

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 July 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

Public redacted version of “Defence response to ‘Prosecution’s Second Application for Admission of Items from the Bar Table into Evidence’”, 3 July 2015, ICC-01/09-01/11-1925-Conf

Sources: Defence for Mr. William Samoei Ruto

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. Anton Steynberg

Counsel for William Samoei Ruto

Mr. Karim A. A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal
Dato' Shyamala Alagendra
Ms. Leigh Lawrie

Counsel for Joshua Arap Sang

Mr. Joseph Kipchumba Kigen-Katwa
Ms. Caroline Buisman

Legal Representatives of the Victims

Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massida

**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

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. In the “Prosecution’s Second Application for Admission of Items from the Bar Table into Evidence” (“Application”),¹ the Prosecution seeks the admission of six documents, namely: (1) KEN-OTP-0045-0209; (2) KEN-OTP-0047-0348; (3) KEN-D10-0001-0126; (4) KEN-D10-0001-0250; (5) KEN-OTP-0152-0223; and (6) KEN-OTP-0061-0305.
2. As indicated in Annex A to the Application, the defence for Mr. William Samoei Ruto (“Defence”) does not object to the admission of all these items, save for KEN-OTP-0152-0223 (“Document 5”). For the reasons set out below, the Defence submits that Document 5 should not be admitted into evidence.

II. Submissions

3. *First*, contrary to the Prosecution’s submissions, Document 5 does not have *prima facie* probative value because it lacks sufficient indicia of reliability.² Document 5 is a “Situation Report” dated 7 January 2008 prepared by the [REDACTED]. The Prosecution seeks to use this document to prove what it alleges are direct acts of Mr. Ruto and other members of the alleged “Network” in funding the PEV.³ Fatal to its reliability is the document’s failure to provide information on the source of the allegations, any explanation of the circumstances in which the information was collected or any details to show that the information contained therein has been verified or is otherwise reliable. This Chamber has already ruled that a document which relies on “unidentified and potentially unverified sources” has limited probative value⁴ and that “it would not be appropriate”⁵ to rely on such a document which goes to the central issues in the case.

¹ ICC-01/09-01/11-1924-Conf and ICC-01/09-01/11-1924-Red.

² Application, para. 16.

³ Application, para. 12.

⁴ ICC-01/09-01/11-1353, paras. 44, 62.

⁵ ICC-01/09-01/11-1353, para. 45.

4. *Second*, the Prosecution's submissions that the document was: (i) prepared contemporaneously by the [REDACTED];⁶ and (ii) signed and circulated on 7 January 2008⁷ are without basis. Other than a date that appears on the face of the document, there is no independent evidence demonstrating when the document was actually created, the purpose for which it was created or whether it was circulated at all.

5. *Third*, as to the purpose for which the document was created, it appears that Document 5 was first provided to the Prosecution by the African Union Panel of Experts on 8 July 2008, as part of the CIPEV Report.⁸ The Defence is concerned that this document may have been created for the sole purpose of providing it to the WAKI Commission, as part of a deliberate scheme by certain senior Government of Kenya ("GoK") officials, in office at the time, to falsely accuse Mr. Ruto in planning and funding the PEV. That this may indeed be the purpose for which the document was created is supported by the fact that, despite what is stated in the document,⁹ there is no evidence in this case that Mr. Ruto has ever [REDACTED].¹⁰ Indeed, the Defence submits that the [REDACTED] has never [REDACTED] Mr. Ruto related to the PEV, [REDACTED]. Furthermore, there is evidence on the trial record from Prosecution witnesses that senior officials of [REDACTED] and the GoK induced witnesses to provide false reports to both the [REDACTED] and the WAKI Commission that Mr. Ruto had planned and financed the PEV.¹¹ The Defence submits that in light of these factors the contents of Document 5 must

⁶ Application, para. 16.

⁷ Application, para. 14.

⁸ The first version of this document is [REDACTED] which was illegible. Note that at ICC-01/09-01/11-1121-Conf-AnxA, p. 31, the provider of [REDACTED] is stated to be the "African Union Panel of Eminent African Personalities".

⁹ KEN-OTP-0152-0223 at 0225-0226

¹⁰ Application, para. 13 citing to KEN-OTP-0152-0223 at 0225.

¹¹ *See, e.g.*, [REDACTED].

be treated with extreme caution and should not be admitted by way of a Bar Table motion.

6. *Finally*, and crucially, this Chamber has previously rejected the Prosecution's request to admit [REDACTED] KEN-OTP-0013-0598 which was a Situation Report by the Commissioner of Police dated 21 November 2007. In its assessment of this report, the Chamber noted that "the Prosecution intends to use the document to prove direct acts of Mr. Ruto in funding an armed group with information for which no source is indicated and for which no further detail or information is provided."¹² Therefore, "in this instance", the Chamber found that "the potential prejudice of admission outweighs the *prima facie* probative value" and refused to admit the report.¹³
7. Accordingly, the Defence submits that Document 5 should not be admitted for the same reasons that this Chamber previously declined to admit KEN-OTP-0013-0598. The potential prejudice of the document's admission will clearly outweigh its *prima facie* probative value.¹⁴

III. Classification

8. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially. A public redacted version will be filed in due course.

IV. Requested Relief

9. For the reasons set out above, the Defence respectfully requests the Trial Chamber to reject the Prosecution's request to admit Document 5, KEN-OTP-0152-0223.

¹² ICC-01/09-01/11-1353, para. 63.

¹³ ICC-01/09-01/11-1353, para. 63.

¹⁴ ICC-01/09-01/11-1353, para 63

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'K.A.A. Khan', with a horizontal line underneath.

Mr. Karim A. A. Khan QC
Lead Counsel for William Samoei Ruto

Dated this 6th Day of July 2015

At The Hague, Netherlands