



Original: English

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

Date: 9 November 2012

TRIAL CHAMBER V

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

URGENT

Public

**Joint Defence Request for an
Indication of Prosecution's Continued Reliance on Confirmation Witnesses**

Source: Defence for Mr. William Samoei Ruto
Defence for Mr. Joshua Arap Sang

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

Cynthia Tai, Trial Lawyer

Counsel for William Ruto

David Hooper QC

Kioko Kilukumi Musau

Counsel for Joshua Sang

Joseph Kipchumba Kigen-Katwa

Joel Kimutai Bosek, Philemon K.B. Koech

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Counsel Support Section

Deputy Registrar

Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The defence for Mr. William Samoei Ruto and the defence for Mr. Joshua Arap Sang (the “defence”) hereby seeks the urgent assistance of the Trial Chamber in obtaining from the prosecution an indication as to whether the prosecution continues to rely on the witnesses that they disclosed to the defence (by pseudonym) prior to confirmation. The defence is unable to prepare for the start of trial in an efficient, effective and meaningful manner without such an indication at this late stage.

II. PROCEDURAL HISTORY

2. Prior to the confirmation of charges hearing held in September 2011, the prosecution disclosed to the defence the pseudonyms and redacted statements of Witnesses 1, 2, 4, 6 and 8. The allegations against the accused flow primarily from the statements of these five witnesses, as recorded during the prosecution’s interviews with them.
3. The defence has not received disclosure from the prosecution of any further incriminating witness statements (redacted or otherwise), based on interviews of these same witnesses or from any new witnesses, since 11 August 2011.
4. In its 9th July 2012 scheduling order, the Trial Chamber determined that the trial will start on 11th April 2013.¹ As part of that Schedule, the Trial Chamber set out various dates for disclosure, requiring that the prosecution must file its list of witnesses and list of evidence to be relied on, along with a pre-trial brief and all incriminating disclosure by 9 January 2013.² As further addressed below, this was in the context of full disclosure. The Trial Chamber further stated, “subject to the case-by-case determinations of the Chamber, disclosure may be required earlier than these dates”.³

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-440, Urgent Public Decision on the schedule leading up to trial, 9 July 2012 (“Schedule”).

² Schedule, paras 13-15.

³ Schedule, para. 8.

5. On 7 September 2012, the defence wrote to the prosecution requesting the following assistance:

We write to request whether, as a matter of courtesy, the prosecution can give us an indication of which of the witnesses that the prosecution relied upon during the confirmation of charges hearing are still being relied upon for trial. Such an indication (even if by way of pseudonym, and not by name) would greatly focus and assist ongoing defence efforts to investigate the case. Of course, we understand that this indication would in no way be binding on the prosecution or commit the prosecution to call those witnesses, but it would be helpful to us to know if any of the witnesses are no longer being relied upon.

We would appreciate any indication as soon as possible, but certainly by the 16th of October, the date upon which the prosecution has been ordered to provide a provisional witness list (and summaries of anticipated evidence) to the Chamber (filing #440).

Please let us know if this is a possibility.

6. On 10 September 2012, the prosecution replied by email:

We are in receipt of your email wherein you request confirmation that the Prosecution will continue to rely on those witnesses presented at the Confirmation Hearing. Please be advised that the Prosecution will advise you of our decision in accord with the Trial Chamber's decision, no later than October 16, 2012.

7. However, following the prosecution's *ex parte* filing to the Chamber on 16 October (which the defence assumes was made as ordered), no such information has been forthcoming.
8. The defence made follow-up requests on 17 October, 22 October, and 29 October reminding the prosecution of their undertaking and of the defence's need for the information, to which the prosecution did not reply. Finally, following a request on November 5th, in which the defence noted that the prosecution had not had the courtesy to reply to the earlier correspondence on the matter, the prosecution gave the following response:

Thank you for your message. We have been considering your request and the possibility to facilitate it out of courtesy.

However, the Prosecution, at the moment, does not envisage that it will be in a position to share the requested information before the deadline set by the Chamber in Decision 440.

Should circumstances changes, we will inform you accordingly.

9. The prosecution thereby states that it does not intend to provide the information before 9th January 2013.

III. SUBMISSIONS

10. The timetable established in the Chamber's Schedule was predicated on its assessment that:

In order for the defence teams to be able to prepare adequately for trial, it is essential for the prosecution to complete its disclosure obligations sufficiently in advance of trial. The Chamber is of the view that three months between the full disclosure of the prosecution case and the commencement of trial will afford the defence sufficient time to carry out all necessary preparations.⁴

11. The defence is not here seeking a review of the disclosure schedule established by the Chamber in its decision. In some respects what is being sought in this application by the defence barely qualifies as 'disclosure' at all, as the material itself has been disclosed over a year ago. The defence seeks a very limited indication from the prosecution, namely whether or not it continues to rely, or not, on all or any of the witnesses disclosed to the defence for the purpose of confirmation.
12. In respect of dates set for disclosure, it is plain, and in conformity with the practice of other cases at the ICC,⁵ that times ordered for disclosure are generally a minimum obligation and that the disclosing party should, where reasonable to do so, try to fulfil disclosure obligations in good faith and at the earliest reasonable opportunity.

⁴ Schedule, para. 7.

⁵ See, for example, *Prosecutor v. Bemba*, ICC-01/05-01/08-590, Order on disclosure of evidence by the Office of the Prosecutor, 4 November 2009 (wherein it is clear that the Trial Chamber ordered disclosure of incriminatory material to be made even in advance of the final disclosure date).

13. As an example in the present case, the Single Judge at the confirmation process, stated, in respect of statutory limits for disclosure:

...[t]he early initiation of the process of disclosure better guarantees the expeditiousness of the proceedings, guided by the overarching principle of fairness. For these reasons, the Single Judge encourages the parties to fulfil their disclosure obligations as soon as practicable and not only on the date when the deadline as provided by the statutory documents expires.⁶

14. Indeed, the present Trial Chamber's decision reflects the same attitude toward disclosure, as evidenced by its use of the words "full disclosure" in paragraph 7 of its Schedule, as set out above.
15. The defence assumes that, in its *ex parte* filing of 16 October 2012, the prosecution indicated, or substantially indicated, to the Trial Chamber the witnesses it intends to call and thereby provided its decision as to whether it intends to call the witnesses relied upon at confirmation or not. The defence submits that it is thus reasonable for the prosecution to give this minimum indication as requested by the defence. This is particularly important for the defence in respect of any abandoned witnesses.
16. The defence is considers that it is unlikely, given the attitude of the Prosecutor, to receive substantive incriminating disclosure (particularly witness statements), whether redacted or unredacted, prior to 9th January 2013. This means that the defence will receive a very substantial amount of new material relatively shortly before the start of trial. In anticipation of this, the defence is attempting to use the intervening period, amongst its other preparation, to focus efficiently and effectively on the allegations made by the confirmation witnesses. However, as the Chamber will appreciate, it will be a significant waste of time and resources to review and investigate such extensive material when the prosecution no longer intends to rely on the evidence.
17. There can be no prejudice to the prosecution in letting the defence know if they still intend to rely on the evidence provided by those five witnesses. Nor can providing that minimal information prejudice the witnesses concerned. Indeed, the

⁶ *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-44, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011.

prosecution's initial willingness to provide the information on the 16th October made no reference to any such concern. The defence are seeking what is, in effect, very limited information in order to better prepare its case and to save what otherwise may be unnecessary time and resources. The defence submits that its request in this regard is among the types of issues upon which the Chamber indicated it would consider on a case-by-case basis.

IV. RELIEF REQUESTED

18. The defence respectfully requests the Chamber, on an expedited basis, to order the prosecution to provide the defence with an indication of whether they intend to rely on Witnesses 1, 2, 4, 6 and 8.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 9th day of November 2012
In London



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 9th day of November 2012
In Nairobi