IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: MUSINGA, OUKO & MURGOR, JJ.A)

CIVIL APPEAL NO. 105 OF 2012

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 274 OF 2011

BETWEEN

THE ATTORNEY GENERAL .....1ST APPELLANT
MINISTER OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY.....2ND APPELLANT
THE KENYANS FOR JUSTICE AND DEVELOPMENT TRUST (KEJUDE).....3RD APPELLANT

AND

THE KENYA SECTION OF INTERNATIONAL COMMISSION OF JURISTS.....RESPONDENT

(Being an Appeal from the Ruling of the High Court of Kenya at Nairobi by (Ombija, J) dated 28th November 2011

in

H.C. Misc. Crim. Appl. No. 685 of 2010)
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JUDGMENT OF THE COURT

We cannot begin the consideration of this appeal without first setting out the historical perspective of the idea of establishing an international criminal court. That history, though important for the background of the matter before us, is long and often contentious. But for the space and opportunity we have in this

judgment we shall do our best to summarize it and present that history as accurately as we can.

While efforts to create such a court can be traced to the early 19th century, the story began in earnest in 1872. It is said that Gustav Moynier – one of the founders of the International Committee of the Red Cross made a proposal for a permanent court in response to the crimes and atrocities committed during the Franco-Prussian War. Prior to this period, trials for violations of the laws of war were tried by *ad hoc* tribunals constituted by the victor in most cases. Although both sides of the conflict agreed that serious violations were committed, they failed to punish those responsible or even to enact the necessary legislation. Moynier presented a proposal for the establishment by treaty of an international tribunal at a meeting of the International Committee of the Red Cross on 3rd January 1872. Although his proposal did not succeed, its relevance remains to this day. See Article by Christopher Keith Hall (1998), '**The first proposal for a permanent International Criminal Court**', International Review of the Red Cross, No. 322.

The next serious call for an international criminal justice system came with the 1919 Treaty of Versailles, which brought World War I to an end. It envisaged an *ad hoc* international court. The Leipzig War Crimes Trials were a series of trials held in 1921 to try the Kaiser and other alleged German war criminals of

World War I before the highest German court the Reichsgericht in Leipzig, where seventeen Germans were put on trial for suspected war crimes in twelve trials.

Then came the World War II, at the end of which the victorious Allied governments, led mainly by France, the then Soviet Union, the United Kingdom, and the United States established the first international criminal tribunals to prosecute high-level political and military officials for their roles in the war crimes and other wartime atrocities. The International Military Tribunal (IMT) was set up in Nuremberg, Germany, to prosecute and punish the major German war criminals. Another tribunal, the International Military Tribunal for the Far East (IMTFE) was created in Tokyo, Japan, to try and punish Far Eastern war criminals. The Charter of the International Military Tribunal (or Nuremberg Charter) outlined the tribunal's constitution, functions, and jurisdiction. The jurisdiction of the IMT was to try and punish persons who committed Crimes against Peace, War Crimes and Crimes against Humanity.

The IMT was the turning point in international criminal justice and there are important lessons to be drawn from its judgment rendered on 1st October 1946 in the case of **France and Others V. Göring (Hermann) and Others** (1946) 22 IMT 203. For example, to deal with impunity among the world leaders, the judgment, relying on **Article 7** of the UN Charter categorically declared that;

> **".....Many other authorities could be cited, but enough has been said to show that individuals can be punished for**

violations of International Law. .....crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. The provisions of Article 228 of the Treaty of Versailles already referred to illustrate and enforce this view of individual responsibility. The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. .....

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law."

The principle of individual criminal accountability for all who commit such acts was established as a cornerstone of international criminal law.

A few years later in 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, itself recognizing in resolution 260 of 9th December 1948 that;

" .....at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required".

Article I of that Convention characterizes genocide as **"a crime under international law"**, and **Article VI** provides that persons charged with genocide **"shall be tried by a competent tribunal of the State in the territory of which**

the act was committed or by such international penal tribunal as may have jurisdiction . . ."

Pursuant to this resolution the General Assembly invited the International Law Commission (ILC) to make recommendations for the establishment of an international judicial organ for such trials. Unfortunately, and like the earlier attempts, these efforts appear to have been abandoned.

Up to this stage it would appear that throughout history most perpetrators of war crimes and crimes against humanity went unpunished to the extent that it was reasonable to believe that they were in fact a law unto themselves and there was no judicial system for redress to the victims of their crimes. For instance, in Cambodia in the 1970s an estimated 2 million people were killed by the Khmer Rouge led by Pol Pot. In armed conflicts in Mozambique, Algeria and the Great Lakes region of Africa, Liberia, El Salvador and other countries the story was the same as enormous massacres of civilians was committed without those responsible being held to account.

Fast forward to a series of events in early 1990s that witnessed the resurgence of drug trafficking, the conflicts in Bosnia-Herzegovina and Croatia as well as in Rwanda and the attendant mass commission of crimes against humanity, war crimes, and genocide in these countries led the UN Security Council to establish two *ad hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for

Rwanda (ICTR) to hold individuals accountable for these atrocities. These *ad hoc* tribunals once again highlighted the need for a permanent international criminal court.

The following Statement by Kofi Annan, then United Nations Secretary-General, succinctly explains the primary objectives of the United Nations to secure universal respect for human rights and fundamental freedoms of individuals throughout the world and the thinking behind the establishment of an international criminal court. He explained;

> **"For nearly half a century, almost as long as the United Nations has been in existence, the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought . . . that the horrors of the Second World War, the camps, the cruelty, the exterminations, the Holocaust, could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time, this decade even, has shown us that man's capacity for evil knows no limits. Genocide . . . is now a word of our time, too, a heinous reality that calls for a historic response."**
>
> *(A Statement of Secretary-General Kofi Annan to the International Bar Association in New York on 11 June, 1997).*

This Statement was made a few years after the ILC had presented its final version of a draft statute for the establishment of the International Criminal Court (ICC) to the United Nations General Assembly (UN GA) in 1994. The draft was subjected to intense and extensive six sessions of the UN Preparatory Committee between 1996 and 1998, and involved UN member States and Non-Governmental Organizations (NGOs).

Based on this draft, the UN GA convened the "Rome Conference" (15th June to 17th July, 1998) in Rome, Italy, with 160 countries participating in the negotiations and more than 200 NGOs closely monitoring these discussions. After weeks of intense negotiations, 120 nations voted in favour of the adoption of the Rome Statute of the ICC, with seven nations, including the United States, Israel, China, Iraq and Qatar voting against the treaty and 21 States abstaining. The treaty finally came into force on 1st July 2002. See: UN Official Report, "*United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June -1 7 July 1998*" Official Records Volume I, New York, 2002.

Apart from the general obligation imposed by the Statute on States Parties to cooperate fully with the Court in its investigation and prosecution of crimes, the States Parties are also enjoined to ensure that there are procedures under their national law for all of the forms of cooperation which are specified in the Statute. The legal system upon which the Rome Statute is anchored is on the premise that the primary competence and authority to initiate investigations of international crimes and to prosecute them is with States Parties national courts; that States Parties have the jurisdiction and the primary obligation to detect, investigate, prosecute and adjudicate the most serious international crimes, both under applicable international law and the Rome Statute; and that the ICC will only investigate and prosecute when national jurisdictions are unable or unwilling to

do so genuinely. This is the principle of complementarity reproduced in the Preamble and **Articles 1** and **Article 17** of the Statute. The principle reflects a realization that it is preferable that such crimes are investigated and prosecuted in the country where they occurred. All States Parties are required to modify their national law to meet this obligation.

Kenya for its part passed the International Crimes Act, No 16 of 2008, which contains measures and judicial practice to comply with the overall objective of the Statute, to put *"an end to impunity for the most serious crimes of concern to the International Community as a whole"*. With this background in mind we turn to consider the appeal before us and this is how it got here.

As more detailed information of the atrocities in the bloody conflict in the Sudanese region of Darfur became available, the United Nations Security Council agreed to discuss the situation. But this came only after nearly 300,000 people had been killed and more than two million displacement in the conflict. On 31st March 2005, by Resolution 1593 reached pursuant to Chapter VII of the Charter of the United Nations, (the U.N. Charter) the Security Council, concerned that the situation in Sudan was degenerating into a threat to international peace and security, decided to refer the situation to the Prosecutor of the ICC and directed the Government of Sudan and all other parties to the conflict to cooperate fully with the ICC and its Prosecutor.

Sudan like Kenya is a member of the United Nations and is bound by the U.N. Charter. While Sudan has been a member since 1956, the latter did so on 16th December 1963.

In addition, Sudan has signed the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, (the Genocide Convention). Although on the other hand, Kenya has not signed the Convention, it has ratified the Rome Statute and in addition enacted the International Crimes Act in both of which genocide is categorized as one of **"the most serious crimes of concern to the international community as a whole".**

On 4th March, 2009, the Pre-Trial Chamber of the ICC issued the first warrant for the arrest of President Omar Ahmed Hassan Al Bashir, the President of the Republic of Sudan, on five counts of crimes against humanity committed in Darfur. A second warrant based on three counts of genocide was subsequently issued on 12 July, 2010. On 4th March, 2009 and 12 July, 2010 respectively, the Registrar of the ICC sent requests for cooperation to all States Parties to the Rome Statute asking them to arrest and surrender President Al Bashir if and when he travelled to those countries.

As Kenya celebrated the promulgation of a new Constitution on 27th August 2010, President Al Bashir was among the leaders from the region who were invited and indeed he did attend the historic occasion. Although it is a

common factor that Kenya was aware of the two warrants to arrest President Al Bashir, it did not do so.

When the Kenya section of the International Commission of Jurists (ICJ-Kenya Chapter), the respondent, learnt that President Al Bashir was planning another visit to Kenya in October 2010 to attend an Inter-Governmental Authority on Development (IGAD) summit meeting in Nairobi, it filed an application in the High Court praying, in the main that;

> **"1. That this Honourable Court be pleased to issue a provisional warrant of arrest against one Omar Ahmad Hassan Al Bashir the President of Sudan.**
>
> **2. That there be issued an order to the 2nd Respondent, the Minister of State for Provincial Administration, to effect the said warrant of arrest, if and when the said President Omar Ahmad Hassan Al Bashir sets foot within the territory of the Republic of Kenya".**

The planned visit however did not take place as the Summit was moved from Kenya to Addis Ababa, Ethiopia. This development is significant as will become apparent shortly.

In the application, the respondent argued: (i) that the International Crimes Act, just like the Rome Statute, did not recognize immunity on the basis of official capacity; (ii) that Kenya had violated its obligations under international instruments and its own statute by hosting and failing to arrest and surrender President Al Bashir during his presence on Kenyan territory in August, 2010; and (iii) that under the International Crimes Act the respondent had the *locus standi*

to seek a provisional arrest warrant from the High Court and serve it on the Minister of State for Provincial Administration and Internal Security (Minister for Internal Security) where the State had reneged on its obligations under the Rome Statute and the International Crimes Act.

The 1st and 2nd appellants argued in opposition to the application that, according to **Article 92** of the Rome Statute, it was only the ICC that could seek a provisional warrant of arrest. They further argued that **Sections 32** and **33** of the International Crimes Act were derived directly from **Article 92** of the Rome Statute, and therefore the interpretation of the former sections must be read together with that Article; and that accordingly, only the ICC could make a request for a provisional warrant of arrest. In their view therefore, the respondent lacked *locus standi* to make the application.

Kenyans for Justice and Development Trust (KEJUDE), the 3rd appellant through its trustees, **Andrew Okiya Omtata Okoiti** and **Augustinho Neto Oyugi,** had also filed a miscellaneous criminal application, **High Court Misc. Crim. Appl. No. 685 of 2010.** Through an order of consolidation, KEJUDE joined the proceedings as the third respondent. For their part, they had argued that the Vienna Convention on Diplomatic Relations was in conflict with the International Crimes Act. It further argued that the African Union (AU) had adopted a decision directing all African member States to withhold cooperation with the ICC, in respect of the arrest and surrender of President Al Bashir. The

3rd appellant further contended that this decision as well as repeated calls by AU to the United Nations Security Council to invoke **Article 16** of the Rome Statute and suspend the warrant of arrest against President Al Bashir, were binding on Kenya, a member State of the AU.

The High Court (Ombija, J) in a landmark ruling rendered on 28th November 2011 found, *inter alia,* that the doctrine of universal jurisdiction was a *jus cogens* obligation under international law and States were authorized to arrest and prosecute persons implicated in international crimes regardless of their nationality, status or place of commission of the crime; that for that reason the High Court had jurisdiction not only to issue a warrant of arrest against any person who was accused of committing a crime under the Rome Statute, but also to enforce the warrants issued by the ICC; and that the obligations under the Rome Statute were customary international law. The learned Judge also found that the respondent had *locus standi* on a platform of public interest litigation to bring the application. In his view, the respondent had a genuine interest in the development, strengthening, and protection of the rule of law and human rights, and that the orders it had sought were justiciable; that as a legal person, the respondent had the requisite mandate and capacity to enforce and/or execute the warrant and was at liberty to apply for warrants of arrest where the Government had failed, neglected, or refused to execute the same. But if the respondent had no capacity, the learned Judge opined that it was nonetheless free to bring an application for

the prerogative order of mandamus which would be directed at the Minister in charge of Internal Security to arrest President Al Bashir should he come to Kenya in the future.

With that determination the learned Judge allowed the prayers for the issuance of a provisional warrant of arrest against President Al Bashir and a further order directing the 2nd appellant "to effect **the said warrant of arrest,** if and when, the said President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] sets foot within the territory of the Republic of Kenya". We emphasise **the said warrant of arrest,** to make it clear that the warrant the Minister was ordered to effect is the provisional warrant.

The appellants were aggrieved and in two separate appeals to this Court challenged the decision of the learned Judge. The two appeals were also consolidated and the following ten (10) grounds constitute a summary of the gravamen of their complaint.

1. That the learned Judge misinterpreted the role of the High Court vis-a-vis the International Criminal Court in the application of **Article 2(6)** of the Constitution of Kenya and the International Crimes Act.

2. That the matter presented before the Judge was not a proper case for application of international customary law or the doctrine of universal jurisdiction.

3. That he failed to appreciate that the immunity of a serving Head of State is guaranteed under the general rules of international law which are part of the laws of Kenya by virtue of **Article 2(5)** of the Constitution and that

Article 2(6) qualifies any treaty to be ratified before becoming part of the laws of Kenya.

4. That he did not consider the fact that **Article 98** of the Rome Statute preserved the immunity from execution in respect of sitting Heads of State.

5. That the learned Judge failed to appreciate that sitting or serving heads of State enjoy functional immunity under the general rule of international law thereby making an error of both law and fact in his ruling.

6. That the learned Judge erred by failing to disclose the provision of Kenyan law that gave him the jurisdiction to issue a provisional warrant of arrest.

7. That the learned Judge by assuming that he had jurisdiction in the absence of invocation of any specific provision of either the Constitution or statute, assumed the role of an international criminal court judge.

8. That the learned Judge erred by concluding that the respondent had *locus standi* to present the application for provisional arrest warrant and by misapplying the provisions of **sections 32** and **29** of the International Crimes Act both of which are clear that only the Minister can present an application for a provisional warrant of arrest.

9. That the learned Judge erred by not considering the import of **Article 98** of the Rome Statute and by disregarding the delicate issues of immunity provided for in the Privileges and Immunities Act, the First Schedule to the Act and **Article 31** of the Vienna Convention.

10. That the learned Judge failed to appreciate that the issues before him were not justiciable under the "political question" doctrine or the "act of State" doctrine; questions which the court was not best suited to address.

Based on these grounds, we summarize below the arguments as presented before us by counsel.

Mr. Bitta, learned counsel for the 1st and 2nd appellants, impugned the decision arguing that the learned Judge failed to appreciate the relationship

between the courts and the Executive in so far as separation of powers is concerned, particularly as regards matters relating to the Rome Statute; that the issue at hand being one of foreign relations, the only branch of Government that had the mandate to resolve it was the Executive; that since the dispute was political, it was not justiciable; that the warrants from the ICC were issued to the Minister for Internal Security or the Attorney General, the only persons recognized and charged with the responsibility of implementing the provisions of the International Crimes Act and the Rome Statute; that the court failed to uphold the immunity of a sitting Head of State.

Mr Bitta further submitted that, since the attention of the learned Judge was drawn to the fact that Sudan is not party to the Rome Statute and therefore could not be bound by it, he erred in issuing the impugned orders. Counsel added that the learned Judge also made an error by ignoring the fact that at the time he issued the orders challenged in this appeal, Kenya had made commitments to the AU, binding itself not to comply with the requests for arrest of President Al Bashir, which commitment is recognized and sanctioned by **Article 98** of the Rome Statute.

In support of those submissions, Mr. Bitta referred us to the following: an article by **Prof. Paola Gaeta**, '*Does President Al Bashir Enjoy Immunity from Arrest?*' Journal of International Criminal Justice, Volume 7, Issue 2, 1 May 2009, Pages 315–332 ; the 2001 decision by the France Court of Cassation in the "**Gaddafi Case**", ILR, vol. 125, p. 508, at p. 509; the decision by the United

States District Court for the Southern District of New York in the Case of **Tachiona v. Mugabe,** No. 00 CIV. 6666 (VM), p. 291; the Audiencia Nacional decision in the **"Kagame Case",** Auto del Juzgado Central de Instrucción No. 4, 6 February 2008, Fourth paragraph, No. 1, pp. 151-157.

For the 3rd appellant (KEJUDE), Mr. Mungai agreed fully with the foregoing submissions but added that Sudan was a friendly State with which Kenya would like to maintain the good relationship; that President Al Bashir as the Head of State of Sudan was immune from arrest while in Kenya; that the treaties provide for immunity of serving heads of State which the courts must respect because it serves a good purpose in international law and relations; and that Kenya and Sudan belong to a region mired in numerous political issues hence the two ought not to be antagonized. Since universal jurisdiction is not applicable in the circumstances of this case, the learned Judge could not exercise jurisdiction beyond that donated to the High Court by the Constitution or statutes.

On *locus standi,* learned counsel asserted that the enforcement of the International Crimes Act is in the province of the Executive branch of Government whose agents in the Act are the Attorney General and the Minister of Internal Security. That the implementation of the provisions of the Act is not justiciable as it is a political decision left to the Executive to make and no citizen can exercise such authority. The respondent therefore, according to the appellants, had no *locus standi* to present or prosecute that application.

Mr. Nderitu, learned counsel for the respondent on his part urged us to ignore the issue of jurisdiction of the High Court as it was not raised before the learned Judge; that in accordance with the celebrated decision of this Court in **Owners of the Motor Vessel "Lillian S" V. Caltex Oil (Kenya) Ltd** [1989] KLR 1, this complaint ought to have been raised in the first instance before the High Court; and that because the appellants recognized that the High Court had jurisdiction they articulated their case before it. On justiciability, counsel submitted that the point ought similarly to have been raised before the High Court.

Regarding the contention that the respondent had no *locus standi* to approach the High Court, counsel drew our attention to the predicament expressed by the learned Judge to the effect that despite two warrants for the arrest and surrender of President Al Bashir being in force, the latter came to Kenya on the 27th August, 2010 and the warrants were not executed. Counsel urged us to find that in the circumstances any person, including the respondent, had the capacity to apply to the High Court for provisional warrant of arrest; that the court complied with the provisions of **section 32** following the visit to Kenya by President Al Bashir and the apprehension that there was another planned visit; that as a matter of fact the meeting that President Al Bashir was planning to attend in Kenya had to be transferred to Addis Ababa due to the respondent's agitation on the Government of Kenya urging it to execute the warrant of arrest; that the Government once again invited President Al Bashir to the swearing in of President Uhuru Kenyatta in April 2013; and that there was every indication that

he would indeed attend but due to sustained pressure from the respondent he did not attend.

Mr. Nderitu's response to the submissions on *locus standi* was that **Article 258** of the Constitution clothes any person with the capacity to institute and argue any matter under the Constitution. He submitted that under international customary law, personal criminal responsibility is a recognized general principle; that although the Vienna Convention gave State agents immunity from criminal action, this was purely to ensure that diplomatic functions were not carried out under the fear of being arrested; that this protection was not intended to protect any individual from personal criminal responsibility for conducts amounting to international criminal acts. This is a fundamental principle of customary international law with the status of ***jus cogens***. It was because of this, according to counsel, that the Supreme Court of Appeal of South Africa in the case of **The Minister of Justice and Constitutional Development v The Southern African Litigation Centre** (867/15) [2016] ZASCA 17 found that the Government of South Africa ought to have arrested Al Bashir when he travelled to that country.

Counsel reminded us that even the International Crimes Act recognizes that Heads of State have no immunity for international crimes and crimes against humanity; and the basis of application of **Articles 98** and **27** in Kenya is **Article 2** of the Rome Statute. In view of the fact that **section 32** of the International Crimes Act does not impose any restrictions as to who may apply for a provisional

warrant, the learned Judge was justified in issuing one upon being satisfied that the criteria set by statute were met.

Concerning Kenya's commitment to the AU resolution not to cooperate with ICC in effecting the warrants of arrest, counsel argued that by **Article 4** of the AU Act, one of the functions of the Union is to fight impunity and it could not renege on that objective.

The primary contention in this appeal is that the High Court did not have jurisdiction to entertain the application because, in the first place, Sudan is not a party to the Rome Statute; the matters before it were not justiciable being matters of politics and international relations; President Al Bashir, as a sitting Head of State was immune to our judicial process; the basis upon which the application for a provisional warrant of arrest was made had dissipated; and that the respondent lacked the necessary *locus standi* to institute and prosecute the application.

States Parties to the Rome Statute resolved to guarantee lasting respect for the enforcement of international justice. The preamble to the Rome Statute explains why it became necessary to establish the ICC, as follows;

> **"Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,**
>
> **Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,**

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

.....

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.

Resolved to guarantee lasting respect for and the enforcement of international justice"

Having so agreed, States Parties established the ICC with jurisdiction over persons charged with commission of the most serious crimes of international