



Original: English

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

Date: 1 May 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
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

**Prosecution's Observations on "Defence Request pursuant to Article 63 (1) of the
Rome Statute"**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Mr. James Stewart

Ms. Cynthia Tai

Counsel for the Defence

For William Samoei Ruto:

Mr. Karim AA Khan QC

Mr. David Hooper QC

For Joshua Arap Sang:

Mr. Joseph Kipchumba Kigen-Katwa

Mr. Silas Chekera

Legal Representatives of the Victims

Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Mr. Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Introduction

1. Having originally sought to attend the trial largely by video-link, William RUTO (“RUTO”) now asks to be excused from attending the trial altogether, save for the opening and closing statements, the delivery of the judgment, and hearings where his attendance is expressly required by the Chamber. Even more than the previous video-link request, this demand is completely at odds with both the plain language and the spirit of the Rome Statute (“Statute”) and the Rules of Procedure and Evidence (“Rules”). It should be denied.

Background

2. On 28 February 2013, the Defence for RUTO and Mr. Joshua Arap SANG (“SANG”) filed their “Joint Submissions on Legal Basis for the Accused’s Presence at Trial via Video Link” (“Joint Submissions”) requesting that the Chamber authorise the use of video link technology “to ensure that the accused’s right to be present at trial is effectuated”.¹

3. On the 22 March 2013, the Prosecution filed its observations on the Defence’s joint submissions (“Observations”), requesting that the Chamber dismiss the Defence’s application² principally on the basis that it was unsupported by the Statute and contrary to the interests of justice.

4. On 17 April 2013, the Defence filed its “Request pursuant to Article 63(1) of the Rome Statute” (“request”) seeking the Trial Chamber’s (“Chamber”) authorisation to (1) grant RUTO’s request to waive his presence at trial; (2) “vary the conditions of RUTO’s summons to appear before the Court to provide that he attend the opening and closing of trial, judgment and all hearings at which his attendance is

¹ ICC-01/09-01/11-629.

² ICC-01/09-01/11-660.

requested by the Trial Chamber” and (3) in the alternative authorise the use of video-link technology.³

Submissions

5. In its Observations, the Prosecution set out in detail why the “presence” required by Article 63(1) means physical presence, and cannot be satisfied by video-link attendance.⁴ Consequently, the Prosecution incorporates by reference its prior submissions.

6. The Defence now contends that *no* presence at all is required by Article 63(1), despite the plain language of that provision. Instead, the Defence argues that the Accused may simply waive the requirement of attendance in Article 63(1), and that because he is now the Deputy President of Kenya, he should be allowed to waive his attendance. These contentions are without merit and are unsupported, by the Statute or Rules, or by the jurisprudence of this Court.

7. The requirement that “[t]he accused shall be present during the trial” is not simply a right of the Accused that may be waived, as the Defence contends. Rather, it is a statutory requirement that is central to the integrity of the proceedings.

8. The Defence’s interpretation of Article 63(1) is at odds with the plain language of the provision itself. The provision is not that the Accused may attend trial if he wishes, or that it is his right that may be waived. Instead, it clearly and simply states that the accused “shall” be present during the trial. As the Prosecution noted in its Observations, the drafters of the Statute knew how to make the presence of the accused waivable, and did so for the confirmation hearing in Article 61(2)(a). For trial, however, the Statute contains no such waiver provision.

³ ICC-01/09-01/11-685, pp. 12-13, pars. 21-22.

⁴ ICC-01/09-01/11-660.

9. Moreover, the Defence's interpretation renders Article 63(1) completely superfluous. As the Defence itself points out, the presence of the Accused at trial is *also* included as one of the "Rights of the Accused" in Article 67. If the Defence's interpretation of the Statute were correct, then it would have been sufficient to have the presence of the accused included only as a right in Article 67 and there would have been no need for Article 63(1) at all. It is a basic principle of statutory interpretation that all words of a statute should be given effect if possible. By including Article 63(1), the drafters of the Statute made it clear that the Accused's presence at trial is not just a right of the accused, but is in fact a requirement that is essential to the integrity of the trial.

10. Further, simply because a statutory obligation aims, in part, to protect the rights of the Accused, it does not follow that the Accused may simply waive that right. This is evident from a reading of Article 67 itself, which is entitled "Rights of the Accused." It provides in section (c) that the Accused has the right "[t]o be tried without undue delay." In subsection (i), the Accused is granted the right "[n]ot to have imposed on him or her any reversal of the burden of proof...". Nobody would argue, however, that the Accused could simply waive these rights and obtain a trial with undue delay and a reversal of the burden of proof. That is because although these provisions protect interests of the Accused, they *also* protect the interests of the other parties and the integrity of the trial itself. That is particularly evident with respect to the presence of the Accused since the drafters included it not just in Article 67, but in addition in a separate provision, Article 63, which mandates the presence of the Accused with just one exception.

11. Accordingly, the Prosecution disagrees with the Defence's assertion that granting RUTO's request will not affect the rights of any of the parties to these proceedings and that his absence would change nothing.⁵ All of the parties have a fundamental interest in RUTO being physically present at trial. RUTO stands accused of very serious charges and there is an obvious expectation that he will be

⁵ICC-01/09-01/11-685, p. 10, par. 15.

physically present. If RUTO were simply allowed to drop in and attend any session that he might choose to attend, whenever it would please him, as is casually suggested by the Defence,⁶ this would undoubtedly have an extremely negative impact on how the Court is perceived by the public and more importantly the victims and witnesses. In fact, the public's trust in the Court would be gravely affected.

12. Further, the Defence has presented no cogent reasons why RUTO should be excused from trial. The Defence says that the Court should accommodate those "occupying high office" and that it should adopt a "flexible and pragmatic approach" in order to allow the "governance of Kenya to continue unimpeded." First, Article 27 (1) clearly states that the Statute applies equally to all persons "without any distinction based on official capacity", and therefore RUTO is not entitled to special consideration simply because of his position. Second, while flexibility and pragmatism are plainly salutary in the abstract, they cannot be a basis for circumventing or ignoring the explicit requirements of the Statute. Third, the Chamber should reject the Defence's suggestion that it interpret the Statute in a manner to accommodate political considerations in Kenya. Given the types of cases addressed by this Court, there would be no end to such requests if this particular door were to be opened. Finally, Art 63(2) provides for only one exception when the presence of the accused may be dispensed with, and at the instance of the Chamber. The reasons proffered by the Defence in support of its application do not fall within this exception.

13. The Defence also cites Trial Chamber III's decision authorising the accused Jean-Pierre Bemba Gombo's absence from trial on two specific occasions as support for its contention that RUTO need not be present for the entirety of the trial, save for special appearances.⁷ However, what the Defence fails to point out is that unlike RUTO, Bemba has been held in custody by the ICC since 2008 pending the outcome

⁶ ICC-01/09-01/11-685, p. 3, par. 1.

⁷ ICC-01/09-01/11-685, p. 6, par. 8.

of his trial. Further, in one of the cases cited by the Defence, Bemba's absence was strictly for a morning session on the basis of medical reasons.⁸ In the other, the Bemba's absence was authorised for just part of one afternoon.⁹ These two very brief absences do not mean that the Accused has not been present for his trial as required by Article 63(1) and provide no support for RUTO's request that he be allowed to skip virtually the entire trial.

14. Finally, as addressed in the Prosecution's Observations, there is no merit to the Defence's contention that Article 64 can be relied upon by the Trial Chamber to exempt RUTO from being physically present during the trial.¹⁰ Article 64(6)(a) allows the Trial Chamber to exercise functions of the Pre-Trial Chamber, but subject to the terms of Article 61(11), which states that the Trial Chamber may only exercise those functions of the Pre-Trial Chamber that are "relevant and capable of application." Because Article 63 explicitly requires the accused's presence at trial and provides for no waiver, it cannot be supplanted by the very different pre-trial regime which explicitly allows for the accused to waive presence at the confirmation hearing. In other words, the waiver provision for the confirmation hearing is neither relevant nor capable of application to the trial context. Accordingly, Article 64 provides no basis to circumvent Article 63.

⁸ ICC-01/05-01/08-T-183-RED-ENG, pp. 1-2.

⁹ No reference was provided by the Defence for this information.

¹⁰ See Observations at par. 13.

Relief Requested

15. For the reasons set out above, the Prosecution respectfully requests that the Chamber dismiss the Defence's request.



Fatou Bensouda, Prosecutor

Dated this 1st day of May 2013

At The Hague, the Netherlands