

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/09-02/11**

Date: **8 January 2013**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van Den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIMEMIA MUTHAURA AND UHURU MUIGAI
KENYATTA

Confidential
with Annex A, B and C

**Request for leave to present a brief in the capacity of amicus curiae pursuant to
rule 103(1) of the rules of procedure and evidence**

Source: Kenya Human Rights Commission-KHRC -"the Applicant"

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Fatou Bensouda, Prosecutor

Counsel for the Defence
Defence of Francis Muthaura
Mr Mr Karim Khan,
Mr Essa Faal,
Defence of Uhuru Kenyatta
Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of the Victims
Mr. Fergal Gaynor

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented
Applicants(Participation/Reparation)

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Silvana Arbia
Deputy Registrar
Didier Preira

Counsel Support Section

Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations
Section
Ms Fiona McKay

Other

1. Whereas **Rule 103(1) of The Rules of Procedure and Evidence** provides for Amicus curiae and other forms of submission in that, at any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
2. And whereas on 9 July 2012 the Trial chamber V directed through its decision ¹ at paragraph 13 "**Prosecution to file list of witnesses and list of evidence to be relied on at trial**. The prosecution is to provide its witness list, which should include a bullet-pointed summary of the main facts on which each witness is expected to testify, an indication of the estimated length of time required for each witness and the total time for the presentation of the prosecution case, in hours. The prosecution is also to file its list of evidence to be relied on at trial. Both the witness list and the list of evidence are to be submitted by **9 January 2013**".
3. The Applicant herein, lodges an application for leave to be allowed to present a written Amicus Brief as contained and or set out in the body of the application herein in its capacity as an organisation.

THE APPLICANT:

4. The Kenya Human Rights Commission (KHRC) was founded in 1992 and registered in Kenya in 1994 as a national level Non-Governmental Organisation (NGO). Throughout its existence, the core agenda of the Commission has been campaigning for the entrenchment of a human rights and democratic culture in Kenya through monitoring, documenting and publicising rights violations.

¹ ICC-01/09-01/11-440

5. The KHRC also works at community level with 27 human rights networks (HURINETS) across Kenya. The Applicant links community, national and international human rights concerns. KHRC's strategic plan aims to 'Secure civic-driven, accountable and human rights-centred governance. Its founders and staff are among the foremost leaders and activists in struggles for human rights and democratic reforms in Kenya.

The Applicant's Vision:

6. Its vision is a Kenya that respects, protects and promotes human rights and democratic values.

The Applicant's Mission:

7. The Applicant's mission is to work towards the respect, protection and promotion of all human rights for all individuals and groups. This will be achieved through multiple strategies and actions aimed at entrenching human rights and democratic values in Kenya by facilitating and supporting individuals, communities and groups to claim and defend their rights and holding state and non-state actors accountable for the protection and respect of all human rights for all Kenyans.

SCOPE OF THE BRIEF:

8. The Amicus Brief is limited to the issue of the Disclosure of the identity of the prosecution witnesses which is to be done beginning 9 January 2012.

JUSTIFICATION:

9. There are very high probabilities that some of the victims of the Post-election violence are likely to participate in the trial before the court in the capacity of victims, witnesses or both.

10. The applicant has for the last four years interacted with a host of victims of the post-election violence.

11. Through this interaction, the applicant has had the opportunity to hear the sentiments of the victims of the Post-election violence in so far as the proceedings of the court are concerned.

LEVEL OF ENGAGEMENT:

12. Towards discharging its mission the applicant has been in the field in various parts of Kenya which were affected by the violence.

13. The applicant has collected a lot of testimonies from the victims, assisted the victims in filing of the statutory forms of the court as well as kept the victims updated on all the developments in so far as the Kenyan cases are concerned on a regular basis.

14. Through the foregoing, the applicant has come not only to appreciate but also to understand the needs of the victims given that it has a host of officers distributed all around Kenya.

15. The applicant has been and continues to interact with the persons affected by the post-election violence on a daily basis through its ;

A. Legal experts.

B. Community based officers.

C. Wide network of paralegals.

D. Partners and networks with assorted expertise in diverse areas of human rights.

THE VICTIMS AND THE WITNESSES:

16. Having interacted with the victims, the Applicant has observed the adverse treatment meted to victims due to perceptions that they are witnesses. The

Applicant also submits that there is a very high probability that some of the victims are also witnesses of the Post-election violence.

17. That the Applicant does not know who the prosecution witnesses are, however, the applicant is concerned that given its observation of the treatment that has been meted to persons perceived as witnesses, this may be a demonstration of the treatment that witnesses may face.

18. Over the past months in the last year, there have been a series of reports in the media demonstrating the treatment that persons who are perceived as having any relations with the International Criminal Court, either as perceived intermediaries or persons perceived to have information on supposed witnesses, have received².

EFFECTS OF THREATENING WITNESSES:

19. Witnesses play a pivotal role in the administration of criminal justice at the International Criminal Court. The conviction or acquittal of an accused person depends substantially on the evidence that the Prosecution tenders through its witnesses.

20. Actual and or perceived threats to the witness have the effect of instilling fear in the witness. This can more often than not lead to refusal to testify. A threatened witness can end up recanting or retracting their earlier statement.

21. The foregoing has the undesired effect of undermining the administration of justice.

² <http://www.nation.co.ke/News/politics/Activists-clash-with-MPs-over-UK-dossier/-/1064/1457646/-/k58ms0z/-/index.html>;
http://www.standardmedia.co.ke/index.php/business/sports/InsidePage.php?articleID=2000058629&story_title=CID%20seeks%20confirmation%20on%20%E2%80%98ICC%20witness%E2%80%99;
<http://www.icpcafrica.org/index.php/news/events/183-maina-ndungu-githongo-and-mboya-joint-parliamentary-statement.html>;
<http://www.nation.co.ke/News/politics/Kenya-chaos-victim-goes-missing/-/1064/1312240/-/tgtuny/-/index.html>;

THE IDENTITY OF THE WITNESSES-UNKNOWN:

22. The prosecution witnesses in this case have all along been under protection and their identity has in the circumstances not been disclosed to the defence. The applicant has no knowledge of who the prosecution witnesses are.

The reasons underlying the protection of the witnesses are well known to the court.

THE VARIOUS RIGHTS OF THE VARIOUS PLAYERS UNDER THE ROME STATUTE:

23. Rights of the accused:

Article 67 (1) (b) of the Rome Statute stipulates that in the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

Article 67 (2) In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Protection of the victims and witnesses and their participation in the Proceedings:

24. Article 68(1) stipulates that The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves

sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Regulation 41 of the Regulations of The Court: Victims and Witnesses Unit

25. The Victims and Witnesses Unit may, pursuant to Article 68, paragraph 4, draw any matter to the attention of a Chamber where protective or special measures under rules 87 and 88 require consideration.

THE BALANCE BETWEEN THE COMPETING RIGHTS:

26. Whereas the applicant appreciates the fact that the identity of the witnesses has to be disclosed to the defence, the applicants wish to point out that the timing of the disclosure is very key.

27. Under Article 68(1) The Court is under a mandatory obligation and or duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

28. Before deciding whether the disclosure of the identity of the witnesses should be deferred to a later date or not, the court shall have regard to all relevant factors as set out under Article 68(1). The Article adopts the word including, which means the considerations and factors as enumerated in the Article are not exhaustive.

29. The right of the accused as guaranteed under Article 67 (1) (b) to have adequate time and facilities for the preparation of the defence cannot in any way supersede the right of the witness to safety, physical and psychological well-being, dignity and privacy as guaranteed under Article 68(1) of The Rome Statute.

30. The disclosure of the witnesses' identity should be done at a stage in the proceedings when there is an assurance that their safety will not end up being compromised.
31. The applicant points out that the stage at which the disclosure exercise should be done should be one that does not at the same time impede on the rights of the vulnerable witness.
32. The Amicus Curiae in the circumstance submits that should the office of the Prosecutor seek to postpone the disclosure, then the court is under a duty to consider the grounds fronted for the postponement in the light of the rights and safety of the witnesses.
33. In determining whether or not to defer the disclosure, The Court has to weigh and assess the competing rights.
34. In *Prosecutor v. Dusko Tadic*³ the Trial Chamber held that the identity of the witnesses could be withheld indefinitely from the accused and the accused's counsel.
35. The Statute contemplated unique situations wherein the need to enlarge the time for doing certain things like disclosure would arise.
36. Threats increase between indictment and testimony phase. According to the Human Rights Watch there was an increase in the number of threats recorded following the confirmation of charges against Lubanga-*Human Rights Watch, Courting History; The Landmark International Criminal Court's First Years*,150.

³ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>

POWER OF THE COURT TO ENLARGE TIME:

Regulation 35 of The Regulations of the Court provides for the variation of time limits;

37. Applications to extend or reduce any time limit as prescribed in these Regulations or as ordered by the Chamber shall be made in writing or orally to the Chamber seized of the matter setting out the grounds on which the variation is sought.

The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.

38. The Amicus submits that the Chamber has the discretion to extend time where limits had been ordered.

39. On 9 July 2012 the Court directed the Prosecutor of the Court to disclose the identity of the witnesses to the Defence.

40. The Applicant strongly submits that the timing of the disclosure is not safe in so far as the witnesses are concerned.

IDEAL TIME FOR DISCLOSURE OF THE WITNESSES:

41. In determining the right time for the disclosure, the Court should at all times weigh between the rights of the victims and the rights of the accused.

42. The early disclosure of the identity of the prosecution witnesses should be at all times be discouraged regard being given to the nature of the case.

43. The fact that the court has already set a timetable for the disclosure should not be cast on stone whenever the issue of the security of the witnesses is concerned.

44. The court has to listen to the sentiments of the prosecution if it has lodged an application to postpone and or delay the disclosure.
45. The court can and should invite the Victims and Witness Unit of the Court to input and ventilate the security and safety concerns whenever they are raised before determining an application to postpone the disclosure.
46. The court is under a duty to give audience to the sentiments of the Amicii and the witnesses wherever possible. It is through hearing the Amicii like the applicant who are in touch with the actual political, social, cultural terrains where the witnesses, the victims and the accused hail from that the court will be able to arrive at a fair and informed decision on the issue.
47. This is in keeping with the spirit of Regulation 103 of the Regulations of the court which the applicant herein invites the Trial Chamber to embrace in granting the leave as sought herein.

THE POLITICAL TERRAIN IN KENYA:

48. Kenya is in its electioneering year. Elections are supposed to take place on 4th March 2013. This coincides closely with the hearing dates of the case before the Trial Chamber i.e. 10th April 2012. There are a lot of political activities and campaigns that are taking place in Kenya at the moment.
49. The Trial Chamber has to consider the nature of the current and the future political terrain in Kenya when considering whether to defer and or postpone the disclosure of the witnesses or not.
50. The court has to reassess the various factors and ask itself whether the timing of the disclosure is right or not.

THE USEFULNESS OF THE BRIEF:

51. The concerns raised by the applicant herein are weighty and they will go a long way towards the proper determination of the case as envisaged under Regulation 103 of The Regulations of the court.

THE DELAY IN THE TRIAL:

52. The applicant has no intentions whatsoever in causing the delay in the hearing of the case. The hearing dates should remain as set out in the court's calendar.

THE RELIEFS SOUGHT:

1. That the applicant be granted leave to submit an amicus brief on the issue of disclosure of the identity of the witnesses.
2. Should leave be granted, then the submissions herein be deemed to be the amicus brief herein.
3. Any other orders and or directions under Regulation 31 of the Regulations of The court.

APPENDIX (Under Regulation 36 of The Regulations of the Court)

The Applicant's submissions are predicated on the following list of authorities and publication-

- A. *The Prosecution v. Thomas Lubanga Dyilo-Trial Chamber 1, ICC 01/04-01/06,18 January 2008*⁴ .
- B. *Prosecutor v. Dusko Tadic-Trial Chamber, UN Doc IT-94-I-T.10 August 1995*⁵.
- C. *Human Rights Watch, Courting History; The Landmark International Criminal Court's First Years, 150*⁶.

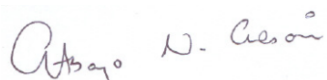
⁴ <http://www.icc-cpi.int/iccdocs/doc/doc409168.PDF>

⁵ <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>

⁶ http://www.hrw.org/sites/default/files/reports/icc0708_1.pdf

Respectfully submitted by:

Ms. ATSANGO CHESONI



On behalf of **KENYA HUMAN RIGHTS COMMISSION -KHRC**

This 8th Day of January 2013.

Regulation 31

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