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

Date: 26 August 2013

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

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

Public

**Sang Defence Response to Prosecution's Second Submission
on the Conduct of Proceedings**

Source: Defence for Mr. Joshua arap Sang

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

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I. INTRODUCTION

1. In its *Order Requesting Submissions on the Conduct of Proceedings*, the Trial Chamber ordered the parties to make any submissions within the meaning of Rule 134 of the Rules of Procedure and Evidence by the 12th of August 2013.¹ The prosecution thereby filed its second submissions on the conduct of proceedings,² raising several discrete issues: rebuttal evidence, the need to “put the case” to relevant witnesses, the possible use of prior recorded statements, and the need for notice under Regulation 55.
2. At the request of the Chamber, these issues were discussed by the parties to some degree at the Status Conference held on 19 August 2013.³ The Sang defence team relies upon and does not intend to rehash its submissions made at the Status Conference. However, the defence make succinct submissions below with respect to the prosecution’s indication that it may seek to introduce a witness’s prior recorded statement(s).

II. SUBMISSIONS

Use of Prior Recorded Statements

3. At paragraph 5 of its submissions, the prosecution stated:

5. The Prosecution takes note of the Chamber’s directions in paragraph 28 of its Directions Decision on the procedure to be followed by a party wishing to introduce into evidence a witness’ prior recorded statement. In this regard, the Prosecution recalls that there may be instances where the calling party will seek leave to introduce into evidence a prior recorded statement of a witness who has become adverse or hostile.
4. The defence submits that the prosecution is conflating two issues – that of the introduction of prior recorded statements and the issue of prior recorded testimony. The two words are not interchangeable. The term ‘statement’ is broad

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-778, Order Requesting Submissions on the Conduct of Proceedings, 19 June 2013, para. 4 (“Additionally, the Chamber directs any party intending to raise any objections or observations at the commencement of trial within the meaning of Rule 134 of the Rules to submit a written notice setting out the content and grounds for any such objection or observation. The written notice should be filed by 12 August 2013 with responses, if any, to be filed by 26 August 2013”).

² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-848, Prosecution’s Second Submissions on the Conduct of the Proceedings, 12 August 2013 (“Submissions”).

³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-T-24, Transcript, 19 August 2013, p. 34-35 (rebuttal), p. 35-44 (putting the case to a witness), and p. 3-25 (Regulation 55(2)).

enough to include ‘testimony’, but not all ‘statements’ qualify as ‘testimony’, since the plain meaning of the word ‘testimony’ is in reference to sworn statements made by a witness during judicial proceedings.

5. The Chamber’s directions,⁴ referred to by the prosecution, speak in terms of the introduction of prior recorded testimony, as per the language of Rule 68.⁵ As the Sang defence understands it, the Chamber then goes on to direct that the party wishing to introduce the prior recorded testimony should mark the statements therein, which are the focus of the application for admission.
6. Whether this direction of the Chamber should be amended to allow the introduction of a prior recorded statement of a witness (ie, a statement which is not part of a witness’s prior recorded testimony as defined by Rule 68) who has become adverse or hostile, should be argued by the applying party a case-by-case basis, should the need arise.⁶ Such an application should include full argument as to the legal basis for the request. The defence notes that this is the same approach the prosecution has undertaken to follow in respect of seeking leave from the Chamber to introduce into evidence prior recorded statements of witnesses who are unavailable to testify.⁷

⁴ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-847-Corr, Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, para. 28 (“When a party wishes to introduce prior recorded testimony in accordance with Rule 68(b) of the Rules, it shall file an application to that effect at least 21 days before the witness is scheduled to appear. The application shall be accompanied by a copy of the prior recorded statement indicating precisely which passages the party calling the witness wishes to enter into evidence. If these passages contain references to other material that is available to the party calling the witness, they shall equally be attached to the application. The other party and the Legal Representative shall have ten days following the notification of the application to raise any objections.”).

⁵ Rule 68 states : When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that: (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

⁶ See generally, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2201-Red, Decision on the prosecution’s Request on the Manner of Questioning of Witness DRC-OTP-WWW-0015 and contact by the prosecution with Court witnesses, 1 February 2010, paras. 1-21. But note that this application did not include a request to tender P-15’s prior recorded statements or testimony.

⁷ Submissions, para. 6.

III. CONCLUSION

7. The Sang defence makes these submissions in order to put the parties on notice of its interpretation of Rule 68 and its understanding of paragraph 28 of the Chamber's Decision, with respect to the use of prior recorded testimony.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 26th day of August 2013
In Nairobi, Kenya