PRESENTATION BY

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EXPLORING AND EMPLOYING ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN CRIMINAL CASES AS A TOOL TO COUNTER DELAYS IN THE DELIVERY OF JUSTICE

SALUTATIONS

I received with great appreciation, the invitation extended to me by my brother the Chief Justice of Zambia to honour the Judiciary of Zambia as the Keynote Speaker at the opening of its High Court Criminal Session for the Year 2025, under the theme: "***Exploring and Employing Alternative Dispute Resolution Mechanisms in Criminal Cases as a Tool to Counter Delays in the Delivery of Justice***". This theme speaks to the position taken by a number of Chief Justices of jurisdictions in Africa who have come together under the Africa Chief Justices' ADR Forum in the pursuit of alternative dispute resolution mechanisms as a legal regime that affords justice seekers in our respective jurisdictions relevant, and more effective, access to justice.

I therefore extend salutations from the Judiciary of Uganda, to the Hon. Chief Justice Dr. Mumba Malila SC, and the Judiciary of Zambia as a whole. Thank you for inviting me speak at this important annual ceremony in the Zambian Judiciary's legal calendar, which provides an invaluable platform for sharing experiences, ideas, and solutions aimed at improving criminal justice delivery in Zambia. This is an occasion that enables the Judiciary, and stakeholders in the justice law and order sector, the opportunity to review the Judiciary's performance in the immediate previous year, and chart the way forward in the New Year. It is an imperative that we dedicate the law year to the Almighty God, and beseech Him for His grace and the fulfilment the country's justice seekers' aspirations.

BACKGROUND

As you are all aware, Africa was subjected to colonial rule. This colonization caused a fundamental change in the legal, regulatory and legislative framework of the African people, when the norms, traditions, and customs of the African peoples were displaced by the colonial masters' legal regime.

While Africa rid itself of the colonial rule, the legal regime that colonialism imposed on us remained intact. It is only now that it is dawning on us that the formal justice system we have practised for decades is not only alien, but is hostile to the African interests and values. This foreign legal regime has had enormous negative impact on the administration of justice in our various African jurisdictions.

For instance, in Uganda, the **Justice Needs and satisfaction Report, 2024** revealed that the number of people seeking justice services through formal Courts in Uganda increased from 4% in 2020, to 10% in 2024. This is an alarmingly pathetic figure. The Report also reveals that the majority of the people in Uganda rely on the informal justice sector, such as direct negotiation, seeking help from family members or friends, and seeking help from Local Council Courts, instead of going to the formal Courts. Even then, the small number of justice seekers who come to the formal Courts do not get the timely justice they are entitled to due owing to the complexity of the justice system in place that overburden court systems; thus creating the monster of case backlog. Delay in criminal justice delivery leave the accused in pre-trial detention for extended period of time, prolong the suffering of victims, and therefore erode public confidence in the Judiciary.

Native customs on the other hand, provided very satisfactory dispute resolution approaches that were people-centered and that left the community members largely satisfied. This is what we abandoned when we embraced the formal Court adjudication system at the expense of our African dispute settlement approaches. It is noteworthy that the USA, the largest economy in the world is run virtually entirely on the ADR mechanism of justice delivery, as for both civil and criminal matters, more that 95% of the cases are resolved through the ADR mechanism.

Against this background, the Judiciary of Uganda hosted the first ever, ADR Summit on the African Continent and we were blessed with the personal

presence of 16 Chief Justices and representatives of various judiciaries across Africa. The Chief Justices ADR Summit was held from 5th to 6th March 2024 in Kampala, Uganda under the theme "***Re-Engineering the Administration of Justice on the African Continent.***"

Some of the key resolutions reached at the ADR Summit were to establish a Chief Justices' Forum on ADR. A Forum known as the Africa Chief Justices' ADR Forum (ACJAF) has since been established. Allow me to use this opportunity to appreciate the Hon. Chief Justice Dr. Mumba Malila who has been very active in advocating for the Forum's agenda. I reiterate Uganda's commitment to him and the Judiciary of Zambia. We look forward to working with you in growing both civil and criminal ADR in Zambia and we are also excited at the prospect of gaining valuable knowledge and experience of the Judiciary of Zambia.

WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

My Lord the Chief Justice of Zambia, I have shared with you my personal definition of ADR as African Dispute Resolution, and what the colonial masters imposed on us is really the alternative. In the case of Uganda for example, the voice of the people of Uganda is well articulated in Article 126 of the Constitution in the following authoritative terms:

(1) Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.

(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles –

(a) justice shall be done to all irrespective of their social or economic status;
(b) ***justice shall not be delayed****;*
(c) ***adequate compensation*** *shall be awarded to victims of wrongs;*
(d) ***reconciliation between parties shall be promoted;*** *and*
(e) substantive justice shall be administered without undue regard to

technicalities.

These imperative provisions call upon the Judiciary and the Courts to respect and enforce the values, norms and aspirations of the people of Uganda in the delivery of justice. Reconciliation, compensation and timely resolution of disputes are at the center of these aspirations.

Community-based mediation and restorative justice practices play a crucial role in integrating ADR in the criminal justice system in Uganda. These practices involve victims, offenders, and community members in the dispute resolution process. Ultimately, this promotes healing and restores social harmony. By focusing on repairing harm rather than merely punishing offenders, restorative justice aligns with African values of communal solidarity and reconciliation.

Today, the Judiciary of Uganda is trying to bless the aspirations of the people of Uganda by introducing and emphasising, among others, the following forms of ADR in criminal justice:

a) compensation, in addition or as an alternative to imprisonment in criminal matters;
b) plea-bargaining and sentence bargaining for all categories of criminal cases;
c) involving victims and considering victim and society interests in determining appropriate sentences;
d) diversion especially in relation to juvenile offenders;
e) reconciliation especially in relation to domestic violence and personal offences;
f) community service in minor offences; and
g) Payment of fines especially in property related offences.

Forms of ADR in Criminal Matters

It has become evident that traditional adjudication alone cannot sustainably meet the growing demands of justice. This realization has led the Judiciary

to explore innovative solutions, including the adoption of Alternative Dispute Resolution (ADR) mechanisms.

In this regard, we have taken pioneering steps to integrate ADR principles into criminal justice, particularly for offences under our penal laws. This approach stems from the understanding that certain criminal matters are best resolved through dialogue, reconciliation, and restorative justice, rather than through adversarial litigation.

a) Reconciliation

The Constitution of Uganda enjoins Courts to promote reconciliation in criminal matters and encourage and facilitate the settlement in an amicable way, of proceedings for assault, or for any other offences of a personal or private nature, not amounting to felony and not aggravated in degree, in terms of payment of compensation or other terms approved by the court, and may, thereupon, order the proceedings to be stayed.

Under Rule 2 of the Judicature (Reconciliation) Rules, SI. No. 41/2011, the following offences may be settled through reconciliation: adulteration of food or drink, adultery, assault, criminal trespass, desertion of a child, elopement, child neglect, pretending to tell fortunes, simple theft, threatening violence and writing or uttering words with intent to wound religious feelings.

b) Plea Bargaining

Plea bargaining, also known as "negotiating a plea," which is an agreement between the prosecution and the accused where the accused agrees to plead guilty to the charges against him/her, in consideration of the promise of a lenient sentence or a reduced charge.

Benefits of Plea Bargaining

Plea Bargaining is a case backlog reduction intervention that the Judiciary of

Uganda has developed and implemented since 2014. The then Chief Justice, through Practice Directions, commissioned the program which run for two years. The essence of the pilot program was for the judiciary and the key stakeholders to do a hands-on process which later informed the development of the Judicature (Plea Bargain) Rules, S. I. No. 43/2016 which were intended to enhance the efficiency in the criminal justice system through an orderly and timely management of trials.

1. This system has worked in Uganda and substantially reduced the cost of criminal trials. The cost of each trial in Uganda is estimated to be Ug. Shs1 million an equivalence of 300 USD. This amount covers a number of costs including legal representation for an accused because our Constitution provides for legal representation at the expense of the state, for anyone who has been charged with a capital offence.

2. However, with plea bargaining, the costs are cut by more than half. Since 2014, we have concluded 45,000 capital cases at the high court. The cost of hearing these cases would have ordinarily been Ug. Shs45 billion.

3. With plea bargaining a trial costs Ug. Shs 500, 000 hence Ug. Shs 22 billion spent and hence Ug. Shs 22.5 billion saved, not including the money saved on appeal, and most importantly promoting restorative justice.

4. In terms of prison administration, the number of convicts has increased compared to the remand prisoners and this has helped management of prisoners by involving the convicts in prison rehabilitation programs.

5. It has played a commendable role in delivering quick and acceptable justice to the parties and has undoubtedly helped in decongesting prisons. With Plea Bargaining we are able to handle cases that may not necessarily be backlog, as long as they are ready for trial.

6. The accused is able to avoid a lengthy trial and the risk of a harsher punishment. It helps in avoiding the stigma of a public trial and the attendant media attention, avoiding undue anxiety by resolving the issue as quickly as possible and moving on; avoiding expense and exposure that can be exceptionally draining on an accused since the longer a trial takes, the more expensive it tends to be.[1]

7. On the side of the State, the prosecution saves the time and cost of going into full trial, the time and cost of summoning and examining witnesses, the stress of having to deal with emotionally traumatized witnesses and the risk of failing to prove the offence leading to acquittal. Sometimes, the prosecution may require the accused/defendant to testify against other offender(s) as a condition for plea bargaining. Still in respect to cost saving, plea bargaining ensures that the matter is resolved once and for all as appeals arise only in rare circumstances.

8. The Court too is a beneficiary. It saves Court's time and resources. If the defendant pleads guilty, the Court prepares for the sentencing hearing without a trial. We do not have to facilitate witnesses; we do not have to spend hours and days in court hearing matters; we do not require forensic support and exhibits. The saved time and resources can be used to deal with other cases hence reducing case backlog.

9. Sitting in Court for long hours and writing proceedings have also adversely affected the health of the Judicial Officers over the years. Back pain, hand disability and loss of eyesight are the common health hazards suffered. Plea Bargaining will certainly ameliorate on this burden.

[1] Rose, C. (2008). Looking beyond amnesty and traditional justice and reconciliation mechanisms in northern Uganda: A proposal for truth-telling and reparations. Boston College Third World Law Journal, 28(2), 345–400

10. On the side of the community, the offer to plead guilty and the acceptance of the offer is a form of reconciliation and forgiveness and the leniency in sentencing seals the deal. The convict serves a fairly short sentence and is more likely to be readmitted into the community. The victims are happy because they chose the kind of punishment that satisfies the injury suffered – unlike a sentence imposed by the Court without considering its desirability or impact.
11. Furthermore, plea bargaining promotes restorative justice which offers an avenue for healing and resolution. It allows victims to express how the crime has affected them and give offenders the opportunity to make reparations directly. In Uganda, this approach has been particularly effective in addressing crimes that affect tight-knit communities, where reconciliation and peace-building are paramount. Restorative justice also fosters a sense of accountability within the offender, as they are required to face the impact of their actions on their victims and the broader community. This engagement creates a more meaningful understanding of justice.

The Process of Plea Bargaining under the Plea Bargaining (**The *Judicature (Plea Bargain) Rules, S. I. No. 43/2016***)

(a) Initiation of Plea Bargaining

A plea bargain may be initiated orally or in writing by the accused or the prosecution at any stage of the proceedings, before sentence is passed.

(b)Consultation of Court

The parties inform Court of the ongoing plea bargain negotiations and consult the court on its recommendations with regard to possible sentence before the agreement is brought to court for approval and recording. A Judicial Officer who has participated in a failed plea bargain negotiation may not preside over a trial in relation to the same case.

(c) Executing a Plea Bargain Agreement

Where the parties are voluntarily in agreement, a Plea Bargain Agreement is executed and filed in Court.

(d)Confirmation of a plea bargain agreement by the Court

After the Plea Bargain Agreement is signed, the accused is presented before the Court. The Court informs the accused person of his or her rights, and must satisfy itself that the accused person understands their rights as set out in the agreement.

(e) Recording the Plea of Guilty

The charge is then read and explained to the accused person in a language that he or she understands. The accused is invited to take plea. A Plea of guilty is accordingly recorded.

The prosecution lays before the court the factual basis contained in the plea bargain agreement and the court determines whether there exists a basis for the Agreement. The accused person is asked whether he/she freely and voluntarily, without threat or use of force, executed the agreement with full understanding of all matters.

A Plea Bargain Confirmation is signed by the parties before the presiding judicial officer in the Form set out in the **Rules** and then it becomes part of the Court record; and is binding on the prosecution and the accused, in the terms spelt out.

(f) Rejection of the Plea Bargain Agreement

The court is not allowed to impose a sentence more severe than the maximum sentence recommended in the plea bargain agreement, but where the court is of the opinion that a particular case is deserving of a more severe sentence than that recommended in a plea bargain agreement, the court is free to reject the Plea Bargain Agreement.

Where the court rejects a plea bargain agreement it shall record the reasons for the rejection, inform the parties and refer the matter for trial. The agreement becomes void and is inadmissible in subsequent trial proceedings or in any trial relating to the same facts.

Either party may, at any stage of the proceedings before the court passes sentence, withdraw a plea bargain agreement, by informing Court of his/her intention to withdraw from the bargain or by pleading not guilty upon reading the charges to the accused.

Any statement made by an accused person or his or her advocate during plea bargain discussions is not admissible for any other purpose beyond the resolution of the case through a plea bargain.

(g) Ethical Considerations

A plea bargain agreement, before being signed, must be explained to the accused person by his or her advocate or a justice of the peace in a language that the accused understands and if the accused person has negotiated with the prosecution through an interpreter, the interpreter must certify to the effect that the interpretation was accurately done during the negotiations and execution in respect of the contents of the agreement.

Additionally, before entering into a Plea Bargain Agreement, the Prosecution must take into consideration the interests of the victim, the complainant and the community. These interests include loss or damage suffered, criminal record of the accused, the nature of and circumstances relating to the commission of the offence, among others.

The Court must also guard against bargains that are reached corruptly or by misrepresentation. Bargains that do not match the gravity of the offence and the circumstances of the offence may be rejected.

> In **Uganda (DPP) Vs Ongoriya Moses & Wanamama Mics Isaiah, C.R.A. No. 44/2024**, it was established after the Plea Bargaining process was completed that

the Prosecutor, had for personal reasons, amended the charge of murder without instructions and substituted it with that of manslaughter, and accordingly proceeded to sign a bargain for six years' imprisonment. The Hon. Principal Judge set aside the Plea Bargain Agreement having established collusion, misrepresentation, illegality and exclusion of the complainant in the execution of the agreement. He observed that:

"*Prosecutorial discretion and amendments must be based on the facts of the case and only intended to foster justice not to curtail it. Since there was no new evidence to amend the existing summary of the case on the Court Record, I find that it was irrational on the part of the 2nd Respondent to amend the charge from Murder to Manslaughter. The consequence is that the 1st Respondent in furtherance of fraud pleaded to nonexistent facts. There is nothing on Court Record to suggest that there was new evidence pointing otherwise that would in law justify an amendment from murder to manslaughter.*

"The amendment … was not only irrational but was also against public policy to let alleged offenders of serious crimes escape responsibility. …. Plea Bargaining was never intended to be a handshake for alleged criminals. It is a method intended to ensure that accused persons who committed offences and are willing to take responsibility for their actions do not spend a long time on remand awaiting trial. It is intended to promote timely delivery of justice while promoting forgiveness, reconciliation and healing of the victims or their families. It shouldn't be used as a handshake for those running away from criminal responsibility in connivance with those supposed to prosecute them."

This case is a demonstration of one of the major challenges associated with plea bargaining. The plea bargain process can be prone to abuse through corruption and misrepresentation of facts, at the expense of the victim.

It is also important to note that Uganda doesn't have mandatory sentencing legislation. Mandatory sentences in Uganda were declared unconstitutional in the case of **Attorney General v Susan Kigula & 417 Ors [2009] UGSC 6 (21 January 2009** in which the Supreme Court held;

"*Furthermore, the administration of justice is a function of the Judiciary under article 126 of the Constitution. The entire process of trial from the arraignment of an accused person to his/her sentencing is, in our view, what constitutes administration of justice. By fixing a mandatory death penalty Parliament removed the power to determine sentence from the Courts and that, in our view, is inconsistent with article 126 of the Constitution.*
We do not agree with learned counsel for the Attorney General that because

> *Parliament has the powers to pass laws for the good governance of Uganda, it can pass such laws as those providing for a mandatory death sentence. In any case, the Laws passed by Parliament must be consistent with the Constitution as provided for in article 2(2) of the Constitution.*
> *Furthermore, the Constitution provides for the separation of powers between the Executive, the Legislature and the Judiciary. Any law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution*."

The difference in Zambia is that you have mandatory minimum and maximum legislation and you can therefore commence plea bargaining as a pilot program, with misdemeanor offences. This can be commissioned by the Chief Justice and I am confident that it will gradually shape the Zambia home grown plea bargaining system.

CHALLENGES

In addition to some of the challenges I have highlighted above such as limited sentences and ethical issues, Uganda also faces the following challenges in implementing ADR;

(a) Limited support from legal practitioners

Successful ADR requires understanding and support by all justice service stakeholders. In Uganda, some lawyers took long to support these initiatives as they thought the interventions would rob them of their lawyers' fees. We have had a lot of sensitizations and engagements with the Uganda Law Society to bring them on board and the response is now positive.

(b) Limited understanding of ADR and conflict with existing laws

The second challenge is mindset change. The Court Users, and even some Judges, have taken long to appreciate that the law is not static and must be applied progressively in answer to the needs of the people. ADR sensitization campaigns must continue. Let's reform our laws and practices to enable ADR to thrive.

CONCLUSION

I am aware that Zambia does have in place an ADR framework in the form of the 2010 Plea Negotiations and Agreements Act. I am informed that the main challenge has been the implementation of the provisions of that Act because it is does not extend to sentence bargaining.

As Africans we have a rich history of resolving disputes through methods that emphasize dialogue, reconciliation, and communal harmony. As I said earlier, long before the advent of colonialism, our societies effectively managed conflicts through methods such as negotiation, mediation and conciliation. These traditional practices were deeply rooted in our cultural values and prioritized restoration of relationships over retribution.

I encourage the Zambian judiciary to continue on this path of innovation and scale up its use of ADR in criminal cases. By investing in capacity building, public awareness, and institutional reforms, Zambia can further cement its position as a leader in justice innovation on the continent.

Our Judiciary is open to share its experiences as well as learning from what Zambia has put in place or intends to put in place.

Let us move forward together, united in our commitment to justice and equity for all. As we continue to explore and implement ADR in criminal cases, let us remain committed to the shared goal of ensuring timely, fair, and accessible justice for all. Together, we can build stronger and more resilient judicial systems that uphold the rule of law and promote social harmony.

Thank you.

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