



Original: English

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

Date: 25 August 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 Redacted Version of

**Confidential Sang Defence Request for Leave to Appeal
the Decision on Prosecution Request for
Admission of Prior Recorded Testimony**

Source: Defence for Mr. Joshua arap Sang

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Anton Steynberg, Senior Trial Attorney

Counsel for William Ruto

Karim Khan QC, David Hooper QC
Shyamala Alagendra, Essa Faal and
Leigh Lawrie

Counsel for Joshua Sang

Joseph Kipchumba Kigen-Katwa
Caroline Buisman

Legal Representatives of the Victims

Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Orchlon Narantsetseg

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. In its *Decision on Prosecution Request for Admission of Prior Recorded Testimony*, the majority of Trial Chamber V(A) (the “Majority”) admitted for the truth of their contents, the prior recorded ‘testimony’ of Witnesses [REDACTED], pursuant to Rule 68(2)(d) and that of Witness [REDACTED], pursuant to Rule 68(2)(c) (collectively the “Statements”).¹ Justice Eboe-Osuji wrote a separate concurring opinion, rejecting the applicability of the amended Rule 68 to the question, but agreeing to admit the statements of all [REDACTED] witnesses (including Witness [REDACTED]) pursuant to Rule 69(3) instead, limited to the extent that they have already been admitted onto the record.²
2. The Majority’s ruling is academic and convoluted, with the result that the ordinary meanings of words and phrases have been twisted to fit the Rule 68 criteria, as amended. The Majority’s ruling also favoured scant allegations of witness interference over the sworn testimony and explanations of witnesses who recanted their prior statements. Ultimately, the admission of these Statements results in a great unfairness to the Defence, will lengthen the trial considerably, and may affect the outcome of the case. Therefore, an immediate resolution by the Appeals Chamber will materially advance the proceedings.
3. Pursuant to Article 82(1)(d), the Sang Defence hereby seeks leave to appeal one succinct core issue, arising from the Majority’s Decision: **whether or not the essence and terms of Rule 68, as amended by the Assembly of States’ Parties resolution in November 2013, was appropriately defined and applied in this case.** This issue comprises various sub-issues which collectively lead to the Majority’s determination that the amended Rule 68 did apply and was the correct conduit through which the Prosecution could admit the Statements in question:

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1938-Conf, Decision on Prosecutor Request Admission of Prior Recorded Testimony, 19 August 2015 (“Decision”), p. 60.

² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1938-Conf-Anx, Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’, 19 August 2015 (“Separate Opinion”), paras. 1-2.

- i. Whether Article 24(2) applies to substantive, but not procedural, issues;³
- ii. Whether the Assembly of States Parties' inclusion of a reference to Article 51(4) in its resolution, given the context of the negotiations, was an indirect reference to the Kenyan Situation;⁴
- iii. Whether the term 'retroactive' in Article 51(4) would only bar the use of an amendment in relation to a 'right' to which the defence had been previously entitled;⁵
- iv. Whether the term 'detrimental' could only be defined in relation to a rule which could not be equally taken advantage of by all parties to the proceedings, rather than general prejudice;⁶
- v. Whether the term 'testimony' could be defined to include unsworn, unrecorded statements taken by an interested party;⁷
- vi. Whether the term 'failure to testify' could be interpreted to include the testimony of witnesses who appeared and answered the Prosecution's questions but who recanted all or fundamental parts of their prior recorded testimony;⁸
- vii. Whether Mr Sang's Article 67(1)(e) right to adequate and effective cross-examination was respected, given that the admitted Statements include allegations which were not raised by the Prosecution in its examination of the witnesses;

³ Decision, para. 22.2

⁴ Decision, paras 17-19.

⁵ Decision, para. 23.

⁶ Decision, paras 24-25.

⁷ Decision, paras 28-33; *Contra*, Separate Opinion, paras 19-25.

⁸ Decision, paras 40-41.

- viii. Whether the correct standard of proof for determining whether or not interference had occurred was 'evidence of sufficient specificity and probative value', especially where the Majority was vague as to what would qualify as 'sufficient', the standard is alien, and it is nearly impossible to identify;⁹
- ix. Whether all relevant factors were properly considered and weighed when finding that there had been interference (such as the witnesses' belief in the possibility of reward for making incriminating statements, the fact that other witnesses with similar statements had recanted for reasons other than interference, and the lack of external corroboration of the prior statements); and
- x. Whether the Majority properly considered fair trial concerns, such as Mr Sang's right to an expeditious trial, the principle of orality, and the admission of evidence going to the acts and conduct of the accused, in assessing the interests of justice component of Rule 68.

II. APPLICABLE LAW

- 4. As determined by Appeals Chamber of the ICC, an issue "is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one".¹⁰ The issue must be more than a mere disagreement over the correctness of a Chamber's reasoning.¹¹
- 5. Article 82(1)(d) stipulates that either party may appeal: "A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the

⁹ Decision, paras 36-37.

¹⁰ *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 9.

¹¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-817, Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 18 July 2013 ("Excusal LTA Decision"), para. 12.

Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.¹² The Appeals Chamber has stated that the object of the remedy provided by Article 82(1)(d) is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.¹³

6. The “fairness” prong has been described as the balance between the parties during the proceedings.¹⁴ In the *Situation in the DRC*, the Pre-Trial Chamber stated, “equity of the proceedings entails equilibrium between the two parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings”, and includes respect for the procedural rights of all parties and participants.¹⁵
7. The “expeditious conduct” of the trial means the timely and efficient conduct of proceedings. The principle requires that decisions at all stages do not unnecessarily delay the ultimate determination of responsibility.¹⁶ Therefore, a decision taken by the Trial Chamber, which delays the determination of responsibility for the alleged crimes or compromises the efficiency of the process, affects the expeditious conduct of the trial.
8. The “outcome of the trial” has been defined as the Judgement at the end of the trial proceedings (rendered pursuant to Article 74 of the Statute), meaning either an acquittal or a conviction. However, the Trial Chamber has also noted that “the Statute provides the Appeals Chamber with other options that could

¹² See also, Excusal Decision, para. 14; ICC-01/09-01/11-596, Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013 (“Witness Preparation LTA Decision”), para. 4.

¹³ *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal (“Extraordinary Review Decision”), para. 19.

¹⁴ Excusal LTA Decision, para. 15.

¹⁵ Extraordinary Review Decision, para. 38; see also, ICC-01/09-01/11-1018-Red, Decision on Prosecution's Application for Leave to Appeal the 'Decision on Disclosure of Information related to Prosecution Intermediaries', 8 October 2013 (“Intermediaries LTA Decision”), para. 11 (The Prosecution has previously agreed that the concept of fairness encompasses the procedural and substantive rights of all participants and parties).

¹⁶ The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. *Prosecutor v Norman et al*, SCSL-2004-07-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, para.8; and Terrier, “Powers of the Trial Chamber” in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65.

‘significantly affect’ the outcome of the trial proceedings, including the repetition of (certain parts of) the trial proceedings as envisaged by the Prosecution”.¹⁷

III. SUBMISSIONS

9. The Sang Defence acknowledges the jurisprudence to the effect that it is not “sufficient for the purposes of granting leave to appeal” that the issue for which leave is sought is either of general interest or may arise again in the future.¹⁸ However, in a situation such as this, where a rule amendment is being engaged for the first time, mid-way through trial proceedings which were already underway when it was proposed by the Court and adopted by the ASP, this consideration should weigh in favour of the Trial Chamber granting leave. Certainly it is of general interest to ensure that the politics of the ASP amendment process not be abused in order to prop up cases, which are otherwise failing in the courtroom.
10. In any event, the Sang Defence submits that the core issue (comprised of the listed sub-issues) meets the criteria for leave to appeal under Article 82(1)(d) and should be immediately certified to the Appeals Chamber for urgent interlocutory determination.

The Issue Arises from the Decision

11. The core issue, along with its component parts, lead to the result that [REDACTED] full interview Statements of witnesses who recanted or did not appear for trial have been admitted into evidence against the accused. If any one of these sub-issues were reversed, the Majority’s final ruling could not stand. Therefore, the issue arises from the Decision.

¹⁷ ICC-01/09-01/11-817, 18 July 2013, para. 22.

¹⁸ Excusal LTA Decision, para. 16 (citing *Prosecutor v. Lubanga*, ICC-01/04-01/06-1191, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, para. 11) and ICC-01/09-01/11-817-AnxA, Dissenting Opinion of Judge Eboe-Osuji, para. 2.

12. At paragraph 22, the Majority found that the principle of non-retroactivity as set out in Article 24(2) pertained only to substantive law, and that Rule 68 is a rule affecting procedure, which does not fall under Article 24(2) of the Statute. Therefore, sub-issue (i) arises from the Decision.
13. At paragraph 17, the Majority dismissed the argument that the ASP resolution had legislated that the amended version of Rule 68 would not apply to the Kenyan Situation, noting that the ASP could have imposed an express time limit as to its application but did not do so. Therefore, sub-issue (ii) arises from the Decision.
14. At paragraphs 23 and 24, the Majority stated that the relief sought was not a retroactive application of the amended Rule 68 because the request did not seek to alter anything which the Defence had been previously granted or been entitled to as a matter of right. Therefore, sub-issue (iii) arises from the Decision.
15. At paragraph 25, the Majority held that Rule 68 is a rule of neutral application, which could be taken advantage of by all parties and therefore there is no inherent detriment to the accused. Thus, sub-issue (iv) arises from the Decision.
16. At paragraphs 28-33, the Majority found that witness statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules qualified as prior recorded 'testimony' for purposes of Rule 68. The Majority highlighted that neither the Working Group on Lessons Learned nor the ASP specified that an oath or affirmation was a necessary prerequisite. Therefore, sub-issue (v) arises from the Decision.
17. At paragraphs 40 and 41, the Majority determined that a witness who appears, but whose testimony deviates from his prior recorded testimony, falls within the scope of the rule requiring that the witness failed to testify to a material aspect of his testimony. Therefore, sub-issue (vi) arises from the Decision.

18. At paragraph 60, for example, the Majority found generally that because the Defence was able to cross-examine the witnesses on specific topics during their in-court testimony, this sufficiently safeguarded Mr Sang's right to cross-examination. However, the Majority did not expressly address what do make of the parts of the Statements, which were not raised by the Prosecution and not examined by the Defence. Therefore, sub-issue (vii) arises from the Decision.
19. At paragraphs 36 and 37, the Majority developed a new standard of proof for considering the degree of factual certainty required when evaluating procedural motions. It rejected the 'beyond reasonable doubt' standard as it might limit the Chamber's ability to consider potentially relevant probative evidence in its assessments of the merits of the case. The Majority then posited that the appropriate standard is "evidence of sufficient specificity and probative value", and proceeded to evaluate the claims of interference with each witness against this standard. Therefore, sub-issue (viii) arises from the Decision.
20. At paragraphs 45 to 133, the Majority embarked upon, *inter alia*, a witness-by-witness evaluation of the allegations of interference which had affected them, and whether these allegations met the standard of specificity which it had established. But nowhere did the Majority address the contentions raised by Defence in its brief, such as why the Prosecution included only some witnesses who had withdrawn on the basis of alleged interference and not others, such as the use of [REDACTED] in obtaining its evidence, and the fact that the witnesses may have given false statements initially because of ideas of financial inducements.¹⁹ Therefore, sub-issue (ix) arises from the Decision.
21. At paragraph 60, for example, the Majority considers whether the introduction of the Statements would be in the interests of justice. It notes that the rights of the accused to be tried with undue delay and the fact that the Statements go to the acts and conduct of the accused, are linked to the rights of the accused generally, but then it goes on to suggest that such concerns are better left to its eventual

¹⁹ ICC-01/09-01/11-1911-Conf-Corr, Sang Defence Response to Prosecution's Request for the Admission of Prior Recorded Testimony of [REDACTED] Witnesses, filed on 12 June 2015, 22 June 2015 ("Sang Defence Rule 68 Response"), paras 115 et seq.

decision on the guilt or innocence of the accused, rather than as part of the Rule 68 analysis. This abdication of analysis at this point gives rise to sub-issue (x).

The Issue Affects the Fair and Expeditious Conduct of the Proceedings

22. The admission of the Statements, which is the result of the issue sought to be appealed, is a significant procedural and substantive unfairness to the defence. Article 24(2) and Article 51(4) are meant to protect the accused from retroactive and detrimental changes to substantive laws and rules of procedure. Yet the Majority has found its way around the clear precepts of these provisions, rendering a Decision, which violates basic tenets of fairness. It has watered down the Defence's ability to confront incriminating material, by admitting Statements full of unverified and untested evidence into the record. Indeed, the bulk of the case against Mr Sang is now based on uncorroborated, recanted statements.
23. To start, the right of an accused to confront his accusers through a full and effective cross-examination is a fundamental requirement and vital component of a fair trial (based on Article 67(1)(e)). However, this right has been obliterated by the Majority's Decision to admit the *full* Statements of [REDACTED] witnesses, despite the fact that the Prosecution chose not to lead all of the allegations contained in the Statements during its examination of the witnesses.
24. Essentially, the Prosecution is having its cake and eating it too. It forced the unwilling and recanting witnesses to appear by way of a summons. It forced them to testify and declared them hostile when their in-court testimony differed from their previous statements. The Prosecution conducted lengthy direct- and cross- examinations of its own witnesses, and it had the opportunity to raise any question or put any part of the witness's statements to him in Court. Often, the Prosecution chose to leave significant portions of the witnesses' prior statements untouched.
25. Consequently, the Defence did not, and should not be expected to, raise allegations during its cross-examination of the witnesses, only to knock them

down. Indeed, the Presiding Judge counselled the Defence that to do so would be unnecessary.²⁰ The Presiding Judge remains consistent with his advise – in his Separate Opinion he argued that the out-of-court Statements of the compelled witnesses should only be admitted to the extent that counsel for the Prosecution and the Defence asked specific questions and received answers to the questions asked, while on the stand.²¹

26. The fairness of the proceedings is further adversely affected by the uncertainty that the parties are now faced with, ie not knowing whether indeed the allegations contained in the Statements will remain on the record and thus need to be addressed with vigour. Pending a final resolution by the Appeals Chamber, the Defence will struggle with this uncertainty as it drafts half time submissions, calls defence witnesses (if necessary), and prepares closing arguments.²²
27. Furthermore, the introduction of these Statements clearly affects the expeditiousness of the proceedings. The drafting history for Rule 68 demonstrates that amendment was to be a tool to shorten the proceedings.²³ Yet the admission of the Statements may necessitate two things: a recall of the compelled witnesses for further cross-examination,²⁴ and a longer defence case in order to fully address additional allegations (though we do not concede that one may be necessary).
28. The Trial Chamber has noted, in the context of the Prosecution's application for leave to appeal the Excusal decision, that "expeditiousness is an important component of a fair trial" and that "the expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial".²⁵ The Defence submits that the delay contemplated by the errant admission of the Statements under Rule 68 is so extensive that it would ultimately affect the fairness of

²⁰ ICC-01/09-01/11-T-145-CONF, 26 September 2014, p. 11-12.

²¹ Separate Opinion, para. 48.

²² Compare to ICC-01/09-01/11-817, para. 24 (the Trial Chamber recognized that the parties' uncertainty as to the absence of the accused during witness created an unfairness).

²³ Separate Opinion, para. 18.

²⁴ Compare to ICC-01/09-01/11-817, para. 23 (the Trial Chamber recognized that the need to recall witnesses would have a significant impact on the duration of the trial proceedings and therefore on its expeditiousness).

²⁵ *Ibid.*

proceedings; this could be avoided by an immediate review of the Decision by the Appeals Chamber.

The Issues May Affect the Outcome of the Trial

29. Certainly the issues raised, and the resulting decision to admit the prior statements of [REDACTED] witnesses, may affect the outcome of the trial. The statements contain incriminating information about Mr Sang, and the Majority has indicated that they will weigh the reliability and evidentiary weight of the statements in the final assessment for purposes of determining the verdict.²⁶ The Prosecution clearly intends to rely on the allegedly incriminating aspects of the statements for proving the guilt of the accused. Indeed, the Prosecution has admitted that without these statements, the Prosecution has been deprived of significant incriminating material. The information contained in the statements is not peripheral, but is central to the case. This is even more so, given that the core Confirmation Witnesses have either been dropped by the Prosecution, failed to testify completely, or testified but gave significantly watered down versions of their original accounts.²⁷
30. In the absence of incriminating testimony from the Confirmation Witnesses, and in the absence of incriminating testimony from the Concerned Witnesses, the admitted statements are one of the few sources of possibly incriminating information currently on record. The Prosecution will have to rely heavily upon the statements if it is to attempt to piece together the existence of a criminal network with an organizational policy and links to the accused. Therefore the admission of these statements may affect the outcome of the trial.

Immediate Resolution of the Issues may Materially Advance the Proceedings

31. It is necessary for the Appeals Chamber to immediately resolve the issues at hand. The Defence is set to make 'no case to answer' motions, which is based on

²⁶ For example, see Decision, paras 60, 86, 117, 133, 145, and 151.

²⁷ Sang Defence Rule 68 Response, paras 115-118.

an analysis of all of the information currently on the record at the close of the Prosecution's case. Given that the Statements have now been admitted, the Defence will have to analyse their contents for purposes of making this 'half-time' application.

32. The Defence believes that even if the material contained in the Statements is evaluated by the Trial Chamber, there is still not a case to answer for Mr Sang, as there is no viable connection to a Network. However, because the Trial Chamber may deem otherwise, Mr Sang may have to put on a full-fledged defence case – taking great time and expense – in order to address all of the allegations raised therein.
33. On the other hand, if the Appeals Chamber were to reverse the Decision and find that the Statements are not admissible in their entirety, or are admissible on a more limited basis²⁸, then Mr Sang is less likely to need a defence case at all, and if one is necessary, he would only have to address a more limited scope of allegations.
34. The admission of the Statements will be hard to reverse if left to an appeal of the final judgement. It would be difficult to untangle the allegations, which were made by the witnesses on paper from the allegations made by the witnesses during testimony, once defence witnesses have generally addressed the allegations during a defence case.

²⁸ such as that described by Judge Eboe-Osuji.

IV. RELIEF REQUESTED

35. The Sang Defence respectfully requests that leave to appeal be granted on the issue identified at paragraph 3 above, and its component parts, as they arise from the decision, affect the fair and expeditious conduct of the trial or the outcome of the proceedings and an immediate resolution by the Appeals Chamber would advance the trial.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 25th day of August 2015
In Nairobi, Kenya