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TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

Public

Prosecution's Motion for Reconsideration of the "Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial" and in the alternative, Application for Leave to Appeal

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Introduction

1. Trial Chamber V(B) excused Mr Kenyatta from attending substantially all of his trial in order to permit him to discharge his official functions as the President of Kenya, while the trial proceeds. This decision follows the approach that Trial Chamber V(A) had previously taken in the *Ruto* case. However, on 25 October 2013, the Appeals Chamber reversed the *Ruto* decision, finding that the Trial Chamber did not properly exercise its discretion when deciding to excuse Mr Ruto from substantially all of his trial. This authoritative judgment of the Appeals Chamber effectively voids the *Kenyatta* decision, which fully adopts the reasoning of the *Ruto* decision, comes to the same conclusions, and grants identical relief.
2. The Appeals judgment clarifies the law with respect to the requirement that an accused must be present at trial pursuant to Article 63(1), and the limits to a Trial Chamber's discretionary power under Article 63(1). This intervening decision, coupled with the Trial Chamber's duty to ensure that the proceedings in the *Kenyatta* case continue to be grounded on a sound legal basis, requires that the *Kenyatta* excusal decision be vacated.
3. The Prosecution accordingly seeks reconsideration by the Trial Chamber of its decision of 18 October 2013, in light of the judgment of the Appeals Chamber. Specifically, the Prosecution requests the Chamber to vacate the *Kenyatta* excusal decision. In the alternative, the Prosecution seeks leave to appeal the matter. The Prosecution submits that it is in the interests of judicial economy and the expeditious resolution of this matter for the Chamber to adopt the first course of action.

Procedural Background

4. On 18 October 2013, the Majority of Trial Chamber V(B) issued the "Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial"

(“*Kenyatta* Decision”).¹ The Majority granted the Defence’s request, allowing Mr Kenyatta to be absent from substantially all of his trial,² “in order to permit him to discharge his functions of state as the executive President of Kenya; while his trial proceeds”.³ Having granted Mr Kenyatta’s request, the Majority did not rule on his alternative request that his continuous presence at the trial be satisfied by means of video link.⁴

5. In the *Kenyatta* Decision, the Majority recalled that on 18 June 2013, the majority of Trial Chamber V(A) granted Mr Ruto a conditional excusal from continuous presence at trial (“*Ruto* Decision”).⁵ The Majority in the *Kenyatta* case “fully adopted” the reasoning of the *Ruto* Decision⁶ and granted the same relief.⁷ The Majority found that “[s]trictly speaking, no more needs be said than has already been said in the [*Ruto* Decision]”. Nevertheless it added “further thoughts [...] in fuller amplification of the reasoning already indicated, and to recognise evident developments that have since occurred”,⁸ namely the Westgate Mall incident and the related adjournment of the *Ruto* trial for one week to enable Mr Ruto to “play his part in managing the incident”.⁹ Judge Ozaki appended a partially dissenting opinion (“Dissenting Opinion”)¹⁰ and Judge Eboe-Osuji appended a separate further opinion.¹¹
6. On 18 July 2013, the majority of Trial Chamber V(A), Judge Eboe-Osuji dissenting, granted the Prosecution leave to appeal the *Ruto* Decision,¹² and the Prosecution filed its appeal on 29 July 2013.¹³

¹ ICC-01/09-02/11-830.

² Decision, paras.4-5, pp.54-55.

³ Decision, para.4.

⁴ Decision, paras.23, 127.

⁵ ICC-01/09-01/11-777.

⁶ Decision, para.67.

⁷ Compare *Kenyatta* Decision, paras.5, 124 and pp.54-55 and *Ruto* Decision, paras.3, 104 and p.52.

⁸ Decision, para.67.

⁹ Decision, paras.60-65.

¹⁰ ICC-01/09-02/11-830-Anx2.

¹¹ ICC-01/09-02/11-830-Anx3-Corr.

¹² ICC-01/09-01/11-817.

¹³ ICC-01/09-01/11-831.

7. On 20 August 2013, the Appeals Chamber granted the Prosecution's request for suspensive effect of the *Ruto* Decision and required Mr Ruto to be present during the trial, pending the final determination of the appeal.¹⁴ According to the Appeals Chamber, "the consequences of implementing the [*Ruto* Decision] prior to the issuance of the judgment on the Prosecutor's Appeal, would be difficult to correct and may be irreversible".¹⁵ In a subsequent decision rejecting a Defence request for reconsideration, the Appeals Chamber found that its conclusion still stands, irrespective of "recent events in Kenya" and the resulting adjournment of the trial for one week.¹⁶ According to the Appeals Chamber, "[t]he difficulties that may arise if the proceedings continued in Mr Ruto's absence, should the [*Ruto* Decision] be overturned, are still the same".¹⁷

8. On 25 October 2013, the Appeal Chamber rendered its judgment in the Prosecution's appeal against the *Ruto* Decision ("Appeals Judgment").¹⁸ It found that "Article 63(1) of the Statute does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused."¹⁹ According to the Appeals Chamber, "the presence of the accused [is] the general rule and [...] article 63(1) of the Statute clearly limits the Trial Chamber's discretion to excuse an accused person from presence during the trial".²⁰ Applying these principles to the *Ruto* Decision, the Appeals Chamber found that "the Trial Chamber did not properly exercise its discretion when it decided to excuse Mr Ruto from substantially all of his trial".²¹ The Appeals Chamber set out specific "limitations on the discretion of the Trial Chamber to excuse an accused person from presence during trial"²² and noted that in this case, "the Trial Chamber provided Mr Ruto with what amounts to a blanket excusal before the trial had even commenced, effectively making his absence the

¹⁴ ICC-01/09-01/11-862 OA5.

¹⁵ ICC-01/09-01/11-862 OA5, para.10.

¹⁶ ICC-01/09-01/11-993-Red OA5.

¹⁷ ICC-01/09-01/11-993-Red OA5, para.10.

¹⁸ ICC-01/09-01/11-1066 OA5.

¹⁹ Appeals Judgment, para.1.

²⁰ Appeals Judgment, para.61.

²¹ Appeals Judgment, paras.64, 61.

²² Appeals Judgment, paras.2, 62.

general rule and his presence an exception. Furthermore, the Trial Chamber excused Mr Ruto without first exploring whether there were any alternative options. Finally, the Trial Chamber did not exercise its discretion to excuse Mr Ruto on a case-by-case basis, at specific instances of the proceedings, and for a duration limited to that which was strictly necessary.”²³ On this basis, the Appeals Chamber reversed the *Ruto* Decision.²⁴

Request for Reconsideration

A. Overview

9. Chambers have discretion to reconsider their decisions when a decision is manifestly unsound and its consequences are manifestly unsatisfactory,²⁵ or when new or previously unavailable information requires that the Chamber reconsider its previous ruling.²⁶
10. The Prosecution submits that in light of the recent ruling of the Appeals Chamber, the *Kenyatta* Decision meets the above criteria for reconsideration. In the circumstances, it is appropriate for the Trial Chamber to vacate the *Kenyatta* Decision.

B. Submissions

11. The Appeals Judgment constitutes new and previously unavailable information, which has a decisive impact on the *Kenyatta* Decision. Because the *Kenyatta* Decision grants the same relief for the same reasons as the *Ruto* Decision,²⁷ the conclusions and the underlying reasons provided in the Appeals Judgment

²³ Appeals Judgment, para.63.

²⁴ Appeals Judgment, para.65.

²⁵ Trial Chamber I accepted the possibility of reconsidering decisions in exceptional circumstances. See ICC-01/04-01/06-2705, paras.13-18. Other Chambers, like Pre-Trial Chamber II in the Uganda Situation, conclude that there is no express statutory authority to reconsider rulings (see, e.g., ICC-02/04-01/05-60, para.18). The Prosecution notes that the Appeals Chamber has affirmed the ability of this Court to exercise inherent judicial powers, as in its authority to issue a permanent stay of proceedings even though no article or rule allows it (ICC-01/04-01/06-772 OA4, paras.36-39).

²⁶ ICC-01/05-01/08-1691-Red, para.17. An analogical application of Article 84 also supports this submission.

²⁷ *Kenyatta* Decision, paras.66-67.

equally apply to the former. Had the Appeals Judgment been issued prior to the *Kenyatta* Decision, the Trial Chamber would have been required to come to a different conclusion: the Appeals Judgment clarified the applicable law both with respect to the legal basis employed by the Trial Chamber, as well as the relief that it granted in the *Kenyatta* Decision. In particular, the Appeals Chamber has ruled that a blanket excusal of an accused from attending trial, without first exploring any alternative options and deciding on an excusal on a case-by-case basis, at specific instances of the proceedings, and for a limited duration that is strictly necessary,²⁸ constitutes an error in the Trial Chamber's exercise of discretion. This error materially affected the *Ruto* Decision²⁹ and resulted in its reversal.³⁰

12. It is fair to assume that, were the Appeals Chamber to rule on the legality of the *Kenyatta* Decision, it would come to the same conclusion as it did in the Appeals Judgment and find the same legal errors. Since the Majority stated in the *Kenyatta* Decision that "the entirety of the material reasoning employed in [the *Ruto* Decision] is fully applicable to the current request of Mr Kenyatta",³¹ it is difficult to imagine how this could not be the case. Therefore, the entire proceedings are likely to be invalidated by the Appeals Chamber after trial, if the trial proceeds in the absence of the Accused as envisaged by the *Kenyatta* Decision.

13. The Appeals Chamber anticipated this effect when granting the Prosecution's request for suspensive effect of the *Ruto* Decision. It found that the consequences of implementing the *Ruto* Decision prior to the issuance of the judgment on the Prosecutor's Appeal "would be difficult to correct and may be irreversible".³² It also found that the "evident developments" referred to in the *Kenyatta* Decision³³ have no impact on this conclusion.³⁴ As the Appeals Chamber has now reversed the *Ruto* Decision, there is certainty that the trial may not proceed in the absence

²⁸ Appeals Judgment, para.63.

²⁹ Appeals Judgment, para.64.

³⁰ Appeals Judgment, para.65.

³¹ *Kenyatta* Decision, para.66.

³² ICC-01/09-01/11-862 OA5, para.10.

³³ Decision, para.67; see also paras.60-65.

³⁴ ICC-01/09-01/11-993-Red OA5, para.10.

of the Accused, unless considered on a case-by-case basis and in accordance with the principles set out by the Appeals Chamber.³⁵

14. To avoid the concrete possibility of the invalidation of the entirety of the trial proceedings in the *Kenyatta* case, the Trial Chamber should vacate the *Kenyatta* Decision in light of the Appeals Judgment.
15. Vacating the *Kenyatta* Decision will also ensure that Messrs Ruto and Kenyatta are treated equally before this Court pursuant to Articles 21(3) and 27(1).

C. Conclusion

16. For the reasons set out above, the Prosecution submits that the Trial Chamber should vacate the *Kenyatta* Decision and revert to the “general rule”³⁶ under Article 63(1) that Mr Kenyatta must be present during trial.
17. If and when the Defence makes a new and specific request seeking a limited authorisation for the Accused to be absent from trial, the Trial Chamber may, after hearing the view of the Prosecution and victims, deal with that request in conformity with the Appeals Judgment.

³⁵ Appeals Judgment, para.62.

³⁶ Appeals Judgment, para.61.

Application for Leave to Appeal

A. Overview

18. In the alternative, the Prosecution seeks leave to appeal the *Kenyatta* Decision, noting that the majority of Trial Chamber V(A) has previously authorised leave to appeal “the issue of the scope of [...] the Chamber’s discretionary power to excuse an accused from attending most of the trial”.³⁷ Given the substantial overlap between the *Kenyatta* and the *Ruto* Decisions, the standard to assess whether this issue meets the criteria for leave to appeal should be applied equally in the two cases and, as a necessary consequence, leave to appeal should be granted. Moreover, granting leave to appeal in this case will allow the Appeals Chamber to ensure that the law is applied consistently in the two cases.

19. Consequently, the Prosecution seeks leave to appeal the Decision on the following issue:

Whether the Trial Chamber correctly exercised its discretion when excusing the Accused from attending substantially all of his trial without first exploring whether there were any alternative options and without exercising its discretion to excuse the Accused on a case-by-case basis at specific instances of the proceedings, and for a duration limited to that which was strictly necessary (the “Issue”).

B. Submissions

(a) *The Issue is an appealable issue that arises from the Decision*

20. As found by the majority of Trial Chamber V(A), the issue of the “scope of the [...] Chamber’s discretionary power to excuse an accused from attending most of the trial” is an appealable issue pursuant to Article 82(1)(d) that arises from the

³⁷ ICC-01/09-01/11-817, para.17.

Ruto Decision.³⁸ As indicated above, the *Kenyatta* Decision fully incorporates the reasoning of the *Ruto* Decision,³⁹ comes to the same conclusions and grants the same relief. Although the *Kenyatta* Decision does not expressly repeat all the arguments of the *Ruto* Decision, these are an integral part of the former ruling and have to be taken into consideration for the purpose of the Chamber's analysis.⁴⁰

(b) The Issue significantly affects the fair conduct of the proceedings

21. As acknowledged by Trial Chamber V(A) in the *Ruto* case, the risk that all or parts of the trial proceedings are nullified by the Appeals Chamber in an Article 81 appeal and the resulting extensive delay affects the fairness of the proceedings, especially considering that this delay could be prevented by a review of the *Ruto* Decision by the Appeals Chamber.⁴¹ This risk is now even more concrete as the Appeals Chamber has found the *Ruto* Decision to be in error and reversed it.
22. Trial Chamber V(A) also found that the fairness of the proceedings is affected by the uncertainty that the parties are faced with pending trial when not knowing for sure that the evidence that was adduced in the absence of the accused can be relied on.⁴²
23. In addition, the Prosecution submits that, as already advanced, according to Articles 21(3) and 27 all accused must be treated equally before the law. The Issue affects the fair conduct of the proceedings because it raises the question of the circumstances and procedures under which an individual accused may be excused from continuous presence at the trial. If leave to appeal is denied, Messrs Ruto and Kenyatta, whose circumstances are similar, would be treated differently. While the former is now subject to the general rule that he must be present at trial from which he may be excused only on a case-by-case basis and

³⁸ ICC-01/09-01/11-817, paras.17-19.

³⁹ *Kenyatta* Decision, paras.66-67.

⁴⁰ In relation to the First Issue, see in particular *Ruto* Decision, paras.43, 49, 71, 75, 99, 104, 109-110. In relation to the Second Issue, see in particular *Ruto* Decision, paras.49-50, 53, 109-110.

⁴¹ ICC-01/09-01/11-817, para.23.

⁴² ICC-01/09-01/11-817, para.24.

under very restrictive conditions,⁴³ the latter would be excused from substantially all of his trial.

24. Finally, the Issue affects the fairness of the proceedings to the extent that the Accused's physical presence during the trial is in his best interests. As found by the Appeals Chamber, "[i]t is important for the accused person to have the opportunity to follow the testimony of witnesses testifying against him or her so that he or she is in a position to react to any contradictions between his or her recollection of events and the account of the witnesses".⁴⁴ The Chamber remains the ultimate guardian of the fairness of the proceedings and must ensure, pursuant to its duty under Article 64(2), that none of the choices of the Accused, including his waiver of the right to be present at the trial, result in unfair prejudice to him. In this respect, the Prosecution notes Judge Ozaki's observation that the question of an accused's attendance at trial has implications for "the fairness and integrity of the proceedings".⁴⁵ The concern of prejudice to the accused was also raised by Judge Herrera Carbuca in dissent in the *Ruto* Decision. She "consider[ed] that it is in the best interests of the accused to be physically present in court"⁴⁶ due to the complexity and unpredictability of proceedings, and observed that "the presence of the accused is thus essential, as only he can instruct his counsel at all stages of the trial proceedings".⁴⁷

(c) The Issue significantly affects the expeditious conduct of the proceedings

25. Trial Chamber V(A) found that the issue concerning the scope of the Chamber's discretionary power to excuse an accused from being present at trial significantly affects the expeditious conduct of the proceedings. This is because of the risk that the portions of the trial that were conducted in the absence of the Accused must

⁴³ Appeals Judgment, paras.61-62.

⁴⁴ Appeals Judgment, para.49.

⁴⁵ Dissenting Opinion, para.14.

⁴⁶ ICC-01/09-01/11-777-Anx2, para.8.

⁴⁷ ICC-01/09-01/11-777-Anx2, para.8.

be repeated and witnesses re-called if those proceedings are later nullified by the Appeals Chamber.⁴⁸

26. In addition, following the Appeals Judgment, the Prosecution may also argue on a case-by-case basis that there may be procedural steps where the fair and efficient conduct of the proceedings requires the physical presence of the Accused beyond the instances foreseen in the *Kenyatta* Decision. Such cases are likely to give rise to lengthy litigation between the parties and participants and require decisions from the Trial Chamber, and possibly also from the Appeals Chamber, which will delay the proceedings. Therefore, to resolve the Issue now through an authoritative decision by the Appeals Chamber will significantly impact on the expeditious conduct of the proceedings.

(d) The Issue affects the outcome of the trial

27. As acknowledged by Trial Chamber V(A) in the *Ruto* case, the risk that all or parts of the trial proceedings are nullified by the Appeals Chamber in an Article 81 appeal is proof that the Issue significantly affects the outcome of the trial.⁴⁹ This risk has now increased as the Appeals Chamber reversed the *Ruto* Decision.

28. If the entire evidentiary phase of the trial needs to be repeated, witnesses will need to be recalled to give evidence after a long period of time. Some witnesses may no longer be available, and the passage of time may have an impact on the memory of the witnesses and their ability to give evidence. In this respect, the Prosecution also shares the Majority's⁵⁰ and the Appeals Chamber's⁵¹ concern regarding the detrimental impact of trial interruptions on some witnesses.⁵² It is the Prosecution's submission, however, that such concerns are best alleviated by taking steps now to resolve issues that may at a later date interrupt or abort a trial.

⁴⁸ ICC-01/09-01/11-817, para.23.

⁴⁹ ICC-01/09-01/11-817, para.22.

⁵⁰ *Kenyatta* Decision, para.63.

⁵¹ Appeals Judgment, para.50.

⁵² *Kenyatta* Decision, para.63.

(e) Immediate resolution by the Appeals Chamber of the Issue may materially advance the proceedings

29. Trial Chamber V(A) also found that immediate resolution by the Appeals Chamber of the Issue may materially advance the proceedings.⁵³ As discussed above, there is a concrete risk that a trial in which the Accused was granted a blanket excusal from being present may later be nullified by the Appeals Chamber. For that reason, immediate resolution by the Appeals Chamber of the Issue will significantly advance the proceedings by settling the Issue through an authoritative decision at this early stage. Moreover, intervention by the Appeals Chamber will ensure a uniform and consistent application of the law in both Kenya cases.

C. Conclusion

30. For the reasons set out above, the Prosecution, in the alternative to its request for reconsideration, requests that the Trial Chamber grant leave to appeal the Decision pursuant to Article 82(1)(d).



Fatou Bensouda, Prosecutor

Dated this 28th day of October 2013

At The Hague, The Netherlands

⁵³ ICC-01/09-01/11-817, para.25.