



KITUO CHA SHERIA

LEGAL ADVICE CENTRE

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Additional Background:

1. The Unilever tea workers Victims' Committee was constituted after the 2007 violence to represent the interests of the victims of ethnic violence who worked (some of whom continue to work) on Unilever's Kenyan tea plantations in Kericho. It has seven members and has never issued a public statement until today. The Committee has asked Kituo Cha Sharia (a leading Kenyan justice NGO) to publish their letter to Unilever's CEO to ensure the victims' version of the facts is on record.
2. The legal case arises out of Unilever Tea Kenya Ltd's (UTKL) alleged failure to protect their tea workers from the foreseeable risk of ethnic violence in 2007. The legal case has been brought by Leigh Day with the support of Kituo Cha Sheria and REDRESS (a leading international human rights NGO).
3. In December 2007, following the general election result, ethnic violence broke out throughout Kenya. Large groups of attackers invaded Unilever's Tea Plantation in Kericho and attacked hundreds of workers and their families with clubs and machetes. Several thousand workers fled the Plantation and did not return for many months. Leigh Day represents 218 claimants who were victims of that violence. A significant number have been left with lifelong physical and/or psychiatric injuries.

The Legal Claims

4. The victims were Unilever employees and/or residents on the Kericho tea plantation which has a residential population of over 100,000. The numbers of employees alone represented 11% of Unilever's global workforce, the largest concentration of Unilever employees anywhere in the world. According to the victims, Unilever had placed their workers in a position of serious risk because most were from tribes which were not local to the area. As a result, at times of social unrest (such as elections) they were potential targets of violence from the majority tribe which surrounded the plantation.
5. There were widespread warnings of impending serious violence prior to the 2007 election, including multiple threats which were reported to UTKL management, regular reports of mounting violence in the domestic and international media and by political risk agencies. The victims contend that the risk of violence was not appropriately assessed, no adequate precautions were taken to protect workers and their families living on the plantation from violent attack (although precautions were taken to protect assets and managers) and, when the crisis hit, Unilever failed to respond appropriately. The victims were "*left to fend for*

themselves". Had a proper crisis management and preparedness plan been put in place measures could have been taken to safeguard workers.

6. The victims contend that the issue necessarily concerns Unilever PLC in London because crisis management expertise resided in PLC and, according to their own documentation, they were responsible for ensuring that effective procedures were in place in Unilever Tea Kenya and that people were adequately trained. In the end Unilever Kenya failed to adequately assess, plan for and respond to the risk of violence precisely because PLC has failed to ensure effective crisis management systems were in place. Unilever Tea Kenya's systems were substantially revised with the help of Unilever PLC's crisis management experts after the 2007, but that was too late for the victims.
7. Proceedings were brought against Unilever in London because the victims are clear that there was no prospect the claims could proceed in the Kenyan courts without placing themselves at significant risk of violence and/or intimidation. At first instance the Judge found that "*there is cogent evidence... that the Cs [the Claimants] will not get substantial justice in Kenya*" and, specifically, that there is a real risk of "*violence or intimidation*".¹ Those findings have not been overturned by the Court of Appeal. Accordingly, the English case represents the only potential avenue for legal remedy.
8. The case has been fought hard by Unilever on every point to try to get the English courts to decline jurisdiction. At first instance the High Court rejected the majority of Unilever's arguments (including crown act of state and limitation) and held that there was cogent evidence that the claimants would not get justice in Kenya. However, the judge ruled that in her view the risk of violence was not foreseeable on the Plantation, because there had been an unprecedented breakdown of law and order, although the violence had been foreseeable in Kenya generally and even in Kericho the town which borders onto the Plantation. The appeal to the Court of Appeal concerned whether the Claimants needed to demonstrate that the precise extent of violence was foreseeable or whether it was sufficient to prove that there was a real risk of violence. That point was not addressed by the Court of Appeal, which declined jurisdiction on the basis that there was insufficient evidence that Unilever PLC was actively responsible for the alleged crisis management failings of its Kenyan subsidiary (even though Unilever had failed to disclose a large amount of relevant documents).
9. Importantly Unilever PLC has been arguing throughout that they have no real involvement with or legal responsibility for UTKL – a position which would appear to be at odds with their due diligence obligations under the United

¹ Judgement at paragraphs 168 & 169

Nations Guiding Principles. This fundamentally calls into question whether the UNGPs have any real utility when it comes to corporate accountability and access to remedy.

10. The victims are currently seeking leave to appeal to the Supreme Court. Grounds of appeal were lodged on 29 August 2018.

The victims reject the following points in Unilever's public statement issued on 23 July 2018:

- i. The international commission of enquiry that was set up by the Kenyan Government ("the Waki Commission") did not find that the violence was "not foreseeable". In the Court proceedings, the claimants filed a statement by the Secretary to the Waki Commission, Mr George Kegoro, who states in clear terms: *"The Waki Commission's overall findings indicate that in its view, the risk of violence around the 2007 Election was foreseeable, and in fact was foreseen by Kenyan security agencies. The Waki Commission makes clear in its report that by 2007, there was a well-established pattern of intense ethnic violence and civil unrest around elections in Kenya and that this pattern had been exhaustively investigated and analysed by previous commissions of inquiry, including the Akiwimi Commission"*.
- ii. The quotation cited in the Statement from the Court of Appeal judgment reflects the findings of the judge at first instance, not the Court of Appeal itself. That finding was the subject of the claimants' appeal on the grounds that the judge was wrong to rule that the precise scale of the violence needed to be foreseeable. It is sufficient in law that tea workers were at real risk of violence for a duty to protect the workers to arise. That appeal was not dealt with by the Court of Appeal and it now forms part of the claimants' application for permission to appeal to the Supreme Court.
- iii. According to the Victims' Committee nothing was done to protect them from the risk of violence when they raised their fears with management (even though they had been put in a position of specific risk by Unilever). They were told to go and hide in the tea bushes when violence broke out. They were sent away from the plantation for 6 months and did not receive any salary for that period. They lost their possessions when their houses were looted. Some victims received some very limited financial assistance from Unilever (a flat rate of around £80 or the equivalent of one month's wages) when they returned to the plantation, which did not reflect the losses of wages or possessions they had suffered. Those who did not return received nothing. Some were provided with maize, the cost of which was then deducted from their salary. Many had to seek urgent

medical treatment while they were absent from the plantation, for which they had to pay themselves. Little support has been available to those who returned to the plantation. They have no knowledge of any “retraining”, although some victims were put on lighter duties.

Links to key documents:

Other background articles/blogs:

<https://www.business-humanrights.org/en/unilever-lawsuit-re-ethnic-violence-in-kenya>

<http://corporate-responsibility.org/unilever-time-real-leadership-human-rights/>

<http://www.accahumanrights.org/en/news/acca-news/245-acca-press-release---ruling-of-uk-court-of-appeal-on-unilever>

<https://www.business-humanrights.org/en/letter-to-mr-paul-polman-concerning-corporate-accountability-issues-in-relation-to-a-case-involving-unilever-tea-plantation-in-kenya>

For the High Court judgment see:

<http://www.bailii.org/ew/cases/EWHC/QB/2017/371.html>

For the Court of Appeal judgment see:

<http://www.bailii.org/ew/cases/EWCA/Civ/2018/1532.html>