



Original: English

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

Date: 31 July 2015

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR V. WILLAIM SAMOEI RUTO AND JOSHUA ARAP SANG***

PUBLIC

**Public redacted version of
“Prosecution opposition to the Ruto Defence’s request for sanctions (ICC-01/09-01/11-1425-Conf-Corr)”, 25 July 2014, ICC-01/09-01/11-1446-Conf-Exp**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. This Chamber has cautioned the parties against making unsupported or gratuitous assertions of misconduct in this case:

[REDACTED].¹

2. Instead of being presented in the “clear, straightforward way” ordered by the Chamber, the Ruto Defence’s Provision of Information [REDACTED] and Request for Sanctions against the Prosecution and/or OTP Staff Members (“Application”)² relies upon highly charged rhetoric that fails to demonstrate any misconduct, much less misconduct that would warrant a judicial consideration. Nor does the Application suggest that the Chamber should take any substantive step, such as the exclusion of evidence. It rests instead on personalised attacks on the actions and submissions of Prosecution staff that were carried out and made in good faith.
3. Such attacks are unhelpful. The Application is lengthy and must have taken many hours to prepare. This response has also taken a considerable amount of time to compile. The Chamber will expend time and resources on the matter. This expenditure of time and effort is being conducted at public expense. The time, effort and expense associated with the Application serve only to distract from the task at hand – to complete the trial in a fair and expeditious manner. Such litigation tactics should be discouraged.
4. When the Application’s shrill language is parsed, the Defence ultimately advances the following six complaints.
5. **Complaint one:** whatever [REDACTED] may have said previously about [REDACTED] interview with Prosecution investigators [REDACTED].³ This [REDACTED], the Defence complains, was concealed for many months

¹ [REDACTED].

² ICC-01/09-01/11-1425-Conf-Corr.

³ ICC-01/09-01/11-1425-Conf-Corr, paras.2-3.

from the Chamber and the Defence, who were thus misled into thinking that the grounds on which [REDACTED] remained valid.⁴

6. **Prosecution response:** there has been no change of circumstances in respect [REDACTED].
7. **Complaint two:** in oral submissions made on [REDACTED], Prosecution counsel misled the Chamber by stating that [REDACTED].⁵
8. **Prosecution response:** the statements made in court on [REDACTED] were in no way misleading.
9. **Complaint three:** the investigator's report appended as Annex C to filing 1343 "provides a misleading summary" of the [REDACTED] interview and "failed to provide material information to the Chamber".⁶
10. **Prosecution response:** Annex C accurately reflects the genuinely and reasonably held belief of Prosecution investigators following [REDACTED] interview.
11. **Complaint four:** the [REDACTED] interview was "confrontational and accusation laden" and the Prosecution investigator "forced her own narrative upon the witness", thereby failing to discharge the obligation placed on the Prosecution by Article 54(1) of the Statute.⁷
12. **Prosecution response:** the [REDACTED] interview was robust, but in no way improper.
13. **Complaint five:** the transcripts of the [REDACTED] interview reveal that Prosecution investigators had concluded that [REDACTED], which had been relayed to the Chamber, [REDACTED] and this too should have been drawn to the Chamber's attention.⁸
14. **Prosecution response:** [REDACTED] irrelevant and bringing them to the Chamber's attention would have served no purpose.

⁴ ICC-01/09-01/11-1425-Conf-Corr, para.3.

⁵ ICC-01/09-01/11-1425-Conf-Corr, paras.2, 13-21.

⁶ ICC-01/09-01/11-1425-Conf-Corr, para.22; *see also* paras.23-26.

⁷ ICC-01/09-01/11-1425-Conf-Corr, paras.27-38.

⁸ ICC-01/09-01/11-1425-Conf-Corr, para.18.

15. **Complaint six:** following the [REDACTED] interview, the Prosecution should have [REDACTED].⁹
16. **Prosecution response:** the Prosecution made no such application because [REDACTED].

Confidentiality

17. This submission and annex are marked confidential, *ex parte* because they refer to matters which are not subject to disclosure to the Defence at this stage. A confidential redacted version is being filed concurrently.

Statement of facts

18. [REDACTED].¹⁰
19. [REDACTED].^{11 12 13 14}
20. [REDACTED].¹⁵
21. On [REDACTED] requested a meeting with the Prosecution.¹⁶ That meeting took place on [REDACTED].¹⁷ During the interview, [REDACTED] departed from his [REDACTED] account and [REDACTED].
22. On [REDACTED], Prosecution staff met with [REDACTED] to discuss [REDACTED]. Contemporaneous notes of that meeting are attached as Annex A. [REDACTED].¹⁸
23. [REDACTED].^{19 20}

Submissions

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ ICC-01/09-01/11-1343-Conf-Red, para.8.

¹⁷ [REDACTED].

¹⁸ Annex A.

¹⁹ ICC-01/09-01/11-1343-Conf-AnxA-Red.

²⁰ ICC-01/09-01/11-1343-Conf-AnxA-Red, p.3.

A. The [REDACTED] interview.

24. The Application conveys the impression (particularly in paragraphs 2 and 16) that the principal reason why [REDACTED] contacted the Prosecution in [REDACTED] was to indicate that [REDACTED]. This is incorrect.
25. The principal reasons advanced by [REDACTED] himself were that he had now come to realise that the Prosecution “loved the truth”,²¹ and because [REDACTED].²²
26. [REDACTED].^{23 24 25}
27. [REDACTED].^{26 27 28}
28. [REDACTED].^{29 30 31 32}
29. [REDACTED].
30. [REDACTED].^{33 34 35 36}
31. The investigators asked [REDACTED] why, unprompted, he had volunteered that he was not meeting them [REDACTED].³⁷ [REDACTED]’s response amounted to dissembling.³⁸
32. The investigators challenged [REDACTED] forcefully. They suggested that, if what he was now saying was the truth, he would have worked methodically through the account he had given in [REDACTED] and

²¹ [REDACTED] KEN-OTP-0131-0132 at 0137 and 0156.

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED] first stated that he “wanted to remove that kind of thinking”, then that “I just want you to understand that maybe this person has come . . . because maybe there is something”. Finally, [REDACTED]. So I just wanted to understand you [sic], that there was no other reason as to why I came here, except that”. [REDACTED] KEN-OTP-0131-0230 at 0255-0258.

identified those parts which were untrue.³⁹ In response to [REDACTED]'s repeated requests for forgiveness,⁴⁰ the investigators suggested that what he was asking to be forgiven for was the lies he had told during these very interviews in [REDACTED]. Initially he denied this.⁴¹

33. The investigators put their suspicions to him in direct terms:

So can you tell me the statement? I want the truth or a lie – answer, no explanations . . . the statement you gave me . . . from [REDACTED] . . . that . . . that was the truth . . . and now you have come back . . . to lie to me . . . lie to the Office of the Prosecutor.⁴²

34. [REDACTED] responded only by saying “Forgive me [REDACTED]”.⁴³ The investigators took this as an acceptance on the part of [REDACTED] that the proposition that had been put to him was correct. It was at this stage, in heated and emotional exchanges, that the remarks upon which the Defence place so much emphasis took place.⁴⁴

35. Challenged as to whether [REDACTED].⁴⁵

36. The closing exchanges between the investigators and [REDACTED] are of significance. The investigators stated that the course the interview had taken was surprising for them, but expressed happiness that although [REDACTED] had come “with one intention”, the interview had “helped you, actually to clear your conscience once and for all” because “at least you know in your mind that you are not lying to us anymore”.⁴⁶ These statements conveyed the investigators’ understanding that [REDACTED] had conceded that his purpose in setting up the [REDACTED] meeting had been to deceive the Prosecution, but that he had now accepted that he had failed in this attempt and had given it up.

³⁹ [REDACTED] or KEN-OTP-0131-0283 at 0307.

⁴⁰ [REDACTED] KEN-OTP-0131-0283 at 0306, [REDACTED] asked to be forgiven over 20 times.

⁴¹ [REDACTED] or KEN-OTP-0131-0283 at 0312.

⁴² [REDACTED] KEN-OTP-0131-0283 at 0312.

⁴³ [REDACTED] KEN-OTP-0131-0283 at 0313.

⁴⁴ ICC-01/09-01/11-1425-Conf-Corr, para.12.

⁴⁵ [REDACTED].

⁴⁶ [REDACTED] KEN-OTP-0131-0283 at 0326-0328.

37. For his part, [REDACTED] concluded with these remarks: “. . . [REDACTED], I would like to say. . . you know, not everyone is an angel. . . and if there is any mistake that I did. . . I am on your [sic] knees, asking for forgiveness”.⁴⁷
38. While the Prosecution acknowledges that the questioning of [REDACTED] in [REDACTED] was robust, it disagrees with the Defence’s assertion that it was improper.
39. *First*, the transcripts indicate that [REDACTED] was reluctant to rehash old ground. When the investigators attempted to broach a subject [REDACTED] had addressed in his [REDACTED] interview – [REDACTED] – he said he did not wish to talk about it, and said “kindly don’t refer me back to the version I have already denied”.⁴⁸ In this context, it was appropriate for the investigators to challenge [REDACTED]’s assertion that his [REDACTED] statement was false rather than to attempt to walk him through it line by line.
40. *Second*, the Defence is incorrect to assert that the investigators attempted to “distract and curtail the witness from providing details of exonerating information” by reminding him “to give an account of what he heard and saw himself”.⁴⁹ It was entirely proper for the investigators to direct [REDACTED] to “talk about [his] own experiences”, and to avoid conflating those experiences with what he may have “heard in the public . . . or maybe from the trial process”.⁵⁰ The investigator’s comments were aimed at determining the truth, not obscuring it, as the Application suggests.⁵¹

⁴⁷ [REDACTED] KEN-OTP-0131-0283 at 0327.

⁴⁸ [REDACTED] KEN-OTP-0131-0230 at 0252.

⁴⁹ ICC-01/09-01/11-1425-Conf-Corr, para.31.

⁵⁰ [REDACTED].

⁵¹ The quote in paragraph 31 of the Application leaves the misleading impression that [REDACTED] was stopped from providing exonerating information (“for example, if I go to the extent of saying that somebody is innocent . . . you won’t allow me to say that”). The opposite is true. In response to [REDACTED]’s query,

41. *Third*, there is no merit to the assertion that the Prosecution’s “regard for Article 68 . . . vanished” during the [REDACTED] interview.⁵² A psychosocial expert attended and when [REDACTED] said he was feeling unwell, the investigators arranged for him to see a doctor, ensuring that [REDACTED] understood that it was “completely [his] choice” on whether to continue.⁵³ As it has throughout its dealings with [REDACTED], the Prosecution gave appropriate regard to his well-being and the assertions to the contrary do not withstand scrutiny.
42. *Fourth*, the Defence is incorrect to characterise the interview an exercise in “verbal manipulation” or a “personal attack” on the witness.⁵⁴ When [REDACTED] presented the investigators with a new and, in their view, wholly unrealistic account [REDACTED], it was proper for them to test the veracity of that account as best they could. Theirs was not a clerk’s task of merely recording what [REDACTED] said, irrespective of the plausibility of his account. Rather, it was to do their best to determine whether the account was correct and whether [REDACTED] could be believed. There was nothing inappropriate in a vigorous questioning of the truthfulness of what [REDACTED] was now saying, given that it contradicted a version he had previously asserted as the truth.
43. That said, the Prosecution accepts that it was unhelpful, in the heat of the exchanges, not to have required [REDACTED] to articulate precisely what it was that he was so often apologising for and to express, in his own words, whether he was maintaining that his new ([REDACTED]) account or his original ([REDACTED]) account was the truth. Similarly, the Prosecution acknowledges that the passage of the interview which is largely taken up with remarks made by the interviewers and minimal responses by

the investigator states “you can say anything else that shows the innocence of the person . . . but it should be based on the facts as they happened at that time”) [REDACTED] KEN-OTP-0131-0199 at 0220.

⁵² ICC-01/09-01/11-1425-Conf-Corr, para.33.

⁵³ [REDACTED] KEN-OTP-0131-0194 at 0196.

⁵⁴ ICC-01/09-01/11-1425-Conf-Corr, paras.32-33.

[REDACTED] does not assist the reader in drawing considered conclusions about the truth of what [REDACTED] was saying.⁵⁵ But to characterise these features as a calculated attempt to distort [REDACTED]’s account and thus to mislead the Chamber is wholly unrealistic. Throughout the interview, the investigators made clear that their goal was to establish the truth.⁵⁶ The Defence’s disagreement with the approach taken does not make it misconduct.

B. The investigator’s report attached as Annex C to filing 1343.

44. Equally unrealistic is the suggestion that the investigator’s report of the [REDACTED] interview⁵⁷ was a deliberate attempt to mischaracterise the content of the interviews [REDACTED].⁵⁸ The investigator’s report was a record prepared, not for the purpose of any Court filing, but to inform the Prosecution team in The Hague about the outcome of the interview while the audio files from the interview were being transcribed. The investigators thus had every incentive to ensure that the report was accurate, and no incentive to produce a “misleading and inaccurate” account, as the Application suggests.⁵⁹
45. In any event, it is plain from the transcripts that the investigators (not without reason) had genuinely concluded that [REDACTED] was admitting that he had arranged the [REDACTED] interviews in an attempt to deceive the Prosecution. This conclusion is reflected in the investigator’s report.

⁵⁵ [REDACTED] KEN-OTP-0131-0283 at 0297-0323.

⁵⁶ *See, e.g.*, [REDACTED] KEN-OTP-0131-0132 at 0160 (“What is the truth? . . . That’s what we want”); KEN-OTP-0131-0162 at 0163 (“You can start now telling us the truth that you would like to tell us”); KEN-OTP-0131-0199 at 0223 (“we are all here to get to the bottom of what really happened”).

⁵⁷ [REDACTED] ICC-01/09-01/11-1343-Conf-AnxC-Red.

⁵⁸ ICC-01/09-01/11-1425-Conf-Corr, paras.22-24.

⁵⁹ ICC-01/09-01/11-1425-Conf-Corr, para 5.

46. No objective reader of the totality of the [REDACTED] interview would understand that [REDACTED] was, at the passage in the interview relied upon by the Defence (or any other passage),⁶⁰ declaring that [REDACTED].
47. Read in context, it is apparent that the passage upon which the Application is premised⁶¹ was aimed at determining the extent to which [REDACTED] was willing to stand by his new account, [REDACTED]. Similarly, [REDACTED]'s response to the investigator's question⁶² is properly understood as an affirmation that the account he provided in [REDACTED] was accurate, [REDACTED].
48. That [REDACTED], is made clear by the records of the Prosecution's [REDACTED] and [REDACTED] meetings with him.⁶³
49. [REDACTED].
50. [REDACTED].
51. [REDACTED].
52. [REDACTED].⁶⁴
53. [REDACTED].^{65 66 67 68 69}
54. [REDACTED].⁷⁰

C. Alleged oral misrepresentation by Prosecution counsel on [REDACTED].

55. The above demonstrates that Prosecution counsel provided accurate information to the Chamber on [REDACTED] when he stated that [REDACTED].⁷¹ [REDACTED].

⁶⁰ [REDACTED] KEN-OTP-0131-0283 at 0315.

⁶¹ [REDACTED] KEN-OTP-0131-0283 at 0315 ("Are you willing to stand by the statement that you just gave us over the last two days . . . and swear upon it . . . and to tell the truth and nothing but the truth?").

⁶² [REDACTED] KEN-OTP-0131-0283 at 0315 [REDACTED].

⁶³ [REDACTED] ICC-01/09-01/11-1343-Conf-AnxA-Red and Annex A to this submission.

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

56. Moreover, any complaint of inaccuracies in the Prosecution's oral submissions must be considered in the context in which they were made. Counsel's remarks were made in response to a Defence motion for which no prior notice was given. As counsel explained during his remarks, the Prosecution was "basically ambushed" and was required to respond on the fly.⁷² In this context, it strains credulity for the Defence to assert that counsel "knowingly misle[d] the Court while making submissions".⁷³

D. Alleged failure to draw doubts about [REDACTED] to the attention of the Chamber.

57. It is accurate to say that investigators expressed scepticism, during the [REDACTED] interview, about [REDACTED].⁷⁴ [REDACTED].⁷⁵ The Defence is incorrect, however, to suggest that the Prosecution had a duty to draw the views of investigators to the Chamber's attention. Those subjective views are irrelevant to the issues before the Chamber – [REDACTED].

58. [REDACTED].^{76 77}

59. The submission advanced in paragraphs 17 and 18 of the Application that the Prosecution committed some offence against good ethics by failing to bring the scepticism expressed by the investigators to the attention of the Chamber is simply unrealistic.

E. Summary

60. As demonstrated above, each of the allegations advanced in the Application disintegrates on analysis. That the Defence disagrees with the Prosecution's

⁷² ICC-01/09-01/11-T-118-CONF-ENG, p.11.

⁷³ ICC-01/09-01/11-1425-Conf-Corr, para.21.

⁷⁴ ICC-01/09-01/11-1425-Conf-Corr, paras.17 and 18.

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

conduct or would have preferred matters to be handled differently does not make it misconduct or constitute grounds for judicial intervention. Conscious of the Chamber's instructions,⁷⁸ the Prosecution will not speculate on the motive behind the Application, but simply observes that when the rhetoric is set aside and the facts are examined calmly and objectively, the Application fails to demonstrate any misconduct, much less conduct that would merit judicial intervention.

61. The Prosecutor and her Office uphold themselves to the highest standards of ethical and professional conduct.⁷⁹ The Prosecutor views all allegations of improper conduct by her staff with the utmost seriousness and agrees that where there is a well-founded concern regarding the conduct of Prosecution staff, it is proper for a complaint to be made in accordance with the applicable legal framework. It is not proper, however, for baseless complaints to be brought before the Chamber, particularly during trial, when the Chamber is charged with concluding the case expeditiously and where groundless complaints distract from that task.

Conclusion

62. Former United States Supreme Court Justice Sandra Day O'Connor opined that:

. . . the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another . . . In my view, incivility disserves the client because it wastes time and energy - time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.⁸⁰

⁷⁸ ICC-01/09-01/11-T-24-CONF-ENG, p. 87.

⁷⁹ To this end, and in addition to other legal and policy instruments governing the conduct of all staff of the Court, a Code of Conduct for the Office of the Prosecutor has been adopted in September 2013, which is equally applicable to Prosecution staff.

⁸⁰ O'Connor, Sandra Day, *The Majesty of the Law: reflections of a Supreme Court Justice*, Random House, 2004, p.228. *see also* *U.S. v. Venable*, No. 11-4216, 2012 WL 130710 (4th Cir. Jan. 18, 2012), n. 4 ("advocates . . . do themselves a disservice when their briefs contain disrespectful or uncivil language directed against the district court, the reviewing court, opposing counsel, parties, or witnesses"); *FDIC v. Van Dellen*, No. CV 10-4915-DSF, transcript of proceedings of 30 January 2012 (C.D. Cal.) ("language like *failures are staggering, violations of this magnitude rarely occur, stunning display of incompetence, bitter irony, breathtaking dereliction of duty* are not only unpersuasive, they're somewhat annoying. I don't have time for rhetoric. I'm really, really busy . . . I don't know whether you stay up nights trying to think of clever

63. Justice O'Connor's observations are apposite here. For all its bluster, the Application contains, to borrow this Chamber's phrase, nothing but "smoke".⁸¹ There is no "fire" that necessitates judicial attention. It is a distraction, calculated to impugn Prosecution staff who acted in good faith, rather than to advance this trial in a sensible manner. Given that the Application fails to assert a defensible claim for the relief sought, the Defence's lamentations about the "basic tenets of conduct for officers of the court" and the need for counsel to act "fairly" and "honourably" ring hollow.⁸²
64. The Prosecution requests the Chamber to dismiss the Application in its entirety.



Fatou Bensouda,
Prosecutor

Dated this 31st day of July 2015
At The Hague, The Netherlands

phrases, but trust me, no judge that I've ever spoken to has ever said, *Boy, can that guy turn a phrase*. They only say, *Boy, why didn't he get to the point.*") (original emphasis).

⁸¹ ICC-01/09-01/11-T-24-CONF-ENG, p. 87.

⁸² ICC-01/09-01/11-1425-Conf, paras.7, 39.