

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 February 2013

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***

**Confidential
With Confidential Annexes A and B**

**Joint Defence Response to
Registry's Transmission of a Submission Received on 20 February 2013**

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
Silas Chekera

Legal Representatives of the Victims

Wilfred Nderitu

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**

1. The defence for Mr. William Samoei Ruto and the defence for Mr. Joshua Arap Sang (the "defence") hereby responds to the '*Registry's transmission of a submission received on 20 February 2013*' containing two confidential annexes.¹
2. The first document annexed is a letter from a source that purports to be the '*The Mungiki Veterans Group/Kenya Sovereignty Defence Squad*' and is dated 13 February 2013. The second document, dated 20 February 2013, is titled 'CHIEF JUSTICE'S STATEMENT ON JUDGES' SECURITY AND ELECTIONS' and is a personal statement from Chief Justice Mutunga in which he first produces what he describes as the 'poison pen letter' (the Mungiki Letter in Annex A), received by him on the 18th of February (notably after the High Court decision at issue, which was rendered on Friday, 15 February 2013 at Milimani Law Courts by a panel of five judges²). Secondly, Mutunga relates an incident at Nairobi airport on or about the 14th of February when an official tried to prevent him travelling to the Coast. The Chief Justice expresses his concerns arising from the two events as evidence of 'a pattern of emerging harassment against my person, the Office of the Chief Justice, and the Judiciary'. He makes a clear declaration of judicial independence not to be swayed by any such behaviour, and calls on the security services to address the issue and to provide full security for the judiciary. He calls for peaceful elections.
3. The Registry filing is a confidential filing, though the defence see no reason for it being confidential given the public nature of the annexes.
4. The manner of the filing before the Chamber is unusual. The prosecution came into possession of the two documents, though the manner it did so is unstated. The prosecution then provided them to the Registry. The Registry then filed them with the Chamber stating that 'the Office of the Prosecutor is of the view that these documents should be brought to the attention of Chamber V'. Why the Registry should act on behalf of the Prosecutor is unclear. This is particularly so given that the so called 'Mungiki Letter' has every appearance on the face of it of being a

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-619, Confidential Registry's transmission of a submission received on 20 February 2013, 22 February 2013.

² See, for instance, http://www.standardmedia.co.ke/?articleID=2000077378&story_title=Kenya-Court-clears-Uhuru,-Ruto-to-vie and <http://www.capitalfm.co.ke/news/2013/02/court-dismisses-uhuru-ruto-eligibility-case/>.

concoction aimed at prejudicing President Kibaki, Mr Kenyatta and other accused. Given that this case has political overtones in Kenya, the Registry should exercise caution in taking every issue arising in Kenya at face value, as it will distract the Court from its primary purpose.

5. That the Mungiki Letter was a fabrication, and that the Registry's intervention was misplaced, is demonstrated by the article attached at Annex A from the *Kenya Daily Post*. The article, dated 23 February 2013, states that a man associated with Raila Odinga's CORD Alliance was arrested in connection to the threats contained in the 'Letter'. Also attached at Annex B is a news media report on the Jubilee Alliance's formal response to the Mungiki Letter and Statement by the Chief Justice. In the circumstances, and given that the Registrar has instructed the Security and Safety Section of the Court to make an assessment of these documents as they pertain to the Court's operations on the ground, the defence submits these for the attention of the Court and the Chamber. The defence also requests that the Registry keep the Chamber and the parties informed of its follow up investigations as to the veracity and provenance of the Mungiki Letter and consequent impact on the security situation in the country.
6. The defence further requests that the Registry's transmission and both annexes be reclassified as public. Both the Mungiki Letter and the Chief Justice's Statement are in the public domain and have been widely circulated in the Kenyan press and social media. The defence is unaware of how, in these circumstances, they can contain "sensitive and confidential information", which must be submitted to the Chamber on a confidential basis. In the event that the Registry's transmission and both annexes are reclassified as public, the defence requests the instant response to be reclassified as public as well. The defence submits that these proceedings must maintain as much transparency as possible.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 26th day of February 2013
In London



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 26th day of February 2013
In Nairobi