

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 27 January 2014

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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

Public Redacted Version of "Consolidated Prosecution Response to the Defence Requests for Leave to Appeal (ICC-01/09-01/11-1080 & ICC-01/09-01/11-1081) the oral decision of the Trial Chamber of 28 October 2013", 8 November 2013, ICC-01/09-01/11-1095-Conf

Source: The 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
 Mr Fabricio Guariglia

Counsel for William Samoei Ruto

Mr Karim Khan
 Mr David Hooper
 Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa
 Ms Caroline Buisman

Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants**Unrepresented Victims****Unrepresented Applicants for
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****Victims and Witnesses Unit**

Mr Patrick Craig

Detention Section**Victims Participation and Reparations
Section****Other**

Introduction

1. The Defence teams for Mr Ruto¹ and Mr Sang² seek leave to appeal (“Ruto Application” and “Sang Application”; collectively “Defence Applications”) the oral decision of the Trial Chamber of 28 October 2013 on the Defence request for disclosure of all costs expended by the VWU for relocation, maintenance and support of Witness P-268 (“Decision” or “Impugned Decision”).³

2. The Ruto Application identifies the following issue:

Whether the Trial Chamber erred in applying the balancing test for disclosure of VWU expense information for the relocation, maintenance and/or support of Witness P-268 by assessing the probative value of this information only on the basis of the source providing the assistance – the VWU – and not also considering whether “reasonable support and maintenance to a witness” may prima facie implicate the credibility of a witness in view of the personal circumstances of the witness and his or her family prior to the provision of such assistance (“First Issue”).⁴

3. The Sang Application identifies the following issue:

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. (“Second Issue”).⁵

4. The Prosecution submits that the Defence Applications should be rejected. Neither issue arises from the Impugned Decision. Even if they did, the issues do not meet the criteria for leave to appeal pursuant to Article 82(1)(d).

¹ ICC-01/09-01/11-1080.

² ICC-01/09-01/11-1081.

³ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 43 and page 44, lines 1-20.

⁴ Ruto Application, para.6.

⁵ Sang Application, para.7.

Procedural History

5. On 28 October 2013, the Defence of Mr Ruto and Mr Sang made an oral request for disclosure of all costs expended by the Victims and Witnesses Unit ("VWU") for the purposes of relocation, maintenance and/or support of Witness P-268 [REDACTED]. The Defence also requested disclosure of any evidence tending to show fraud or other acts of illegality on the part of the witness that bears a direct connection to his maintenance and support [REDACTED] ("Defence Request").⁶
6. The Prosecution did not object to disclosure of any evidence tending to show fraud or other acts of illegality.⁷ However, the Prosecution objected to the remainder of the Defence Request.⁸
7. The Chamber issued the Impugned Decision on the same day. It approved disclosure of any evidence tending to show fraud or other acts of illegality on the part of the witness that bears a direct connection to his maintenance and support [REDACTED]. However, the Chamber rejected the remainder of the Defence Request.⁹
8. On 4 November 2013 the Defence of Mr Ruto ("Ruto Defence") submitted the Ruto Application. On the same day, the Defence of Mr Sang ("Sang Defence") submitted the Sang Application.

⁶ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 4, line 14 to page 41, line 5.

⁷ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 41, lines 11-19.

⁸ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 41, lines 22-25, page 42, lines 1-15.

⁹ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 43 and page 44, lines 1-20.

Confidentiality

9. This Response is submitted as confidential since it references confidential sources.¹⁰ A public redacted version will be filed as soon as practicable.

Submissions

(i) *The Issues do not arise out of the Decision*

10. The First and Second Issues do not arise from the Decision. The First Issue is predicated on a mischaracterisation of the Impugned Decision: the Chamber did not assess the probative value of the information sought “only on the basis of the source providing the assistance – the VWU”.¹¹ By partially granting the Defence Request, the Chamber also considered the nature of the information and approved the disclosure of material that actually had the potential to impact on the credibility of Witness P-268.¹² Hence, the First Issue does not arise from the Impugned Decision. Moreover, there is no indication that the Chamber failed to consider whether reasonable support and maintenance to a witness may implicate the credibility of a witness. The Chamber considered the information before it and came to a different conclusion than the Defence. The mere fact that the Defence disagrees with this finding does not constitute an appealable issue.¹³

11. The Second Issue seeks to litigate a question that was never decided by the Chamber in the Impugned Decision. The Chamber did not make a blanket decision as to whether, generally, the “costs expended by the VWU in relation to prosecution witnesses who are part of the witness protection programme

¹⁰ Regulation 23bis(2).

¹¹ Ruto Application, para.6.

¹² ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 44, lines 5-6.

¹³ ICC-02/05-02/09-267, paras.11-12.

fall within the confines of Article 67(2) or Rule 77".¹⁴ Neither did it make a decision impacting on all witnesses. It decided that *certain* financial details - i.e. those that tend to "show fraud or other acts of illegality on the part of the witness"¹⁵ were disclosable and that other financial details were not. Moreover, the Chamber decided this focussed question solely in relation to Witness P-268.¹⁶ It is settled law that the party seeking leave to appeal should identify "a specific 'issue' which has been dealt with in the relevant decision and which constitutes the appealable subject."¹⁷ The Sang Application fails to meet this requirement. In light of the above, the Second Issue does not arise from the Decision.

(ii) *The Issues do not meet the criteria for leave to appeal under Article 82(1)(d)*

The Issues do not significantly affect the fair conduct of the proceedings.

12. The Ruto Defence submits that:

"If the Impugned Decision is materially flawed, the Defence may have been denied access to readily available information in the possession of the Court that "may" impact on the credibility of Prosecution evidence. Accordingly, the Defence submits that the Issue is one that significantly impacts on the fairness and expeditiousness of proceedings as well as the outcome of the trial."¹⁸

13. Similarly, the Sang Defence claims that

"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

¹⁴ Sang Application, para.7.

¹⁵ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 44, lines 5-6 read with ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 43, lines 11-14.

¹⁶ See ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 43, lines 7-14 where the Presiding Judge characterizes the Defence Request as being limited to Witness P-268.

¹⁷ ICC-02/05-03/09-428, para.7.

¹⁸ Ruto Application, para.7.

cross-examination purposes, but it could also be a catalyst for further investigation and thus the identification of additional evidence. [...] 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.¹⁹

14. The Prosecution submits that firstly, any financial information that actually has the potential to impact on the credibility of Witness P-268 or any other witness would be disclosed to the Defence regardless of whether the Appeals Chamber resolves the issues proposed for appeal [REDACTED].²⁰ [REDACTED].²¹ [REDACTED].²²

15. Secondly, the above approach is supported by the Impugned Decision, which granted the second limb of the Defence Request – allowing for “disclosure of any evidence tending to show fraud or other acts of illegality on the part of the witness that bears a direct connection to his maintenance and support within the witness protection and support programme.”²³ The VWU is well placed to make this assessment since even the Ruto Defence agrees on the presumptive reasonableness of VWU as an independent body providing assistance to witnesses.²⁴ Moreover, the fact that the expenses are paid by the VWU, a neutral body which has independently assessed both their necessity and reasonableness, provides sufficient protection against the payment of disproportionate or inappropriate benefits and thus adequately protects the fairness of the proceedings.

¹⁹ Sang Application para.11.

²⁰ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 27, lines 18-23.

²¹ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 27, lines 9-15.

²² ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, pages 6-7. See further page 27 lines 9-15 [REDACTED] and lines 18-23 [REDACTED].

²³ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 44, lines 5-7.

²⁴ Ruto Application, para.21.

16. Thirdly, the Prosecution has already agreed that even where there is some doubt as to whether a particular payment may have an impact on credibility by, for example, serving as an inappropriate incentive to a witness, the matter can be submitted to the Trial Chamber, who would then decide on the disclosability of the information.²⁵ The possibility of review by the Chamber further reduces the likelihood that financial information relevant to the credibility of Witness P-268 or any other witness will remain unexamined.

17. Fourthly, the Defence's claims regarding the impact of the Impugned Decision on the fair conduct of proceedings are speculative. This is highlighted by the submissions of the Ruto Defence, who requested the Chamber to [REDACTED]²⁶ and argued that [REDACTED].²⁷ In other words, the Defence seeks to obtain disclosure of a large pool of information, acknowledging that it may not be truly material to the Defence or relevant for the fair conduct of the proceedings. Hence, even if the Impugned Decision involved any arguably erroneous consideration, the link between the blanket disclosure requested and the credibility of Witness P-268 is too tenuous to support the conclusion that fairness is affected by the ruling. A "purely general complaint"²⁸ regarding fairness or descriptions of a hypothetical impact²⁹ will not suffice under Article 82(1)(d).

18. Fifthly, the generalised financial information requested by the Defence, provided with no context regarding, for example, the cost of living in the relevant location, would not be useful for assessing whether the specific payment can provide an inappropriate incentive impacting on the credibility of Witness P-268, or any other witness. A "reasonable" payment for rent in

²⁵ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 29, lines 21-25 [REDACTED].

²⁶ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 38, lines 10-12.

²⁷ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 38, lines 13-14.

²⁸ ICC-01/04-01/06-2463, para. 31.

²⁹ ICC-01/04-01/07-1958, para. 20.

one location would not be “reasonable” in another location. Therefore, disclosure of general financial information - in a vacuum - would not assist the Defence in any tangible way, which further demonstrates that there is no real impact on fairness caused by the ruling. Moreover, as the VWU has clarified, [REDACTED].³⁰

19. Finally, the Impugned Decision does not prevent the Defence from challenging the credibility of the witness in cross-examination. The Defence is not prevented from questioning the witnesses about any promises of benefits that may have been offered as an inducement to testify or to falsify their evidence, as the case may be. Nor is it prevented from questioning the witness about the general nature of the assistance he received.³¹

The Issues do not significantly affect the expeditious conduct of the proceedings.

20. The Defence Applications claim that the First Issue³² and Second Issue³³ significantly affect the expeditious conduct of proceedings since the Defence will have to carry out investigations and potentially recall witnesses if it discovers evidence that assistance / benefits provided by VWU acted as an inducement or incentive. The Prosecution submits that these claims are speculative, at best, more so since the information sought by the Defence cannot truly assist it in the determination that it wishes to make, and in light of the ongoing disclosure to the Defence (See paragraphs 14-18 above).

³⁰ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 37, lines 3-9. [REDACTED]. See ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 39, line 25 to page 40 line 5.

³¹ See for example ICC-01/09-01/11-T-65-CONF-ENG ET 04-11-2013, page 24, line 6 to page 25, line 22.

³² Ruto Application para.30.

³³ Sang Application, para.13.

The Issues do not significantly affect the outcome of trial and an immediate resolution by the Appeals Chamber will not materially advance the proceedings

21. The Prosecution submits that the Issues do not significantly affect the outcome of trial and further, that an immediate resolution by the Appeals Chamber will not materially advance the proceedings. Firstly, even if the Impugned Decision was affected by any form of error, the limited scope of the Decision – pertaining to only one witness – makes it very unlikely that there will be an impact on the outcome of the trial.

22. Secondly, the safeguards currently in place prevent the “unravel[ing of] the judicial process”³⁴ and “ensur[e] that the proceedings follow the right course”:³⁵ Regardless of whether the First and/or the Second Issue are certified for appeal, the Impugned Decision already ensures the disclosure to the Defence of any evidence tending to show fraud or other acts of illegality on the part of Witness P-268 that bears a direct connection to his maintenance and support [REDACTED].³⁶ Moreover, as noted above, procedural avenues already exist for the Chamber to clarify any doubts regarding the relevance of a particular piece of witness-related financial information.

23. The above, coupled with the on-going disclosure carried out by the Prosecution, should suffice to provide the Defence with the necessary information to thoroughly scrutinize the credibility of Witness P-268. There is therefore no need for appellate intervention at this stage.

³⁴ ICC-01/04-168, para.16.

³⁵ ICC-01/04-168, para.15.

³⁶ ICC-01/09-01/11-T-60-CONF-ENG ET 28-10-2013, page 44, lines 5-7.

Conclusion

24. For the above reasons, the Prosecution requests that the Chamber reject the Defence Applications.



Fatou Bensouda,
Prosecutor

Dated this 27th day of January, 2014
At The Hague, The Netherlands