in comparing the duration of the prosecution case to that of the defense. The court rejected the use of November 7, 2018 - the reading of the charges - as a start date. Monitor's Notes, July 11, 2019; Draft Trial Transcript, July 11, 2019, pgs. 231-232. This suggests that the relevant start date for the defense's case would be July 9th, when the defense presented its first witness in court. The starting date could also be marked as June 21st, when the court ruled that the defense had a case to answer, June 26th, when the defense was meant to present its first witnesses in court, or July 1st, when the court ordered the issuance of summonses for witnesses. Either way, the period from start to finish amounts to approximately two to three weeks.

⁶⁸ While the magistrate stated in court on July 11 that the defense case was closed, the official ruling came on July 16. The Center will use the latter date to mark the end of the defense case.

⁶⁹ From March 20 to June 19, 2019. On March 20, 2019, the prosecution opened its case with the testimony of its first witness. Prosecution Witness I was examined on March 20 and April 16 and cross-examined on May 9 and 13. He was re-examined on June 17, 2019. On the same day, Prosecution Witness II commenced his testimony. He was cross-examined on June 18 and re-examined on June 19. The final Prosecution witness, Prosecution Witness III, testified on June 19, 2019.

witnesses was adjourned a number of times, including twice at the request of the prosecution,⁷⁰ once because the defense objected that the prosecution had not disclosed relevant documents,⁷¹ and twice because the magistrate/courtroom was unavailable.⁷² Four of these adjournments lasted at least two weeks: each near equal to the entire length of time afforded to the defense case.⁷³ Strikingly, the longest adjournment granted during the defense case was three business days. Furthermore, throughout the trial, hearings consistently started several hours late due to the absence of the magistrate and/or logistical difficulties, belying the pressure placed on the defense to complete its case.⁷⁴

As such, the court neither provided the defense with the “same conditions for obtaining the attendance of and examining witnesses,” nor took active steps to ensure that the defense had the facilities to secure necessary witnesses. The expedited closure of Dr. Nyanzi’s case thus amounts to a violation of her right under the ICCPR and African Charter to obtain the attendance and examination of witnesses on her behalf.

Right to Adequate Time to Prepare a Defense

Under Article 14(3)(b) of the ICCPR, accused persons must have adequate time and facilities for the preparation of their defense. The determination of what constitutes “adequate time” requires an assessment of the circumstances of each case.⁷⁵

Article 7(1)(c) of the African Charter provides for a broad right to defense, including the right to be defended by counsel of the accused’s choosing. The Fair Trial Guidelines elaborate on this guarantee in Principle N(3)(c), which establishes that the “accused has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case.”⁷⁶ The same principle enumerates the factors that may affect the adequacy of time for preparation of a defense, including

⁷⁰ From April 9 to April 16 for rejoinder to address defense submissions and from May 17 to May 31 because of the unavailability of Prosecution Witness I.

⁷¹ From March 20 to April 9.

⁷² From April 23 to May 9 and from May 31 to June 17.

⁷³ Notably, the presiding magistrate did not attend a scheduled hearing on March 1, at which the prosecution was supposed to commence its case, and the proceedings were adjourned until March 20. Again, this delay essentially equals the time allocated to the defense case.

⁷⁴ See Monitor’s Notes: March 20, 2019 (supposed to begin at 9:00 am, started after 12:00 pm), April 9, 2019 (supposed to begin at 9:00 am, started after 3:00 pm), May 9, 2019 (supposed to begin at 9:00 am, started after 2:00 pm), May 13, 2019 (supposed to begin at 9:00 am, started after 11:00 am), May 17, 2019 (supposed to begin at 9:00 am, started after 12:00 pm), June 17, 2019 (supposed to begin at 9:00 am, started after 10:30 am), June 18, 2019 (supposed to begin at 9:30 am, started after 11:00 am), June 19, 2019 (supposed to begin at 11:00 am, started after 11:45 am), July 1, 2019 (supposed to begin at 9:00 am, started at 2:00 pm), July 3, 2019 (supposed to begin at 9:00 am, started at 10:45 am), July 10, 2019 (supposed to begin at 9:00 am, started at 11:00 am), July 11, 2019 (supposed to begin at 9:00 am, started at 1:00 pm).

⁷⁵ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/35, August 23, 2007, para. 32. See Human Rights Committee, *Smith v. Jamaica*, U.N. Doc. CCPR/C/47/D/282/1988, May 12, 1993, 10.4.

⁷⁶ African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, Principle N(3)(c).

“the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.”⁷⁷

As noted above, on June 21, 2019, the court ruled that the defense had a case to answer. Subsequently, the defense submitted a handful of requests for adjournment, first to facilitate consultations and later to procure the attendance of witnesses. As also discussed above, although abbreviated adjournments were granted on a few occasions,⁷⁸ the court allocated seven days over a period of approximately two to three weeks to the defense's presentation of its case, whereas the prosecution had seven days over a period of three months.

In addition, several particularly truncated time periods are worth mentioning. The court reportedly issued its summonses to defense witnesses for the session on July 3 on July 2, giving the defense less than 24 hours to procure witnesses' attendance with said summonses.⁷⁹ Furthermore, on July 3, 2019, prior to the defense procuring the attendance of any of its witnesses, the court set July 11, 2019 as the date for the final submissions.⁸⁰ Knowing that the final submissions would be on July 11 and that the defense had not yet procured the attendance of any of its witnesses, the court allocated just two days, July 9 and 10, for the examination of nineteen proposed witnesses. This expedited schedule resulted in significant “prejudice to the defense.”

The court understandably wanted to try Dr. Nyanzi without undue delay in compliance with Article 14(3)(c) of the ICCPR and Article 7(1)(d) of the African Charter. However, Dr. Nyanzi's right to be tried without undue delay is meaningless if guaranteed at the expense of her right to adequate time to present her defense.

Right to an Impartial Tribunal

Under Article 14(1) of the ICCPR, an accused is entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Article 7 of the African Charter likewise establishes an accused's right to be tried before an impartial tribunal.

As the UN Human Rights Committee has clarified, impartiality has two components. First, judges must not allow their decision-making to be influenced by personal bias or prejudice and second, the tribunal must also appear to a reasonable observer to be impartial.⁸¹

⁷⁷ Id. See also African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial, 1992, Section 2(e)(i).

⁷⁸ From June 21 to June 26 - 2 business days; from June 26 to July 1 - 2 business days; from July 1 to July 3 - 1 business day; and from July 3 to July 9 - 3 business days.

⁷⁹ As noted above, this was reportedly the result of a disagreement over the language that could be included in the summonses.

⁸⁰ Monitor's Notes, July 3, 2019.

⁸¹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/35, August 23, 2007, para. 21.

“[j]udges must not only be impartial, they must also be seen to be impartial.”⁸² In assessing whether there are legitimate grounds to doubt a judge’s impartiality, the decisive factor is “whether the fear can be objectively justified.”⁸³

In the present case, when Dr. Nyanzi was first brought before the court on November 7, 2018, the presiding magistrate stated: “[t]he accused is rude and disrespectful.”⁸⁴ Given that the case revolved around Dr. Nyanzi’s use of radical rudeness tactics, this comment is troubling. It arguably gave Dr. Nyanzi objective justification to fear the magistrate’s lack of impartiality, raising concerns regarding respect for her rights under Article 14(1) of the ICCPR and Article 7 of the African Charter.

D. OTHER FAIRNESS CONCERNS

Equality of Arms

The apparent violations of Dr. Nyanzi’s right to obtain attendance of her witnesses and right to adequate time for preparation also implicate the principle of equality of arms. Both the ICCPR and the African Charter establish that all parties before judicial proceedings have the right to be treated equally.⁸⁵ This standard “means that the procedural conditions at trial and sentencing must be the same for all parties. It calls for a ‘fair balance’ between the parties, requiring that each party should be afforded a reasonable opportunity to present the case under conditions that do not place her/him at a substantial disadvantage vis-à-vis the opponent.”⁸⁶

In Dr. Nyanzi’s case, the defense was placed at a “substantial disadvantage” in its ability to make an effective case. As discussed above, the defense was unable to procure the attendance of its witnesses, apart from one witness who essentially refused to testify. Despite these difficulties, the court at one point ordered the defense to present all of its nineteen proposed witnesses in two days and, overall, confined the defense case to approximately two to three weeks. In contrast, the prosecution’s presentation of three witnesses lasted approximately three months so as to accommodate adjournments and delays largely attributable to the magistrate and prosecution. As such, the court did not treat the defense and prosecution equally.

Right to Freedom of Expression

⁸² Human Rights Committee, *Maria Cristina Lagunas Castedo v. Spain*, U.N. Doc. CCPR/C/94/D/1122/2002, October 20, 2008, para 9.7.

⁸³ *Id.*

⁸⁴ Draft Trial Transcript, November 7, 2018, pg. 1.

⁸⁵ ICCPR, Article 14(1); African Charter, Article 7(1); Fair Trial Guidelines, Principles A(2), N(6)(a).

⁸⁶ Organization for Security and Cooperation in Europe, “Legal Digest of International Fair Trial Rights”, 2012, pg. 110.

In addition to violating Dr. Nyanzi's right to a fair trial, the prosecution also violated her right to freedom of expression. The right to freedom of expression is a fundamental right guaranteed by Article 19 of the ICCPR and Article 9 of the African Charter.

First, certain provisions of the Computer Misuse Act violate the right to freedom of expression on their face. Second, the application of the Computer Misuse Act to Dr. Nyanzi's Facebook post violated Dr. Nyanzi's right to freedom of expression. Finally, the imposition of a jail sentence is - in any event - an excessive penalty.

Provisions of the Computer Misuse Act violate the right to freedom of expression guaranteed by international law

The Computer Misuse Act restricts freedom of expression beyond the limits established by international human rights law. Under the ICCPR and African Charter, restrictions on the right to freedom of expression must (i) be prescribed by law, (ii) serve a legitimate objective and (iii) be necessary to achieve and proportionate to that objective.⁸⁷ Objectives deemed legitimate by the UN Human Rights Committee and African human rights system include the protection of public morals, national security, and the rights and reputation of individuals.⁸⁸

According to the Committee, a restriction "violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression."⁸⁹ The necessity requirement overlaps with the proportionality requirement, as the latter means that the restriction must be the "least intrusive instrument amongst those which might achieve their protective function."⁹⁰ In this vein, laws cannot be overbroad.⁹¹ As stated by the Committee, legislation must be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly ... [and] may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."⁹²

The African Court has likewise elaborated on the standards of necessity and proportionality, stating: "[o]ne of the main criteria for determining whether a measure is necessary in a democratic society is to determine if it is proportionate to the set objective. ... In order to consider the need for a restriction on freedom of expression, the Court notes that such a need must be assessed within the context of a democratic society; it also notes that this assessment must ascertain whether that restriction is a proportionate

⁸⁷ See Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2; African Commission on Human and Peoples' Rights, *Media Rights Agenda and Others v. Nigeria*, Communication Nos. 105/93, 128/94, 130/194, 152/96, 1998, paras. 68-69.

⁸⁸ *Id.*

⁸⁹ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 33.

⁹⁰ *Id.* at para. 34.

⁹¹ *Id.*

⁹² *Id.* at para. 25.

measure to achieve the set objective.”⁹³ Proportionality analysis entails consideration of whether the prescribed punishment is excessive.⁹⁴

With respect to the present case, the Computer Misuse Act was promulgated in 2011 with the goal - among others - of preventing the abuse of information systems.⁹⁵ While the government has a legitimate interest in protecting public morals as well as the rights and reputation of individuals, the broadness of certain provisions of the Act is problematic. In particular, the sweeping restrictions contained in the Act are not necessary to achieve or proportional to the objective of combating computer misuse, as required by the ICCPR and African Charter.

Section 24 of the Act states:

A person who commits cyber harassment is liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both.

For purposes of this section cyber harassment is the use of a computer for any of the following purposes—

making any request, suggestion or proposal which is obscene, lewd, lascivious or indecent . .

The provision is vague and does not set forth an explanation or example of what would constitute “obscene, lewd, lascivious or indecent” language. Due to this ambiguity, the provision potentially encompasses a wide range of protected speech, conferring “unfettered discretion” on the authorities.

Section 25 of the Act, which proscribes offensive communication, states:

Any person who willfully and repeatedly uses electronic communication to disturb or attempts

⁹³ African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, December 5, 2014, paras. 143, 145.

⁹⁴ *Id.* at para. 149.

⁹⁵ Computer Misuse Act, 2011, Preamble. “An Act to make provision for the safety and security of electronic transactions and information systems; to prevent unlawful access, abuse or misuse of information systems including computers and to make provision for securing the conduct of electronic transactions in a trustworthy electronic environment and to provide for other related matters.”

to disturb the peace, quiet or right of privacy of any person with no purpose of legitimate communication whether or not a conversation ensues commits a misdemeanor and is liable on conviction to a fine not exceeding twenty four currency points or imprisonment not exceeding one year or both.

Again, it is unclear what “disturb[ing] the peace, quiet or right of privacy” would entail. Many protected activities could fall within this category. The provision likewise creates ambiguity as to what would constitute “legitimate communication” and how the authorities would determine that speech lacked a legitimate purpose.

Moreover, in seeking to fulfil the objective of protecting morals/and or the rights and reputation of individuals, the Act does not pursue the “least intrusive” route, as required by the ICCPR and African Charter. It sets forth a potential jail sentence of 3 years for cyber harassment and 1 year for offensive communication, an encroachment far from necessary to achieve state interests. As noted by the African Court, “[a]part from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences.”⁹⁶

Consequently, the Act is inconsistent with the ICCPR and African Charter. Notably, various UN Special Rapporteurs, including the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, as well as the UN Working Group on Arbitrary Detention have likewise expressed concern about the overbroad nature of Sections 24 and 25.⁹⁷

The Computer Misuse Act was applied to Dr. Nyanzi in a way that violated her right to freedom of expression

The application of the Act to Dr. Nyanzi’s poem violated her right to freedom of expression, particularly given that her words were aimed at a public figure and situated within a broader public discussion.

⁹⁶ African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, December 5, 2014, para. 165.

⁹⁷ Special Procedures Communication, “Reference: AL UGA 3/2019”, May 31, 2019. Available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24616>; UN Working Group on Arbitrary Detention, Opinion No. 57/2017 Concerning Stella Nyanzi (Uganda), U.N. Doc. No. A/HRC/WGAD/2017/57, October 11, 2017, paras. 64-65, 74.

In interpreting Article 19 of the ICCPR, the UN Human Rights Committee has emphasized the importance of safeguarding political debate and citizenry's capacity to criticize political officials. The Committee, for example, has stated that "[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential."⁹⁸

In the Committee's words: "the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition."⁹⁹

The African Commission has likewise noted that "[p]eople who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether."¹⁰⁰ In *Loha Issa Konate v. Burkina Faso*, the African Court made similar remarks, finding that speech relating to public figures that is part of a larger public debate should be subject to a "lesser degree of interference."¹⁰¹

Additionally, the European Court of Human Rights has concluded that artistic expression should be afforded heightened protection, even in instances where the speech therein could otherwise be restricted.¹⁰²

Dr. Nyanzi's poem discusses her wish that the President had never been born. While Dr. Nyanzi uses graphic language in the piece, she does so in the context of political commentary on the President's respect for human rights, stating, for example: "I wish the acidic pus flooding Esiteri's cursed vaginal canal had burnt up your unborn fetus. Burnt you up as badly as you have corroded all morality and professionalism out of our public institutions in Uganda" and "I wish the infectious dirty-brown discharge flooding Esiteri's loose pussy had drowned you to death. Drowned you as vilely as you have sank and murdered the dreams and aspirations of millions of youths who languish in the deep sea of massive unemployment, and under-employment in Uganda."

Notably, prosecution witnesses indicated that their discomfort with the poem was partially rooted in its irreverence towards a political figure. The first prosecution witness, investigating officer Bill Ndyamuhaki, testified: "the post is an abuse to the President

⁹⁸ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 13.

⁹⁹ *Id.* at para. 38.

¹⁰⁰ African Commission on Human and Peoples' Rights, *Media Rights Agenda v. Nigeria*, Comm. Nos. 105/93, 128/94, 130/194, 152/96, 1998, para. 74

¹⁰¹ African Court on Human and Peoples' Rights, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, December 5, 2014, para. 155.

¹⁰² See European Court of Human Rights, *Karatas v. Turkey*, App. No. 23168/94, July 8, 1999, para. 52; European Court of Human Rights, *Alinak v. Turkey*, App. No. 40287/98, March 29, 2005, paras. 41-45.

Yoweri Kaguta Museveni ... Yoweri Museveni is not the one that has corroded our morality and professionalism out of our public institutions ... No, Yoweri Museveni is not the one that has aborted any semblance of democracy, good governance and rule of law.”¹⁰³ He further noted that “[t]he test of what is acceptable does not leave room for citizens to in obscene way insult *political leaders* (italics added).”¹⁰⁴ Correspondingly, the second prosecution witness, Uganda Law Committee member Charles Dalton Opwonya, remarked: “[y]ou cannot accuse someone *especially a public figure* of what you have not given proof of (italics added).”¹⁰⁵ Again, the “mere fact that [the poem was] considered to be insulting to a public figure” does not justify the charges and Dr. Nyanzi’s subsequent conviction. Furthermore, as a work of art, the poem warranted greater latitude within the freedom of expression framework.

Troublingly, the investigation and prosecution appear to have drawn upon a skewed sampling of the community in determining that the poem was obscene and/or offensive. Investigating officer Bill Ndyamuhaki, for example, noted that that he had interviewed just “one member of the community” about the poem and had thereafter “c[o]me to the conclusion” that it was “disgusting to the community.”¹⁰⁶ He added that he had not interviewed any women in the course of his investigation and that his religious beliefs had shaped his evaluation.¹⁰⁷ The testimony of the second prosecution witness, Charles Dalton Opwonya, was seemingly influenced by his own children’s reactions to the post: “My children are even the ones who told me that the post was bad ... and I was ashamed.”¹⁰⁸ The witness also surveyed internet backlash against the poem to make his assessment.¹⁰⁹ The opinions of respondents such as Facebook friends and one’s own children cannot be the basis for evaluating whether speech is protected by the ICCPR and African Charter.

Dr. Nyanzi’s poem, albeit explicit, relies on metaphors and artistic license to make a political point. Her words should thereby have received heightened protection as opposed to being grounds for prosecution.

Criminal penalties on the basis of speech are only warranted in the most serious and exceptional circumstances

Dr. Nyanzi was convicted of cyber harassment and sentenced to 18 months in prison. This sanction is inconsistent with the jurisprudence of the UN Human Rights Committee and African human rights system as well as with commentary from UN Special Procedures.

¹⁰³ Draft Trial Transcript, May 13, 2019, pgs. 100-101.

¹⁰⁴ Id at pg. 104.

¹⁰⁵ Draft Trial Transcript, June 17, 2019, pg. 125.

¹⁰⁶ Draft Trial Transcript, May 13, 2019, pg. 103.

¹⁰⁷ Id at pgs. 105-106.

¹⁰⁸ Draft Trial Transcript, June 18, 2019, pg. 143.

¹⁰⁹ Draft Trial Transcript, June 17, 2019, pgs. 123, 125-26.

The penalty of imprisonment is a severe form of punishment. The Committee has stated that “the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.”¹¹⁰ In *Marques de Morais v. Angola*, for example, the Committee found that the arrest and imprisonment of a journalist for penning a series of articles that denounced the Angolan president was incompatible with Article 19.¹¹¹ In the Committee’s words, the “severity of the sanctions imposed on the author [could not] be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition.”¹¹²

The UN Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression has further noted that with respect to speech offenses, only child pornography, incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred should ever be criminalized.¹¹³ According to the Special Rapporteur, it is never permissible to levy criminal penalties in response to other forms of expression given the “significant chilling effect” that occurs.¹¹⁴ As referenced above, the African Court has likewise limited custodial sentences for expression offenses to “serious and very exceptional circumstances.”¹¹⁵

The imposition of an 18-month sentence on Dr. Nyanzi is particularly concerning given the Computer Misuse Act’s close resemblance to criminal defamation legislation. While the provisions under which Dr. Nyanzi was charged do not explicitly criminalize defamation, they have been applied in such a way as to *de facto* prohibit statements about the President that are perceived to be defamatory: i.e. criticism of his administration.

The UN Human Rights Committee has concluded that “imprisonment is never an appropriate penalty” for defamation offenses.¹¹⁶ The Committee has stated that States “should consider the decriminalization of defamation”, urging “the application of the criminal law [to] only be countenanced in the most serious of cases.”¹¹⁷ Likewise, the African Commission has discouraged criminal penalties for defamation except when necessary to protect security and public order.¹¹⁸

¹¹⁰ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 38.

¹¹¹ Human Rights Committee, *Marquis de Morais v. Angola*, U.N. Doc. CCPR/C/83/D/1128/2002, March 29, 2005, para. 6.8.

¹¹² *Id.*

¹¹³ UN General Assembly, Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixty Sixth Session, U.N. Doc. A/66/290, August 10, 2011, para. 40.

¹¹⁴ *Id.*

¹¹⁵ African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, December 5, 2014, para. 165.

¹¹⁶ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 47.

¹¹⁷ *Id.*

¹¹⁸ African Commission on Human and Peoples’ Rights, *Media Rights Agenda v. Nigeria*, Comm. Nos. 105/93, 128/94, 130/194, 152/96, 1998, para. 75.

Dr. Nyanzi's statements do not rise to the level of severity that would warrant criminal penalties. Her prosecution and conviction violate the guarantees established by international law.

CONCLUSION AND GRADE



The prosecution and conviction of Dr. Nyanzi violated her right to freedom of expression and the proceedings were marred by fair trial abuses. More broadly, the case against Dr. Nyanzi reflects a troubling trend of suppression of free speech in Uganda, enabled by the Computer Misuse Act's sweeping provisions.

As noted above, activists in Uganda initially used radical rudeness to challenge the colonial government and now use it to criticize government officials. President Museveni's administration has been quick to punish individuals who engage in radical rudeness tactics - particularly when the speech at issue concerns him and his family. Troublingly, the broadness of the Computer Misuse Act has provided his administration with a new vehicle through which it can pursue criminal penalties against dissenting voices, undermining Ugandan citizens' ability to continue employing radical rudeness as a form of democratic criticism.

GRADE:

D



GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”¹¹⁹ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

¹¹⁹ ICCPR, Article 26.