SUMMARY AND LEGAL ANALYSIS OF THE CHRIS MUBIRU JUDGMENT
(*Uganda v Christopher Mubiru Kisingiri* Crim. Case No 0005/2014)

1. Facts of the case

Christopher Mubiru Kisingiri (herein after 'the accused') was charged with two counts of having carnal knowledge against the order of nature contrary to Section 145(a) of the Penal Code Act of Uganda. It was alleged that in 2009 and 2004, the accused had carnal knowledge of Emmanuel Nyanzi (the first complainant) and George Oundo (the second complainant) respectively.

The first complainant alleged that he was 17 years old when he first met the accused at a bar in Kampala. That the accused invited him to his house in Mengo for a family get-together party. That the first complainant went to the house, but did not find anyone else except the accused who informed him that the others had already left and gone to the beach. The accused then offered the first complainant a glass of wine, which he took and became unconscious. When he woke up, he found himself naked on the accused's bed with pain in the thighs and he was bleeding from the anus. That the accused then asked him to remove the bed sheets from the bed and put them in a basket. He then offered him 50,000 shillings and asked him to go home. The first complainant stated that he feared to ask the accused what had happened because he felt ashamed. He also did not mention the incident to anyone for the same reason. He went to an unnamed clinic where the doctor told him that he had been sodomised. The doctor gave him painkillers and some ointment for treatment.

The second complainant alleged that he was a homosexual since he was 12 years old and had reformed and become born again in 2010. He said that he met the accused in 2004 in a restaurant called Mama Mia on Speke Road and accepted his advances. He was then taken to the accused's home where they had consensual sex and he was paid 100, 000 shillings. He says that he bled and felt a lot of pain because of the accused's size of the penis, but did not go to hospital because of the shame. He said that he and the accused had sexual intercourse only once.

The accused denied all the charges and pleaded not guilty.

2. Evidence adduced

Prosecution produced six witnesses: the two complainants, the investigating officer, a pastor (Pastor Male), a medical doctor and a forensic expert.

The first complainant said he did not have a medical report and the clinic he went to for treatment had been closed and the doctor had relocated. He however gave evidence of what transpired on that day.

The second complainant also gave evidence of what happened on the said day. He said that he also had no medical report as he had treated himself. He said that by the time he reported the case in 2013, it was very late and the Police advised him that after such a long period of time, a medical examination may not be useful.

The investigating officer testified that during his investigations, he found materials at the accused's residence including painkillers, an assortment of medical creams, and chloroform.

Pastor Male testified that the two complainants opened up to him about what had happened to them when they approached him for counseling. He also produced sex videos that allegedly showed the accused having sexual intercourse with men and women.

The medical doctor testified that the accused's mental state was normal and also produced medical reports of the first complainant and the accused.

The forensic expert testified that the items found in the accused's home were similar to items used by homosexuals to have sex. The painkillers are used to ease the pain of anal intercourse and the gels and creams for lubrication of the anal area. That chloroform is used to drug people and this was consistent with the first complainant's allegation that he was drugged.

The defence produced two witnesses i.e. the accused and a medical doctor. The accused denied the charges and said he did not know the complainants. He said that the complainants might know his home since it was once used as a church.

The medical doctor produced a medical report showing that the accused had been examined but his anus and penis did not show any signs of sodomy.

3. Judgment

In her judgment, the magistrate stated that the offence of having carnal knowledge against the order of nature had two ingredients:

1. Anal sexual act was performed against each of the victims

2. The accused participated in performing the act

The court framed the issue as: **Whether the accused had anal sex with the victims.**

The magistrate noted that the medical evidence adduced by prosecution was inconclusive and could not be relied upon. This was because the examinations had been done a long time after the alleged sexual incidents took place. Regarding the medical report of the accused, the magistrate noted that he could not be expected to have anal damage or damage on his penis since he was the perpetrator and he did not use force but rather induced the other party to sleep. He also used lubricants. She therefore excluded consideration of the medical reports.

The magistrate also held that the videos adduced were not admissible in evidence since they did not conform with the *Electronic Evidence Act* and because the current victims were not party to the recordings.

In the case of the first complainant, the magistrate noted that although the accused claimed that the victim might have known his home because it had been used as a church, there was nothing to show why of all the supposed church goers, the victim would be the one to give false evidence against the accused. The magistrate also noted that the accused, during the whole trial, avoided direct eye contact with the victim and was looking at the floor during the whole process. She also noted that at some point, the victim broke down and cried and the accused turned his back against the court and faced the exit, which was very unusual. In the magistrate's view, for an accomplished footballer and coach 'out to prove his innocence', this reclusion reflected a degree of uncertainty about his conduct or misconduct. She therefore held that there was ample circumstantial evidence that the accused had unnatural sex with the 1st victim.

In the case of the second complainant, the magistrate noted that in his testimony, the second complainant confessed that he had been a homosexual since the age of 12 and reformed in 2010 when he was an adult. The magistrate wondered why he had not reported all the people he had had unnatural sex with for all that period. She also said that by allowing other people to have carnal knowledge of him against the order of nature, the victim also became a perpetrator just like the accused and this is exactly what Section 145(c) covered. There were also contradictions in the 2nd victim's testimony as to when he reformed. The magistrate noted that all these made the evidence of the 2nd victim unreliable.

The accused was therefore convicted on the 1st count and acquitted on the second count.

4. Sentencing

The accused was sentenced to 10 years imprisonment and payment of 50 million shillings as compensation to the 1st victim. The magistrate put into consideration the fact that the accused was a first time offender and a sole breadwinner. However, the magistrate also noted that the accused raped the victim, who was 17 years old, which caused him a lot of trauma and poor health.

5. Analysis

The following issues stand out as important: This case is important in the development of jurisprudence on Section 145 in the following ways:

1. *On consent as an ingredient of Section 145:* This is the first known completed case in recent times that has an element of consensual same sex relations. All the earlier cases were either about same sex relations with children below the age of consent, forced sexual intercourse or bestiality. For those that concerned consensual same sex relations, they were usually dismissed for want of prosecution and they thus never proceeded to the stage of a conviction or acquittal.

   The second count thus makes the case unique since it concerned consensual same sex relations. The magistrate noted that the fact that the second complainant consented to the same sex act makes him as culpable as the accused and that he could be charged under Section 145(c) for permitting a male person to have sexual intercourse of him against the order of nature. However, despite the magistrate noting this, it seemed to be more of dictum than the reason for her conclusion. The main reason why the accused was not convicted on the second count was that he did not present himself as a credible witness. The facts that: he took so long to report; he had admitted to having same sex relations with many other men other than the accused and yet he had not reported any of them; and the contradictions in the dates when he had 'reformed' and reported the homosexuality allegations all proved him unreliable as a witness.

   This leaves the question open on what the magistrate would have concluded had the second complainant admitted to having consented to the sexual act and was also found to be a credible witness.

   The case still conforms to the standard view that consent is immaterial as far as Section 145(a) is concerned. It also however shows that the fact that the complainant consented would make him liable to prosecution under Section 145(c). So far from making the distinction between consensual same sex relations and non-consensual same sex relations, the magistrate seems to be suggesting that Section 145(c) should be applied in cases where both parties are consenting.

2. *The ingredients of Section 145(a):* The case lays down the ingredients of the offence of 'having carnal knowledge against the order of nature'- which are: i) Anal sexual act was performed against each of the victims and ii) The accused participated in performing the act.

   The way the first ingredient of the offence is framed shows that the magistrate took it as trite that Section 145(a) is about anal intercourse. This interpretation seems to be both narrow and broad at the same time. It is narrow in the sense that it limits Section 145(a) to anal sex, and broad in the sense that it seems to cover all circumstances where there is anal sex, and it does not matter whether it was in a same sex relationship or in a heterosexual relationship.

   This interpretation should be read within the circumstances of the particular case, and should not be regarded as a general interpretation of Section 145(a). It is however a useful guideline as to what courts consider to be part of Section 145(a).

3. *The use of Section 145(c):* Section 145(c) is much less used as a charge. It criminalises someone permitting a male person to have carnal knowledge of him/herself against the order of nature. The magistrate suggests that where consent is shown, then the other person could also be charged under Section 145(c). This clarifies circumstances under which Section 145(c) would apply and also seems to confirm the position that consent is not a defence under Section 145.

4. *The utility of anal examinations*: Anal examinations have been discredited as being in violation of the right to freedom from inhuman and degrading treatment under Article 24 of the Constitution and of the right to privacy under Article 27 of the Constitution, and also for being of no evidential value. This case does not discuss the human rights implications of these examinations, but points to the fact that they are not reliable as evidence upon which to base a conviction more especially when they are done a long period after the incident. The magistrate refused to rely on any of the medical reports and stated that in the circumstances, they were inconclusive as to whether sexual intercourse took place. The medical examination of the two complainants and the accused were rejected. That of the first complainant was rendered inconclusive because of the lapse of time between the occurrence of the incident and the examining of the complainant while that of the second complainant was rejected because since the sex was consensual and lubricants were used to ease penetration, it was improbable that there would be any signs of injury or scars that are consistent with forced anal penetration.

This observation is very instructive because the Police usually subjects persons that are arrested on suspicion of being 'homosexuals' to anal examinations. Although the Magistrate's conclusion on anal examinations is restricted to the specific facts of this case and does not exclusively rule them out as evidence, it is the first of its kind and can go a long way in challenging the actions of the police in subjecting almost all suspected 'homosexuals' to anal examinations and to discredit such evidence during trial.

5. *The use of circumstantial evidence*: Circumstantial evidence was greatly relied on in this case. The Investigating Officer testified that during his investigations, he had found painkillers, medical creams/lubricants and chloroform at the accused's home. The forensic expert testified that the items found in the accused's home were similar to items used by homosexuals. That the painkillers could be used to ease the pain associated with anal intercourse, and the lubricants were for ease of penetration. That chloroform is used to drug people and this was consistent with the first complainant's allegation that he was drugged.

   Circumstantial evidence can indeed be the best evidence where every inference leads to the conclusion that the accused is guilty or innocent. In this case, the magistrate relies on items found at the accused's home, which included painkillers, gels and creams and chloroform. Painkillers, gels and creams/lubricants have a number of other uses besides sex and even if they were for sex, they are not entirely limited to same sex intercourse. To rely on these to reach a guilty verdict seems to be a long stretch and it puts people at a great risk of being charged with an offence under Section 145 when they are found with painkillers and gels/lubricants. This is a precedent that may be abused.

   However, the chloroform which is not sold over the counter was questionable in this case, and though there was no evidence that chloroform was used on the first complainant, its being found at the accused's home without any explanation provided was quite telling, and the magistrate may not be faulted for reaching the conclusion that she did on this piece of evidence.

6. *The choice of charge*: Although the first complainant clearly stated that he was 17 years old when the incident occurred, this was not put into consideration when considering the appropriate charge. Section 129 of the Penal Code now covers 'defilement of boys' and any sexual intercourse with a child below 18 years old is covered. This was introduced by the *Penal Code (Amendment) Act,* 2007. The punishment is life imprisonment just like it is under Section 145(a). Cases of defilement of boys were before 2007 largely prosecuted under Section 145 but this had to change with the 2007 amendment. Section 129 refers to a sexual act and defines what this means, and yet Section 145(a) is vague. Section 129B expressly provides for compensation of victims of

defilement over and above the imprisonment sentence given to the accused. It therefore potentially provides a better form of redress since apart from punishing the accused, the victim also receives justice for any personal injury occasioned. This begs the question as to why Section 145(a) was preferred to Section 129.

The answer perhaps lies in the fact that a charge under Section 145(a) breeds more stigma than that under Section 129. Defilement of girl children by men is a very common occurrence in Uganda and not a lot of attention is paid to it. However, where boys are concerned, there is usually a lot of condemnation and allegations of 'recruitment' of children into homosexuality. This is perhaps what informed the charge in this case.

7. *The reliance on the demeanour of the accused and the complainants*: The magistrate also relies heavily on the demeanour of the first complainant while in the witness box, and the behaviour of the accused person while the first complainant testified to believe the first complainant and to disbelieve the accused. Though this is not unlawful and a magistrate indeed needs to consider demeanour, relying on it so much may lead to a mistrial. Indeed, the accused was convicted almost solely on the evidence of the first complainant, which was only a little corroborated by the chloroform evidence. Demeanour swayed the case in his favour. This is therefore a dangerous trend more especially in such cases that involve sexual conduct. This is why as a matter of practice, corroboration is always required in sexual offences. Demeanour cannot form the necessary corroboration. If convictions were based on demeanour alone, then the one who can act most to convince the court would always win.

   Oddly, the accused's behaviour during the testimony of the first complainant was also used to determine his demeanour. Demeanour is used to test the credibility of a witness and not the person in the dock. The accused's demeanour would have been more relevant when he was giving evidence not when he was reacting to evidence adduced. The magistrate also refers to the accused as a person who was 'out to prove his innocence'. This tends to imply that the magistrate was shifting the burden of proof to the accused to prove his innocence rather than the prosecution proving his guilt. He was thus expected to act like an innocent person all through the trial. Such expectations may be too high on a person facing a sexual charge in a hostile community and against whom highly incriminating evidence is being given.

8. *Sentencing*: The punishment for having carnal knowledge against the order of nature is imprisonment for life. The accused in this case was sentenced to 10 years imprisonment after the magistrate took into consideration the fact that he was a first time offender and a sole breadwinner. This sentence was therefore within the legally prescribed punishment. The Magistrate also

ordered the accused to pay compensation to the complainant in the value of 50 million shillings. Section 145 of the Penal Code Act does not provide for compensation as part of the punishment. This could be explained by the fact that the offence is not based on the existence of a victim like in cases of defilement. That is why, two people engaging in consensual same sex sexual intercourse can be charged with this offence with none of them being treated as a victim.

The Magistrate however seems to have made the compensation order using her discretionary powers under Section 197(1) of the Magistrate Courts Act, which allows a magistrate to order for compensation to be paid to a person that has sustained personal loss or injury as a result of the offence committed by the accused. In this case the order was made on the grounds that the complainant was 17 years old at the time of the occurrence of the crime and that he was traumatised and still in poor health at the time of trial as a result of the offence the accused was convicted of. The order would therefore be lawful since no amount is set by the law, though of course it would have been better if the charge was under section 129 and then Section 129B would have been automatically applicable for it is specific on defilement cases.

6. Conclusion

This case is an important one in the development of jurisprudence around Section 145 and specifically around consensual same sex relations. It clearly shows that anal sex is criminalised under Section 145(a) and it also illustrates the violations that accrue out of the use of anal examinations. It does not clear the issue of consent as a defence under Section 145(a) and also points out that Section 145(c) would be applicable where there was consent. It also points to how every day items that are in common use by everyone can be used to build a case against LGBTI persons. The conviction of the accused on the basis of having non-consensual sexual relations is a welcome development. Persons who have sex with persons who are underage and those who stupefy other people in order to have sex with them should be punished. It is immaterial whether the acts were between persons of the same sex or between persons of the opposite sex since sexual abuse is sexual abuse.