

## The court record and the right to a fair trial: Botswana and Uganda

*Catherine S Namakula*

Senior lecturer, Faculty of Law, University of Fort Hare; Head of Department, Adjectival Law, Nelson Mandela School of Law, East London, South Africa

### Summary

*The court record is everything to the judicial process. Budgetary constraints and administrative challenges facing judicial services in the African countries studied here leave courts with inefficient modes of generating and maintaining full and reliable court records, hence defeating the ends of justice. Evidence is lost in the process of recording and during the preservation of court records through fires and malpractices. The court record is the basis for a fair trial. Any determination of a court is founded on the material in the record and such decision is placed and preserved on the face of the record. Fair trial guarantees of appeal and review are initiated by the court record. An appeal is a trial of the record. The competence of a court that cannot accurately record its proceedings and preserve the records to guarantee a fair trial is questionable. There is a need to facilitate a reliable mode of producing and maintaining the court record, towards a culture of fulfilling the right to a fair trial in Africa. This analysis focuses mainly on the experiences of the courts of Botswana and Uganda.*

**Key words:** *court record; competence; fair hearing; justice; trial rights*

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\* LLB (Hons) (Makerere), LLM (Nottingham), PhD (Witwatersrand);  
cthrnamakula@yahoo.co.uk

## 1 Introduction

The capacity of the courts of several African countries, such as Kenya,<sup>1</sup> Nigeria,<sup>2</sup> South Africa<sup>3</sup> and Zambia,<sup>4</sup> to foster a reliable system of taking and maintaining the court record is constrained by budgetary compromises and resource constraints that adversely affect the realisation of the right to a fair hearing. Fair trial guarantees are facilitated by a court record that fairly and accurately represents the proceedings and the findings. The record is what accords juridical value to what would otherwise be ordinary information. The court record also initiates judicial processes such as appeal, review and revision, which are significant to trial fairness. An appeal, particularly, is decided on the record only.<sup>5</sup>

Several courts of law in Africa use outdated gadgets, while many others, especially at the lower level, rely on handwritten notes of

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- 1 E Maseh 'Managing court records in Kenya' (2015) 25 *African Journal of Library Archives and Information Science* 85: 'Results show that records management in the Kenyan judiciary faces several challenges such as persistent backlogs of cases – a factor which is attributed to poor records management resulting in lost, misfiled or damaged files, delays in registering cases, locating records and filing documentation, the lack of records management policies and inadequate staff capacity, limited awareness about the value of sound records management for enhanced service delivery, limited use of ICT and inadequate budgets. The implications of poor management of court records in the Kenyan judiciary are that decisions are made without full information about cases. Besides, the absence of systematic record keeping and controls leaves scope for corruption and collusion between court officials and lawyers. Furthermore, court time is wasted and the Judiciary's standing is lowered.' See also M Musembi 'The management of legal records in Kenya: A case study' in M Roper (ed) *Managing public sector records: Case studies* (1999) Cases 13-24.
  - 2 A Abioye 'Court record management and efficient administration of justice in Nigeria' (2014) 24 *African Journal of Library, Archives and Information Science* 36: 'The management of records in Nigerian courts falls short of the acceptable standard with dire consequence on efficient administration of justice in Nigeria.'
  - 3 See 'Modernise court systems: Mogoeng' *ioL News* 28 November 2014 [http://www.ioL.co.za/news/crime-courts/modernise-court-systems-mogoeng-1.1788118#.VjnU\\_8LovIU](http://www.ioL.co.za/news/crime-courts/modernise-court-systems-mogoeng-1.1788118#.VjnU_8LovIU) (accessed 4 November 2015). In the words of the Chief Justice to Parliament's Justice Portfolio Committee while explaining problems facing the court system: 'South Africa is in an unfortunate situation where dockets disappear even in the custody of prosecutors.' See also International Records Management Trust *Case studies: Legal and judicial records and information systems in South Africa* (2002).
  - 4 P Nabombe 'An assessment of records management at the courts of law in Zambia: The case of court registries' contribution towards Access to Justice, University of Zambia, <http://datad.aau.org/handle/123456789/57381>. The study found administrative risks in the court registries, which negatively affected the records management function, and reputation risks that eroded public confidence in the courts of law and court registries in particular. There is a general lack of infrastructure development in the courts of law that has contributed to congestion in court registries, bad record management in court registries resulting from a failure to comply with regulations stipulated in the National Archives Act of Zambia, the lack of a records management policy, and a poor work culture among registry clerks, among other findings.
  - 5 *S v Magalefe* CLHFT-000 033/2008 [2008] BWHC 280 para 5. See also *Ntungamili v S* CLHFT-000018-12 [2013] BWHC 6.

judicial officers in circumstances where stationery may be inadequate and storage facilities are exposed to risks of fire and theft. Evidence is lost during the taking and storage of the court record. There are no video or audio recordings of proceedings, thus leaving the aforementioned notes as the only evidence of the proceedings. The court record, in such circumstances, reflects what the adjudicating officer believes to have heard;<sup>6</sup> mistakes and mishearing are humanly possible. Cases of incomplete and fragmented records of handwritten notes of proceedings have been challenged on appeal as occasioning a miscarriage of justice.<sup>7</sup> An incomplete record does not aid the delivery of justice to the parties.<sup>8</sup> Common omissions include actual questions put to a witness;<sup>9</sup> the full submissions of the parties;<sup>10</sup> and the sworn status of a witness.<sup>11</sup>

The record should contain all the questions and answers.<sup>12</sup> It is difficult to understand the meaning of responses given in examination if the questions asked are not recorded. In cases where only answers to questions are recorded, the context in which a response is given and the intended meaning of the response are not clear to an appellate tribunal.<sup>13</sup> However, the High Court of Botswana has been hesitant to hold all records that do not reflect questions incomplete.<sup>14</sup> Omissions may result from incomplete transcriptions, such as in the case of *S v Israel*,<sup>15</sup> where certain portions of the record were not typed. The courts have been moved to redress inadequacies of court records. An issue arises as to whether a court that lacks the capacity to maintain a full record of its proceedings is a competent court in the language of article 14 of the International Covenant on Civil and Political Rights (ICCPR).

The right to a fair trial is a civil right enshrined in article 14 of the ICCPR.<sup>16</sup> Of the 54 countries of Africa, 52 are member states to the

6 *Monyandiwa & Others v S* CLHFT-000136-06 [2009] BWHC 174.

7 See eg *Bishanga Silagi v Bataha Joselin* HCT-05-CV-CA-0015-2011 [2012] UGHG 202.

8 *Matilda Baidoo v Alfreda Davis* Suit HI/180/07 Court of Appeal of Ghana, judgment of 12 May 2011.

9 See eg *Nabakooza v The State* Cr App F36/2005 [2005] BWHC 95, *S v Monnawatlala* CRHFT-000 010-07 [2007] BWHC 64.

10 *Jng Express (Pty) Ltd v Botswana Insurance Company Limited* Civil App 017-06 [2007] BWHC 55.

11 See *S v Saidoo* CHLB-000092-07 [2008] BWHC 49. The typed record did not indicate whether a witness was sworn in but the manuscript clearly stated that he was duly sworn in.

12 *S v Alfred* CLHFT 000 081/2006 [2008] BWHC 199 para 8.

13 *S v Pitlagano* CRAF-18-05 2008 BWHC 349 para 17.

14 *Tsitsino v S* CLHFT-000070-10 [2010] BWHC 186 para 15.

15 *S v Israel & Another* CLHFT 000 013-07 [2008] BWHC 469.

16 Also expressed as the right to be heard in art 7 of the African Charter on Human and Peoples' Rights adopted on 27 June 1981, entered into force on 21 October 1986, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 29.

ICCPR.<sup>17</sup> The obligation to fulfil this civil right, as other rights in the Covenant, takes immediate effect for all state parties.<sup>18</sup> The resources required to foster a reliable standard of taking the court record raise questions as to whether this is an aspect of fair trial that demands progressive but steady realisation.

In principle, the right to a fair trial applies, with similar effect, to civil and criminal matters. However, it has an inherent inclination towards criminal trials by according specific guarantees to the accused person, constituting definitive elements of the right. This article may manifest that bias, but its findings apply to both civil and criminal matters. This is a study of two jurisdictions: Botswana (Southern Africa) and Uganda (Eastern Africa). Both countries are state parties to the ICCPR. Botswana serves as an example of a progressive jurisdiction that created a computer-based system known as the court records management system (CRMS), which is currently operational in some of its courts. Since its initiation in 2005, the electronic court records management system has improved the efficacy of the record among participating courts.<sup>19</sup> This has set the momentum for other jurisdictions, such as South Africa, which have demonstrated a willingness to follow suit. However, paper records exist parallel to electronic records by law and, partly because of several challenges to the implementation of CRMS, this debate is equally relevant to Botswana. Uganda predominantly operates a paper-based manual court record management system. The judiciary of the East African nation is struggling with the operationalisation of a court case management system known as the court case administration system (CCAS).<sup>20</sup> In 2011, the International Records Management Trust found that the CCAS was not compliant with international good practice standards for electronic court records management.<sup>21</sup> The system has, however, assisted with workflow management among

17 See <http://www.cccprcentre.org/select-country/> (accessed 9 November 2015).

18 General Comment 31 [80] 'The nature of the general legal obligation imposed on states parties to the Covenant' para 5.

19 See Justice Maruping Dibotelo 'Enhancing court efficiency – Judicial case management and performance measurement' Conference on Access to Justice 7-10 July 2011. See also L Motsathebe & N Mnjama 'The management of High Court records in Botswana' (2009) 19 *Records Management Journal* 173; and *Gaopalelwe Jacob v The State* Court of Appeal Cr App CLCGB-065-12 Judgment 1 February 2013 para 9: Magistrate's courts do not have mechanical recording systems.

20 See J Ssinabulya 'ICT in the Uganda judiciary' paper presented at the AfricanLII Workshop 14, 17 August 2015 <http://slideplayer.com/slide/5760971/> (accessed 9 August 2015).

21 International Records Management Trust *Managing records as reliable evidence for ICT/e-government and freedom of information: Uganda court case study* (2011) 15 [http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBsQFjAAahUKEwiRgj-tnoPJAhWFtA8KHSMzCRE&url=http%3A%2F%2Fwww.irmt.org%2Fdocuments%2Fresearch\\_reports%2FIDRC%2FUGANDA%2520COURT%2520CASE%2520STUDY.doc&usq=AFQjCNGSoKdOB6wcrEQknOuW1hA8Scnhzw&bvm=bv.106923889,d.ZWU](http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBsQFjAAahUKEwiRgj-tnoPJAhWFtA8KHSMzCRE&url=http%3A%2F%2Fwww.irmt.org%2Fdocuments%2Fresearch_reports%2FIDRC%2FUGANDA%2520COURT%2520CASE%2520STUDY.doc&usq=AFQjCNGSoKdOB6wcrEQknOuW1hA8Scnhzw&bvm=bv.106923889,d.ZWU) (accessed 9 November 2015).

participating courts and enabled partial electronic working.<sup>22</sup> The judiciary of Uganda has an ICT Policy and Strategic Plan which prioritises the implementation of a digital court recording and transcription system at all commercial courts,<sup>23</sup> before extending it to other courts. This is yet to fully materialise. Many of the processes of even the Commercial Court are still manual, and paper records are widely used.<sup>24</sup> The aforementioned African jurisdictions experience common challenges in records management that are demonstrably rife among several African countries.

The article addresses an untreated area of fair trial and introduces a debate, in the context of information science, to human rights discourse. It consists of four parts. Part 1 explores the meaning and significance of the court record, while highlighting the importance of such records to trial and appeal processes. This is followed in Part 2 by a discussion of the practicalities of producing the court record in the jurisdictions studied and the problematic situations that arise during its generation and storage. Part 3 focuses on the impact of these inadequacies in the record on the realisation of the right to a fair trial, while highlighting the minimum rights of the person on trial that are directly affected. This is followed by a discussion of remedies available to aggrieved parties.

## 2 Meaning, nature and significance of the court record

'Court record' is a broad term denoting the case file, containing all the material admitted into a case by the court and that which the court produces in that regard. This includes documentary evidence; exhibits; summons; correspondence between the parties; affidavits of service; judgments; final orders of court; and the transcript or record of proceedings. The civil record book and criminal record book kept by the registrars and clerks of the High Courts and magistrate's courts of Botswana are designated forms of the record.<sup>25</sup> The criminal record book is referred to as the 'criminal case record'.<sup>26</sup> Examples of what a record should comprise of include any judgment or ruling; any

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22 As above.

23 Court recording and transcription system (DCRTS) that aims at producing a transcript within 12 hours of the court proceeding. See Ssinabulya (n 20 above) 14.

24 International Records Management Trust (n 3 above). See also Ssinabulya (n 20 above) 24, alluding to the lack of enthusiasm to embrace ICT and resistance to change towards the use of ICT in the judiciary, insufficient training of staff and end users of the system.

25 Civil Record Book (Order 3 Rule 2, Rules of the High Court, 2011 Statutory Instrument 1 of 2011; Order 3 Rule 1, Rules of the Magistrate's Courts Statutory Instrument 13 of 2011), Criminal Record Book (Order 48 Rule 1, Rules of the Magistrates' Courts; Order 67 Rule 7, Rules of the High Court, 2011).

26 See Order 48 Rule 1, Rules of the Magistrate's Courts.

evidence given in court; any objection made to such evidence; the proceedings of the court, including any inspection *in loco*; any matter demonstrated by any witness in court; and any other portion of the proceedings which the judge may specifically order to be recorded.<sup>27</sup> The record books of the courts of Botswana contain the following common features: the serial number of the case; the names of the parties; the cause of action; the date the document was filed and the party filing it; the hearing date; and the judgment, among others.<sup>28</sup> These specifics are similar to the contents of the record of proceedings of local council courts of Uganda.<sup>29</sup> The aforementioned details give the case an identity and a time value. They also substantiate and legitimise the claim or charge. The record *per se* serves the following functions: It initiates proceedings, safeguards the memory of the case, acts as evidence, and often supports the legal rights and obligations of stakeholders.<sup>30</sup>

The form and manner of taking, keeping, and the disposal or destruction of the court record are subjects of law. The Rules of the High Court and the magistrate's courts of Botswana instructively lay down the procedure to be followed in the generation and maintenance of the court record.<sup>31</sup> The statutory foundation, rule basis and systematic character of recording and custody of the court record accord legal force and character of due process to an otherwise administrative task. In Uganda, the Rules Committee is mandated to prescribe the form and manner in which court records are to be kept and disposed of or destroyed.<sup>32</sup> However, it is not clear whether such rules exist. Of note, proper generation of the record is crucial among courts with original (trial) jurisdiction, such as the magistrate's courts and the high courts of the countries studied. Botswana enacted an Act enabling the admissibility of electronic records as evidence in legal proceedings.<sup>33</sup> As more activity is being conducted electronically, the primary or best evidence is manifesting more in electronic form, such as e-mails. The special features of an e-mail, such as the place where it was generated, the time it was written and the gadget that was used, have evidential value. Technological advancements, such as electronic case files, aid the fact-finding process.

27 See Order 45(16) (a)-(e), Rules of the High Court, 2011.

28 See Order 3 Rule 2, Rules of the High Court, 2011; Order 3 Rule 1, Rules of the Magistrate's Courts.

29 Sec 22 (a)-(k), Local Council Courts Act, 2006. See *Uganda v Rugarwana Constance & Another* [2005] UGHC 90: They include the serial number of the case; the statement of claim; the date of witness summons; the hearing date of the case; names and addresses of the parties and their witnesses; a brief description of the case; the documentary exhibits; the judgment and final orders of the court, including the dates of such judgments and final orders; the particulars of execution of judgment and the date of payment of the judgment debt.

30 See Motsaathebe & Mnjama (n 19 above) 174.

31 See eg Order 45 Rules 17-21, Rules of the High Court (Civil Record Book), Order 48 Rules 2-3, Rules of the Magistrate's Courts (Criminal Case Record).

32 See eg sec 41(2)(i) Judicature Act Cap 13; sec 18(a) Children Act Cap 59.

33 Electronic Records (Evidence) Act 13 of 2014.

It is desirable that the record contains all that transpired in the court *verbatim*.<sup>34</sup> Reference to the court record for what unfolded in the judicial process is the only way to determine whether the manner by which the decision was made was proper.<sup>35</sup> In the language of the Supreme Court of Uganda in the case of *Ozia*, 'the written proceedings are the official and authentic history of the case and the judgment intended to remain a perpetual and unimpeachable memorial of the proceedings and judgment'.<sup>36</sup> The Court further alluded to the significance of recording the actual words of trial participants as a means of preserving the truth for future verification.<sup>37</sup> The record often contains pleadings;<sup>38</sup> the court's findings; procedural steps taken;<sup>39</sup> observations such as site visit reports; comments on the demeanour of witnesses; the evidence; and the identity of participants such as counsel, interpreters and the parties. The record aids crucial judicial processes, such as review, appeal and revision, by setting down the proceedings in writing, while revealing their compliance or irregularity (if any). The grounds of the judgment *per se* must derive from the record.<sup>40</sup> Of note, an error which is apparent on the face of the record accords distinct privileges to an aggrieved party, such as nullification of the trial and a retrial of the case. Such an error can only be revealed by a proper record. An irregularity qualifies as an error apparent on the face of the record if it can be ascertained merely by examining the record without having recourse to other evidence.<sup>41</sup> The doctrine of precedent also brings the record to the core of a common law-based system.

Courts of judicature are also distinguished by the legal obligation to maintain records. There is a distinction between a court of record and a court of no record. The definition of a court of record is important, but it is difficult to articulate a fully satisfactory formulation.<sup>42</sup> A

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34 As held in *Motai & Others v DPP* CLHFT-000 097/2006 [2008] BWHC 198 para 11. See also Order 48 Rule 2(1), Rules of the Magistrate's Courts that obliges the court reporter to record the specified portions of the proceedings *verbatim*.

35 *Nakedi v Commander of Botswana Defence Force & Another* MAHFT 000086/2006 [2007] BWHC 92; See also *S v Mphodi* MCHFT-000076/2007 [2007] BWHC 96. The facts and the evidence given at the trial together with the presiding officer's reasons for his or her decision should ordinarily be found in the record of proceedings.

36 *Patrisi Ozia v R* [1957] EA 36 37.

37 As above.

38 See *Salongo Lutwama v Emmanuel Ssebaduka & Another* Civil App 11/2010, [2012] UGHC 238: Pleadings are a critical component of a record of proceedings under consideration on appeal.

39 In documenting procedural steps, the record acts as a report card for due process rights.

40 See *Ononge v Okallang* (1986) HCB 63, cited in *Okullu Ferdinando v Abok David* Civil App 8/2003 [2009] UGHC 56: Observations must not appear in the judgment from nowhere.

41 See *Chartis Uganda Insurance Company Limited v Insurance Regulatory Authority of Uganda & Another* HCT-00-CC-MC-25-2012 [2013] UGCOMM 64.

simple description is advanced as that court whose proceedings are recorded.<sup>43</sup> In the words of Blackstone, a court of record is<sup>44</sup>

that where the acts and judicial proceedings are enrolled for a perpetual memorial and testimony, which rolls are called the records of the court, and are of such high and super eminent authority that their truth is not to be called in question.

Thus, the integrity of the record of proceedings must be undisputable. Scholars have elevated the status of documents produced by a court of record to forming part of the law itself.<sup>45</sup> The distinction between a court of record and a court of no record is weakened by the good practice of keeping records among all entities that exercise juridical or quasi-judicial functions.

The courts of record in Uganda include the Supreme Court, Court of Appeal, High Court (as superior courts of record),<sup>46</sup> and magistrate's courts (Chief Magistrate, Magistrate Grade I, Magistrate Grade II).<sup>47</sup> Local Council Courts are not established as courts of record but are required by law to keep records of their proceedings in writing.<sup>48</sup> Superior courts of record in Botswana include the Court of Appeal, at the highest level,<sup>49</sup> followed by the High Court.<sup>50</sup> These are preceded by two parallel streams of subordinate courts: the magistrate's courts comprising of regional magistrates; chief magistrate's courts; principal magistrates; senior magistrates; Magistrate Grade I, Magistrate Grade II and Magistrate Grade III; and customary courts consisting of the Customary Court of Appeal; higher customary courts; and lower customary courts. Magistrate's courts are required, by law, to generate and maintain records of proceedings.<sup>51</sup> The Customary Courts of Appeal of Botswana also keep records of proceedings.

### 3 Making the court record: The practicalities

The court record is a valuable asset that is vital to the dispensing of justice.<sup>52</sup> The significance of the record to the integrity of the judicial process makes the capacity of courts to facilitate the record a core

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42 See 'Courts of record' (1889) 29 *Central Law Journal* 67. See also 'What is a court of record' (1900) 34 *American Law Review* 70.

43 *Rubarema Godfrey v Uganda* [1999] KALR 141,142, Kibuuka J.

44 Reiterated in 'Courts of record' (n 42 above).

45 See Musembi (n 1 above).

46 Arts 129(1)(a), (b) & (c) Constitution of Uganda.

47 Sec 4(2) Magistrate's Courts Act (MCA) (1971) Cap 16 stipulates the grades of magistrates in Uganda.

48 Sec 22 Local Council Courts Act 2006.

49 Sec 99(4) Constitution of Botswana.

50 Sec 95(3) Constitution of Botswana.

51 Order 28 Rules of the Magistrate's Courts.

52 See Maseh (n 1 above) 77.



component of court competence. The process of generating the court record is therefore worth noting.

In Botswana, the aforementioned process is guided by the rules of the courts. There is no elaborate procedure, but the rules contain fragments of instructive guiding principles. Of note is Order 45 Rules 16-19 of the Rules of the High Court, which set out (i) the composition of the record; (ii) the means by which the record is to be kept; (iii) the circumstances under which the record may be transcribed; and (iv) the means by which a party may access the record.<sup>53</sup> Directives on the record of civil proceedings among magistrate's courts are contained in Order 28 of the Rules of Magistrate's Courts, setting out (i) the contents of the minutes of court proceedings; (ii) the role bearers; (iii) the manner in which the record is taken; (iv) the circumstances under which the record may be transcribed; and (v) the mode of correcting errors.<sup>54</sup> The Magistrate's Court Rules also set standards for the taking of the criminal case record.<sup>55</sup> Key observations are that the adjudicating officer maintains substantial control of and undertakes considerable responsibility for the process. In fact, the official minutes of judicial officers constitute the record.<sup>56</sup> The record often appears first in manuscript (a handwritten version), whereupon it is typed. Second, there is no standardised form in which the record is to be taken and kept: the record may be taken down and filed in longhand, shorthand, mechanically or electronically.<sup>57</sup> The magistrate's courts' Rules envisage an open category of 'other means' that permits any other form of producing the record.<sup>58</sup> Third, transcribing and duplicating the record occur, as of necessity, at the request of an adjudicating officer or a party intending to lodge an appeal.<sup>59</sup> Transcription has proven strenuous for the courts. The High Court of Botswana noted that there were not sufficient transcribers to expedite the production of records for matters going on appeal and to process current court orders and judgments.<sup>60</sup> Fourth, an accused person has the right to a copy of the proceedings upon payment of a fee, subsequent to the judgment of the offence.<sup>61</sup> Fifth, every court reporter of a magistrate's court or stenographer of the High Court of Botswana is required to take an oath or affirm, before assuming duty, that they would faithfully and to the best of their ability record and transcribe the

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53 This section applies specifically to civil trials. There is no synonymous provision for the procedure of taking the record in criminal trials.

54 Correction of errors is not provided for in the Rules of the High Court, 2011.

55 See Order 48 Rules 1-4, Rules of the Magistrate's Courts.

56 See eg *Monyadiwa & Others v S* CLHFT-000136-06 [2009] BWHC 174 para 43: The official record was the minutes of the magistrate.

57 See also Order 45 Rule 17, Rules of the High Court, 2011.

58 Order 28 Rule 9, Rules of the Magistrate's Courts.

59 Order 45 Rule 18(2), Rules of the High Court, 2011.

60 *Boapotswe v S* MCHFT-000186-12 [2013] BWHC 3 para 17.

61 Sec 10(3) Constitution of Botswana.

record of proceedings, if required to do so.<sup>62</sup> This implies that such court reporter, stenographer or transcriber may be cross-examined on the contents of the record and their role in the process of generating it. The significance of this good practice cannot be underestimated. The rule-based partial electronic record management system of Botswana illustrates that an improved system of court record management is possible in Africa.

In Uganda, a strategy has been devised to implement an electronic record management system known as CCAS. This system is currently partially operational in the Commercial Court. However, the majority of the courts of Uganda rely on handwritten notes of the proceedings taken down by adjudicating officers.<sup>63</sup> The Civil Procedure Rules oblige judges to take down or direct the taking down in writing of the evidence of witnesses.<sup>64</sup> The paper-based manual case management system is predominant. The procedure of taking down the record is not regulated by law. The boundaries of the role of court officials in managing the record are vague. Judicial officers take notes, but it is not clear whether they have any responsibility for the manner in which the record is kept. The means of facilitating even the handwritten record are not sufficient. The case file covers are similar to those found at the Lobatse High Court; they are torn up easily and cannot accommodate voluminous papers.<sup>65</sup> In subordinate courts, the stationary is inadequate.<sup>66</sup> Nigeria is facing a similar situation: Record books are not readily available in its subordinate courts.<sup>67</sup> These ill-facilitated subordinate courts are the fora for the bulk of cases. The Constitution of Uganda provides that the distribution of powers and functions as well as checks and balances among various organs and institutions of government provided for in the Constitution shall be supported through the provision of adequate resources for their effective functioning at all levels.<sup>68</sup> Subordinate courts are equally assigned the role of administering justice; the funding of operations should be proportionate to the task.

Similarly, a person who is subjected to a criminal trial is entitled to a copy of the proceedings, upon payment of a fee, subsequent to the judgment of the offence.<sup>69</sup> The practice is to provide typed records of proceedings which are often required for purposes of lodging appeals.

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62 Order 28 Rule 5(2), Rules of the Magistrate's Courts; Order 45 Rule 21, Rules of High Court, 2011.

63 Author's observation that has been confirmed by practising attorneys and judicial officers.

64 Order XVIII Rule 5, Civil Procedure Rules Statutory Instrument 71-1.

65 Motsaathebe & Mnjama (n 19 above) 183.

66 Author's observation.

67 TF Yerima & HA Hammed 'Magistracy and internal security challenge in the administration of criminal justice in contemporary Nigeria' (2014) 20 *East African Journal of Peace and Human Rights* 107.

68 See National Objectives and Directive Principles of State Policy para viii, Constitution of Uganda 1995.

69 Art 28(6) Constitution of Uganda 1995.

It is then that the transcription of the record becomes vital. Transcription brings the system to test. The few transcribers<sup>70</sup> in Uganda are often ill-equipped, sometimes with outdated manual typewriters. Unpredictable power supplies also hinder the consistent use of even the available electronic gadgets. In *Damas Malagwe v Lanex Forex Bureau Ltd & 4 Others*,<sup>71</sup> the Commercial Court was faced with the dilemma of recording material of inferior quality. The tapes used to record the proceedings turned out to be counterfeit and the entire recorded proceedings were lost. It took a very long time (not specified) to resolve the matter until all the parties agreed that the lawyers provide the Court with their handwritten notes to guide it and form the court's record. It should be remembered that the Commercial Court is the best equipped court in Uganda in view of the government's policy to improve the investment climate by expediting commercial disputes.

Other factors that affect the taking of the court record include the audibility of participants in the trial. Court room communication should be of such quality as to allow competent recording. Participants should speak clearly, audibly and at a reasonable pace to enable the person transcribing the proceedings to hear, process and capture the proceedings in writing. In a system where there are no audio or video backups of proceedings, this is crucial. Audio aids such as address systems are also limited.

The accuracy of typed records has similarly been a subject of controversy in both Uganda and Botswana. Inconsistencies between the typed record and the original rendition have been identified.<sup>72</sup> In the case of *S v Sepeni*, a judge of the High Court of Botswana recommended that the original handwritten statement (in this case the confession) be preserved as a means of solving discrepancies.<sup>73</sup> The judge further acknowledged some advantage in having the typed version approved by the maker of the statement, although it may not seem necessary. Thus, in situations where the record is originally handwritten, it would constitute the authoritative version.

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70 On insufficient staffing, see Ssinabulya (n 20 above) 25.

71 HCT-00-CC-CS-358-2006 [2011] UGCommC 1.

72 See eg *Obane v Directorate of Public Prosecution* CLHFT-000096-12 [2013] BWHC 56; *Mandla v The State Criminal Trial F49/2004* [2006] BWHC 67 para 9: The transcribed record used the word 'stabbed' instead of 'slapped'. The magistrate in her own handwriting had used the word 'slapped'; *Marumo & Another v S* CRAF 11-05 2008 BWHC 347 para 3: The typed version of the record revealed that the witnesses were not sworn in while the original handwritten notes indicated that the witnesses were duly sworn in; *S v Mokopi* CLHFT-000140-06 [2008] BWHC 362: The typed record erroneously indicated that the appellant had given his evidence under oath. The handwritten original of the record of proceedings did not indicate that any oath had been administered to him.

73 *S v Sepeni* CLCLB-054-06 [2007] BWHC 54, See also *S v Mokwatso & Others* CLHFT -000079-08 [2008] BWHC 412 para 8: 'It is important to place original handwritten notes of the presiding officer on the record of proceedings to facilitate the correction of errors that may appear in the typed record.'

Further, records that constitute a mixture of both handwritten and typed notes cause confusion. In *S v Phalaagae*,<sup>74</sup> while the charge sheet was primarily typewritten, the statement of offence for count 4 was handwritten. The appellant claimed that the handwritten portion must have been inserted some time after the judgment. Although his allegation was rejected as unimpressive and baselessly ascribing bad motive to the magistrate, the lesson is valid.

It is important to address the question of whether the taking of the court record is an administrative or judicial function. There is currently no clear identity of this role; the office of the registrar seems to be accountable for this facet of trial, yet judges also make records. The taking of the court record often manifests as a purely administrative role, sometimes as a judicial duty and at times as an administrative function executed by judicial officers or an administrative duty under the supervision of judicial personnel.<sup>75</sup> As a judicial function, it would be subject to judicial processes of appeal, review and revision, hence availing aggrieved parties judicial remedies. The practice of using the minutes of adjudicating officers as the record constrains the availability of complaint mechanisms to aggrieved persons. In principle, a person who assumes the role of a transcriber should be able to attest to the correctness of the record made. The likelihood of subjecting a judicial officer to such a procedure is daunting.

There are three problematic situations in relation to the court record: (i) a missing record (where there is no record at all); (ii) an unavailable or misplaced record (one that is inaccessible); and (iii) an inadequate record (one that is not easily legible or comprehensible).

### 3.1 Missing court records

All registry staff of the Lobatse High Court in Botswana that participated in a study on the management of legal records at the court in 2007 revealed that they had lost and misplaced files, and they could not tell the number of files they lost in a year.<sup>76</sup> This experience is not peculiar to Botswana.<sup>77</sup> It was found that the manual file tracking system was difficult and did not assist in expediting filing or tracking borrowed files. The Court had no prescribed period for which an action officer could keep a file, and unfiled documents piled up in registries.<sup>78</sup> Records were seldom kept under lock and key, hence exposing them to improper access. These are some of the factors that contributed to misplacing or losing records.<sup>79</sup>

74 Cr App 126/04 [2007] BWHC 127.

75 See *Boitumelo Mmereki v The State* Cr App F112/2003 [2004] BWHC 33: 'It is the duty of every magistrate when proof reading the record to ensure that the typists produce the said record *verbatim*.'

76 See *Motsaathebe & Mnjama* (n 19 above) 182.

77 See *Maseh* (n 1 above) 85.

78 *Motsaathebe & Mnjama* (n 19 above) 182.

79 As above.

The disappearance of court files and documents from the record jeopardises the successful and efficient conclusion of cases. While a civil matter loses its place on the court calendar when the court record is missing,<sup>80</sup> a criminal matter is not scheduled for hearing without the record, which can lead to prolonged detentions. Records are lost due to negligence and sometimes administrative inefficiency. Tampering with the records of proceedings amounts to a malpractice that leads to a miscarriage of justice.<sup>81</sup> The High Court of Uganda discovered an obvious malpractice in the case of *Salongo Lutwama v Emmanuel Sebaduka & Another*.<sup>82</sup> A case file was reported missing although the suit had been entered in the register. A fictitious suit was superimposed over the suit of the alleged lost file and was being used interchangeably with another suit. The court regretted being unable to make sense of the anomalies because the record of proceedings in respect of the latter suit was incomplete, as it did not include the pleadings or final submissions.

A missing record may lead to loss of evidence. In the case of *David Muhenda*,<sup>83</sup> the sketch drawing of the *locus in quo* which the trial magistrate had made got lost and was not available to the Appellate High Court judge. The Appellate Court had to visit the *locus in quo*, hence descending into the arena of the trial court. Even then, the learned appellate judge did not make notes of what had transpired during his visit at the *locus in quo*. Although this did not occasion a miscarriage of justice, the Supreme Court took note of the failure to fulfil that duty.<sup>84</sup> The costs of both trial time and resources spent by the court on the subsequent fact-finding mission are significant.

A case of a missing record leads to a retrial or trial of the matter *de novo* (anew). In the case of *Byabagambi v E Kenzirekwija*,<sup>85</sup> the record was unavailable. A party to the case raised the plea of *res judicata* (a matter judged), alleging that the matter had already been heard. The High Court of Uganda held:<sup>86</sup>

The availability of a judgment and record of proceedings of the [Local Council] I Court would have put this matter to rest at the earliest opportunity ... There is no judgment or record of proceedings from which this court may ascertain if the issues in the first case were about inheritance, trusteeship or ownership. It may well be explained that the

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80 See *Eric Ntungura v Jane Mwesigwa* Civil Suit 71/2005 [2010] UGHC 130 – delay of 4 years due to a misplaced court file; *S v Charuka* CLHLB-000067-07 [2008] BWHC 393 para 1: There was scanty progress with an appeal for 5 years due to misplacement of the case file. Even the partially-reconstructed trial record lacked certain relevant documentation such as details of previous convictions and the committal warrant.

81 *Turyahikayo James & Others v Ruremire James* HCT Civil App 43/2010 [2012] UGHC 157.

82 [2012] UGHC 238.

83 *David Muhenda & 3 Others v Margret Kamuje* Civil App 9/1999 [2000] UGSC 7.

84 As above.

85 HCT-05-CV-CA-48-2003.

86 *Byabagambi* (n 85 above) 4 5.

[Local Council] I of that time and indeed many of them even today do not keep records. It may be for this reason that the [Local Council] system, appellate courts start cases *de novo*. But this does not provide the excuse rather it makes it difficult for any party who wants to raise a plea of *res judicata* to do so without supporting evidence. I cannot guess what the proceedings were in order to rule on this ground. I would say that it is not substantial and it fails since issues that were determined in the first case cannot be ascertained.

Similarly, the court record has evidential value in circumstances where a person seeks to challenge double jeopardy: In such cases the record of the previous conviction or acquittal is essential. It is a fair trial warrant that a person cannot be tried or punished for an offence for which they already have been convicted or acquitted (article 14(7) of the ICCPR). In short, the record makes the trial a reality and in so doing aids fair trial guarantees. The absence of the record renders a trial unsupported.

### 3.2 Unavailable court records

The general rule is that the court record is a public document accessible to all persons and may be in both soft and hard copy.<sup>87</sup> However, the intervention of a court may be required to obtain the record of proceedings.<sup>88</sup> There are instances when the court is not able to access the record. An unavailable record is distinguishable from a missing record because the former may exist but is simply inaccessible or cannot be acquired in a practical or effective way. Unavailable or misplaced records of proceedings prolong trials. In the case of *Tendani Mahube*,<sup>89</sup> the record of proceedings had been misplaced by the trial court. The matter before the High Court of Botswana could not proceed for three years because the registrar's office had not typed the record of proceedings as requested by the attorneys handling the matter. This delay was not only inordinately excessive, but it was also unexplained.<sup>90</sup> There were two obstacles to the accessibility of the court record in the aforementioned case: the misplacement of the record by the trial court and the subsequent delay in typing it by the registrar's office. Delays in accessing the record may also arise from searching for the relevant file among the bulk of paper files of a court. Several trials and hearings of interlocutory matters are delayed by the length of time it takes to type and produce the court record.<sup>91</sup>

87 See *Shell (U) Ltd & 9 Others v Rock Petroleum (U) Ltd & 2 Others* Misc Applic 645/2010. See also International Records Management Trust (n 3 above) para 60.

88 See *Commissioner General Uganda Revenue Authority & Another v Kyotera Victoria Fishnet Company Limited & Another* Misc Applic 362/2012, [2012] UGCOMM 96.

89 *Tendani Mahube v The State* Cr Applic F76/2004 [2005] BWHC 92.

90 Distinction drawn in *S v Setlhare* MCHLB-000059-07 [2009] BWHC 4 para 3, 14.

91 *S v Kebojakile* CTHLB-000014-06 [2007] BWHC 197.

### 3.3 Inadequate court records

This category includes documents that are written in illegible handwriting; incorrect records; incomplete records; and mutilated records such as those that are partly destroyed by fire, are torn or faded.

#### 3.3.1 Illegible material

This mainly relates to handwritten material. The pressure upon an adjudicating officer who has to capture the proceedings in writing affects the quality of the handwriting and eventually the output. The quality of handwritten material also depends on the abilities of the writer; there is no guarantee of uniformity or comprehensibility of the material produced in this manner because there is no standard handwriting. A judicial process should promote certainty and precision among its sectors, including the preparation of the court record, by utilising modern and standardised modes of recording.

#### 3.3.2 Incorrect records

A court record may be wholly or partially incorrect. A record that gives a different rendition of the proceedings may be misleading during a trial. In the case of *Kitti*,<sup>92</sup> the facts on the record were disputed by the appellant. The High Court of Botswana found that that which appeared on the record as facts was what was written by the court clerk, presumably after the court proceedings. What compounded the situation was that even the clerk of the court who prepared the record conceded that part of the record had been prepared by the police at the police station. There was no sufficient proof that the record of proceedings accurately reflected the statement of the facts as dictated by the prosecutor at the trial.

In the case of *Gabasie*,<sup>93</sup> the appellant averred that the incorrect recording of his age as 28 rather than 23 years had an impact on the sentence. Although this possibility was ruled out as his youthfulness had been considered as an extenuating factor, it is a viable illustration.

#### 3.3.3 Incomplete and mutilated records

The judge in *Dichabe v The State*<sup>94</sup> was confronted with the problem of an incomplete recording of the evidence. In his language, the judge noted:<sup>95</sup>

I must observe that the evidence on record, as is usually the case in the magistrate's court, was not taken *verbatim*. It is impossible to know what questions were put to the complainant or indeed to any witness in cross-

92 *Kitti v Attorney-General & Others* MAHLB-000217-08 [2008] BWHC 156.

93 *Gabasie v The State* MCHFT 000 088/2006 [2006] BWHC 47 para 11.

94 Cr App F142/03, [2005] BWHC 7.

95 *S v Raditsebe* CLHLB-00126-07 [2008] BWHC 394: The magistrate briefly recorded selective aspects of the evidence of the witnesses.

examination or re-examination because only the witness' responses and not the questions asked are recorded.

An appellate court in Hong Kong found that where the evidence taken down is in question and answer form, it is vital that it should be recorded *verbatim*.<sup>96</sup> The deficiency of the court record, in the aforementioned regard, raised the likelihood of bias as the failure to connect the responses to the questions obscured the direction of the inquiry, and also the evidence that informed the judge's determination.<sup>97</sup> A court record should be made in light of its objective and purpose as a full representation of the proceedings in a case.

An incomplete or improper record may also deprive evidence adduced of character, validity and value. In *Ojaka Yeko & 2 Others v Onono Philips*,<sup>98</sup> the record did not state whether the evidence of the parties and witnesses had been taken under oath. The court made a finding that this negated the quality of the evidence. The record is everything to a judicial process; it is a means of justice.

Courts have sternly redressed matters of incomplete records. In the case of *Bishanga Silagi v Bataha Joselin*,<sup>99</sup> the record of the proceedings, both typed and handwritten, did not indicate that the witnesses had been sworn or affirmed before giving their evidence, and it did not indicate who asked the questions in cross-examination and who answered them, among several errors. The first successful ground of appeal was that the trial magistrate had erred in law and fact by relying on a tangled record of the proceedings and sketchy unintelligible evidence to make a decision, and this error occasioned a miscarriage of justice. The Appellate Court held:<sup>100</sup>

The manner of receiving and recording evidence adopted by the trial court was grossly irregular, and exhibits a tangled mesh-mash of confusion. One only derives from the record a general hazy impression of what the case is all about due to the poor methods of receiving and recording the evidence by the trial court ... The record is obviously tainted with multiple gross irregularities which could not be left to stand as they certainly led to a miscarriage of justice.

Thus, an incomplete and inadequate record may jeopardise a case. In 1975, a Hong Kong law journal suggested that consideration should be given to the tape recording of all trials in Hong Kong. It advanced the view that 'machines, by their very nature, are unbiased, and when used properly they can prevent suspicions directed at more fallible creatures'.<sup>101</sup> All lower courts in Pretoria, South Africa, were found to

96 *Or Chung-yan v R* Fct Cr App 964 of 1973 in (1975) 5 *Hong Kong Law Journal* 365 (notes of cases).

97 *Or Chung-yan* (n 96 above) 366.

98 Civil App 36/2007 [2008] UGHC 111.

99 HCT-05-CV-CA-0015-2011 [2012] UGHC 202.

100 *Bishanga Silagi* (n 99 above) 4.

101 *Or Chung-yan* (n 96 above) 365 366.



record all cases on audio cassettes.<sup>102</sup> These carefully-tracked recordings form the basis of transcriptions, and the transcriptions are verified by the magistrate who heard the case.<sup>103</sup>

Poor handling and storage of records may expedite their wear and tear.<sup>104</sup> Crowded facilities of uncontrolled temperatures are unfavourable for paper records.<sup>105</sup> The state of magistrate's courts in Nigeria, as observed by Ali,<sup>106</sup> is shared by several lower courts in other African countries. Those courts do not have proper or secure places to keep court records and exhibits.<sup>107</sup> The records are exposed to the risk of fire and other hazards such as theft. The form in which these records are kept (as paper files) is also more prone to such dangers. In July 2004, fire gutted the old Mahalapye magistrate's court house in Botswana, reducing all the court records to ashes. The records of proceedings in two part-heard matters of *State v Lebakeng* and *State v Ngahino*<sup>108</sup> were among the records that were completely destroyed.<sup>109</sup> These cases had to be commenced afresh, thus causing a delay of justice to the accused and victims.

The destruction of records in the *Lebakeng* case was found to be the result of criminal arson at no fault of the state.<sup>110</sup> The fire at the Mahalapye magistrate's court was proof of the management problems regarding court records in Botswana, and constituted one of the driving factors for the project to computerise court records.<sup>111</sup> Indeed, the state should assume the responsibility of facilitating courts with modern means of storing and backing up records. Court competency in the ambit of a fair trial should encompass the capacity by a court to secure records. A competent court should embrace technological advancements in handling information securely and efficiently.

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102 International Records Management Trust (n 3 above) para 105.

103 International Records Management Trust paras 143 & 144.

104 Abioye (n 2 above) 36: 'In some cases, wooden racks were used for the storage of records while records were also dumped on the floor unorganised.'

105 Motsaathebe & Mnjama (n 19 above) 183. See also Abioye (n 2 above) 36.

106 See YO Ali 'Delay in the administration of justice at the magistrate court: Factors responsible and solution' [http://www.yusuali.net/articles/delay\\_in-the\\_administration\\_of\\_justice.pdf](http://www.yusuali.net/articles/delay_in-the_administration_of_justice.pdf) (accessed 2 November 2015).

107 As above.

108 MCHFT 000 046, 047, 054/2006 [2006] BWHC 28, [2006] 2 BLR 331.

109 See also *Phuthego v The State* Cr App F17/2004 [2006] BWHC 60: The record of proceedings was destroyed in a fire which gutted the old Mahalapye magistrate's court house where the appellant had been tried and convicted on three separate charges of theft. The conviction and sentence of 7 years were set aside. The trial records in *S v Sebitola* MCHLB-000005-07 [2007] BWHC 24 were destroyed. The court exercised its inherent powers to grant the orders requested by the accused, that his sentence run concurrently, without further consideration. In *Mochela v Director of Public Prosecutions* MCHFT 000 111/2006 [2007] BWHC 273, the conviction and sentence were set aside because the record was burnt in a fire that engulfed the magistrate's court at Mahalapye and could not be reconstructed.

110 *S v Lebakeng* MCHFT 000 046, 047, 054/2006 [2006] BWHC 28, [2006] 2 BLR 331 para 19.

111 Motsaathebe & Mnjama (n 19 above) 178.

## 4 Effect of the court record on the right to a fair trial

The contribution of the court record to the realisation of the right to a fair trial is assessed on the basis of the impact that the record has on the fulfilment of the minimum guarantees. A person who is charged with a criminal offence is entitled to the following minimum rights: (a) the presumption of innocence; (b) information on the nature of the offence; (c) adequate time and facilities for the preparation of the defence; (d) the presence and legal representation of the accused at trial; (e) legal aid; (f) the assistance of an interpreter; and (g) facilitation to examine and cross-examine witnesses.<sup>112</sup> The ICCPR and the African Charter on Human and Peoples' Rights (African Charter) supplement this list with the guarantee of appeal, among others.<sup>113</sup> The court record directly facilitates four minimum rights: (i) presence at the trial; (ii) adequate time and facilities for the preparation of a defence; (iii) a trial without undue delay; and (iv) appeal.

### 4.1 Presence at the trial

The general principle is that an accused person is entitled to effective presence at his or her trial.<sup>114</sup> Effective presence entails a facilitated state of competency to participate in the proceedings. This involves the practical possibility of informing the record, accessing the content of the record, and seeking to effect necessary changes to the record, such as corrections and additional information, among others. A person appears in a suit by filing pleadings.<sup>115</sup> In summary, presence is participation and participation is by way of filing documents.

In criminal proceedings, the court record is often the basis upon which the accused appears before the court, and in civil proceedings, it is the reference for scheduling hearings. By facilitating the appearance of the accused before the court, the court record is the foundation of the right to be heard.<sup>116</sup> The disappearance of case files is a common and absurd cause of the prolonged detention of persons charged, especially in subordinate courts in Uganda.<sup>117</sup> Files disappear as a result of malpractices such as bribery of court officials to destroy evidence,<sup>118</sup> arson as well as accidental fires, negligence or

112 Art 28(3) Constitution of Uganda; art 10(2) Constitution of Botswana, with the exception of the guarantee of legal aid.

113 Art 14(5) ICCPR; art 7(1)(a) African Charter.

114 Art 28(3)d Constitution of Uganda, 1995, as amended; sec 10(2)(d) Constitution of Botswana, 1966, as amended.

115 See Order VIII Civil Procedure Act.

116 CS Namakula 'Language fair trial rights in the Uganda criminal justice system' (2014) 20 *East African Journal of Peace and Human Rights* 131.

117 As above.

118 See also, in Nigeria, Yerima & Hammed (n 67 above) 118.

poor filing practices. Missing court records also adversely affect the computation of sentences or prison terms.<sup>119</sup>

Civil matters are eroded by missing records or mutilated documentary evidence. The record serves as the basis of a claim, without which the matter is unsubstantiated or obscure.

#### 4.2 Adequate time and facilities for preparation of the defence

A person on trial is entitled to adequate time and facilities to defend himself or herself.<sup>120</sup> Adequate facilities include a functional record that fully and effectively represents the proceedings. The record is particularly important in situations of appeal,<sup>121</sup> a change of counsel, a change of the adjudicator, and to refresh the memory of the adjudicator(s) at the time judgment is to be made. The Commercial Court of Uganda held:<sup>122</sup>

To be afforded a fair hearing, a litigant must have adequate time, resources and facilities to prepare and present his or her case. Some of these factors must be afforded by the state or the court system or by the individual person himself. In the case of appeals, the person must be afforded by the court system adequate time and the necessary records to be able to prepare an appeal and present the same for hearing.

The time considered adequate to prepare an appeal starts from the date the registrar of the court notifies a litigant that the court record is ready for collection.<sup>123</sup> The availability of the record is a significant milestone in the appeal process.

The High Court of Uganda observed that the records of proceedings in lower courts often are not available<sup>124</sup> and that, if they exist, they are inadequate. The records of local council courts at levels I and II came under intense scrutiny when a matter originating from a local council court was referred to the High Court of Uganda for revision in the case of *Uganda v Rugarwana Constance & Another*.<sup>125</sup> The record of Local Council Court I, particularly, left a lot to be desired: It lacked precise details of the date when the case was heard, the statement of claim and the names and addresses of witnesses.

119 *Sibanda v S* MCHLB -000035-08 [2009] BWHC 162 para 7.

120 Art 28(3)(c) Constitution of Uganda, 1995; sec 10(2)(c) Constitution of Botswana.

121 See *James Mutoigo t/a Juris Law Office v Shell (U) Ltd* HCT-00-CC-MA-0068-2007 [2007] UGCommC 35.

122 As above.

123 *James Mutoigo* (n 121 above) para 11.

124 See *Otile Charles v Onedo Beneyokasi* Civil App 45/2007, [2009] UGHC 47. The statutory courts of South Sudan try almost all cases originating from customary courts *de novo* due to the inadequacy of records. See P Mertenskoetter & SD Luak 'An overview of the legal system and legal research in the Republic of South Sudan' (2012) [http://www.nyulawglobal.org/globalex/South\\_Sudan.html](http://www.nyulawglobal.org/globalex/South_Sudan.html) (accessed 20 October 2015).

125 HCT-05-CV-0001-2005 [2005] UGHC 90.

There are obvious defects in generating reliable records at the local council courts level.<sup>126</sup> These defects are mainly due to a lack of facilities to generate a competent record, and also the limited personal abilities of the officials even to use the available facilities. A court that lacks facilities to execute its functions has no capacity to offer adequate facilities to its clients. The issue is whether such a court is competent enough to guarantee a fair trial.

The inadequacy of case files has been a cause for adjournments and standing over of cases, sometimes characterised by a further remand of accused persons. A senior magistrate of a court in South Africa revealed to the International Records Management Trust that seven out of ten cases brought to court lacked information, and if the prosecutor was not satisfied with the ripeness of the case, he or she would ask the presiding officer that the accused be remanded pending further investigation.<sup>127</sup> Whereas some of this information may be missing because it had not been obtained, some of it may simply be misplaced, misfiled or lost.<sup>128</sup>

Justice is the result of a contest among streams of information. This contest involves the extraction, analysis, comparison, maximisation and development of information as captured on the record. The court depends on the record to deliver justice. Motsaathebe and Mnjama correctly note:<sup>129</sup>

The daily operations of the court depend on availability of accurate, authentic and reliable information, presented in a timely manner, hence the need to maintain an effective and efficient record keeping system for the [judiciary].

The record and justice are interconnected. The proper management of case files and security of evidence are important facets of a defence. By filing its pleadings and evidence with the court, the defence entrusts the court with its 'assets', especially from the prosecution, which is often viewed as one with the court.

### 4.3 Trial without undue delay

An accused person must be tried promptly and expeditiously.<sup>130</sup> There has to be a trial; the trial should commence in good time, should proceed at a reasonable pace, and it must be completed within a reasonable period. This process is driven by the evidence, on record, before an adjudicating officer.<sup>131</sup> The primary source of all court actions and decisions is the case file. Properly managed court

126 See eg *Otile Charles v Onedo Beneyokasi* Civil App 45/2007 [2009] UGHC 47: The local council courts could not provide authentic records of the complete trial.

127 International Records Management Trust (n 3 above) para 100.

128 International Records Management Trust para 167.

129 Motsaathebe & Mnjama (n 19 above) 174.

130 Art 28(1) Constitution of Uganda, 1995; sec 10(1) Constitution of Botswana.

131 *Obadia Kuku v Uganda* Cr App 5/1998 [1999] UGCA 5.

records aid the expediency of trials. This is illustrated by the following examples:

- (1) A record of evidence given by a witness at a trial has the same force and effect as the witness testimony; it is enough to tender that record in evidence, without recalling the witness.<sup>132</sup> A court record secures the authenticity of actions taken in the course of legal proceedings; it suffices that those actions were properly taken once in the trial.
- (2) A document produced before any court in Uganda as a record of evidence given in a judicial proceeding or before an authorised officer is presumed genuine and its contents accurate.<sup>133</sup>
- (3) Foreign judicial records are equally presumed genuine and accurate by the courts of Uganda, subject to the conditions laid down in section 86 of the Evidence Act, Cap 6. There would be no need for further transboundary actions so as to obtain evidence that is not controversial.
- (4) The function of the record of evidence taken as a true and correct representation of proceedings allows for the trial to proceed without undue delay by accused persons absconding from hearings or obstructing their own trials and having to be removed.<sup>134</sup> Such persons are provided with the record of proceedings so as to follow their trial.

A modern court record facilitates efficient modes of perusing the case file. Searchable databases and documents allow targeted screening that potentially saves time. Video and audio recordings of the proceedings that can be sorted according to the dates of hearings also offer an efficient way of examining the court record. The High Court of Botswana has pronounced itself on this matter, holding:<sup>135</sup>

Despite the shortfalls of evidence by video link or video recordings such as the lack of opportunity for a judge to ask further questions to the witness, seeing and listening to a good video recording is very close to hearing the witness directly as opposed to the paper record especially in as far as it enables the judge to examine the demeanour of the witness.

On the other hand, poor court record management practices cause delays in registering cases, and filing and locating documentation.<sup>136</sup> An adjudicating officer who is obliged to write out the proceedings on paper needs more time to hear the case than one who has the assistance of a trained typist or stenographer. A failure to make records available to the court on time, for whatever reason, slows down a trial. In South Africa it was found that dockets created by the police were supposed to be in court three days before the date set for the trial, but delays are frequent.<sup>137</sup> The police allege a lack of means

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132 Sec 69 Criminal Procedure and Evidence Act Cap 08:02.

133 Sec 79 Evidence Act Cap 6.

134 Sec 100 Criminal Procedure and Evidence Act Cap 08:02.

135 *First National Bank of Botswana Limited v Eastgate Enterprises (Pty) Ltd & Others* CACLB-059-07 [2008] BWHC 3.

136 *Motsaathebe & Mnjama* (n 19 above) 180 182; *Maseh* (n 1 above) 78.

137 *International Records Management Trust* (n 3 above) para 109.

of transport to convey dockets to court, but court officials claim that there is a lack of discipline on the side of the police.<sup>138</sup> This leads to adjournments that could otherwise have been avoided. Such delays translate into the increased cost in litigation, in addition to the stress associated with long periods of waiting for justice to be done.<sup>139</sup> Delays also erode confidence in the judiciary by the public.<sup>140</sup> Frustrated litigants sometimes withdraw their cases.<sup>141</sup>

An expert has recommended that 'records should be classified in a manner that facilitates systematic storage and speedy retrieval of information'.<sup>142</sup>

#### 4.4 Appeal/review/revision

Appeal, review and revision are identical functions. A person aggrieved by a decision of a court may appeal to an appropriate forum.<sup>143</sup> Every person convicted of a crime has the right of his or her conviction or sentence to be reviewed by a higher tribunal according to the law.<sup>144</sup> The review of a case is scrutiny of the record.<sup>145</sup> In the exercise of its powers of revision, the High Court of Uganda may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court.<sup>146</sup> Revision is principally an examination of the record of proceedings.<sup>147</sup>

An appeal can only be adequately and reasonably prepared upon receipt of the record of proceedings and the reasons for the decision made, from which the appeal arises.<sup>148</sup> In fact, an allegation by an appellant has merit only if it is supported by the record.<sup>149</sup> The limited fact-finding mandate of an appellate court confines the court

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138 As above.

139 Abioye (n 2 above) 27 28.

140 Abioye 27 30.

141 International Records Management Trust (n 3 above) paras 109 & 173.

142 Motsathebe & Mnjama (n 19 above) 174 180.

143 Art 50(3) Constitution of Uganda, 1995. The Constitution of Botswana does not provide for the right to appeal. However, this right may derive from the ICCPR and the African Charter, to which Botswana is a state party.

144 Art 14(5) ICCPR. The Constitution of Botswana accords the right to judicial review to various categories of persons, such as detainees (sec 16(2)(c) Constitution of Botswana), and persons whose freedom of movement is restricted (sec 14(4) Constitution of Botswana), among others.

145 See sec 50 Criminal Procedure Code Act Cap 116; Order 61 Rule 9, Rules of the High Court, 2011.

146 Sec 48, Criminal Procedure Code Act Cap 116.

147 As above. Higher magistrate's courts may also revise proceedings of inferior magistrate's courts under sec 49 of the Criminal Procedure Code Act Cap 116.

148 *James Mutoigo* (n 121 above) para 9.

149 *Molosiwa Resheng v The State* Cr App F4/2003 [2003] BWHC 19.

to the record of proceedings in deciding whether a judgment was made correctly.<sup>150</sup> The record, therefore, is among the documents which initiate the processes of appeal and review.<sup>151</sup> A certified record of proceedings has to be attached to the documents of appeal.<sup>152</sup> The duty of the first appellate court to evaluate and scrutinise the evidence afresh and to come to its own independent conclusion, is facilitated by a competent and reliable court record. In the case of *Getrude Nakanwagi v Stanislaus Muwonge*,<sup>153</sup> the court reiterated the significance of this duty of the first appellate court, while noting that the record filed in that case regrettably was 'so jungled to the extent that a significant claim and the proceedings thereon were not on the record of evidence'. A second appellate court may also be compelled to re-evaluate the evidence and to make an appropriate order where it finds that the first appellate court erred in law in that it failed in its duty to treat the evidence as a whole to that fresh and exhaustive scrutiny to which an appellant is entitled.<sup>154</sup> This reinforces the importance of an adequate record as a tool in the appeal process.

A proper record saves the time of an appellate court and enables it to deliver justice expeditiously. The Supreme Court of Uganda lamented the wasting of time during the hearing of the appeal of *Katuramu*.<sup>155</sup> The Court was asked to verify whether the trial court had actually sentenced the appellant after having convicted him. The original handwritten notes of the trial judge and the typed record were missing. Only a formal typed order, extracted from the original, was available but was unsigned. The Court had to trace the commitment warrant signed by the trial judge, which acted as evidence that the appellant had been duly sentenced. The Supreme Court pronounced itself on the matter as follows:<sup>156</sup>

We are constrained to direct the Registrar and all others responsible for and concerned with compiling the records of appeal, and the custody of the

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150 See *Keganne v Law Society of Botswana & Others* Misc Case 439/2004, [2005] BWHC 2.

151 *Edward F Kisitu (Administrator of the estate of the Late Kagombe Sepiriya) v Sam Bateesa Makabugu* Civil App 56/2011 [2014] UGHC 26: An appellate court as of necessity relies on the record as compiled or recorded by the lower court. *Sinden v Attorney-General of Botswana* Misc Civil Applic F175/2003 [2005] BWHC 17: 'The submission of the record of proceedings is a step preliminary to the hearing of any review application. The record enables the court to properly review the proceedings and the decision concerned.'

152 See *Orient Bank Limited v Avi Enterprises Limited* Civil App 2/2013 [2013] Ugcommc 182: Handwritten unauthenticated notes were filed on appeal as a record of proceedings. The court refused to rely on a document that was not authenticated by certification. See also Order 59 Rule 3, Rules of the High Court, 2011; Order 60, Rules of the High Court, 2011: The record of an appeal, in a civil matter, must contain a correct and complete copy of the pleadings, evidence and all other documents necessary for the hearing of the appeal.

153 HCT Civil App 52/07 [2010] UGHC 16.

154 *Margaret Kato & Another v Nuulu Nalwoga* Civil App 3/2013 [2013] UGSC 07.

155 *John Katuramu v Uganda* Cr App 2/1998 [1998] UGSC 14 (SC).

156 As above.

original court files, to pay more attention to accuracy of the record, and preservation of the original court file intact.

In the interests of fairness, there should be an acceptable time frame within which the court record should be made available. This is a problematic area for courts. In *S v Letsholo*,<sup>157</sup> the appellant was sentenced on 21 July 2000. He lodged his appeal timely, but the record of the case was made available only in 2004 after the intervention of the ombudsman. The court held that this was an unacceptable state of affairs for an institution administering justice, although it did not state or recommend a time frame for making the record of appeal available.<sup>158</sup> The lack of reliable facilities to manage court records makes a commitment to time frames unrealistic. It is to be noted that the Rules of the High Court of Botswana set the date from which a copy of the record in a civil matter on appeal may be availed at not less than four months from the date of receipt of a notice of appeal.<sup>159</sup> There is no commitment to a deadline.

Conversely, the appeal process is also abused by persons who take advantage of flaws in court record management systems and fraudulently procure the disappearance of their court files. In the words of Chief Justice Mogoeng of South Africa, explaining problems facing the court system:<sup>160</sup>

A trend has emerged where records of proceedings disappear after people are convicted and sentenced ... and it happens that a person in prison somehow knows that the records are gone and then institutes an appeal. With their records missing, it means the court would have difficulty in executing the appeal effectively.

Such cases may have to be dismissed and the accused released. The absence of systematic record keeping and control creates an opportunity for such corrupt practices, often involving collusion between lawyers and court officials.<sup>161</sup>

Thurston correctly observed:<sup>162</sup>

Dysfunctional records management undermines legal and judicial reform. Decisions are made without full information about cases, and the absence of systematic recordkeeping and controls leaves scope for corruption or collusion between court officials and lawyers. Court time is wasted, delays are created, and the judiciary's standing is lowered. The large volume of records passing through a typical court system, their sensitivity, and time pressures on courts makes effective records management essential.

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157 CRAF-221/2004 [2007] BWHC 236.

158 *S v Letsholo* CRAF-221/2004 [2007] BWHC 236 para 2.

159 Order 59 Rule 1, Rules of the High Court, 2011. See also Order 60 Rule 2, Rules of the High Court, 2011, which accords an adjudicator of a criminal matter appealed against 10 court days to provide a summary statement of the facts and justification for his or her findings and decision. This forms part of the record but it is not a record of the proceedings.

160 See 'Modernise court systems' (n 3 above).

161 See Maseh (n 1 above) 85.

162 A Thurston 'Fostering trust and transparency through information systems' (2005) 36 *ACARM Newsletter* 2.



## 5 Remedies

A person whose rights are violated is entitled to an effective remedy.<sup>163</sup> Inefficient court records may be an infringement of the right to a fair trial, hence entitling the aggrieved party to a remedy. The objective is to avoid prejudice to an accused person, or to restore a party in a matter to the position in which he or she would have been if the defect in the record had not occurred. This is an exercise of judicial discretion, and the jurisprudence illustrates some of the courses of action adopted by the courts, including (i) correction of the error; (ii) the quashing of an order made on the basis of a defective court record; (iii) discharge of the accused person; (iv) setting aside of the verdict; (v) retrial; and (vi) a permanent stay of prosecution.

### 5.1 Correction

Any person having received a copy of the typed record of proceedings may apply, by notice to the court and the prosecutor, for an error in the record to be corrected.<sup>164</sup> This remedy facilitates the addition of excluded material to the record, and correct records which purportedly do not express what transpired in court, because omissions and variations of the content of the court record are not matters to be addressed on appeal. In appeal proceedings the court is bound by the four corners of the court record.<sup>165</sup> Similarly, a judge of the High Court has the discretion to correct clerical or arithmetic mistakes made in judgments or orders, or errors arising from any accidental omission.<sup>166</sup>

### 5.2 Quashing orders

A defective court record is the subject of judicial review which can lead to the quashing of orders of a tribunal.<sup>167</sup> In the words of a judge of the High Court of Botswana:<sup>168</sup>

The law is to the effect that where there is an error on the face of the record, judicial review will lie even if the body being reviewed has kept within its jurisdiction and the main remedy where there is an error on the face of the record is a quashing order.

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163 Art 2(3)(a) ICCPR.

164 Order 28 Rule 10, Rules of the Magistrate's Courts. See also *S v Mpofo* CLHFT-000049/2007 [2008] BWHC 490 para 5.

165 *S v Motlhalane* MCHLB-000048-08 [2006] BWHC 135: The applicant alleged that some of his propositions put to witnesses had not been recorded on the record. *S v Othusitse* CLHFT-000-107/2006 [2008] BWHC 203 para 3: In hearing an appeal, the court is restricted to the record of proceedings. See also *Malope Rankalo v The State* Cr Applic F113/2004, [2005] BWHC 76: An appeal court proceeds with a matter based on the record as it is.

166 Order 32 Rule 6, Rules of the High Court, 2011.

167 *Ouma Andrea v Attorney-General & Another* HCT-04-CV-MA-0095-2012 [2012] UGHC 145.

168 As above.

A material irregularity may also found a decision to declare proceedings null and void.<sup>169</sup>

### 5.3 Discharge of the accused person

Ongoing proceedings may be discontinued on account of deficiencies in the court record. In the case of *Mudongo*,<sup>170</sup> the charge sheet had been irretrievably lost. The court concluded that the appellant had been put through trial while no formal charge had been laid against him. The appellant was discharged.

### 5.4 Setting aside of verdicts

A conviction and sentence may be set aside in the following circumstances: where a record cannot be sufficiently reconstructed to make a just hearing on appeal or the proper consideration of a review possible;<sup>171</sup> and where a convicted person cannot lodge an appeal because the record of proceedings had been lost irretrievably and could not be reconstructed.<sup>172</sup>

There are standards for setting aside a verdict. Section 10(1)(d) of the High Court Act of Botswana<sup>173</sup> provides:<sup>174</sup>

No conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of proceedings unless it appears to the Court that a failure of justice has resulted therefrom.

Thus, unless an irregularity or defect in the record goes to the very root of the matter and results in a miscarriage or failure of justice, a conviction is not to be set aside if there is ample evidence in the record to support it.<sup>175</sup> The test to be applied may be stated as follows: But for the irregularity or defect, would a court properly directed on the evidence in the record have convicted the accused?<sup>176</sup> This consideration mainly relates to defects in substance in the court record as opposed to form. The test reflects a

169 *S v Seutwetse & Others* CRHLB-000015-07 [2008] BWHC 11: failure to take plea.

170 *Mudongo v S* CLHLB-00081-08 [2010] BWHC 409.

171 *Seabelo & Another v S* CLHFT-000071-09 [2010] BWHC 138 para 8, citing *Whitney & Another* 1975 (3) SA 1453 1456.

172 *Tshabang v The State* [2002] 1 BLR 102 (CA), reaffirmed in *Phuthego v The State* Cr App F17/2004 [2006] BWHC 60: Only a portion of the record was available. The court ordered that his conviction and sentence be set aside and that he be discharged from custody.

173 Cap 04:02.

174 Reiterated in the case of *Samuel Motshegare v The State* Cr App 6/1999 (CA) 6-7, Korsah JA. See also sec 325 of the Criminal Procedure Act Cap 08:02.

175 *Moapei Garemoitse v The State* Cr App F11/2003 [2003] BWHC 17; *S v Diteko & Another* CLHFT-000016-06 [2008] BWHC 184.

176 *Moapei Garemoitse* (n 175 above). See also *S v Alfred* CLHFT 000 081/2006 [2008] BWHC 199 para 8: The applicant had to show how the failure to record the questions prejudiced him.

constitutional principle that justice should be administered without undue regard to technicalities.<sup>177</sup>

In the case of *Nthowa*, a conviction of rape and a sentence of 10 years were set aside because the record could not be found on appeal.<sup>178</sup> This was done to avoid prejudice to the accused person.

### 5.5 Retrial

Retrials are ordered in cases where crucial procedural aspects, such as the swearing in of witnesses<sup>179</sup> and plea taking,<sup>180</sup> are absent from the record.

A retrial was ordered in the case of *Odur Tonny v Odur George*,<sup>181</sup> because the total of handwritten and typed record of proceedings failed to contain the evidence for an appellate court to re-evaluate. The record did not indicate whether the witnesses were sworn in or affirmed before testifying.

However, problems with court record management should not accord an unfair advantage to an accused person. The court retains the responsibility for administering justice. The judge in the case of *Lebakeng* correctly observed that what had been destroyed were not the proceedings themselves, but the record of proceedings. With the police dockets available, it is possible to reinstitute the proceedings.<sup>182</sup> The court distinguished cases which had been heard and completed, in which it would be unfair to order a retrial, from part-heard cases in which proceedings were extant.<sup>183</sup> An application to reinstitute proceedings was also made by the Director of Public Prosecutions who had the means to do so. It avoided a retrial on those grounds.

### 5.6 Permanent stay of prosecution

This is a drastic remedy which should only be reserved for exceptional cases where the court is fully satisfied that an accused person cannot

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177 Art 126(2)(e) Constitution of Uganda, 1995.

178 *Nthowa v Director of Public Prosecutions* MC HFT 000 134/2006 [2007] BWHC 274.

179 *Boitumelo Mmerekhi v The State* Cr App F112/2003 [2004] BWHC 33: The typed record of proceedings did not indicate whether witnesses were ever sworn in, affirmed or admonished. The court held that if indeed the witnesses were not sworn, affirmed or admonished, the end result would be a mistrial rendering whatever outcome a nullity.

180 See *Gaolatheope Oki @Mokwenda v The Director of Public Prosecutions* MCHFT 000 086/2006 [2006] BWHC 45 para 13. If the plea is not recorded but the trial proceeds on the basis of a plea of not guilty, the major consideration would be whether the appellant was prejudiced by the apparent omission to record his or her plea or by the manner in which the trial was conducted.

181 Civil App 44/2003, [2008] UGHC 93.

182 *S v Lebakeng* MCHFT 000 046, 047, 054/2006 [2006] BWHC 28 [2006] 2 BLR 331 para 8.

183 See *Lebakeng* (n 182 above) para 19.

be afforded a fair trial even if an order was made for the trial to proceed speedily.<sup>184</sup> It applies to situations where the defect in the record translates into a serious breach of the rights of the accused person that go to the root of the jurisdiction of the court. A court cannot base its jurisdiction on egregious breaches of human rights.<sup>185</sup> A permanent stay of execution is distinguishable from the discharge of an accused person: In the latter case, the accused may be retried on the same facts.

## 6 Conclusion and recommendations

To a court of law, the record is everything. The court record refers to the entire court file. A court can only guarantee a fair trial based on a record that is complete, substantially accurate and authentic. It has also become crucial that courts develop their capacity to maintain electronic case files so as to capture the best evidence. The fair trial guarantees of presence at trial, adequate time and facilities to prepare one's defence, trial without undue delay and appeal, are facilitated by the court record. Justice derives from an efficient court record management system.

A good record management system should contain standards that ensure that records are cared for in a systematic and planned manner in accordance with the legal and administrative requirements of the establishment.<sup>186</sup> It is not enough to computerise filings. Uganda, among other jurisdictions, needs a normative framework constituted of legislation, policies and procedures to guide the management of records.<sup>187</sup> Botswana deserves commendation for legislating on the key aspects of court record management, including the admissibility of electronic evidence. Challenges facing the management of court records are twofold: administrative inefficiencies and *lacunae*, leading to a lack of proper guidance on how court records should be taken, maintained and disposed of. Courts are faced with problems of storage, retrieval, and the loss and misplacement of records.<sup>188</sup> These problems with record management are confirmed by court findings.

A situational analysis reveals that the courts of law in several African jurisdictions, including Kenya, Nigeria, South Africa and Zambia, have limited capacity to generate and manage court records efficiently. Understaffed courts have poor facilities, and while many courts struggle with outdated transcription machines, subordinate courts even may lack stationery. There is a manifest disproportionality between the facilities of higher courts and those accorded to subordinate courts. The storage facilities of mainly paper files are

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184 *S v Setlhare* MCHLB-000059-07 [2009] BWHC 4 para 6.

185 See *Jean-Bosco Barayagwiza v P* ICTR-97-19-AR 72 para 112.

186 Motsaathebe & Mnjama (n 19 above) 175.

187 See Maseh (n 1 above) 81.

188 See Motsaathebe & Mnjama (n 19 above) 178.

prone to fire that has previously destroyed records and compromised cases. Unpredictable power supplies constrain even the use of the available electronic equipment. There is no standardised form of taking court records: A record may be handwritten, typed or both. This has aided practices such as inserting material in the record. Delays in making typed records available to parties have caused trials to be prolonged. The competency of a court to guarantee a fair trial should include its capacity to generate adequate court records and to manage these efficiently.

Whose role it is to take the court record is not certain. As partly a judicial role, it is subject to the judicial processes of appeal, review and revision. It is also a rule-based procedure which is subject to due process standards. Courts have awarded the remedies of correction, the quashing of orders, the discharge of accused persons, the setting aside of verdicts, retrials and, in limited circumstances, a permanent stay of prosecution, to aggrieved parties. This important role needs to be carried out professionally.

The following best practices can be nurtured and promoted to advance court record efficacy: developing the capacity of courts to maintain electronic case files and developing the capacity of staff to utilise the systems effectively; ensuring that court reporters, transcribers and stenographers take an oath before assuming duty; protecting records from improper access, accidental loss, theft, damage or unwanted destruction;<sup>189</sup> keeping records under lock and key or securing databases with secret passwords; backing up court records with electronic files and recordings; considering a reliable power supply for courts of law; improving court room communication with the use of audio aids such as public address systems; and making a sufficient budget allocation to record management in the judiciary.

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189 Motsaathebe & Mnjama 184.