



**IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
FIRST INSTANCE DIVISION**



*(Coram: Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J;
Fakihi A. Jundu, J & Audace Ngiye, J)*

APPLICATION No. 4 OF 2015

(Arising from Reference No. 16 of 2014)

MEDIA LEGAL DEFENCE INITIATIVE (MDLI)

& 19 OTHERS APPLICANTS

VERSUS

1. RONALD SSEMBUUSI (DECEASED) 1ST RESPONDENT

**2. THE ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA 2ND RESPONDENT**

28TH JUNE 2016

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RULING OF THE COURT

A. INTRODUCTION

1. This Application was brought under Articles 23, 27, 40 and 127 of the Treaty for the Establishment of the East African Community (hereinafter referred to as “**the Treaty**”), as well as Rules 21, 36 and 53 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as “**the Rules**”).
2. Media Legal Defence Initiative (MLDI) and 19 other organisations (hereinafter referred to as “**the Applicants**”) sought to be granted leave to appear as *amici curiae* in Reference N° 16 of 2014, Ronald Ssemuusi vs. The Attorney General of the Republic of Uganda.
3. The above Reference challenges sections 179 and 180 of the Uganda’s **Penal Code Act (cap 120)**, which provide for the offence of criminal defamation, on the premise that the challenged provisions place unjustifiable restrictions on the right to freedom of expression, freedom of the press and the right to access to information contrary to Articles 6(d) and 7(2) of the Treaty. It also challenges the 1st Respondent’s conviction and sentencing under the said provisions, asserting that it constituted a violation of Article 8(1)(a) and (c) of the Treaty.
4. At the hearing, the Applicants were represented by Mr. Francis Gimara, the First Respondent (suing through his legal representative) was represented by Mr. Nicholas Opiyo, while the Second Respondent was represented by, Ms. Patricia Mutesi, Mr. Geoffrey Atwine and Mr. Ojiambo Bichachi.

B. APPLICANTS' CASE

5. It was the Applicants' case that they possess a strong commitment to the promotion of the right to freedom of expression, including freedom of the press and the right to access to information; have significant experience in the promotion of the right to freedom of expression, and have valuable expertise in that area of the law, which they sought to share with the Court. It did transpire at the hearing that some of the Applicant entities had previously provided this Court with relevant information on the right to freedom of expression in the case of **Burundian Journalist' Union vs. the Attorney General of the Republic of Burundi, EACJ, N°7 OF 2013.**
6. It was Mr. Gimara's contention that the Applicants sought to bring clarity to questions of permissible limits on the right of freedom of expression and how these freedoms relate to the Treaty on protected principles of democracy, rule of law, accountability, transparency, justice and protection of human rights. Learned counsel argued that this right had been duly acknowledged by this Court in the case of **Burundian Journalist' Union** (supra), and maintained that the Applicants were non-partisan neither did they have a special interest in the matter, and their sole motivation was fidelity to the law and the Treaty. To this end, according to him, the Applicants were only keen to aid the Court in the interpretation and application of Treaty principles articulated in **Reference No. 16 of 2014** by proposing a comparative and international law approach.

C. FIRST RESPONDENT'S CASE

7. The First Respondent did not object to the Application, contending that it satisfied the requirements for an *amicus* brief given the Applicants'

expertise and extensive experience in handling issues of freedom of expression.

D. SECOND RESPONDENT'S CASE

8. The Second Respondent opposed the Application, and contended that the Affidavit in support of the Application was incompetent, having been premised on unsubstantiated statements that were not within the deponent's knowledge. The Second Respondent further asserted that the Applicants' public statements and associations, as depicted in the Affidavit of Mr. Jimmy Oburu Odoi, exhibited a bias for the decriminalization of defamation, rendering them incapable of being neutral in the present proceedings to the extent that they share the same goal with the First Respondent herein.

9. Mr. Atwine referred this Court to the case of **Attorney General vs. Silver Springs Hotel Civil Appeal No. 1 of 1989**, where the Supreme Court of Uganda held that one of the fundamental considerations for an *amicus curiae* to be admitted was that such a party was independent of the dispute between the parties. According to him, therefore, a party that sought to be joined as *amicus curiae* was required to demonstrate its neutrality and objectivity on the matter before a court, and show that it was not an interested party therein.

E. APPLICANTS' REJOINDER

10. In an Affidavit in Rejoinder, the Applicants' respective mandates in the area of freedom of expression was reiterated as the basis for their expertise in the issues before this Court; their intricate participation in the promotion of the right to designated press freedoms was an expression of this mandate rather than alleged bias and, if granted

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leave to appear as *amicii curiae*, they would restrict their *amicus* brief to matters of law that were instrumental to the Court's analysis of Uganda's criminal defamation laws.

11. In the same vein, Mr. Gimara maintained that the Applicants' only interest was to share their vast knowledge and expertise in this matter with the Court. He cited **Forum pour le Renforcement de la Societe Civile (FORSC) & 8 Others vs Burundi Journalists Union & Another EACJ Application No. 2 of 2014** in support of this preposition.

F. COURT'S DETERMINATION

12. Rule 36(2)(e) and (4) of the Rules highlights the parameters against which an application for leave to appear as *amicus curiae* may be considered. Whereas Rule 36(2)(e) requires the demonstration of an interest in the outcome of the case in which an applicant seeks to appear, Rule 36(4) prescribes the additional test of justification as a basis for the grant of leave to appear as *amicus curiae*. For ease of reference, we reproduce the cited Rules below:

"Rule 36(2)(e)

(2) An application under sub-rule (1) shall contain –

(a)

(b)

(c)

(e) a statement of the intervener's or *amicus curiae*'s interest in the result of the case.

Rule 36(4)

If the Court is satisfied that the application is justified, it shall allow the intervention and fix a time within which the intervener or *amicus curiae* may submit a statement of intervention.”

13. As this Court held in **UHAI EASHRI & Another vs. Human Rights Awareness Promotion Forum (HRAPF) & Another EACJ Applications No. 20 & 21 of 2014**, Rule 36(2)(e) places a duty upon an applicant for joinder as *amicus curiae* to demonstrate the nature of its interest in the outcome of the substantive proceedings. Indeed, faced with a similar Application in **FORSC & 8 Others** (supra), this Court did hold that an *amicus curiae* must have an interest in the proceedings it seeks to join. In **UHAI EASHRI & Another** (supra), this Court also held that Rule 36(4) imposed a duty upon such an applicant to establish to the satisfaction of the Court circumstances that *prima facie* justify its appearance as *amicus curiae*.
14. As quite correctly averred in the present Application, sections 179 and 180 of the Uganda Penal Code Act were challenged in **Reference No. 16 of 2014** for violating the right to freedom of expression, including freedom of the press and the right to access to information. The Applicants’ interest therein is captured in paragraphs 23 – 27 of the Affidavit of one Yakare-Oule Jansen. Paragraph 23 describes the Applicants as organisations whose area of focus includes ‘promoting respect for and observance of the right to freedom of expression, including freedom of the Press and the right to access to information.’ It thus establishes their expertise in the

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matters raised in **Reference No. 16 of 2014**, from which the present Application arises.

15. Against that background, it seems to us that paragraph 25 of the same Affidavit clearly demarcates the Applicants' interest in the outcome of the Reference in the following terms :

“These issues are central to the mandate of each of the (NGO) organisations, thus they seek to utilize their expertise towards assisting the Court in its interpretation and application of the Treaty.”

16. We are, therefore, satisfied that the Applicants have aptly demonstrated their interest in the outcome of **Reference No. 16 of 2014** as required by Rule 36(2)(e).

17. Having so found, we revert to a consideration of whether the Applicants have satisfactorily demonstrated circumstances that would justify their joinder in the Reference as *amici curiae* as provided by Rule 36(4). Stated differently, what considerations should a court take into account when faced with an application such as the one before us? This Court has had occasion to pronounce itself on the parameters to be considered in determining this question.

18. In **Avocats Sans Frontieres vs. Mbugua Mureithi Wanyambura & 2 Others EACJ Application No. 2 of 2013**, it was held that a court may consider joinder of an applicant as *amicus curiae* if it considered it to be in the interest of justice to do so, provided that such prospective *amicus curiae* was independent of the dispute between the Parties. Indeed, in **FORSC & 8 Others** (supra) this Court held that an *amicus curiae* was under a duty to restrict its brief to ‘the most cogent and impartial information.’

19. In the latter case of UHAI EASHRI & Another (supra), citing with approval Mohan, S. Chandra, 'The Amicus Curiae: Friends No More?', 2010, Singapore Journal of Legal Studies, 352 – 371, p.14, it was held:

“An *amicus* is normally appointed if the court is of the view that a case involves important questions of law of public interest; if a party that is unrepresented would not be able to assist the court; or if the points of law do not concern the parties involved but is nevertheless a matter of concern to the court.”

20. In the more recent cases of Dr. Ally Possi & Another vs. Human Rights Awareness Promotion Forum (HRAPF) & Another EACJ Application No. 1 of 2015 and Secretariat of the joint United Nations Programme on HIV/AIDS vs. HRAPF & Another EACJ Application No. 3 of 2015, this Court did uphold the principle of neutrality, whereby the relationship between a prospective *amicus curiae* and the parties to a dispute should be neutral, independent of the dispute and governed by fidelity to the law.

21. Therefore, in our considered view, the parameters for consideration in determining the joinder of an applicant as *amicus curiae*, and within which courts' judicial discretion may be exercised are as follows:

- a. Principle of neutrality – a prospective *amicus curiae* should be neutral, impartial, and independent of the parties to an adversarial dispute.
- b. A prospective *amicus curiae* should demonstrate reasonable expertise in the subject matter for adjudication, as well as its fidelity to the law.

- c. An *amicus curiae* shall normally be appointed if the court is of the view that a case involves important questions of law in an area of public interest.
- d. Whether the questions of law posed do not concern the parties involved but are nevertheless a matter of concern to the court.
- e. Whether it is, otherwise, in the interest of justice to admit prospective *amicus curiae* to a dispute.

22. We have carefully scrutinized all the material on record in the present Application, and dutifully considered the rival arguments of all Parties. We have seen press statements, as well as print outs from the different Applicants' websites dated 20th July 2015 in which the Applicants display a series of activities conducted particularly in their campaign to end criminalization of defamation, including legal representation of journalists and organization of seminars.

23. It was submitted that the foregoing statements are an expression of bias and lack of partiality. With respect, we take a contrary view. It seems to us that the impugned statements provide insight into the Applicants' mandate and, as we have held earlier herein, explain their interest in the outcome of the substantive Reference. Such scholarly interest in the subject of criminal defamation would inform the substance of an *amicus* brief provided by the Applicants, and is to be distinguished from the unprincipled, often unresearched advocacy that is typified by pressure groups.

24. In the instant case, we have Applicants that have undeniably engaged in the extensive study of selected laws and their impact on freedom of the press and related rights. They seek to share the knowledge garnered thereby with a view to contributing to legal

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jurisprudence in that area. The inference that the Applicants' mandate is skewed to the abolition of criminal defamation should be weighed against the legal questions posed by the restricted press freedoms highlighted in the material on record, as well as the Applicants' scholarly and specialized contribution to possible legal reform in the area of freedom of expression generally.

25. We are fortified in this position by the role of an *amicus curiae* viz a viz the Court's discretion as to the usefulness of an *amicus* brief. On the one hand, a 'friend of court' assists the court by providing information so that the court will not fall into error, but does not seek to influence the final outcome or attempt to persuade the court to adopt a particular view, whether or not he has a direct interest in the outcome. See **Mohan, S. Chandra, 'The Amicus Curiae: Friends no more?', *Ibid.*, p.3.** On the other hand, it is the duty of a court that has been successfully courted by an *amicus curiae* to judiciously determine the neutrality of the positions advanced in an *amicus* brief and distill therefrom such data as is demonstrably useful in the determination of the matter before it.

26. It seems to us, therefore, that whereas an *amicus curiae* must of necessity have some semblance of interest in a matter that would motivate it to apply to be joined therein in the first place, courts are at liberty to disregard *amicus* briefs that seek to influence the final outcome or attempt to persuade the court one way or another. For present purposes therefore, should this Court deduce a biased, irrational and unresearched premise for the positions advanced by the Applicants, it would be at liberty to sever its friendship with them and disregard their *amicus* brief.

27. In the result, we take the view that the justice of this matter dictates that the Court do benefit from the Applicants' apparent expertise in the issues under scrutiny in the substantive Reference. We do, therefore, allow this Application and hereby grant the Applicants leave to be joined as *amici curiae* in **Reference No. 16 of 2014**.

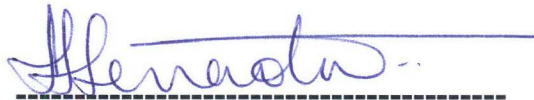
G. DISPOSITION

28. Having so held, we make the following final orders:

- i) *Medical Legal Defence Initiative (MLDI) & Others are hereby granted leave to join **Reference N° 16 of 2014**, as amici curiae;*
- ii) *The said amici curiae are hereby granted leave to submit a joint Amicus Brief in writing in **Reference N° 16 of 2014** within such time frame as shall be directed by the Court;*
- iii) *The Amicus Brief shall be restricted to issues within the amici curiae's mandate and of specific relevance to the Reference aforesaid; and*
- iv) *We make no order to costs.*



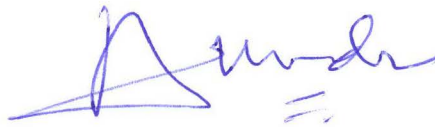
Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE



Hon. Justice Isaac Lenaola
DEPUTY PRINCIPAL JUDGE



Hon. Justice Faustin Ntezilyayo
JUDGE



Hon. Justice Fakihi A. Jundu
JUDGE



Hon. Justice Audace Ngiye
JUDGE