

UGANDA / JUDGMENT

Uganda v Sserwadda & 6 Others (Miscellaneous Cause 14 of 2022) [2022] UGHCI CD 9 (3 October 2022)

[2022] UGHCI CD 9

COURT

HC: International Crimes Division (Uganda)

BEFORE

Komuhangi, J

CASE / FILE NUMBER

Miscellaneous Cause 14 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (INTERNATIONAL CRIMES DIVISION KOLOLO) MISCELLANEOUS CAUSE NO. 14 OF 2022 (ARISING FROM HCT-00-ICD-CR-SC-004-2022)

| UGANDA===== APPLICANT | |

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| VERSUS | |

| A1. SSERWADDA MIKE | |

| A2. MUWONGE JUDE | |

| A3. WAMALA BULO | |

| A4. MUGERA JOHN | ===== RESPONDENTS |

| A5. HON. ALLAN SSEWANYANA ALOYSIUS | |

| A6. HON. SSEGIRINYA MUHAMMAD | |

| A7. KANYIKE JACKSON | |

BEFORE: HON. LADY JUSTICE ALICE KOMUHANGI KHAUKHA**RULING****Introduction**

This ruling is in respect of an **ex parte** application brought by a Notice of Motion under Sections 14 and 33 of the Judicature Act, Cap. 13 and Rules 22 (3) (a) (b) (c) (d) (e) (f), (4) and (7) of the Judicature (High Court) (International Crimes Division) Rules, 2016 for Witness Protection Orders that:

- 1) The non-disclosure of the Identity of seventeen (17) witnesses (PE1- PE17) prior to commencement of the main trial;
- 2) Delayed disclosure of the identities of witnesses in (1) above and to disclose within a period of fifteen (15) days prior to their testimonies in court;
- 3) Redacted disclosure for seventeen (17) witnesses (PE1- PE17);
- 4) The number of people able to access information relating to the seventeen (17) witnesses (PE1-PE17) is limited; and
- 5) The log of persons handling information relating to the seventeen (17) witnesses (PE1- PE17) is kept.

Appearance and Representation

The applicant was represented by Mr. Richard Birivumbuka, a Chief State Attorney in the Office of the Director of Public Prosecutions. He made oral submissions and relied on a court decision which shall be considered in this ruling.

The Application

The application is supported by the affidavits of Mr. Thomas Jatiko, an Assistant Director of Public Prosecutions and Detective SP Mubangizi Innocent. The grounds in both affidavits in support of the application can be summarized as follows:

That the respondents are jointly indicted on charges of terrorism, aiding and abetting terrorism, murder, attempted murder and are all remanded at Kitalya Government Prison. The pre-trial hearing has commenced and prosecution is in the process of disclosing the evidence to the Court and the respondents. However, there are security threats and intimidation against the seventeen (17) witnesses who are subject of this application and if their identities are disclosed at this stage, their lives and that of their loved ones would be in danger.

The deponents also state that all the witnesses subject to this application are factual whose evidence implicates the accused persons. That the threats against the witnesses are directly emanating from the accused persons and their accomplices who are still at large. The accused persons are leaders of a group that is emanating from greater Masaka region and A5 and A6 who

are Members of Parliament have the resources and influence to interfere with the witnesses. That the threats against the witnesses are directly emanating from their participation in this case as witnesses. The accused persons are charged with offences that involve personal violence and the prevailing security situation in most parts of greater Masaka region is delicate.

The deponents further stated that it is highly likely that a considerable length of time will lapse between the disclosure of the evidence in the case and the actual trial of the accused persons and yet there are no protection measures in place for all the witnesses at the moment save for the ones sought for. That most of the witnesses subject to this application are permanent residents of Masaka and the cost of relocating them to other places would be unreasonably high if their identities are disclosed now. The Orders sought if granted will not cause any injustice to the accused persons since summary and redacted disclosures if allowed will be made and full disclosure will be made before trial commences.

Issue

Whether the prosecution should be granted the Orders sought for in this application.

Resolution

Counsel for the applicant submitted that the application was brought because of the need to protect the identities of the factual witnesses in Criminal Case No. 004 of 2022. He emphasized that the witnesses have faced threats due to their perceived association with the investigation. He also argued that A5 and A6 are very influential persons in society being Members of Parliament with the capacity to influence the witnesses thereby affecting the entire prosecution's case negatively.

Counsel for the applicant further stated that there is a lot of insecurity within Masaka and 27 people lost their lives in the same period. That other suspects are at large and may have influence on the witnesses. Counsel further contended that police has made an assessment of the witnesses and many of them have been threatened. That these threats if implemented may result into physical and psychological trauma which calls for the support of court to have their identities not disclosed until the main trial.

Counsel for the applicant then prayed for redacted disclosure where the names and addresses of the witnesses together with any other information that may lead to their identities would be removed before disclosure to the respondents. He also prayed for summary disclosure for the evidence of the two co-accused persons and to limit the number of people to access the information.

Counsel for the applicant while relying on the case of **Soon Yeon Kong Kim and Another Versus Attorney General Constitutional Reference No. 6 of 2007**, submitted that the right to disclosure is not absolute. That disclosure is subject to some limitations to be established by evidence by the State on grounds of State secrets, protection of witnesses from intimidation, protection of the identity of informers from disclosure or that due to simplicity of the case, disclosure is not justified for purposes of a fair trial.

The present application is made pursuant to Rule 22 (3), (4) and (7) of the Judicature (High Court) (International Crimes Division) Rules, 2016 which provide that:

(3) The pre-trial Judge, Trial Judge or trial Panel dealing with a matter shall, on its own motion or request of the Prosecution or Defence take the necessary steps to ensure the confidentiality of information disclosed, to protect the safety of witnesses, victims, and members of their families, including by authorizing-

- **a) The non-disclosure of the identity of witnesses prior to the commencement of the trial;**
- **b) Disclosure in summary form;**
- **c) Redacted disclosure; where the witness statement and related materials are disclosed to the other party in a form where all information that would lead to the identification of a particular witness is redacted;**
- **d) Delayed disclosure; to permit disclosure at an exceptionally late time as opposed to full disclosure immediately prior either to the start of the trial or commencement of the testimony of the witness;**
- **e) Non- disclosure to the accused person but disclosure only to certain members of the Defence team with strict instructions against disclosure outside the permitted group;**
- **f) Specific instructions for handling information including by keeping a log of persons handling the information or limiting the number of people able to access information within the trial team; or**
- **g) In exceptional circumstances, monitoring of non-privileged communications of an accused person.**

(4) The prosecution may not introduce material or information referred to in sub-rule (2) in evidence during pre-trial hearing or the trial without adequate prior disclosure to the Defence.

(7) Where material or information in possession or control of the prosecution may lead to the grave endangerment of the security of witnesses or victim or his or her family, the Prosecution shall not disclose the material or information to the Defence and the material or information may not be subsequently introduced into evidence during the trial without adequate prior disclosure to the Defence.

Article 28 of the Constitution provides for a right to a fair hearing. In particular, Article 28 (1), (3) (a) (c) (d) and (g) stipulates the following:

* (1) "In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.*

* (3) Every person who is charged with a criminal offence shall: (a) be presumed to be innocent until proved guilty or until that person has pleaded guilty; (c) be given adequate time and facilities for the preparation of his or her defence; (g) be afforded facilities to examine witnesses and obtain the attendance of other witnesses before the court.*

In the case of **Soon Yeon Kong Kim and Another Versus Attorney General Constitutional Reference No. 6 of 2007** (supra), it was stated that the right to disclosure is not absolute. That disclosure is subject to some limitations to be established by evidence by the State on grounds of State secrets, protection of witnesses from intimidation, protection of the identity of informers from disclosure or that due to simplicity of the case, disclosure is not justified for purposes of a fair trial.

Having evaluated all the evidence that has been presented to this Court through the affidavit of Mr. Thomas Jatiko and Detective SP Mubangizi Innocent, I am satisfied that full disclosure of the identities of the said witnesses (PE1-PE17) may risk their safety, security and wellbeing. In the case of **The Prosecutor Versus Bosco Ntaganda, ICC-01/04-02/06**, it was stated that Court's jurisprudence has consistently held that all restrictions on disclosure shall be justified by a showing of:

- 1) the existence of an "objectively justifiable risk" to the safety of the person concerned or which may prejudice further or on-going investigation;
- 2) the risk must arise from disclosing the particular information to the Defence;
- 3) the indefeasibility or insufficiency of less restrictive protective measures;
- 4) an assessment as to whether the redactions sought are "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial; and
- 5) the obligation to periodically review the decision authorizing the redactions should circumstances change.

In the instant case, I find that there is an objectively justifiable risk to the safety of the seventeen (17) prosecution witnesses since they are said to have been threatened due to their perceived association with the investigation. I take note of the fact that the said witnesses are factual whose evidence may directly implicate the accused persons. Also, Detective SP Mubangizi Innocent in his affidavit avers that the prevailing security situation in greater Masaka where all if not most of the said witnesses reside is delicate and can escalate easily if the identities of these witnesses is disclosed at this stage. As such, I find that ordering for full disclosure of the identities of the seventeen witnesses may pose a risk to the safety and wellbeing of the witnesses and resultantly

negatively affect the prosecution case. I agree with prosecution's submissions that a considerable length of time is likely to elapse between the disclosure of evidence in the case and the actual trial of the accused yet there are no protection measures in place for all the witnesses at the moment.

I also find that the protection measures being sought for by prosecution to wit: delayed, redacted and summary disclosure of the said seventeen (17) witnesses, limitation of the number of people able to access information and keeping a log of persons handling the information relating to seventeen (17) witnesses shall not cause any injustice to the accused person. This is because no witnesses shall be called upon to testify without adequate full disclosure should this court confirm the charges for trial. This will afford the accused persons adequate facilities to defend themselves as enshrined in Article 28 (3) (c) of the Constitution. This court will also examine the redacted and summary statements before they are served on the respondents' counsel to ensure that the respondents are not prejudiced.

Therefore, this application is allowed with the following Orders:

- 1. that there shall be redacted disclosure of fifteen (15) witnesses (PE3-PE17);
- 2. that there shall be summary disclosure of the evidence of two witnesses (coaccused) (PE1 and PE2);
- 3. the redacted and summary disclosure shall be done by 7th October 2022;
- 4. full disclosure of the identities of the witnesses and evidence shall be done not later than 15 days before commencement of the trial should this court confirm the charges.

I so order.

Dated at Kampala this 3rd day of October 2022.

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Alice Komuhangi Khaukha JUDGE 3/10/2022

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