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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 Sang Defence Observations
on Admissibility of Prosecution Interview with [REDACTED],
ICC-01/09-01/11-1534-Conf**

Source: Defence for Mr. Joshua arap Sang

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

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I. INTRODUCTION

1. On [REDACTED], Trial Chamber V(A) (“Chamber”) instructed the parties to file written submissions on whether the Office of the Prosecutor’s (“Prosecution”) interview with Prosecution witness [REDACTED] gave rise to an issue under Article 69(7) in combination with Article 55(2)(d) of the Rome Statute.¹
2. The context in which the Chamber issued this instruction was as follows: During the [REDACTED] of [REDACTED], the circumstances and content of his interview with Prosecution investigators on [REDACTED] were explored. When asked if it was correct that the investigators explained to him his rights, [REDACTED] in part responded, “though they speak about giving me a lawyer or giving me time to go and look for a lawyer but they never gave me time”.² The audio recording of the start of the interview was then played.³ The [REDACTED] that he had consented to continue the interview without a lawyer present and he was asked if he recalled this.⁴ [REDACTED] responded:

Your Honour, I had no opportunity to say that ‘I want to go and look for an advocate,’ because one thing I was a new person in that area. I know nobody. Two, they get hold of me. They don’t allow me to go anywhere. They want me to get an advocate from nowhere. I don’t know where the advocate is. At the same time, they want me to immediately comply with what they are asking. They are interviewing me. So for sure I had no time. I was not given even a single opportunity to be – to go and look for a lawyer. I would have gone and even come for another day so that they can interview me. I could not refuse, but I was not given that opportunity.⁵

3. The Defence hereby gives response to the Chamber’s instruction and submits that the entire [REDACTED] interview⁶ was conducted in violation Article 55(2)(d) – as the interview was a [REDACTED], was conducted without the witness providing a knowing and voluntary waiver of his right to counsel, was conducted in a language he was not entirely comfortable with – and it should therefore be excluded under Article 69(7) of the Rome Statute – as it is unreliable, as well as antithetical and damaging to the integrity of the proceedings.

¹ [REDACTED].

² [REDACTED].

³ [REDACTED]. The audio is [REDACTED] and its transcript [REDACTED].

⁴ [REDACTED] (with reference to page [REDACTED] of the transcript of that audio recording).

⁵ [REDACTED].

⁶ [REDACTED].

II. APPLICABLE LAW

4. Pursuant to Article 55(2)(d) of the Rome Statute, a person against whom “there are grounds to believe that a person has committed a crime within the jurisdiction of the Court” and who “is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9”, shall have the right “[t]o be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel”, of which he or she “shall be informed prior to being questioned”.
5. Violation of this right may lead to exclusion of the interview pursuant to Article 69(7) of the Rome Statute, which provides:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

6. Jurisprudence of this Court confirms that an interview conducted in violation of the right to have counsel present can indeed lead to exclusion of the interview as evidence in the case pursuant to Article 69(7).⁷
7. In line with the *ad hoc* jurisprudence, endorsed by the ICC Chambers,⁸ it is most essential that, prior to an interview, the suspect is informed of his or her right to legal advice in a manner that is “reasonably understandable” to him or her.⁹ If a statement is taken after the suspect was properly advised of his rights and he voluntarily waived them, such a statement is ordinarily admissible.¹⁰ However, it is for the Prosecutor to prove “convincingly and beyond reasonable doubt” that a suspect voluntarily waived his or her right to legal assistance.¹¹ Such a waiver is valid only if explicit, unequivocal and

⁷ ICC-01/04-01/06-1981, para. 43; ICC-01/04-01/07-2635, paras 62-63.

⁸ ICC-01/04-01/06-803-tEN, para. 86.

⁹ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C), 14 October 2004, para. 17 (« Kabiligi Admission Decision »).

¹⁰ *Prosecutor v. Nyiramasuhuko et al.*, ICTR-97-21-T, Decision on Kanyabashi's Oral Motion to Cross Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, 15 May, 2006, para. 80. *See also Prosecutor v. Halilovic*, IT-01-48, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August, 2005, para. 15 (« Halilovic Interlocutory Appeal »).

¹¹ Kabiligi Admission Decision, paras 17 and 18; *Prosecutor v. Delalic et al.*, IT-96-21, Decision on Zdravko Mucic's Motion For the Exclusion of Evidence, 2 September 1997, para. 42.

informed.¹² Where “there are indications that a witness is confused, steps must be taken to ensure that the suspect does actually understand the nature of his or her rights”.¹³

8. An interview must further be conducted in complete voluntariness, the suspect having been fully informed of his or her rights and the possible consequences of conducting such an interview. Only then is he in a position to give an informed consent to being interviewed.¹⁴ At a minimum, for the interview to be admissible, the suspect must be made aware of the right against self-incrimination, to be presumed innocent and to remain silent, and the possible consequences of the use of his interview against him if this right is waived.¹⁵ These rights are also recognized in the Rome Statute,¹⁶ and are fully interwoven with the right to legal representation.¹⁷
9. In this context, it has been held that, “when an interview is stopped to address an on-the-record question of the Appellant that clearly implicates the potential non-voluntariness of the interview”, a lack of an adequate on-the-record clarification of what has been discussed off-the-record may raise doubts as to the voluntariness of the suspect in continuing to be interviewed.¹⁸ The voluntariness may also be undermined by “fear of prejudice” or a hope of an advantage, induced by promises of, for instance, protection or financial assistance to the suspect’s family.¹⁹
10. Simply reading out the rights of the suspect before interrogating him or her is insufficient even if the suspect signs a waiver of his or her right to counsel. This is clear from the ICTR case of General Kabiligi and the SCSL case of Issa Sesay both of whom had signed a waiver to their right to counsel, indicating that they had received full explanation of,

¹² Kabiligi Admission Decision, para. 21; *Prosecutor v Karemera et al*, ICTR-97-24-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumapfse, 2 November 2007, paras. 25, 32.

¹³ Kabiligi Admission Decision, para. 17.

¹⁴ Halilovic Interlocutory Appeal, para. 15.

¹⁵ *Prosecutory v. Prlic et al.*, IT-04-74, Decision on the Admission into Evidence of Slobodan Praljak’s Evidence in the Case of Naletelic and Martinovic, 5 September 2007, paras. 19, 21; Decision on the Prosecution Motion for the Admission into Evidence of the Testimony of Milivoj Petkovic Given in the Other Cases before the Tribunal, 17 October 2007, paras 15, 20.

¹⁶ See Articles 55(1)(a), 55(2)(b), 66, 67(1)(g), 67(1)(i) of the Rome Statute.

¹⁷ ICC-01/04-01/07-2635, para. 62, relying on European Court of Human Rights, Grand Chamber, *Case of Bykov v. Russia*, Judgment of 10 March 2009, Application no. 4378/02, para. 93. See also Kabiligi Admission Decision, paras 16, 21.

¹⁸ Halilovic Interlocutory Appeal, paras. 40-45. See also *Prosecutor v Sesay et al*, SCSL-04-15-T-1188, Written Reasons—Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30 June 2008, paras. 49-51 (« Sesay Admissibility Decision »).

¹⁹ Sesay Admissibility Decision, paras. 52, 68.

and understood the rights they were signing away, and did so without receiving threats or promises. However, the circumstances surrounding their interviews suggested that they did not fully understand the nature of the rights they were signing away. In Sesay's case, this was due to the fact that the Prosecution appeared to have conflated his right to have counsel present at the interviews with a complete waiver of his right to consult with counsel before, during and after the interviews. He also indicated on a number of occasions he wished to consult with a counsel, but none was provided.²⁰ In addition, his continued voluntariness appeared to have been based on his confusion as to whether he was a suspect or a witness, and Mr. Sesay's possible hope or understanding that he could avoid prosecution by cooperating with, and being a witness for the Prosecution.²¹

11. In Kabiligi's case, his voluntariness to be interviewed in the absence of counsel was based on "a misperception that his right to counsel was conditional upon being informed of the case against him", which he had not yet been, and related to a preliminary interview only.²² The Chamber also found that Mr. Kabiligi attempted to invoke the right to counsel, be it in a confused manner, but that should have been a reason for the investigators to cease their questioning immediately.²³

III. FACTUAL CIRCUMSTANCES SURROUNDING [REDACTED] INTERVIEW

12. For a few weeks before the contested interview with [REDACTED] took place, the Prosecution had collected information from [REDACTED] suggesting that [REDACTED] was involved in witness interference, which could be punishable under Article 70 of the Rome Statute.²⁴ The Prosecution then set up a [REDACTED] in which [REDACTED] recorded seemingly incriminating material against [REDACTED],²⁵ and the Prosecution investigators confronted and interrogated [REDACTED] without him knowingly and voluntarily waiving his right to have counsel present.

²⁰ *Prosecutor v. Taylor*, SCSL-03-01-T-988, Defence Motion to Exclude Custodial Statements of Issa Sesay, 1 July 2010, para. 10. The Defence notes that Sesay's custodial statements were excluded in his own trial where Sesay was an accused, and also subsequently where Sesay appeared as a Defence witness for the accused Charles Taylor. See SCSL-03-01-T, Transcript of Oral Decision, 13 August 2010, p 46255-6.

²¹ Ibid, paras 11-12 and citations to the transcripts from the RUF Trial.

²² Kabiligi Admission Decision, paras. 19-20.

²³ Ibid, para. 20.

²⁴ [REDACTED].

²⁵ Ibid, paras 35-80.

13. On [REDACTED], shortly after a recorded face-to-face conversation took place between [REDACTED], during which [REDACTED] alleges [REDACTED],²⁶ Prosecution investigators [REDACTED] conducted an interview with [REDACTED] pursuant to Article 55. The record provided to the Defence is incomplete; there was apparently some initial discussion about [REDACTED] right to counsel, which was not captured on the recording and/or disclosed.²⁷ In light of the jurisprudence discussed above, the fact that this seemingly important conversation about [REDACTED] rights has not been recorded may give rise to doubts about his voluntariness. The exchange that then transpires makes it clear that [REDACTED] did not fully understand that he was a suspect, and that he did not knowingly and voluntarily waive his right to a lawyer.
14. [REDACTED] confusion about his status (whether as a suspect or as a witness) is similar to Mr. Sesay's confusion about the same. The investigators tell [REDACTED] that they want to use him "to assist us in our investigation"; [REDACTED] says that he has no problem doing that.²⁸ This agreement, of course, cannot be said to imply consent because providing assistance with an investigation is different than providing a statement which might incriminate oneself in that investigation. [REDACTED] continues, saying "... I would like you now to come with us and put the allegations to you so that I can get you to assist us. You know exactly what I'm talking about, OK. And you understand what I'm talking about. You know the evidence we have." But in fact, it is not told clearly to [REDACTED] at this stage, what the allegations are against him, or what 'evidence' the Prosecution has. Indeed, in [REDACTED] mind, he has committed no crime because his in-court account is that he and [REDACTED] have only fabricated a story of interference so that [REDACTED] can procure additional benefits from the Prosecution.²⁹ It is an unreliable and internally contradictory account, in any event.³⁰
15. It is not until the investigators arrive at the hotel room with [REDACTED] that they state they have information implicating him in interfering with witnesses.³¹ [REDACTED] says he wants to be open about the information that they have with [REDACTED]

²⁶ Ibid, paras. 74-80.

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ See, for example, [REDACTED] called it an « agenda for getting money » from the Prosecution investigators).

³⁰ The contradictions as to the amounts allegedly given or to be given to [REDACTED] change from [REDACTED] Ksh, and the amount witness [REDACTED] was to have received ranges from [REDACTED].

See, for example [REDACTED].

³¹ [REDACTED].

(including [REDACTED]), so that [REDACTED] can then “discuss matters”, “assist in progressing the investigation” or “cooperate” with them.³² [REDACTED] explains that where they are able to get information against certain people, the aim is to obtain arrest warrants.³³ This may have led to [REDACTED] understanding that the Prosecution wanted to arrest him if he did not cooperate.³⁴

16. The investigators then press upon [REDACTED] the urgency and importance of his assistance.³⁵ They give him the option of continuing in English or Kiswahili and [REDACTED] says it “is good to have Swahili” but that he can use English and “in case I do not understand I ask so that I can be given in Swahili”.³⁶ Similar to the courtroom submissions [REDACTED],³⁷ the Prosecution’s clear preference was for him to continue in English, despite [REDACTED] hesitation about his ability to fully express himself in English.
17. The investigators then take [REDACTED] phone, say that it is for “security reasons”, and ask to go through it.³⁸ The investigators tell him to empty his pockets and then proceed to conduct a body search.³⁹ All of this was done without explaining properly his right to counsel or his related rights not to incriminate himself and to be presumed innocent. The only thing they had mentioned to him at this point was when they were in the taxi and they told him that he had a right to have a lawyer present, but they quickly told him that he also had the opportunity to waive that right. To which [REDACTED] expressed his concern that he did not have any lawyer around and that he didn’t “know which lawyer should I take”.⁴⁰ As [REDACTED] explained [REDACTED], the investigators did not give him any time to obtain a lawyer.⁴¹ Certainly, it cannot be said that [REDACTED] has waived his right to counsel at this point; rather he has expressed logistical difficulties with obtaining one quickly.

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

18. [REDACTED] continues to be interrogated in a room with three Prosecution personnel. The investigators discuss what they term to be ‘procedural’ issues with [REDACTED]; this part is translated into Kiswahili. [REDACTED] tells [REDACTED] that he is here on a voluntary basis and that he may leave if he wishes, but [REDACTED] claims he didn’t understand that because the investigators said they wanted to interview him, which he interpreted to mean they had to interview him: “...If someone wants to interview you, and then he wants ... and request is quite different”.⁴² Finally [REDACTED] gives in; even though he did not plan to be here from the outset, he can listen to what the investigators want to tell him.⁴³ Yet listening is different from responding substantively to criminal allegations.
19. To an inadequate degree, investigators explain that [REDACTED] has the right to legal assistance in accordance with Article 55. The witness asks for clarification, “What’s the work of this Legal Counsel? For what purpose is he coming in this situation?” After some explanation by the investigator, he asks again “about that lawyer being here; what is the work of that lawyer being here?”, and [REDACTED] says he only understands the purpose of a lawyer when someone has been taken to court. At no time do the investigators tell him that the purpose of the lawyer is to protect his right against self-incrimination. Rather, the investigators phrase it in terms of his “right”, his “choice” but never an essential aspect of protecting him. [REDACTED] even asks “You know when you bring issues of law, lawyers, then we tend think maybe I’ve been accused of something, I don’t know or do I have other accusations somewhere?”. It is at this stage that the investigators should have stated clearly “Yes, we are accusing you”, but they continue giving a bland explanation about how they are “investigating” him and want to “interview” him and want to tell him and then he can chose whether to respond or not.⁴⁴ The investigators do not explain that their purpose in conducting the interview is to put on record information which would be used to impeach him when giving testimony or to implicate him in crimes. To the contrary, [REDACTED] was promised, “But any assistance that you give cannot be held against you, OK, so if you do give assistance of some sort, it can’t be seen to be incriminating against you, OK, it will not be used to incriminate you”.⁴⁵

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

20. When [REDACTED] is eventually asked if he wants a lawyer to be present, he replies “I can get the information alone there’s no problem”.⁴⁶ All that he consented to, was receiving the allegations against him, but he did not waive his right to have a counsel present for the purpose of answering allegations. Nor was he asked to sign a waiver at this critical point at the beginning of the interview, which may have alerted him to the significance of the waiver.⁴⁷
21. The investigators then proceeded with the substantive interrogation. Toward the end, [REDACTED] tries to recap how [REDACTED] consented to be interviewed. But tellingly, [REDACTED] says “From the word go, the way you started approaching me all along has meant me to be afraid of doing anything apart from listening from what he says”.⁴⁸ The investigator dismisses this subjective feeling on his part and says “It’s not about how you feel. It’s about me making a threat to you. Have I issued you any threat to take part?”.⁴⁹
22. Only then, almost as an after thought at the conclusion of the interview, the investigators had [REDACTED] sign a waiver of his right to counsel.⁵⁰ This waiver was clearly uninformed, too late, and ambivalent at best. [REDACTED] did not receive any legal advice prior to or during the interview. At no stage did the investigators clearly explain to [REDACTED] the consequences of speaking to them without having consulted a lawyer, or attempt to remove [REDACTED] confusion about his status as a suspect and/or witness. Nor did they cease the interview when [REDACTED] suggested he may have wanted to consult with a lawyer. The overall circumstances of this interview, which resemble those of Mr. Kabiligi’s and Mr. Sesay’s whose interviews were excluded, leave serious doubts about the voluntariness thereof, in particular in the absence of counsel. [REDACTED] right under Article 55(2)(d) of the Statute is therefore clearly violated. The seriousness and totality of the irregularities that took place in conducting this interview warrant its exclusion as evidence in this case under Article 69(7) of the Statute, since both the reliability of the evidence and the integrity of the proceedings have been seriously undermined. Moreso, where the violation occurred as a result of [REDACTED]

⁴⁶ [REDACTED].

⁴⁷ It is important to note that these parts of the conversation were no longer being translated into Kiswahili.

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

and where the investigators should have known to have a duty counsel on standby, at a minimum.

IV. RELIEF REQUESTED

23. The Defence submits that the circumstances in which the [REDACTED] interview was conducted with [REDACTED], most notably the violation of his right to have counsel present during this interview, warrants its exclusion as evidence in this case.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 6th day of August 2015
In Nairobi, Kenya