

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 July 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

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

**Public
with Confidential Annex A**

**Public Redacted Version of "Sang Defence Response to
Prosecution's Update on Disclosure and
Request for additional time to disclosure certain materials",
as submitted on 20 June 2013**

Source: 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
Anton Steynberg, Trial Lawyer

Counsel for William Ruto

Karim Khan QC, David Hooper QC
Kioko Kilukumi, Shyamala Alagendra

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**

Paolina Massida

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Deputy Registrar

Didier Daniel Preira

Victims and Witnesses Unit

Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The trial against William Ruto and Joshua Sang was initially scheduled to start on 10 April 2013; all disclosure to the defence was supposed to be made by the 10th of January 2013, three months prior to the start of trial. On 3 June 2013, Trial Chamber V(A) re-scheduled the commencement of trial for 10 September 2013.¹
2. Subsequently, the prosecution, through its filing, *Update on Disclosure and Request for additional time to disclose certain materials*, has admitted that as of 10 June 2013, it is still not prepared to start trial.² This is despite direct public proclamations to the contrary.
3. Most recently, at the Status Conference held on 14 May 2013, and in response to a direct question posed by then-Presiding Judge Ozaki, querying whether the prosecution was “ready to start immediately”, Ms Tai stated “Yes, exactly”.³ In fact, the prosecution requested that the Chamber set a trial date “as soon as practicable”.⁴ No mention was made of the sixty or so items on the prosecution’s List of Evidence, which had been disclosed but which were not yet accompanied by a proper transcript and/or translation.⁵
4. Now the prosecution seeks an extension of approximately six weeks (ie, until mid-July) to disclose outstanding transcripts and/or translations for six Kalenjin-language audio/video files, for use at trial. The prosecution has had these materials in its possession since July 2012. This Request must be rejected.

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-762, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013 (“**Decision Rescheduling Start Date**”).

² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-768-Conf, Prosecution’s Update on Disclosure and Request for additional time to disclose certain materials, 10 June 2013 (“**Request**”).

³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-T-22, 14 May 2013, p. 40.

⁴ *Ibid.*

⁵ The Sang defence team has written a series of emails to the prosecution on the issue of outstanding transcriptions and translations of A/V material on the prosecution’s List of Evidence. The first email, which should have alerted the prosecution to this problem, were they not already cognizant of it, was sent on 10 May 2013. Follow up emails were sent on 30 May 2013 and 5 June 2013. There was no response from the prosecution until 13 June 2013, following the prosecution’s filing on this matter. These communications are attached as **Confidential Annex A**.

II. SUBMISSIONS

5. In its Request, the prosecution has conceded that audio/video materials are incomplete and ineffective if they are disclosed in a language that is not a working language of the court and are not accompanied by a transcript and/or translation.⁶ In this regard, the defence notes regulation 39(1) of the Regulations, which provides that all documents and materials filed with the Registry shall be in English or in French, unless otherwise provided in the Statute, the Rules, the Regulations, or authorized by the Chamber or the Presidency.
6. The defence recalls that prior to the confirmation of charges hearing, the Single Judge of Pre-Trial Chamber II explained that “for disclosure to proceed satisfactorily and for the time limits for disclosure to be effective also in cases where the evidence is not in a working language of the Court, translations of evidence must be provided within the time limits for disclosure”.⁷ The prosecution has thus had ample notice that in order to rely on Kalenjin-language A/V items at trial, it must provide the defence a transcript and/or translation by the deadline for disclosure.
7. Yet on the day of the final deadline for disclosure, the prosecution belatedly seeks authorization to file transcripts and/or translations in relation to the following six audio/video materials:

⁶ Request, para. 8 citing ICC-01/04-01/07-1336, para. 13 where Trial Chamber II stated: “The Chamber is of the view that the transcripts and translations form an integral part of the video and must for that reason be considered as constituting one and the same piece of evidence – when one is missing, the evidence is not complete. Therefore, until the transcript and the necessary translations into one of the working languages of the Court have been provided to the Defence, the Prosecution has not complied with its disclosure obligations and its obligations under regulation 39(1) of the Regulations.”

⁷ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-300-Conf, Decision on the "Prosecutor's Request for an Order Excluding the Evidence Intended to be Relied Upon at the Confirmation of Charges Hearing by the Defence for Ruto and Sang, and the Defence for Kosgey", 29 August 2011, para. 37.

ERN	Wit.	Name / Description	Type & Date of Disclosure	Date OTP Obtained
KEN-OTP-0073-0193 (Tracks 1 to 55)	P-397 ⁸	[REDACTED] [audio/video]	Trial INCR package 32 18 Feb 2013	7 Jul 2012
KEN-OTP-0073-0205	P-356	[REDACTED] Data CD [audio/video]	Trial INCR package 30 11 Feb 2013	7 Jul 2012
KEN-OTP-0073-0206 (Tracks 1 to 29)	P-356	[REDACTED] Disk 01 Data DVD [audio/video]	Trial INCR package 30 11 Feb 2013	7 Jul 2012
KEN-OTP-0073-0207 (Tracks 1 to 13)	P-356	[REDACTED] Disk 02 Data DVD [audio/video]	Trial INCR package 30 11 Feb 2013	7 Jul 2012
KEN-OTP-0075-0042 (Tracks 1 to 2)		[REDACTED] [audio only]	Trial INCR package 23 9 Jan 2013 Trial Rule 77 package 18 21 Dec 2012	6 Jul 2012
KEN-OTP-0075-0078 (Tracks 1 and 2)		[REDACTED] [audio only]	Trial Rule 77 package 18 21 Dec 2012	6 Jul 2012

8. A review of this chart makes it clear that the prosecution, in its Request, has once again provided inaccurate information to the Trial Chamber, this time in respect of the date these items were disclosed to the defence. The Chamber recently chastised the prosecution for providing inaccurate information to the Chamber, and urged it to be diligent in the future.⁹ Unfortunately, in aid of its submissions, the prosecution states that the “original A/V files were disclosed to the defence within the 9 January 2013 deadline”.¹⁰ But the metadata associated with these items (as reproduced in the chart above) shows that only the two audio files were disclosed by 9 January; the other audio/video files were disclosed on either the 11th or 18th of February 2013. However, in many ways this is a distinction without a difference, as the defence team is still unable to effectively review the contents of the files, due to the lack of a translation.

9. The defence is unsympathetic to the prosecution’s complaint that it has a large

⁸ The defence notes that within the last month, [REDACTED]

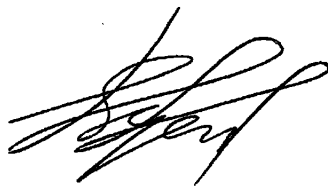
⁹ Decision Rescheduling Start Date, para. 55.

¹⁰ Request, para. 9.

amount of A/V materials in its collection and that it has only employed [REDACTED] [REDACTED].¹¹ Given the particular circumstances of this case, this is not a justifiable basis upon which to request the delayed disclosure of the materials it intends to use at trial. Clearly, the prosecution has been on notice since the beginning of its case that they would need personnel who could translate from Kalenjin to English. The nature of the charges against Sang, alleging a contribution to the Network's commission of crimes against humanity, through, *inter alia*, his Kalenjin-language radio broadcasts, makes it blatantly obvious that there would likely be, in the course of the trial, Kalenjin-language radio broadcasts or other materials in Kalenjin that the prosecution would want to disclose as evidence. The prosecution have had ample opportunity to recruit appropriate staff or contractors for this purpose. Had the prosecution been having trouble in this regard, it was incumbent upon them to raise the issue with the Trial Chamber in a timely manner, rather than to proclaim that they were trial ready.

III. CONCLUSION

10. For the above reasons, the defence submits that the prosecution has not shown good cause pursuant to Regulation 35(2) to extend the disclosure deadline in relation to these six transcripts and translations. The defence maintains its position that it needs, at a minimum, three months from the date of full disclosure of the prosecution's case, to prepare meaningfully for trial.



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua arap Sang
Dated this 11th day of July 2013
In Nairobi

¹¹ Request, para. 9 and FN 3.