

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 1 March 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***

Public Redacted Version of

**Joint Defence Request for an Order for the Prosecution to Indicate
Forthwith whether it Intends to Withdraw Witness P-0015
(previously Confirmation Witness 8)**

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. On the 27th of February the prosecution alerted the defence to further disclosure. Later that day, the Case Manager received four items of potentially exculpatory ("pexo") disclosures related to P-15.¹

2. Among the items was an affidavit made by witness P-15 and dated 7 February 2013. In the affidavit, P-15 states that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3. Despite the unequivocal statements made by P-15, the Prosecutor has not as yet informed the defence of the withdrawal of the witness as a witness in the case. Given that the affidavit has been in the hands of the prosecution for about ten days, and the compelling nature of the affidavit, the defence is concerned that no such indication has been made.

4. In those circumstances, given the significance of P-15's anticipated evidence, and the proximity of the trial date, which presently remains the 10th of April, the defence considers it appropriate to request the Chamber to order the prosecution to disclose its intentions in respect of P-15 to the Chamber and to the defence forthwith and, if the prosecution's intention is to abandon P-15 as a witness, to serve an amended Pre-Trial Brief as soon as possible.

¹ ICC-01/09-01/11-628-Conf-AnxA, Prosecution Communication of Evidence, 28 February 2013.

² KEN-OTP-0093-1199, paras 10-12.

³ KEN-OTP-0093-1199, para 14.

⁴ KEN-OTP-0093-1199, paras 15-16 and 26.

⁵ KEN-OTP-0093-1199, paras 28 and 29.

⁶ KEN-OTP-0093-1199, para 30.

⁷ KEN-OTP-0093-1190.

5. Witness P-15, originally Confirmation Witness 8 is, by the Prosecutor's own admission, "a key source of evidence for the Prosecution regarding the direct criminal involvement of the Accused William Samoei Ruto and Joshua Arap Sang" and "an essential Prosecution witness who is a percipient witness to crimes".⁸ The statements of Witness 8 were cited 162 times in the Pre-Trial Chamber's Decision on the Confirmation of Charges. His uncorroborated testimony was relied on by the Pre-Trial Chamber as the basis for confirming allegations pertaining to planning meetings held on 30 December 2006,⁹ 15 April 2007¹⁰ and 6 December 2007¹¹. No other witness was invoked to same the extent. He was a core witness, if not indeed 'the' core witness, lauded for his detail and coherence.

6. The anticipated testimony of witness P-15 is relied on 136 times in the prosecution's updated Pre-Trial Brief.¹² The prosecution has indicated that Witness 8 or P-15 would testify under direct examination for 16 hours.¹³ The allegations pertaining to three meetings (30 December 2006, 15 April 2007 and 6 December 2007) are still uncorroborated in the updated Pre-Trial Brief; there has been no new evidence obtained through investigations that took place after the confirmation of charges hearing to further substantiate these allegations.

7. A prompt indication by the prosecution of its intentions is not only necessary in the interests of justice but will enable the defence to determine the full extent of the change to the prosecution's case that the withdrawal of P-15 will cause. This may include requesting a referral of the case against Mr. Ruto and Mr. Sang to the Pre-Trial Chamber. In any event, the effect of withdrawal of P-15 on the prosecution case and on the work of the defence in preparing its case is plain and the tardiness of the prosecution in declaring its intentions inexplicable. The defence has, for example, been working on an analysis of the evidence of P-15 in the past week; work and effort that would now seem to have been wholly unnecessary.

⁸ ICC-01/09-01/11-474-Conf-Red, 22 November 2012, para. 1 and 18. See also paras. 10-12.

⁹ ICC-01/09-01/11-371, Confirmation Decision, paras 113-119.

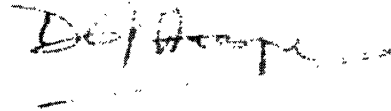
¹⁰ ICC-01/09-01/11-371, Confirmation Decision, paras 120-125.

¹¹ ICC-01/09-01/11-371, Confirmation Decision, paras 142-147.

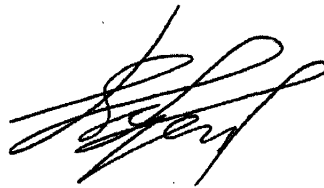
¹² ICC-01/09-01/11-625-Conf, Updated Prosecution Pre-Trial Brief, 26 February 2013.

¹³ ICC-01/09-01/11-540-Conf-AnxB-Red, Prosecution Pre-Trial Materials, 9 January 2013.

8. In the event that the Prosecutor does withdraw P-15, the defence requests the Chamber to order a further, amended Pre-Trial Brief to take into account the significant effect such withdrawal will have on the prosecution case.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 1st day of March 2013
In London



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 1st of March 2013
In Nairobi