

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 4 February 2015

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

**Decision on the Prosecution's Application for Admission of Documentary Evidence
Related to the Testimony of Witness 13**

Decision 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 Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan

Mr David Hooper

Mr Essa Faal

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

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’ or ‘ICC’), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64(2), 64(9)(a), 67(1)(e), 69(4) of the Rome Statute (the ‘Statute’) and Rules 63(2) and 68 of the Rules of Procedure and Evidence (the ‘Rules’), renders this Decision on the Prosecution’s Application for Admission of Documentary Evidence Related to the Testimony of Witness 13.

I. BACKGROUND

1. On 10 June 2014, the Chamber rendered its ‘Decision on the Prosecution’s Request for Admission of Documentary Evidence’ (‘Admission Decision’).¹
2. On 16 and 17 June 2014, the Chamber heard the testimony of Witness 247.²
3. On 10 and 11 July 2014, the Chamber heard the testimony of Witness 13.³
4. On 28 October 2014, the Office of the Prosecutor (the ‘Prosecution’) submitted its ‘Prosecution’s Application for Admission of Documentary Evidence Related to the Testimony of Witness P-0013’ (the ‘Application’). Therein, it sought to tender 12 items into evidence which were shown to, and identified by, Witness 13 during his testimony.⁴
5. On 19 November 2014, the defence team for Mr Ruto (the ‘Ruto Defence’) filed its response to the Application (the ‘Ruto Response’).⁵
6. On that same day, the defence team for Mr Sang (the ‘Sang Defence’, and, together with the Ruto Defence, the ‘Defence’) filed its response to the Application (the ‘Sang Response’).⁶

¹ ICC-01/09-01/11-1353.

² ICC-01/09-01/11-T-116-CONF-ENG and ICC-01/09-01/11-T-117-CONF-ENG.

³ ICC-01/09-01/11-T-124-ENG and ICC-01/09-01/11-T-125-ENG.

⁴ ICC-01/09-01/11-1619-Corr-Red, with confidential annex, ICC-01/09-01/11-1619-Conf-AnxA.

⁵ Ruto Defence response to Prosecution’s Application for Admission of Documentary Evidence Related to the Testimony of Witness P-0013, ICC-01/09-01/11-1666-Red. The Ruto Defence filed a corrected version on 25 November 2014, ICC-01/09-01/11-1666-Conf-Corr.

II. SUBMISSIONS

Prosecution's submissions

7. The Prosecution seeks to tender the following items for the truth of their contents, except insofar as the contents relate to the personal acts and conduct of the Accused:⁷

- KEN-OTP-0001-0364
- KEN-OTP-0001-1288 (MFI-T-OTP-00092)
- KEN-OTP-0005-9365 (MFI-T-OTP-00096)
- KEN-OTP-0005-5398
- KEN-OTP-0005-3079
- KEN-OTP-0001-0002
- KEN-OTP-0005-2817
- KEN-OTP-0010-0034
- KEN-OTP-0005-7542
- KEN-OTP-0006-1045 (MFI-T-OTP-00097)
- KEN-OTP-0005-7770
- KEN-OTP-0006-0493

8. The Prosecution submits that while some information in these items is 'testimonial in nature, it is not 'prior recorded testimony' of a Prosecution witness', pursuant to Rule 68 of the Rules. Rather, the admission of these documents is governed by Articles 64(9)(a) and 69(4) of the Statute.⁸

9. In relation to the hearsay nature of some of the information contained in these documents, the Prosecution submits that hearsay evidence is 'fully admissible at the ICC' and, the weight given to the evidence can only be 'properly determined

⁶ Sang Defence response to the Corrected Version of the "Prosecution's Application for Admission of Documentary Evidence Related to the Testimony of Witness P-0013", ICC-01/09-01/11-1619-Conf-Corr, ICC-01/09-01/11-1675-Conf. The Sang Defence filed a second corrected version of its response on 26 November 2014, ICC-01/09-01/11-1675-Conf-Corr2.

⁷ Application, ICC-01/09-01/11-1619-Corr-Red, para. 2.

⁸ Application, ICC-01/09-01/11-1619-Corr-Red, paras 2, 6, 9-11; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, paras 77-78; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 9 March 2012, ICC-01/09-02/11-406, paras 40-41.

once the Chamber has all the evidence before it and is in a position to freely assess and consider the entire case record'.⁹

10. The Prosecution also submits that the documents are clearly relevant and reliable, and have 'significant probative value' having been produced geographically and temporally close to the events in question, in the course of a 'formal and independent enquiry' subjected to 'significant legal scrutiny'.¹⁰
11. In relation to the prejudice to the Accused, the Prosecution submits that all documents were disclosed to the Defence and included in the Prosecution's List of Evidence on 9 January 2013. It also submits that Witness 247 and/or Witness 13 are the logical witnesses through which the Prosecution would seek to tender them. Since these documents are tendered except insofar as their content relates to the acts and conduct of the Accused, the Prosecution submits that 'the prejudicial effect of admitting these documents, if any, is minimal'.¹¹

Ruto Defence's submissions

12. In general, the Ruto Defence submits that the Application should be dismissed.¹² It argues that the six transcripts of testimony of witnesses questioned by the CIPEV are 'testimonial in nature' and, therefore, 'fall within the regime set out in Rule 68'. In addition, the Ruto Defence submits that each document fails to satisfy one or more of the elements comprising the general rule of admissibility.¹³
13. The Ruto Defence states that the Application is in part a request for reconsideration of the Chamber's Admission Decision,¹⁴ and the admission of these documents through a provision other than Rule 68 of the Rules would seriously undermine the

⁹ Application, ICC-01/09-01/11-1619-Corr-Red, para. 16.

¹⁰ Application, ICC-01/09-01/11-1619-Corr-Red, para. 17.

¹¹ Application, ICC-01/09-01/11-1619-Corr-Red, paras 18 and 19.

¹² Ruto Response, ICC-01/09-01/11-1666-Red.

¹³ Ruto Response, ICC-01/09-01/11-1666-Red, para. 2.

¹⁴ Ruto Response, ICC-01/09-01/11-1666-Red, paras 2 and 4.

fundamental rights of the accused to adversarial confrontation and the principle of orality enshrined in Articles 67(1)(e) and 69(2) of the Statute.¹⁵

14. The Ruto Defence submits that although 'Articles 64(9)(a) and 69(4) are broadly drafted, they cannot be applied to the exclusion of the *lex specialis* Rule 68 of the Rules, which expressly governs the admission of "Prior Recorded Testimony"'.¹⁶ It also contends that although Witness 13 and Witness 247 have a limited role to play in the authentication of the documents (which the Defence does not dispute), authenticity 'is not the end of the assessment' of admitting an item into evidence.¹⁷

Sang Defence's submissions

15. In general, the Sang Defence submits that none of the items should be admitted, as 'their admissibility falls to be determined under Rule 68 of the Rules'. Alternatively, if Rule 68 of the Rules does not apply, the Sang Defence submits they should be excluded since their probative value is outweighed by their potentially prejudicial effect.¹⁸ It also refers to the importance of orality in proceedings.¹⁹
16. The Sang Defence mentions the Chamber's Admission Decision, where it declined to admit four documents on the basis of their testimonial nature. In its view, there is nothing compelling in the Application to depart from this position, nor does the testimony of Witness 13 cure the testimonial aspect of this material.²⁰

¹⁵ Ruto Response ICC-01/09-01/11-1666-Red, paras 2 and 4.

¹⁶ Ruto Response, ICC-01/09-01/11-1666-Red, para. 9-12.

¹⁷ Ruto Response, ICC-01/09-01/11-1666-Red, para. 3; referring to the Presiding Judge's comments during the testimony of Witness 247, ICC-01/09-01/11-T-116-CONF-ENG ET, p. 6, lines 10-15.

¹⁸ Sang Response, ICC-01/09-01/11-1675-Conf-Corr2, paras 1 and 2.

¹⁹ Sang Response ICC-01/09-01/11-1675-Conf-Corr2, para. 8; referring to Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3 May 2011, ICC-01/05-01/08-1386, paras 75-78.

²⁰ Sang Response, ICC-01/09-01/11-1675-Conf-Corr2, para. 9; referring to ICC-01/05-01/08-1353, paras 2, 86 and 88.

17. The Sang Defence further submits that the decisions of other Trial Chambers do not apply to the present case.²¹ It reminds that in the present case, this Chamber has given an even broader interpretation to ‘testimony’ pursuant to Rule 68 of the Rules and this interpretation includes any statement made by a person before the Commission of Inquiry into the Post-Election Violence (the ‘CIPEV’).²² The Sang Defence further contends that, contrary to the Prosecution’s submissions, some of the items have specific references to Mr Sang’s alleged acts and/or conduct.²³

III. ANALYSIS

18. Mindful of the general rule of admissibility that this Chamber has previously set out,²⁴ the Chamber will first deal with two individual documents. It will then assess the remaining items under two groups; namely, those relating to transcripts of non-ICC testimonies and documents whose admissibility the Chamber had already ruled upon.

19. At the outset, the Chamber recalls its Admission Decision, where it underlined ‘that its assessment of items of evidence for the purposes of admissibility is a distinct question from the evidentiary weight which the Chamber may ultimately attach to admitted evidence in its final assessment once the entire case record is before it, for the purposes of the verdict in the case’.²⁵

20. **KEN-OTP-0001-0364** is the CIPEV Final Report, produced following its investigation into the facts and circumstances surrounding the 2007-2008 post-election violence in Kenya. The Prosecution submits that Witness 13 testified that the document is a reliable copy of the report that he and his fellow commissioners

²¹ Sang Response, ICC-01/09-01/11-1675-Conf-Corr2, paras 10 and 11; referring to ICC-01/04-01/07-2635, paras 44-49 and ICC-01/05-01/08-2299-Red, paras 57-62.

²² Sang Response, ICC-01/09-01/11-1675-Conf-Corr2, para. 13.

²³ Sang Response, ICC-01/09-01/11-1675-Conf-Corr2, paras 16 and 17.

²⁴ Decision on the Prosecution’s Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353 (‘Admission Decision’), paras 12-19.

²⁵ Admission Decision, ICC-01/09-01/11-1353, para. 18.

produced and signed at the conclusion of the CIPEV's mandate.²⁶ The Defence did not contest the authenticity of the document.²⁷ However, it questioned its relevance.²⁸ Further, the Ruto Defence objects to the admission of the document as, in its view, it could usurp the Chamber's truth and fact finding function.²⁹

21. In respect of the Defence's assertions, the Chamber finds that the document is relevant, particularly to the background of the case. The Chamber also notes that the document has been supported by the testimony of Witness 13, who referred to the methodology of the CIPEV in the elaboration of this report.³⁰ The Chamber is of the view that the *prima facie* probative value outweighs any prejudicial effect, noting that the excerpts on which the Prosecution intends to rely do not refer to the alleged acts or conduct of the Accused. Accordingly, the Chamber admits KEN-OTP-0001-0364.

22. **KEN-OTP-0010-0034**, is an internal memorandum from the Department of Information of the Republic of Kenya related to the KASS FM program 'Lee Nee Emet'. The Prosecution wishes to rely on this document to complement the audio recordings, transcripts and translations of the program referred to in this document and to also explain their provenance.³¹ It does not seek to rely on the content of this document related to the personal acts and conduct of the Accused.³² The Sang Defence questions the relevance of this document to any other issue or fact in dispute bar the alleged acts and conduct of Mr Sang.³³ The Ruto Defence defers to the Sang Defence's argument concerning this document.³⁴

²⁶ Application, ICC-01/09-01/11-1619-Corr-Red, para. 15.

²⁷ Ruto Response, ICC-01/09-01/11-1666-Red; Sang Response, ICC-01/09-01/11-1675-Conf-Corr2, para 19.

²⁸ Ruto Response, ICC-01/09-01/11-1666-Red, para. 17; Sang Response, ICC-01/09-01/11-1675-Conf-Corr2, para. 20.

²⁹ Ruto Response, ICC-01/09-01/11-1666-Red, para. 15.

³⁰ ICC-01/09-01/11-T-124-CONF-ENG ET, p. 19 and p. 29 to 33 and ICC-01/09-01/11-T-125-CONF-ENG ET, p. 29 to p. 35.

³¹ Application, ICC-01/09-01/11-1619-Corr-Red, para. 15(vii).

³² Application, ICC-01/09-01/11-1619-Corr-Red, para. 2.

³³ Sang Response, ICC-01/09-01/11-1675-Conf-Corr2, para. 42 and 43.

³⁴ Ruto Response, ICC-01/09-01/11-1666-Red, para. 26.

23. The Chamber finds that the testimony of Witness 13 did not add any probative value to, or enhance the reliability of, the document. Accordingly, the Chamber rejects the admission of KEN-OTP-0010-0034.

Non-ICC Transcripts

24. The Prosecution submits six documents which are transcripts of evidence taken before the CIPEV. These include **KEN-OTP-0005-5398; KEN-OTP-0005-2817; KEN-OTP-0005-7542; KEN-OTP-0006-1045; KEN-OTP-0005-7770; and KEN-OTP-0006-0493**. The Prosecution also submits **KEN-OTP-0005-3079** which is a typed statement handed up to the CIPEV.³⁵
25. The Prosecution observes that Witness 13 testified on the reliability of these documents that he and other commissioners produced and signed. It also notes that Witness 13 testified about the nature of the CIPEV and its methodology; particularly the CIPEV's impartiality, seen through its use of public and open hearings which were important safeguards to enhance the integrity of proceedings.³⁶
26. The Defence submits that the admission of the CIPEV transcripts should be governed by Rule 68 of the Rules. It emphasises that there is no compelling reason for the Chamber to deviate from its Admission Decision regarding the admissibility of CIPEV transcripts. It also contends that the case law submitted by the Prosecution in support of its application is unpersuasive.³⁷

³⁵ Application, ICC-01/09-01/11-1619-Corr-Red, para. 15.

³⁶ Application, ICC-01/09-01/11-1619-Corr-Red, para. 15.

³⁷ Ruto Response, ICC-01/09-01/11-1666-Red, paras 4-12; Sang Response, ICC-01/09-01/11-1675-Conf-Corr2, paras 8-15. The Ruto Defence refers to: *Prosecutor v Jean-Pierre Bemba Gombo*, Trial Chamber III, Public redacted version of the 'Decision on the Prosecution's Application for Admission of materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012, 08 October 2012, ICC-01/05-01/08-2299-Red, paras 101-101; ICC-01/05-01/08-1386, paras 80-81; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision of Prosecutor's Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, paras 45, 57 and 50.

27. The Chamber reiterates its position in the Admission Decision that this material is testimonial in nature.³⁸ The Chamber reiterates that ‘there is an obvious interest on the part of an accused person to confront any person whose testimony (on the stand or through a document) would implicate an accused in criminal conduct, either directly or indirectly’.³⁹ In the present case, the CIPEV transcripts, which are clearly testimonial in nature, should more appropriately be considered pursuant to Rule 68 of the Rules. Moreover, the Chamber finds that Witness 13’s testimony did not cure the testimonial aspect of the documents. Accordingly, the Chamber does not admit any of the CIPEV transcripts.

Reconsideration of documents

28. **KEN-OTP-0001-0002**, which is the Kenyan National Commission on Human Rights report ‘On the brink of the Precipice: A Human Rights Account of Kenya’s Post-2007 Election Violence’, was previously ruled inadmissible in the Chamber’s Admission Decision.⁴⁰ **KEN-OTP-0001-1288**, which is a CIPEV report entitled ‘Gender Based Violence Report’; and **KEN-OTP-0005-9365**, which is entitled ‘status report on IDP’s’, were previously ruled inadmissible in oral rulings during the hearing of Witness 247.⁴¹

29. The Prosecution nevertheless seeks their admission submitting that Witness 13’s testimony provides sufficient additional explanations with regards to the nature, value and purpose of these documents, significantly mitigating the prejudicial effect of these documents.⁴²

³⁸ Admission Decision, ICC-01/09-01/11-1353, paras 86-88.

³⁹ Admission Decision, ICC-01/09-01/11-1353, para. 25.

⁴⁰ Admission Decision, ICC-01/09-01/11-1353, para. 42.

⁴¹ ICC-01/09-01/11-T-116-CONF-ENG ET and ICC-01/09-01/11-T-117-CONF-ENG ET.

⁴² Application, ICC-01/09-01/11-1619-Corr-Red, para. 15(ii and iii), referring to ICC-01/09-01/11-T-124-ENG ET and ICC-01/09-01/11-T-125-ENG ET.

30. The Defence submits that the Application amounts to a reconsideration of the Chamber's earlier decisions concerning the admissibility of these documents.⁴³

31. The Chamber notes that it has already ruled on the admissibility of these three documents. The Chamber finds that the testimony of Witness 13 did not change any of the circumstances that necessitated its previous rulings. In fact, with regards to Document 3 of the Annex, Witness 13 questioned the reliability of this document.⁴⁴ Accordingly, the Chamber does not admit any of these three documents.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADMITS item KEN-OTP-0001-0364.

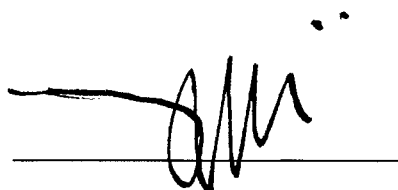
ORDERS the Registry to thereafter assign an EVD number to KEN-OTP-0001-0364; and

REJECTS the remainder of the Application.

⁴³ Ruto Response, ICC-01/09-01/11-1666-Red, para. 4; Sang Response, ICC-01/09-01/11-1675-Conf-Corr2, paras 26 and 35.

⁴⁴ ICC-01/09-01/11-T-124-CONF-ENG ET, pages 70-74.

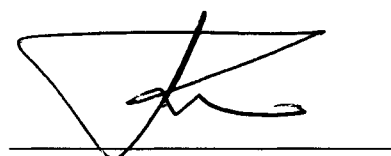
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 4 February 2015

At The Hague, The Netherlands