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

Date: 4 November 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

**Sang Defence Application for Leave to Appeal the Oral Decision
of 28 October 2013 on disclosure of costs expended
by the Victims and Witnesses Unit for purposes of relocation, maintenance
and/or support of witnesses in the witness protection and support programme**

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
James Stewart, Deputy Prosecutor
Anton Steynberg, Senior Trial Attorney

Counsel for William Ruto

Karim Khan QC, David Hooper QC
Shyamala Alagendra and Essa Faal

Counsel for Joshua Sang

Joseph Kipchumba Kigen-Katwa
Caroline Buisman

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**

Orchlon Narantsetseg

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. On 28 October 2013, Trial Chamber V(A) (“Chamber”), issued an oral decision refusing a Defence request¹ for disclosure of costs expended by the Victims and Witnesses Unit (“VWU”) for purposes of relocation, maintenance and/or support of witnesses in the witness protection and support programme (“Decision”). The Chamber held that “the probative value of granting the request in the first limb is outweighed by both the considerations of prejudice and efficiency, not only in relation to the witnesses but also the operations of the Victims and Witnesses unit and the administration of justice in general.”² In addition, the Chamber determined that this information could “not afford a prima facie indicia of credibility” with respect to witnesses in the protection and support programme.³
2. The Defence seeks leave to appeal this Decision on one issue: whether information concerning costs incurred by VWU (and thus benefits received by witnesses) comes within the ambit of Article 67(2) and/or Rule 77 and should therefore be disclosed to the Defence.
3. The Defence submits that this issue satisfies the criteria for leave to appeal under Article 82(1)(d); namely, there is a clearly identifiable issue which requires immediate resolution by the Appeals Chamber, and the issue of disclosure is one which would significantly affect the fair and expeditious conduct of these proceedings. In the alternative, the Defence submits that lack of access to this information will affect the outcome of the trial. Furthermore, an immediate resolution by the Appeals chamber would materially advance these and subsequent proceedings.

II. APPLICABLE LAW

4. Article 82(1)(d) provides:
 1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

¹ The submissions of the parties and participants were canvassed at ICC-01/09-01/11-T-60-Conf, 28 October 2013, pgs. 4-42.

² ICC-01/09-01/11-T-60-Conf-ENG ET, 28 October 2013, p 44, lines 8-12.

³ Ibid, line 16.

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. The Court's jurisprudence concerning the application of Article 82(1)(d) was recently summarised by Judge Ekaterina Trendafilova in the following manner:⁴

16. The Single Judge, mindful of the exceptional character of the remedy of the interlocutory appeal, recalls that for leave to be granted, the following specific requirements must be met:

a) the decision must involve an "issue" that would significantly affect (i) both the "fair" and "expeditious" conduct of the proceedings; or (ii) the outcome of the trial; and

b) in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

17. In the following, the Single Judge recalls some key findings of the Court's jurisprudence which guide her in deciding whether or not the alleged "issue" warrants consideration by the Appeals Chamber.

18. According to established jurisprudence, an "issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An "issue" is constituted by a subject, "the resolution of which is essential for the determination of matters arising in the judicial cause under examination".

19. "Fairness" in the context of article 82(1)(d) of the Statute "is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1)) and article 21(3)". "Expeditionessness", an "attribute of a fair trial", is closely linked to the concept of proceedings "within a reasonable time", namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned.

20. According to the jurisprudence of the Appeals Chamber, the "outcome of the trial" is affected "where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon". In deciding a request under article 82(1)(d) of the Statute, the Pre-Trial Chamber "must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence".

21. A determination that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial does not automatically qualify it as a

⁴ Pre-Trial Chamber II, ICC-01/09-01/11-912, Decision on the Prosecutor's Request for Leave to Appeal the Decision Rejecting the Amendment of Charges (ICC-01/09-01/11-859), 6 September 2013, paras 16-22. Footnotes in original text omitted.

subject of appeal. Pursuant to article 82(l)(d) of the Statute, the issue must be such "for which, in the opinion of the Pre-Trial [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings". To materially "advance" the proceedings has been identified by the Appeals Chamber as to "move forward" "by ensuring that the proceedings follow the right course". Whether this is the case involves an assessment by the relevant Chamber as to whether the authoritative decision by the Appeals Chamber will rid "the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial".

22. Concerning the requirements set out in paragraph 16 (a) and (b) above, the Single Judge recalls that they are cumulative. Failure in demonstrating that one of the requirements in (a) and (b) is fulfilled makes it unnecessary for the Single Judge to address the remaining requirements under article 82(l)(d) of the Statute.

III. SUBMISSIONS

6. The defence recalls that the Chamber has previously said the following, with respect to the materiality of disclosable information:

59. The Chamber finds it pertinent to recall that only *prima facie* materiality is required to be shown by the Defence. The Chamber considers that it is not necessary for any showing of malfeasance in order to make a determination of materiality in respect of payments and benefits paid to witnesses. In the Chamber's view, benefits, payments or other assistance provided to a witness, in connection with their status as such, are *prima facie* material to preparation of the defence case as they could, amongst other things, go to the credibility of the witness.⁵

The Issue

7. The issue is whether or not information about the costs expended by the VWU in relation to prosecution witnesses who are part of the witness protection and support programme fall within the confines of Article 67(2) or Rule 77.
8. This issue arises directly from the Chamber's decision in its oral ruling on 28 October 2013. It is submitted that this is not a mere disagreement, but a fundamental issue which will have a real impact on the proceedings and the ability of the Defence to challenge the prosecution case and present its own case.

⁵ ICC-01/09-01/11-904-Red, Decision on Disclosure of Information related to Prosecution Intermediaries, 4 September 2013, para. 59.

9. To the extent that this issue involves any factual determinations as to the type of information held by the VWU or its utility to the Defence, it is noted that an “issue” for the purposes of Art 82(1)(d) “may be legal or factual or a mixed one”.⁶

Fairness and Expeditiousness

10. As recognised by the Appeals Chamber in ICC-01/04-168⁷ and as summarised by the Single Judge above, fairness in Article 82(1)(d) directly correlates to the norms of a fair trial as reflected in international human rights law, as well as the ability of a party to present its case.
11. In terms of the accused’s right to a fair trial, it is submitted that disclosure of evidence is a core facet of the fair trial right. This is essentially recognised in Article 67(2) and Rule 77. Access to exculpatory evidence, or evidence relevant to the veracity, credibility or improper motivation of a witness’s testimony, directly impacts on the accused’s ability to challenge the prosecution’s case and thus defend him or herself. Not only is it pertinent information for cross-examination purposes, but it could also be a catalyst for further investigation and thus the identification of additional evidence. It is accordingly submitted that depriving the Defence of access to this information significantly affects the fair conduct of these proceedings as it limits the Defence’s ability to mount a defence and challenge the Prosecution’s case.
12. The Defence recognises that the fairness of proceedings must also take into account the interests of the prosecution and witnesses. It is submitted that disclosure of information regarding expenses incurred by the VWU does not prejudice the prosecution or witnesses to the point of rendering the proceedings unfair. The Defence does not seek disclosure of details which could place witnesses at risk, and disclosure of expenses does not place an onerous or unfair burden on the Prosecution or the VWU, nor does it unduly impact on the Prosecution’s investigative abilities. In any event, the Defence submits that it is necessary to weigh these interests against the probative value of this evidence. The Defence submits that the probative value of this evidence is high, as it may

⁶ ICC-01/04-168, para. 9.

⁷ Ibid, para. 11.

demonstrate a motive for witnesses to present false allegations to the court. Moreover, as recognised in Article 68(3), while the interests of victims and witnesses must be protected, this is to be done in a manner which is not prejudicial or inconsistent with the rights of the accused. It is submitted that denying the Defence access to the information sought is inconsistent with the accused's fair trial rights, in particular because as noted above the Defence does not seek information which would place any witness at risk of harm.

13. This issue also affects the expeditious conduct of these proceedings. Receipt of benefits by witnesses, in the Defence's view, provides an incentive to falsely incriminate the accused. Non-disclosure of this information will require the Defence to conduct significant additional investigations in order to support the Defence's position that witnesses have an ulterior motive for testifying. This will entail a delay to the proceedings and may also require recalling earlier Prosecution witnesses. Consequently, failing to determine this issue at this stage could both prolong the proceedings and involve additional expense for the parties. In addition, following a final decision, if an appeal was made and allowed on this basis then this may necessitate a re-trial, which would adversely impact on the International Criminal Court's ("Court") limited resources.

Potential Impact on the Outcome

14. In the alternative, the Defence submits that this issue may bear upon the outcome of this trial. The Defence recognises that this limb of Art 82(1)(d) necessarily involves forecasting the consequences of this issue being wrongly decided.⁸ It is submitted that denying the Defence access to evidence that may pertain to the credibility or motivations of prosecution witnesses has a very clear potential to influence the outcome of these proceedings. As credibility, and/or a witness' motivations, inevitably pertain to the weight to be given to a witness' evidence, denying the Defence access to material that may reveal a basis for impeachment deprives the Court of information relevant to the assessment of evidence. The potential consequence is that testimonies are given more weight than they otherwise would have, and the impact this could have on the outcome is clear.

⁸ Ibid, para. 13.

Material Advancement of the Proceedings

15. Turning to whether immediate resolution of this issue would materially advance the proceedings, the Defence submits that it would. As per the jurisprudence quoted above, material advancement of the proceedings involves ensuring proceedings “follow the right course” and are free of errors which have the potential to taint the fairness of the proceedings or mar the outcome of the trial. The Defence submits that denying the Defence access to material relevant to a witness’s credibility or which is able to provide further avenues for investigation is an error that has the potential to taint the fairness of these proceedings. It directly impacts on the Defence’s ability to cross-examine prosecution witnesses and present its case, and the loss of opportunity in terms of different avenues of investigation cannot be sufficiently remedied through a later appeal against the Chamber’s final decision. In contrast, given that the Prosecution’s case is currently at the initial stages of presentation, an interlocutory decision in favour of disclosure at this time would enable the Defence to rely on this information for the remainder of the trial. In this sense, the Defence submits that the stage at which these proceedings are at strengthens the argument in favour of immediate resolution. This consideration equally applies to the expeditious conduct of proceedings.
16. More generally, and with reference to the Chamber’s role in determining the truth,⁹ the Defence submits that access to this information would also assist the Chamber in assessing the weight which is to be attributed to a witness’s testimony and would thus materially advance the proceedings in that respect.
17. The Defence further recognises that material advancement of proceedings also takes into account the advancement of prior and subsequent proceedings before the Court.¹⁰ It is submitted that access to information about the costs involved in relocation and thus benefits received by witnesses is likely an issue of relevance to other proceedings in which witnesses have received benefits as part of the relocation and protection process. Accordingly, determining whether this

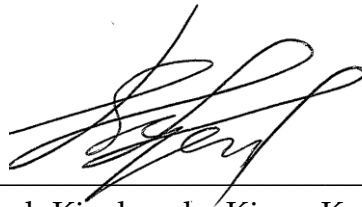
⁹ For example, see Article 69(3).

¹⁰ ICC-01/04-168, para. 12.

information should be disclosed may also materially advance other proceedings at the Court that are currently underway or are soon to commence.

IV. CONCLUSION AND RELIEF REQUESTED

18. The Defence submits that Article 82(1)(d) has been satisfied and leave to appeal should be granted. This issue is one which is likely to have repercussions to both the fair and expeditious conduct of the proceedings and the outcome of the trial. In addition, resolution of this issue at this stage would materially advance these proceedings.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 4th day of November 2013
In The Hague, The Netherlands