

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
IN THE INTERNATIONAL CRIMES DIVISION (ICD) - KOLOLO
SITTING AT HIGH COURT IN GULU KAMPALA
HCT-00-WCD-CRIMINAL CASE NO. 0002 OF 2010 (Arising from
Criminal Case No. BUG CAPITAL CASE 09/2010)
UGANDA:.....PROSECUTOR
VERSUS
THOMAS KWOYELO Alias LATONI:.....ACCUSED

BEFORE: HON JUSTICE SUSAN OKALANY

**PRE-TRIAL CONFERENCE RULING ON WITNESS PARTICIPATION,
FAIR TRIAL OF THE ACCUSED AND STATUS OF PROSECUTION
DISCLOSURE**

At the beginning of these pre-trial proceedings, Counsel for the accused raised preliminary points of law regarding the jurisdiction of the pretrial Judge and the legality of the pre-trial hearing, considering that the orders made by the Hon. Lady Justice Lydia Mugambe had not been reversed.

This court made a ruling, which the defence counsel sought to appeal. They also prayed that the court stay the pre-trial hearing pending the determination of their appeal to the court of appeal against this court's earlier decision.

Their application was dismissed, and the court ordered that the pre-trial conference proceeds. The parties were asked to make oral submissions on any of the issues stipulated in R 4 (2) of the Judicature (High Court) (International Crimes Division) Rules 2016 to enable the pre-trial court to make the relevant orders under R. 7 of the said rules.

In his earlier submissions contesting the jurisdiction of the pretrial Court, Mr Nicholas Opio, Counsel for the accused, also raised the issue of the victims' counsel failing to present a list to the pre-trial court of the intending victim participants and to draw a line between the victims and the prosecution witnesses.

He argued that without a defined group of victims, the court could not determine which persons to order compensation for in the event of a conviction.

Mr. Caleb Alaka, lead Counsel for the defence his part, submitted that Rules 4 (2) (e), 18, 34, 35, 36 and 48 of the Judicature (High Court (International Crimes Division) Rules 2016 provide how victims should participate in ICD trials. They can participate only in regard to their protection and compensation. He further submitted that the said rules are subject to the Constitution of the Republic of Uganda, which places the burden of proof in criminal prosecutions on the prosecution and on no one else. It is in recognition of that Constitutional mandate that rules 38, 43 and 44 of the Judicature (High Court) International Crimes Division) Rules provide for normal criminal law procedures.

He argued that the court should give guidance on how victims should participate in the trial and proposed that such participation should be limited to the provisions in the ICD Rules.

On the issue of the accused's constitutional right to a fair trial, Mr Alaka submitted that the accused had not understood the charges against him because they were preferred in a language he did not understand. The court had, therefore, not fully complied with the requirements in Article 28 (3) (b) and 44 (c) of the Constitution of Uganda. That the right to a fair trial is a non-derogable right. In the circumstances, the accused did not understand the charges against him and the prosecution evidence disclosed to him. He preferred that this court order that the indictment, summary, and disclosed evidence of the prosecution be translated into the Acholi dialect so that the accused, who can read in Acholi, would understand the charges and evidence against him.

On his part, Mr Charles Dalton Opwonya argued that the charges preferred are based on the LRA conflict, which had many parties and victims' counsel, and the victims should remain neutral with the prosecution against the accused. He challenged the validity of redacted disclosure that the prosecution had done without a court order, contending that the prosecution should have applied to the court justifying the need for redacted disclosure, and the court would have ordered redaction on a case-by-case basis. He cited the case of ***Bongomin Richard Vs. Uganda, Criminal Appeal Number 94/2011*** in support of his submission that the accused was entitled to full disclosure, unless the prosecution justifies by evidence, the limitations that should be imposed by the Court. He prayed that the court would order the prosecution to provide full disclosure. In regard to the facilitation of the accused, Counsel Opwonya submitted that the accused is entitled to researchers, vehicles, computers and other amenities as well as financial assistance. He also prayed for the provision of security for all counsel in the case.

Counsel further submitted that the prosecution had failed to disclose exhibits to the defence and had not made provisions for the defence to inspect any physical exhibits of the prosecution intended to be relied on in the trial, as provided for by Rule 21 (4) of the Judicature (High Court) International Crimes Division) Rules 2016.

Mr. Geoffrey Boris Anyuru supported the contentions raised by his co-counsel, emphasizing that the only mode of participation provided for by the above-mentioned rules is in respect of reparation and compensation (Rule 48). He noted that the Registrar of the ICD had not established a special Register for the victims as mandated by Rule 51 (3) of the ICD Rules 2016.

He complained about the redacted disclosures made by the prosecution, which he said were in disregard of Rule 22 (3) of the said Rules.

Regarding the defense's submissions, Mr. William Byansi argued that the issues raised can be categorized into three main areas: victim participation, ensuring a fair trial and facilitating the accused, and the status and nature of disclosure. He argued that Rule 6(2)(a) of the ICD Rules 2016 allows for victim participation and addresses the special needs of the accused. He expressed support for the involvement of victims' counsel and promised to collaborate with victims and their advocates to safeguard the rights of victims.

He noted that the Constitution of Uganda obligates the state to accord the accused adequate time and facilities to prepare his defence. However, facilitation was not well defined in the Constitution. He argued that so far, the state had:

- Provided the accused with the indictment and summary of the case (six years ago).
- Allowed the accused to access a lawyer.

- Provided the accused with two additional counsels on state brief.
- Ensure that the charges are read and translated.

Counsel argued that according to Article 28 (3) (b), it is not required for the charge to be translated, and that oral translations done in court are sufficient. He mentioned that defense lawyers have a responsibility to discuss the prosecution's evidence with the accused. If they cannot communicate in the accused's language, an interpreter will be provided. Mr. William Byansi further argued that the court must exercise its powers in line with the requirements of Article 124 of the Constitution, which means in accordance with the legal values, norms, and aspirations of the people. One important aspect of justice is that it should not be delayed. He contended that translating over 100 statements of prosecution witnesses into Acholi dialect could cause delays. The main trial is already delayed by over 5 years, and there is a possibility that government resources may not be readily available. The government operates through budgets, and every proposed expenditure must be budgeted for. The budget process is lengthy and normally takes one financial year to complete, which will cause further delay in the trial. Additionally, the cost of translating over 100 witness statements and several pieces of documentary evidence is likely to be significant. It was argued that while the court may adopt best practices from the ICC, the nation may not have the same resources to implement each and every practice. It was emphasized that the state should do everything within its means to ensure that justice is done and that the accused is provided with the necessary resources to prepare their defense. The court cannot be compared with the ICC on all accounts, and it should make orders that are achievable. It was suggested that Article 28 (3) (f) of the Constitution should be applied instead.

During his submissions, Mr Kaamuli Charles Richard promised to provide new evidence to all defence lawyers and to the pre-trial court. He agreed with Mr. Byansi's arguments about the expenses associated with translating witness statements.

Ms Florence Akello, Principal State Attorney, expressed concerns about sharing certain sensitive video evidence with the defence at this stage. She mentioned that the disclosure of such videos would be governed by Rule 21(1) and (4) of the ICD Rules 2016 and that the prosecution would seek the court's approval to redact, delay, or withhold the evidence. Ms Akello pointed out that some sensitive video evidence had been shared with Counsel Caleb Alaka and Counsel Nicholas Opiyo six years ago, before the enactment of the ICD Rules 2016. She requested that an order be issued under Rule 22(3)(e) regarding the mentioned videos.

In response to defense submissions on the participation of victims and their advocates, Mr. Henry Kilama Komakech, learned Counsel for the victims, submitted that there is a list of victims which shall be presented to the pre-trial court for formal recognition, and that these victims may not necessarily be prosecution witnesses. He mentioned that they come from two specific sub-counties mentioned in the indictment and are not all the victims of the LRA war. Counsel further submitted that the court is required to apply international standards as Uganda is a signatory to the ICCPR, Article 24, which provides for the right of every person whose rights have been violated to participate in the hearing of their case, and that the Constitution (Article 8(a) and Objective 28(1)(b) mandates the court to do so.

Ms. Jane Magdalene Amooti, counsel for the victims, argued about the validity of the appointment of victim advocates and referred to Rule 51(1)(c) of the ICD Rules 2016 to support her argument. She contended that victims' rights go beyond just the right to reparations; they also include the right to truth and justice. She emphasized that for these rights to be realized, victims must be able to participate from the initial stages of investigations up to the appeals process.

She cited Judgments ***C. 288/2002, C 805/2005, and C. 875/2002 of the Colombian Supreme Court to reinforce her submissions. The principle of the law in these judgments is that victims must actually participate in the stages of investigations, prosecution,*** and reparations.

Ms. Amooti referenced the ICC case information sheet updated on 10/2/2016, ***Prosecutor Vs. Thomas Lubanga***, to argue that participating involves examining witnesses and submitting exhibits.

Furthermore, she cited the case of ***Prosecutor vs. Germaine Katanga—ICC case Information sheet updated on 25/3/2015 to support the position that victims can be granted the right to participate represented by their counsel at the court's expense*** She noted that in the aforementioned case, victims' counsels were permitted to take part in questioning witnesses about specific issues.

Finally, Counsel Amooti requested the court to turn to international law in situations where our domestic law has gaps, as mandated by the ICD Practice Direction, Legal Notice No. 10/2011.

In response, Mr. Charles Dalton Opwonya argued that the drafters of the Judicature (High Court) (International Crimes Division) Rules

2016 gave judges broad discretion to establish the victim participation system. He referred to Rule 2 of the Rules to support his argument. He also referenced Article 68(3) of the Rome Statute, which states that a court can permit victims to participate in all stages of the proceedings, as long as it does not prejudice or conflict with the rights of the accused.

DETERMINATION

I have considered the above-stated arguments raised by counsel for all parties; I agree with Mr. William Byansi SPSA that the broad areas for determination are the following:

- (1) Victim participation
- (2) Fair trial and facilitation of the accused
- (3) Status and nature of prosecution disclosure

1. VICTIM PARTICIPATION

All parties agree that victims should be involved in the pre-trial and trial process. The point of contention is about when and to what extent they can participate. I have reviewed the relevant laws, including the Constitution of Uganda, the ICD Rules - SI 40/2016, ICD Practice Direction Legal Notice No. 10/2011, and the cases of Thomas Lubanga and Germaine Katanga. Additionally, I have considered Article 68 (3) of the Rome Statute and Rule 89 of the ICC Rules of Procedure and Evidence. Article 68 (3) of the Rome Statute states:

where the personal interests of the victims are affected, the court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court in a manner which is not prejudicial to or

inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the Legal representatives of the victims where the court considers it appropriate, in accordance with the rules of procedure and evidence.

The Rome Statute clearly allows victim participation in trial proceedings with the court's permission. The court must consider the accused's right to a fair and impartial trial before granting such permission. The ICC Rules of Procedure and Evidence outline the procedure for victims' applications to participate.

Rule 89 of the said Rules provides:

- (1) In order to present their views and concerns, victims shall make written applications to the Registrar who shall submit the application to the relevant Chamber subject to the provisions of the Statute, in particular article 68 paragraph 1, the Registrar shall provide a copy of the application and the defence who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of Sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate which may include making opening and closing statements.*

In my opinion, the court can apply the provisions of the ICC Statute and the Rules of Procedure and Evidence, with relevant modifications, in line with provisions of the ICD Practice Direction, Legal Notice No. 10/2011. Since the ICD Rules do not address how victims can participate, the court will apply the ICC Rules to deal with applications by witnesses to participate in the case and applications for orders of special measures. In this context, the ICC Rule and Rule 88 are relevant.

I believe that victims have the right, according to national and international standards ratified by Uganda, to participate in all stages of the criminal justice process, from investigations to appeals. They should not simply be used as tools to prove the prosecution's case, but their interests, which begin at the level of the investigation, should be taken into account from that stage. Therefore, I do not find fault with the decision of the Registrar of this court in appointing Victim's Counsel. Consequently, I hereby issue the following orders regarding victim participation:

- 1) The victims, through their Counsel, should formally apply to the Registrar of the ICD under Section 51(1)(c) of Regulation 40/2016 and Rules 88 and 89 of the ICC Rules of Procedure and Evidence for Victim Participation and Special Measures to facilitate their participation.
- 2) The victims' advocates are also directed to compile a list of victims and to make relevant applications for each victim.
- 3) Counsel for the victims should file their pleadings for victim participation for each victim by October 11, 2016, and serve state Counsel and Counsel for the defence.
- 4) Counsel for the state and the defence shall file their pleadings, if any, in reply by October 25, 2016, and serve counsel for the victims.
- 5) Any rejoinder pleadings shall be filed by the victim's counsel before October 31, 2016.
- 6) The Registrar ICD will fix the applications for hearing on October 31, 2016, and ensure service of hearing notices.
- 7) The trial judges will issue relevant directions regarding the extent of victim participation during the trial.

2. FAIR TRIAL AND FACILITATION OF THE ACCUSED

After carefully considering the strong arguments presented by both parties, I have found an agreement on the issue of the right to a fair trial. The remaining contentious issue concerns how much support the accused should receive from the court. I am convinced that in a complex trial like this involving multiple charges and witnesses, the accused should be given more support than usual to prepare their defence. Therefore, this court has appointed 2 lawyers on State Brief to support the accused's, defence team. However, I acknowledge the limited resources of the Judiciary and the need to allocate them wisely to clear the backlog of pending cases in all courts. Keeping this in mind, the following orders are made by this court:

- 1) The registrar of the ICD has been instructed to allocate sufficient research and transportation funds to counsel for state briefs, in addition to the fees paid to counsel for the accused, to enable them to carry out their duties effectively.
- 2) The Registrar of the ICD has been directed to facilitate visits and interactions between the accused and his witnesses on several occasions, as agreed upon between the Registrar and Defence Counsel, taking into account the availability of resources.
- 3) The Registrar of the ICD, in consultation with the Defence Counsel, is responsible for appointing an Acholi Dialect interpreter to assist the accused in understanding the prosecution evidence presented against him. The registrar will ensure that the interpreter is able to carry out their task and is available throughout the trial.
- 4) The Uganda Police Force (UPF) and Uganda Prison Service (UPS) authorities have been directed to provide necessary assistance to the court-appointed interpreter and the accused to ensure the accused's accessibility.

5) The indictment and the case summary should be translated into the Acholi Dialect at the Court's expense.

3. STATUS OF DISCLOSURE

Regarding this issue, all parties agree that fresh disclosure of the prosecution evidence is necessary. They also agree that the prosecution's redacted disclosure contravenes the provisions of S I 40/2016. Below are the orders:

- 1) The prosecution must provide disclosure to this court within 15 days in accordance with Rule 21(1) of S. I 40/2016. They should disclose to the defence the evidence they intend to rely on, not restricted by 4/10/2014, in accordance with Rule 21(2) of S. 2 40/2014.
- 2) Per Rule 21 (4) of S I 40/2016, the prosecution must allow the defence to inspect books, documents, photographs, and other tangible evidence they intend to rely on within 15 days.
- 3) The prosecution must make applications by 11/10/2016 to the court to authorise:
 - a. Non-disclosure of the identity of specific witnesses;
 - b. Disclosure in summary form;
 - c. Redacted disclosure;
 - d. Delayed disclosure;
 - e. Non-disclosure of certain evidence to the accused, as provided for by Rule 22(3) of S I 40/2016. They should serve the defence and victim advocates with the relevant applications by 11th/Oct/2016.

The defence and victim advocates must file pleadings in reply by 25/10/2016 and serve counsel for the state.

- 4) Any rejoinder of pleadings by Counsel for the state should be filed by 30/10/2016.
- 5) The Registrar of the ICD should schedule the applications for hearing on 31/10/2016 and issue hearing notices accordingly.

4. SECURITY

This court acknowledges the security concerns raised by Mr Opwonya. He emphasized the need for security for all parties involved. Therefore, the Registrar of the ICD is directed to collaborate with the UPF to conduct a thorough assessment and make all required arrangements. This is particularly important as the parties and the court will need to travel to and from Kampala on multiple occasions.

I so order.

Susan Okalany

JUDGE

23/9/2016