



Original: English

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

Date: 30 June 2014

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Erkki Kourula
Judge Anita Ušacka

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 Government of the Republic of Kenya's
Observations under Rule 103 in relation to the Defence Appeal
against the Decision on Prosecutor's Application for Witness Summonses
and resulting Request for State Party Cooperation***

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
Helen Brady, Appeals Counsel
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

The Government of Kenya

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. The Defence for Joshua arap Sang (“Defence”) hereby submits its Response to the *Government of the Republic of Kenya's Observations under Rule 103 in relation to the Defence Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*,¹ filed on 25 June 2014 (“GOK Observations on Summonses”).
2. The Defence notes that the observations made therein by the Government of the Republic of Kenya (“GOK”) are detailed and sufficiently explanatory of the relevant legal provisions of Kenya's International Crimes Act (“ICA”). The Defence reiterates that the GOK is best placed to interpret and explain its own law.² Accordingly, the Defence fully endorses all points made in the GOK Observations on Summonses.
3. In response to the GOK Observations on Summonses, the Defence makes the following additional observations.

II. SUBMISSIONS

4. The GOK acknowledges that Article 2(6) of the Constitution and Section 4(1) of the ICA give the Rome Statute direct force of law in Kenya,³ as was also found by the Majority in its *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation* (“Decision on Summonses”).⁴
5. Thus, the GOK rightly submits that “where the ICA is more specific or more detailed in its provisions, then resort to the Rome Statute is not necessary and the ICA provisions take precedence”.⁵ Indeed, in the case of *Beatrice Wanjiku v. Attorney General*, the High Court Judge, DS Majanja, addressed the question of the hierarchy and application of treaties vis-à-vis domestic laws in light of Articles 2(1) and 2(6) of the 2010 Constitution of Kenya.⁶ He stated:

¹ ICC-01/09-01/11-1406, 25 June 2014.

² ICC-01/09-01/11-1138-Red, paras. 3, 68.

³ ICC-01/09-01/11-1407, para. 6.

⁴ ICC-01/09-01/11-1274-Corr2, paras 164-168, 173. *See also* the Minority Judge, who emphasised that Article 93(1)(e) is incorporated into Kenyan law under section 20(1)(a)(vi) of the ICA: ICC-01/09-01/11-1274-Anx, para 17.

⁵ ICC-01/09-01/11-1407, para. 6 referring in footnote 7 to the Decision, paras. 165-177.

⁶ *Beatrice Wanjiku & Another vs. Attorney General & Another [2012]*, Judgement in relation to Petition 190 of 2011 in the High Court of Kenya at Nairobi, available at: http://www.kenyalaw.org/Downloads_FreeCases/88056.pdf

20. I take the position that the use of the phrase “under this Constitution” as used in the Article 2(6) means that the international conventions and treaties are “subordinate” to and ought to be in compliance with the Constitution. Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, I do not think the framers of the Constitution would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of Article 94. Article 1 places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of our Constitutional set up.

[...]

23. The nature and extent of application of treaties must be determined on the basis of the subject matter and whether there is domestic legislation dealing with the specific issue at hand bearing in mind that legislative authority, which is derived from the people of Kenya, is conferred by Parliament under Article 94 and when dealing with matters of fundamental rights and freedoms, the duty to the court, when applying a provision of the Bill of Rights, to adopt the interpretation that most favours the enforcement of a right or fundamental freedom as provided in Article 20(3)(b). The issue then, is not necessarily one of hierarchy but of application of treaties and conventions.

6. Clearly then, the ICA, as the relevant domestic legislation, is what instructs the GOK in relation to the summons question, in particular, sections 86 to 89 of the ICA, implementing Article 93(1)(e) of the Rome Statute. Given their specificity, these sections, emphasising the requirement of consent, cannot be circumvented by relying on the Rome Statute. But even if it could, reliance on the Rome Statute is not helpful because of the glaring omission therein of any enforcement mechanism for compellable summonses. This omission is reinforced by the inclusion of Articles 22 and 23 of the Rome Statute, incorporating principles relating to punishment under the Rome Statute. If the Rome Statute were to serve as the basis to impose penalties on witnesses who refuse to testify before the Court, then the principles set out in these articles cannot be ignored.

7. If on the other hand, Kenyan legislation is to serve as a basis to enforce compellable summonses, as is the position of the Prosecution,⁷ then such enforcement mechanism must be found in sections 86-89 of the ICA, which cannot be circumvented by relying on any other section in the ICA. This is because these sections, as noted by the GOK,⁸ are the *lex specialis* relating to witness appearance before the International Criminal Court (“ICC”). As previously noted,⁹ a *lex specialis* prevails over a *lex generalis*. Of interest here is a document titled “Kenya Draft Preamble International Crimes Bill 2005”, as found on the website of the Coalition of the International Criminal Court, which contains a *Memorandum of Objects and Reasons* presented by the former Attorney General Amos Wako on 22 March 2005, and states as follows with respect to the pertinent sections of the eventual ICA:

Part V (clauses 76–118) prescribes the manner of dealing with ICC requests other than requests for surrender. The main forms of such other assistance are mentioned in article 93 of the Rome Statute.

Clauses 76–83 apply in respect of ICC requests for assistance in locating persons or things, or obtaining evidence. The **Attorney-General is to determine whether and how the request is to be complied with** and to co-ordinate the Kenyan response by referring the request to an appropriate Kenyan agency. Obtaining evidence pursuant to any such request will in general proceed according to the law of Kenya, subject to certain exceptions provided by the Rome Statute and the Rules made under it.

Clauses 86–89 prescribe the **manner of dealing with ICC requests for assistance with service of documents and arranging the appearance of witnesses in connection with proceedings of the ICC.**¹⁰

These explanatory notes highlight both the significant role of the Attorney-General in determining the Government’s position with respect to the legislation, and also the *lex specialis* nature of the sections.

8. Even if other provisions of the ICA could be relied upon to enforce summonses on ICC witnesses residing in Kenya, none of the provisions in the ICA incorporates any enforcement mechanism for compulsory summonses. The only legal basis for the enforcement of witness summonses is set out in sections 144-149 of Kenya’s Criminal

⁷ ICC-01/09-01/11-1380, para. 58.

⁸ ICC-01/09-01/11-1407, para. 6.

⁹ ICC-01/09-01/11-1344, para. 29.

¹⁰ Kenya Draft Legislation, Preamble to Draft International Crimes Bill 2005, *Memorandum on Objects and Reasons*, by Amos Wako, 22 March 2005, p. 122, available at: http://www.iccnw.org/documents/Kenya_DraftPreamble_InternationalCrimesBill2005.pdf. Emphasis added.

Procedure Code, authorising the issuing of compellable summonses by Kenyan domestic courts in domestic criminal cases.¹¹ As previously argued,¹² the Court cannot simply read into the ICA or any other Kenyan law an authorisation to transplant one law, dealing with domestic situations, into another law, dealing with international situations.

9. The Defence also concurs with the Government's observations to the effect that States Parties did not knowingly sign the Rome Statute with the understanding that they would be required to enforce summonses against unwilling witnesses. In this regard, it is useful to consider Kenya's obligations under the rules of other regional bodies of which Kenya is a member. For instance, in the Rules of Court for the African Court on Human and Peoples' Rights,¹³ States are not required to compel witnesses to appear before the court, or to testify. While the Registrar may issue a summons,¹⁴ the States' obligations are limited to executing the summons.¹⁵ This seems to be the consistent approach taken by Kenya with respect to summonses for its citizens to appear before international or regional courts.

III. RELIEF REQUESTED

10. Accordingly, the Defence requests that the Appeals Chamber adopts the interpretation and explanation of Kenya's relevant legal provisions of the ICA as set out in the GOK Observations on Summonses. In light of the GOK observations and those made by the Defence in this Response, as well as in its *Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State*

¹¹ Criminal Procedure Code (Rev. 2009) [Kenya], Sections 144-149, cited in ICC-01/09-01/11-1120-Red, para 80.

¹² ICC-01/09-01/11-1344, para. 70; ICC-01/09-01/11-1138-Red, paras. 66-75.

¹³ Available at: http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final_English_7_sept_1_.pdf

¹⁴ African Court on Human and Peoples' Rights, Rules of Court, Rule 46: Witnesses, Experts and Other Persons: 1. The Registrar shall issue summons to any witness, expert or other person the Court decides to hear.

¹⁵ African Court on Human and Peoples' Rights, Rules of Court, Rule 32: Cooperation of the States:

1. The States Parties to a case have the obligation to cooperate so as to ensure that all notices, communications or summonses addressed to persons residing in their territory or falling under their jurisdiction are duly executed.
2. The same rule shall apply to any proceeding that the Court decides to conduct or order in the territory of a State Party to a case.

3. When the performance of any of the measures referred to in the preceding paragraphs requires the cooperation of any other State, the President shall request the government concerned to provide the requisite assistance.

Party Cooperation,¹⁶ the Defence reiterates its request that the Appeals Chamber overturns the Trial Chamber's Decision on Summonses.¹⁷

Respectfully submitted,



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 30th day of June 2014
In Nairobi, Kenya

¹⁶ ICC-01/09-01/11-1344.

¹⁷ ICC-01/09-01/11-1274-Corr-2.