

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 20 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

Confidential

Second Decision

on the Prosecution's Request for Admission of Documentary Evidence

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 'ICC' or 'Court'), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 64, 67 and 69 of the Rome Statute (the 'Statute') and Rule 63 of the Rules of Procedure and Evidence (the 'Rules'), renders this 'Second Decision on the Prosecution's Request for Admission of Documentary Evidence'.

I. PROCEDURAL HISTORY

1. On 9 August 2013, the Chamber issued its first decision on the conduct of the proceedings (the 'Conduct of Proceedings Decision'),¹ in which it set out a procedure for the admission of documentary evidence.²
2. On 10 June 2014, the Chamber issued its 'Decision on the Prosecution's Request for Admission of Documentary Evidence' (the 'First Admission Decision').³
3. On 30 June 2015, the Prosecution submitted its 'Second Application for Admission of Items from the Bar Table into Evidence' (the 'Request').⁴ Therein, it requests the Chamber to admit six items into evidence.⁵ The Prosecution states that the defence for Mr Ruto (the 'Ruto Defence') and the defence for Mr Sang (the 'Sang Defence') (together, the 'Defence') agree with the admission of all items except one.⁶

¹ Decision on the Conduct of Trial Proceedings (General Directions), ICC-01/09-01/11-847-Corr.

² Conduct of Proceedings Decision, ICC-01/09-01/11-847-Corr, para. 27.

³ First Admission Decision, ICC-01/09-01/11-1353.

⁴ Prosecution's Second Application for Admission of Items from the Bar Table into Evidence, ICC-01/09-01/11-1924-Conf with Confidential Annexes A and B (Public redacted version notified on 30 June 2015, ICC-01/09-01/11-1924-Red).

⁵ Request, ICC-01/09-01/11-1924-Conf, paras 1-3.

⁶ Request, Annex A, ICC-01/09-01/11-1924-Conf-AnxA.

4. On 2 July 2015, the Chamber directed the parties and participants to file any responses to the Request no later than 10 July 2015.⁷
5. On 3 July 2015, the Ruto Defence filed its response to the Request (the 'Ruto Defence Response').⁸
6. On 10 July 2015, the Sang Defence filed its response to the Request (the 'Sang Defence Response').⁹

II. SUBMISSIONS AND ANALYSIS

Preliminary remarks

7. The Chamber recalls its First Admission Decision, in which it determined that in exercising its discretion to admit documentary evidence, 'the Chamber has an overarching obligation under Article 64(2) of the Statute to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.¹⁰ In its First Admission Decision, and pursuant to Article 69(4) of the Statute, the Chamber also determined that in making an admissibility ruling, it may take into account, '*inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to the fair evaluation of the testimony of a witness'.¹¹ It also determined that 'what is required at this stage is not definitive proof of reliability but rather *prima facie* proof based on sufficient indicia'.¹² It further stated that evidence may be excluded 'where its

⁷ E-mail from Trial Chamber V-A Communications to counsel on 2 July 2015 at 11.45.

⁸ Ruto Defence Response to "Prosecution's Second Application for Admission of Items from the Bar Table into Evidence", ICC-01/09-01/11-1925-Conf.

⁹ Sang Defence Response to Prosecution's Second Application for Admission of Items from Bar Table into Evidence, ICC-01/09-01/11-1927-Conf.

¹⁰ First Admission Decision, ICC-01/09-01/11-1353, para. 14.

¹¹ First Admission Decision, ICC-01/09-01/11-1353, para. 14.

¹² First Admission Decision, ICC-01/09-01/11-1353, para. 15

prejudice is great and its probative value is comparatively slim'.¹³ Finally, the Chamber 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'.¹⁴

8. In accordance with the First Admissibility Decision, the Chamber conducts its admissibility assessment for each item individually, regardless of whether there is no objection from any of the parties as regards their admission.¹⁵

Non- contested items

9. Document **KEN-OTP-0045-0209** is an internet printout from media outlet 'The Standard', dated 31 December 2007. The Prosecution submits that it intends to use this document to demonstrate that the Kenyan authorities ordered a suspension of live broadcasts starting on 30 December 2007. The Defence does not object to the admission of this item, although notes that it could have been tendered through a witness like Witness 789.¹⁶ The Chamber notes that the Defence does not contest the relevance, authenticity or reliability of the document. The Chamber considers that the document is relevant to the charges and has *prima facie* probative value, which outweighs any prejudice caused to the accused if admitted.

10. Document **KEN-OTP-0047-0348** is also an internet printout from media outlet 'The Standard', dated 9 November 2007. The Prosecution submits that it intends to rely on this document for general background information

¹³ First Admission Decision, ICC-01/09-01/11-1353, para. 16.

¹⁴ First Admission Decision, ICC-01/09-01/11-1353, para. 18.

¹⁵ First Admission Decision, ICC-01/09-01/11-1353, para. 19.

¹⁶ Request, Annex A, ICC-01/09-01/11-1924-Conf-AnxA, page 2.

on the Orange Democratic Movement (the 'ODM') and members of the network. The Defence does not object to the admission of this item, although the Ruto Defence notes that it could have been tendered through a witness like Witness 326.¹⁷ The Chamber notes that the Defence does not contest the relevance, authenticity or reliability of the document. The Chamber considers that the document is relevant to the charges and has *prima facie* probative value. Moreover, as it is intended to be relied upon for general background purposes, its probative value outweighs any prejudice caused to the accused if admitted.

11. Document **KEN-D10-0001-0126** is a certified copy of a Nandi Hills police station occurrence book. The Prosecution states that it intends to rely on pages 0128 to 0134 of the document to corroborate witnesses' evidence concerning crimes in Nandi Hills area and the general *modus operandi* of perpetrators. The Defence does not object to its admission, although the Sang Defence notes that the item has limited relevance in relation to the scope of the charges (30 December 2007 to 2 January 2008). The Sang Defence also highlights that this document needs to be assessed in light of the agreed fact in relation to burning of houses in Nandi Hills.¹⁸ The Chamber notes that the Defence does not otherwise contest the relevance, authenticity or reliability of the document. Although some parts of the document are outside the temporal scope of the charges, the Prosecution intends to rely on this document to prove the 'general *modus operandi* of perpetrators'. Therefore, the identified portions of the document in their entirety are relevant to the case. The document appears to be authentic and emanates from an ostensibly reliable source. Consequently, it has *prima facie*

¹⁷ Request, Annex A, ICC-01/09-01/11-1924-Conf-AnxA, page 2.

¹⁸ Request, Annex A, ICC-01/09-01/11-1924-Conf-AnxA, page 3.

probative value, which outweighs any prejudice caused to the accused if admitted.

12. Document **KEN-D10-0001-0250** is a Kapsabet police station occurrence book. The Prosecution states that it intends to rely on pages 0252-0254 of the document to corroborate witnesses' evidence concerning crimes in Kapsabet and the general *modus operandi* of perpetrators. The Defence does not oppose its admission, although the Sang Defence notes that the item has limited relevance in relation to the scope of the charges (30 December 2007 to 16 January 2008). The Sang Defence also highlights that this document needs to be assessed in light of the agreed fact in relation to burning of houses in Kapsabet. The Defence further states that this item corroborates evidence provided by Witness 800 during his in-court testimony. Although the Prosecution accepts this assertion, the parties disagree over what evidence is corroborated.¹⁹ The Chamber notes that the Defence does not otherwise contest the relevance, authenticity or reliability of the document. As noted above, although some parts of the document are outside the temporal scope of the charges, the Prosecution intends to rely on this document to prove the 'general *modus operandi* of perpetrators'. Therefore, the identified parts of this document are relevant to the case. The document appears to be authentic and emanates from an ostensibly reliable source. Consequently, it has *prima facie* probative value, which outweighs any prejudice caused to the accused if admitted.

13. Document **KEN-OTP-0061-0305** is a map of Uasin Gishu District obtained through Google maps. The Prosecution intends to rely on it to provide a general overview of the area and precise location of towns and roads mentioned by some witnesses. The Defence does not oppose its admission,

¹⁹ Request, Annex A, ICC-01/09-01/11-1924-Conf-AnxA, pages 4-5.

and the Ruto Defence highlights that this map should to be assessed in light of an agreed fact relating to it.²⁰ The Chamber notes that the Defence does not contest the relevance, authenticity or reliability of the document. The Chamber considers that the document is relevant to the case, namely the geographical scope of the charges. The document appears to be authentic and emanates from an ostensibly reliable open source. Consequently, it has *prima facie* probative value, which outweighs any prejudice caused to the accused if admitted.

Contested item

14. Document **KEN-OTP-0152-0223** is a 'Situation Report' from the Kenya Police Headquarters in Nairobi. The Prosecution intends to rely on this item to corroborate witnesses' evidence concerning crimes in the Rift Valley and the general *modus operandi* of perpetrators.²¹ The Prosecution submits that this document is a legible version of an item rejected in the Chamber's First Admission Decision for being illegible.²² The Prosecution submits that the item is relevant to the charges, and particularly to the criminal responsibility of Mr Ruto and the organised character of the network.²³ The Prosecution further submits that the document has *prima facie* probative value, as: (a) it was prepared contemporaneously by the Kenya police force; (b) it is complete, internally consistent, referenced and signed; (c) it bears official headings; (d) it was officially transmitted to the Prosecution by the Government of Kenya; and (e) the Defence does not challenge its authenticity.²⁴ Moreover, the Prosecution states that any prejudice caused to the accused is outweighed by the item's probative value, as the Chamber

²⁰ Request, Annex A, ICC-01/09-01/11-1924-Conf-AnxA, pages 8-9.

²¹ Request, Annex A, ICC-01/09-01/11-1924-Conf-AnxA, pages 5-6.

²² Request, ICC-01/09-01/11-1924-Conf, paras 8-9.

²³ Request, ICC-01/09-01/11-1924-Conf, paras 11-12.

²⁴ Request, ICC-01/09-01/11-1924-Conf, paras 15-16.

may admit the document and later decide what weight to attach to the item of evidence, against the background of the entire record of admitted evidence.²⁵ It further submits that the item is corroborated by other evidence and 'it is not submitted as the sole evidence upon which to convict the Accused' and therefore should not be excluded for going to the acts and conduct of the accused.²⁶

15. The Defence opposes the admission of this document. The Ruto Defence submits that the item does not have *prima facie* probative value, since it relies upon anonymous sources and that certain of the Prosecution's submissions regarding authenticity are not supported. Furthermore, in the opinion of the Ruto Defence the document was created as part of a scheme to falsely accuse Mr Ruto of planning and funding the post-election violence.²⁷ The Ruto Defence also submits that the item is outside the temporal and geographical scope of the charges. It also contends that the Police Commissioner was involved in crimes and therefore was not independent.²⁸ The Sang Defence contends that the document is not authentic and its probative value is outweighed by its prejudicial effect against the accused, namely since it includes allegations against Mr Ruto and other members of the network.²⁹

16. The Chamber considers that the document has sufficient indicia of reliability, as it originates from an official source of information which is ostensibly reliable. The document has limited probative value, as there is no information as to the provenance of the information set down in the report

²⁵ Request, ICC-01/09-01/11-1924-Red, paras 18-20.

²⁶ Request, ICC-01/09-01/11-1924-Red, paras 22-23.

²⁷ Ruto Defence Response, ICC-01/09-01/11-1925-Conf, paras 3, 5.

²⁸ Request, Annex A, ICC-01/09-01/11-1924-Conf-AnxA, pages 5-8.

²⁹ Sang Defence Response, ICC-01/09-01/11-1927-Conf, paras 1, 3-8; Request, Annex A, ICC-01/09-01/11-1924-Conf-AnxA, pages 5-6.

by the author of the report, namely whether the Police Commissioner was able to corroborate the evidence provided by these anonymous sources of information. Although the Prosecution submits that it intends to rely on this document to corroborate other evidence in the case, the Chamber considers that it would be unduly prejudicial to the accused to admit an item of such limited probative value if information therein goes to the acts and conducts of the accused, namely Mr Ruto, and members of his alleged network.

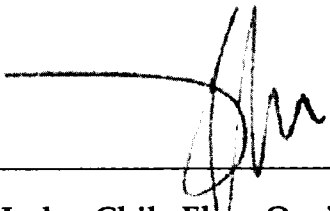
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADMITS items KEN-OTP-0045-0209, KEN-OTP-0047-0348, KEN-D10-0001-0126, KEN-D10-0001-0250, KEN-OTP-0061-0305.

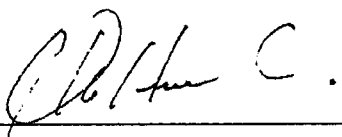
REJECTS the admission of item KEN-OTP-0152-0223.

ORDERS the Registry to assign EVD numbers to the admitted evidence.

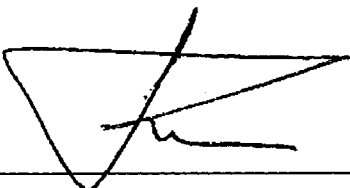
Done in both English and French, the English version being authoritative.



Judge Chile Ebbe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 20 July 2015

At The Hague, The Netherlands