

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 February 2014

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR***

v.

WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

**Common Legal Representative for Victims' Response to the Prosecution's Application
for Leave to Appeal the Decision on Excusal from Presence at Trial under Rule
134^{quater}**

Source: Wilfred Nderitu, Common Legal Representative for Victims

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

The Office of the Prosecutor

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Legal Representatives of Applicants

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**Victims Participation and Reparations
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26th February 2014

I. LEGAL BASIS FOR THE FILING

1. The Common Legal Representative for Victims (“the CLR”) hereby submits his response to the Prosecution’s “Application for Leave to Appeal the Decision on Excusal from Presence at Trial under Rule 134*quater*”,¹ pursuant to Regulation 65(3) of the Regulations of the Court.
2. The CLR associates himself with the four grounds² raised in the Prosecution’s application as justifying resolution of the issues sought to be appealed upon by way of interlocutory appeal. In particular, the CLR contends that there is need for finality on the law as regards the consistency of Rule 134*quater* of the Rules of Procedure and Evidence vis-à-vis Articles 63(1), 21(3) and 27(1) of the Rome Statute.
3. The CLR submits that Article 51(4) is unequivocal on the requirement that “[t]he Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute”. The Statute is also hierarchically superior to the Rules in terms of being the primary source of the applicable law of the Court under Article 21(1)(a), in the grand scheme of things. The need for resolution of the issues raised by the Prosecutor through an interlocutory appeal cannot therefore be overstated, as there is need for the parties and participants to be assured of the consistent application of the Statute throughout the proceedings.
4. Moreover, and as noted by the Prosecution in its application, “it is foreseeable that the Appeals Chamber will be called upon to review the Decision in any eventual Article 81 appeal against conviction, acquittal or sentence. If the Appeals Chamber finds the Chamber erred in the Decision, it may require parts of the trial not attended by Mr. Ruto to be re-heard to ensure consistency with the restrictions set down in its 25 October 2013 judgment.”³ In other words, there are reasonable prospects that parts of the ongoing trial could be reopened later, and to not determine the issues raised in the intended appeal at the earliest stage is to let the possibility of re-hearing the parts of the trial heard in Mr. Ruto’s absence to hang and continue hanging like the sword of Damocles over the parties and participants.

¹ ICC-01/09-01/11-1189, filed on 24 February 2014.

² Para. 2

³ Para. 8

5. At yet another (but related) level, the CLR submits that failure to resolve the issues immediately by way of an interlocutory appeal would negatively impact victims' continued participation in the case and, by extension, significantly affect the outcome of the trial (in the broader sense), as well as the general jurisdiction, functions and power of the Court as contemplated by the Statute. This is a significant consideration, particularly given the actual stage of the proceedings in this case.

II. PRAYER SOUGHT

6. Accordingly, the Common Legal Representative supports the Prosecution's application and respectfully requests the Trial Chamber to grant the Prosecutor leave to appeal the Decision on Excusal.

Respectfully submitted,

A handwritten signature in purple ink, appearing to read 'Wilfred Nderitu', with a long horizontal flourish extending to the right.

WILFRED NDERITU
Common Legal Representative for Victims

Dated this 26th day of February 2014
At The Hague, The Netherlands