



Original: English

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

Date: 21 July 2015

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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

With Confidential Annex A and Confidential Redacted Annex B

**Public redacted version of
“Prosecution’s submissions regarding issues of Articles 55(2)(d) and 69(7) of the
Rome Statute relating to [REDACTED]”, 22 September 2014, ICC-01/09-01/11-1535-
Conf**

Source: Office of the Prosecutor

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 the Defence

For William Samoei Ruto:

Mr Karim Khan
Mr David Hooper
Ms Shyamala Alagendra

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

Deputy Registrar

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Other

Background

1. On 19 September 2014 the Trial Chamber V(A) (“Chamber”) requested that the parties file submissions on whether there was any issue concerning the combination of Article 55(2)(d) and Article 69(7) of the Rome Statute (“Statute”) in reference to [REDACTED] Article 55(2)¹ statement and the two audio recordings² in which he participated, all of which the Office of the Prosecutor (“OTP” or “Prosecution”) seeks to have admitted as evidence on the record.³

Introduction

2. The Prosecution submits that there was no violation of [REDACTED] statutory right to be questioned in the presence of counsel pursuant to Article 55(2)(d) of the Statute. In fact, the witness ultimately chose voluntarily to proceed with the Article 55(2) interview without Counsel after having been fully apprised of his rights in this regard.⁴ The record of the Article 55(2) interview demonstrates that prior to commencing the substantive interview with the witness, the OTP investigators fully informed the witness of his right to be represented by Counsel, including the right to seek legal assistance without payment.⁵ At no time was the witness misled or threatened with arrest if he failed to cooperate.

3. Alternatively, the Prosecution submits that any breach of Article 55(2) in this case, if it occurred, was marginal at most, and therefore incapable of meeting the high threshold for exclusion of evidence enshrined in Article 69(7) of the Statute.

Confidentiality

¹ [REDACTED] (Audio), [REDACTED] (Audio), [REDACTED].

² [REDACTED] (Audio), [REDACTED] (Transcript), [REDACTED] (Translation), [REDACTED] (Audio), [REDACTED].

³ T-140, p. 33.

⁴ [REDACTED].

⁵ [REDACTED].

4. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Prosecution requests that these submissions be classified as “confidential” as they address confidential matters regarding witness [REDACTED] testimony.

Submissions

The first meeting with the witness

5. OTP investigators first met [REDACTED] in the street [REDACTED]. The need to proceed with discretion and efficiency in a public environment clearly led to a succinct description of the witness rights pursuant to Article 55(2)(d) of the Statute. The objective at that point was simply to determine whether the witness was willing to cooperate with the OTP in providing a statement regarding [REDACTED]. The record shows that upon meeting [REDACTED] OTP investigators asked for his assistance,⁶ informed him of his right to have a lawyer present when taking part in the interview and the possibility for him to waive that right as well.⁷ Given the circumstances, it was not explained to the witness, at that juncture, that he could obtain the services of Counsel without payment if he could not afford one. However, this was unnecessary at that time, as the Article 55(2) interview proper would only be conducted later at the interview location and that his full rights would be explained to him in detail at that time. The most important matter to address with the witness at that initial meeting was that the Prosecution sought his assistance with the investigation and to convey that such assistance was voluntary.

6. As evidenced by the record, at no time was the witness forced to accompany the investigators to the interview location for his assistance in the investigation.⁸ After having met the investigators in the street and listened to their explanations,

⁶ [REDACTED].

⁷ [REDCATED].

⁸ [REDACTED].

[REDACTED] voluntarily agreed to “continue with the session”⁹ and accompanied the investigators to the interview location. Given that the first part of the investigators’ meeting with the witness on the street was unfortunately not recorded - as the recorder had not been properly activated¹⁰ - the events which preceded that activation of the recording device were specifically placed on the record by the investigators during the Article 55(2) interview.¹¹ In this regard, the witness confirmed that, *inter alia*, the investigators had (1) introduced themselves and shown identification; (2) informed him that they were investigating a matter involving [REDACTED];¹² (3) told him that they wanted to talk to him in relation to the matter of [REDACTED] and that this discussion would be audio recorded;¹³ (4) told him that he had the right to have a lawyer present; and (5) told him that he had the right to remain silent and could leave at any time.¹⁴ [REDACTED].

7. Should the Chamber find that in not fully explaining to the witness upon first meeting him his right to representation by a counsel, in particular the right to have counsel provided to him if he could not afford to engage his own legal representative, the OTP investigators breached [REDACTED] rights pursuant to Article 55 (2)(c) and (d), the Prosecution submits that this technical violation was effectively cured when the OTP investigators fully informed the witness of his rights prior to the Article 55(2) interview proper at the private location. Consequently, it had no bearing on the entirety of the substantive evidence provided by the witness during the conduct of the interview and which is presently at issue in the current proceedings. This evidence, as will be seen below, was provided by [REDACTED] after having been fully informed of his rights under Article 55 (2) including

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

subsections (c) and (d).¹⁵ The only substantive matter addressed with the witness during the initial contact with him on the street were general questions regarding where he had come from, whom he had seen and for what reasons.¹⁶ In all six questions. The investigators did not probe any further at this point.

8. The Prosecution emphasises that this was not a pre-arranged meeting [REDACTED], but rather a real-time operation in which it was important for investigators to [REDACTED] and request him to accompany them [REDACTED] where they could proceed with the necessary investigative activities. The Prosecution submits that it is appropriate in the circumstances that the Chamber should make allowances for these circumstances in determining whether the Prosecution, in good faith, fulfilled its duties under the Statute.

At the interview location

9. The record demonstrates that once at the interview location the OTP investigators fully informed [REDACTED] of his statutory rights under Article 55(2) of the Statute,¹⁷ including his rights to legal representation under subsections (c) and (d).¹⁸ The investigators clearly indicated to the witness that his participation in the interview was voluntary and confirmed for the witness that he could not be forced to take part in it.¹⁹ The investigators also briefly explained to the witness how a lawyer might help him.²⁰ Ultimately, after having been fully informed of his rights under Article 55(2), including subsections (c) and (d) the witness confirmed that he wished to continue with the Article 55(2) interview without legal representation²¹ and signed a waiver in this regard.²² Subsequently, the witness confirmed for the record that he

¹⁵ See para.7.

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

had accompanied the investigators to the interview location voluntarily and that the investigators had made no threats for him to take part in the interview.²³

10. At no point preceding or during the interview did the investigators tell the witness or imply that he was obliged to cooperate or assist them in any manner. In fact, the record demonstrates that prior to beginning any questioning the investigators reiterated to the witness that they were asking for his assistance²⁴ and stressed the voluntary aspect of the interview.²⁵ They also confirmed to the witness that they could not force him to take part in the interview if he did not wish to do so.²⁶

11. Accordingly, the Prosecution submits that there was in fact no breach of the witness rights under Article 55(2)(d).

Article 69(7) of the Statute

12. However, should the Chamber find that the investigators did not fully comply with the provisions of Article 55(2) of the Statute, the Prosecution submits that the evidence should not be excluded as (1) it does not cast doubt on the reliability of the evidence obtained by the investigators, and (2) its admissibility would not be antithetical to nor would it seriously damage the integrity of the proceedings.

13. The Prosecution submits that the technical and transient nature of the violation would not be of the sort to affect the reliability of the evidence. The record shows that the witness responded voluntarily to the questions put to him during the Article 55(2) interview. Furthermore, much of the questioning relates to the witness [REDACTED], providing a further assurance of reliability.

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

14. Also, the nature of the violation is not of the sort to damage the integrity of the proceedings. Any breach of the witness rights was clearly unintentional, technical in nature and transient, and was rectified by the investigators at the first reasonable opportunity. As mentioned above, the Article 55(2) interview also primarily addressed information deriving from [REDACTED], which has already been admitted into evidence.²⁷

15. Furthermore, it is important to note that any violation of rights that has occurred relates to the rights of the witness, and not the Accused before the Chamber. Therefore, and firstly, the admission of this evidence will cause no unfairness to the Accused. Second, the witness himself is not at peril in these proceedings and similarly the admission of this evidence will not affect his rights, more especially since he is in receipt of assurances under Rule 74 of the Rules of Procedure and Evidence that his evidence in these proceedings will not be used against him in any subsequent prosecution. These reasons alone would suffice not to reject the evidence; coupled with the minor and technical nature of any infraction to Article 55(2), they provide an even more solid basis to conclude that the high threshold for exclusion of evidence under Article 69 (7) of the Statute is not met in this case.

Conclusion

16. Given the foregoing the Prosecution respectfully submits that the witness rights in regards to Article 55(2)(d) were not violated by the OTP investigators and that he was fully informed of his rights, including his right to legal representation without payment, prior to the Article 55(2) interview proper. Alternatively, should the Chamber find that there was breach of the witness rights in regards to Article

²⁷ [REDACTED].

55(2)(d) the Prosecution submits that the technical nature of the violation would not warrant the exclusion of the Article 55(2) statement or [REDACTED] implicating the witness.

Relief

17. The Prosecution accordingly requests the Chamber to admit into evidence the following items: [REDACTED] (Audio), [REDACTED] (Transcript), [REDACTED] (Audio), [REDACTED], [REDACTED] (Transcript), [REDACTED] (Transcript), [REDACTED] (Transcript), [REDACTED] (Transcript), [REDACTED] (Transcript), [REDACTED] (Transcript), [REDACTED] (Audio), [REDACTED] (Transcript), [REDACTED] (Translation), [REDACTED] (Audio), [REDACTED] (Transcript) [REDACTED] (Translation).



Fatou Bensouda, Prosecutor

Dated this 21st day of July 2015

At The Hague, The Netherlands