

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: HER LORDSHIP SUSAN OKALANY JUDGE

PRE-TRIAL CONFERENCE RULING

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.

A ruling was made by this court from which defence counsel sought to appeal from. They also prayed that court stays the pre-trial hearing pending the determination of their appeal to the court of appeal against the earlier decision of this court.

Their application was dismissed and 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 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 had also raised the issue of failure by the victims' counsel 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 it would not be possible for the court in the event of a conviction to determine which persons to order compensation for.

Mr. Caleb Alaka lead Counsel for the defence on 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. That they can participate 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. That 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 court to 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 fair trial Mr. Alaka submitted that the accused had not understood the charges against him because the same were preferred in a language he had not understood. That 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 had not understood the charges against him and the prosecution evidence disclosed to him. He preferred that this court orders that the indictment, summary and disclosed evidence of the prosecution should be translated into the Acholi dialect so that the accused who can read in Acholi would read and 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 and 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 court orders the prosecution to provide full disclosure. In regard to 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 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 the fact 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 against the redacted disclosures made by the prosecution in disregard of Rule 22 (3) of the said Rules.

In reply to the submissions of the defence, Mr. William Byansi submitted that the issues raised by the defence are categorized in three broad areas, namely:

- (1) Victim participation.

(2) Fair trial and facilitation of the accused.

(3) Status and nature of disclosure.

He submitted that Rule (6) (2) (a) of the ICD Rules 2016 provides for victim participation as well as special needs of the accused. He supported the role of victims' counsel and undertook to work with victims and their advocates to protect 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 further contended that Article 28 (3) (b) does not mandate that the charge be translated and that the oral translations being done in court are sufficient. He noted that it is the duty of defence lawyers to discuss the evidence of the prosecution with the accused and if they cannot communicate in his language, an interpreter be accorded to them. It was further submitted by Mr. William Byansi that this court must exercise its powers in accordance with the requirements of Article 124 of the Constitution, i.e. in conformity with the Law values, norms and aspirations of the people. That one of the known tenets of justice is that it should not be delayed. He

argued that translating the 100 (one hundred) plus statements of prosecution witnesses into the Acholi dialect would lead to further delay of the main trial, which is already delayed by over 5 years, since there is a real possibility that resources may not be readily available in the government coffers. That government operates through budgets and every proposed expenditure must be budgeted for. Counsel stated that the budget process is a lengthy one which normally takes one financial year to complete. That process will certainly cause a further delay in the trial. Also, the amount required to translate over 100 witness statements and several pieces of documentary evidence is likely to be gross. He contended that although this court may borrow best practices from the ICC, this nation may not have the same resource envelope to implement each and every practice at the ICC. The state should do everything within its means to ensure that justice is done and the accused is facilitated (within the means of the state) to prepare his defence. The court cannot compare itself on all accounts with the ICC. It should make Orders which are achievable. Article 28 (3) (f) of the Constitution should be applied instead.

Mr. Kaamuli Charles Richard in his submissions undertook to provide fresh disclosure of evidence to all defence lawyers and to the pre-trial court. He supported Mr. Byansi's submissions regarding the cost of translating witness statements.

Ms. Florence Akello, Principal State Attorney raised the concern of disclosing some sensitive video evidence to the defence at this point.

She submitted that disclosure of such videos will be subject to Rule 21 (1) and (4) of the ICD Rules 2016 and that the prosecution would apply to court to order redacted, delayed and non-disclosure of prosecution evidence. She noted that some sensitive video evidence was already in the hands of Counsel Caleb Alaka and Counsel Nicholas Opiyo following the disclosure done to them 6 years ago before the ICD Rules 2016 were enacted. She prayed that an order be made under Rule 22 (3) (e) in respect of the said videos.

In response to defence submissions on 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. 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 enjoined to apply international standards to which Uganda is a signatory. That the Constitution (Article 8 (a) and Objective 28 (1) (b) mandates the court to do so.

He cited 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.

Ms. Jane Magdalene Amooti Counsel for the victims submitted on the validity of the appointment of victim advocates and cited Rule 51 (1) (c) of the ICD Rules 2016 in support of her

argument. Regarding the participation of victims, she contended that victims' rights are not just the right to reparations. They include the right to truth and justice and for this right to be realized, the victims must participate from the time of investigations up to appeals.

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 the said judgments is that victims must actually participate at the stages of investigations prosecution and reparations.

Ms. Amooti cited the case of Prosecutor Vs. Thomas Lubanga ICC case information sheet updated on 10/2/2016 to support the contention that participation means examining witnesses and sending 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 courts expense, and observed that in the said case, victims' Counsel were allowed to participate in the examination of witnesses on specific issues.

Lastly, counsel Amooti asked court to resort to international law in situations where there are gaps in our law as mandated by the ICD Practice Direction, Legal Notice No.10/2011.

In rejoinder, Mr. Charles Dalton Opwonya submitted that the drafters of the Judicature (High Court) (International Crimes

Division) Rules 2016 left wide discretion to the judges to shape the victim participation regime. He cited Rule 2 of the said Rules in support of his argument.

He also cited Article 68 (3) of the Rome Statute in support of the position that a court can allow victims to participate at all stages of the proceedings but that the said participation should not be prejudiced or inconsistent 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 in their submissions agree that victims must participate in the pre-trial and a trial. What is contested is at what stage they can participate and to what extent.

I have considered the law cited, especially the Constitution of Uganda, the ICD Rules - SI 40/2016, ICD Practice Direction Legal Notice No. 10/2011, Thomas Lubanga's case and Germaine Katanga's case Supra, as well as 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 provides:

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.

This provision of the Rome Statute clearly provides for victim participation during the trial proceedings with the permission of court.

The court is enjoined to consider before granting such leave, the right of the accused to a fair and impartial trial. The ICC Rules of Procedure and Evidence provide for the procedure for application to participate by victims.

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.

This court in line with the provisions of the ICD Practice Direction, Legal Notice No. 10/2011 can be persuaded to apply with relevant modifications, the provisions of the ICC Statute and the Rules of Procedure and Evidence. Since there is a lacuna in the ICD Rules on how victims can participate, I am persuaded to apply the said ICC Rules in respect of dealing with applications by witnesses to participate in the case as well as in regard to applications for orders of special measures. The above cited ICC Rule as well as Rule 88 thereof, are relevant.

I therefore find in regard to this issue that victims have a right under national and international standards and practices to participate at all stages of the criminal justice process right from investigations to appeals. Regarding this pretrial, therefore, I make the following orders on victim participation:

- The victims through the Counsel should apply formally to the Registrar of the ICD under S. 51 (1) (c) of R 40/2016 and Rules 88 and 89 of the ICC Rules of Procedure and Evidence for victim participation and for special measures to facilitate their participation.
- The victims' advocates are also directed to compile a list of victims and to make relevant applications in respect of each victim.

- Counsel for the victims should file their pleadings for victim participation for each victim by 11/10/2016 and serve state Counsel and Counsel for the defence.
- Counsel for the state and the defence shall file their pleadings if any, in reply by 25/10/2016 and serve counsel for the victims.
- Any rejoinder pleadings shall be filed by victims counsel before 31/10/2016.
- The Registrar ICD will fix the applications for hearing on 31/10/2016 and ensure service of hearing notices.
- The trial judges will issue relevant directions regarding the extent of victim participation during the trial.

2. FAIR TRIAL AND FACILITATION OF THE ACCUSED

Having considered the vehement submissions of both parties, I find consensus on the issue regarding the right to fair trial. The issue that remains thorny is that of the extent to which the accused should be facilitated by the court. I am convinced that an accused person in a trial like this one involving several indictments and witnesses should be accorded more than the usual facilitation to prepare his defence. It is in light of the same that this court appointed 2 lawyers on state brief to bolster the accused's defence team. However, this court is aware of the inadequate resource envelope of the Judiciary and the need to balance the allocation of those resources to clear the pending case backlog in all courts of Judicature. It is with this awareness in mind that this court makes the following orders:

1. The registrar of the ICD is directed, in addition to the fees paid to counsel for the accused on state brief, provide adequate research and transport funds to counsel on state brief to effectively carry out their duties.
2. The Registrar of the ICD is directed to facilitate the witnesses of the accused to visit and interact with him on a number of occasions as shall be agreed upon between the Registrar and Defence Counsel, having regard to availability of resources.
3. The Registrar of the ICD in consultation with Defence Counsel will appoint an Acholi Dialect interpreter to assist the accused appreciate the prosecution evidence disclosed against him. The said interpreter will be facilitated by the registrar in the execution of his/her task and should be available throughout the trial.
4. The Uganda Police Force (UPF) and Uganda Prison Service (UPS) authorities are directed to provide the necessary assistance to the court appointed interpreter and the accused in regard to the accused's accessibility.
5. The indictment and the summary of the case should be translated in the Acholi Dialect at Court's expense.

3. STATUS OF DISCLOSURE

Regarding this issue, there is consensus in the arguments of all parties to the effect that fresh disclosure of the prosecution evidence is to be done. It also agreed that the redacted disclosure conducted by the prosecution contravenes the provisions of S I 40/2016.

I therefore order as follows:

(1) The prosecution shall provide disclosure to this court within 15 days hereof in accordance with Rule 21 (1) of S. I 40 /2016. The prosecution shall disclose to the defence the evidence they intend to rely on which is not restricted by 4/10/2014 in accordance with Rule 21 (2) of S. 2 40/2014.

(3). The prosecution shall permit the Defence to inspect books, documents, photographs and other tangible evidence which they intend to rely on within 15 days in accordance with Rule 21 (4) of S I 40/2016. The prosecution shall make applications by 11/10/2016 to court to authorize:

(a) Non-disclosure of the identity of specific witnesses;

(b) Disclosure in Summary form;

(c) Redacted disclosure;

(d) Delayed disclosure,

(e) None disclosure of certain evidence to the accused, as provided for by Rule 22 (3) of S I 40/2016.

The prosecution should serve the Defence and victim advocates with the relevant applications by the said 11th /Oct/2016.

(6) The Defence and victim advocates are directed to file pleadings in reply by 25/10/2016 and serve counsel for the state.

(7) Any rejoinder of pleadings by Counsel for the state should be filed by 30/10/2016.

(8) The Registrar of the ICD shall fix the applications for hearing on 31/10/2016 and issue hearing notices accordingly.

4. SECURITY

Regarding the matter of Security raised by Mr. Opwonya, in which he argued that all parties need security, this court directs the Registrar ICD to liaise with the UPF to conduct an assessment and make all the necessary arrangements, especially considering the fact that the parties and the court will have to move to and from Kampala on various occasions.

I so order.

Susan Okalany

JUDGE

23/9/2016