

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **15 September 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. WILLIAM SAMOEI RUTO
AND JOSHUA ARAP SANG**

Confidential

Sang Defence Second Request for Reconsideration of Page Limit

Source: Defence for 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 3 June 2014, Trial Chamber V(A) (“Chamber”) rendered its Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer’ Motions) (“Decision”);¹ the Presiding Judge issued a separate opinion.² The Decision established the standard and procedure to be used in relation to ‘no case to answer’ Motions.
2. In the Decision, the Chamber held that submissions in support of a ‘no case to answer’ Motion were not to exceed 40 pages in length (“page limit”), with the length of the submissions in response to be determined at a later date.³ In relation to the time limit, the Chamber determined that such a Motion must be filed within 14 days after the defence provides notification of an intention to file such a Motion – this notification was to be done orally, no later than the last day of the Office of the Prosecutor’s (“Prosecution”) case (“time limit”).⁴
3. On 2 October 2014, the Sang Defence filed a request for reconsideration of the page and time limits set out in the Decision (the ‘Request’).⁵ In the Request, the Defence sought the page limit to be extended to 100 pages and that the relevant time limit be extended to at least 30 days after the Defence gives oral notification of its intention to file a ‘no case to answer’ motion.⁶
4. In its “*Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits*”,⁷ the Chamber rejected the request. The Chamber was unpersuaded by the Defence’s submissions that the “developments relating to summonsed witnesses becoming hostile and/or recanting their testimony and the admission of further documentary evidence” and “the lack of ‘opportunity’ to make submissions relevant to the requisite limits” amounted to new facts and circumstances warranting reconsideration.⁸ However, the Chamber noted that “the Prosecution’s

¹ ICC-01/09-01/11-1334.

² ICC-01/09-01/11-1334-Anx-Corr.

³ ICC-01/09-01/11-1334, para 37.

⁴ ICC-01/09-01/11-1334, para 37.

⁵ ICC-01/09-01/11-1585-Red.

⁶ ICC-01/09-01/11-1585-Red, paras 4 and 34.

⁷ ICC-01/09-01/11-1813.

⁸ ICC-01/09-01/11-1813, paras 21 and 22.

case was continuing and acknowledged the possibility of developments which might justify amendment of the time and/or page limits established in the Decision.⁹ Therefore, the Chamber acknowledged that the Decision was without prejudice to any future application which might be brought in that regard.¹⁰

5. In view of the new developments in the case, the defence for Joshua arap Sang (“Defence”) respectfully reiterates its request, that the Trial Chamber reconsiders the page limit for submitting a ‘no case to answer motion’ and extend it to 100 pages.

II. Submissions

6. The Defence submits that the ‘factual and evidential complexity of the case’ has changed since the Chamber issued the Decision,¹¹ most notably in respect of the admission of the written statements of five witnesses.¹² Furthermore, in light of the pending appeal on the *Decision on Prosecution Request for admission of Prior Recorded Testimony*,¹³ the Trial Chamber has stated that in any ‘no case to answer’ motion the Defence files, it should be able to address the “evidence before the Chamber both in terms of the current record, and in the alternative, in a situation where the aforementioned materials [statements of five witnesses] would not form part of the evidence”.¹⁴
7. This means that the Defence will have to make additional and detailed submissions to incorporate the newly admitted material, and to argue what the record would look like in its absence amounting to a total number of approximately 1,669 pages of new documentary evidence. These statements fundamentally alter the evidentiary status of the case, as they contain numerous allegations which were recanted at trial. Whilst these allegations do not suffice to establish a *prima facie* case against Mr Sang, they need careful and detailed attention. Therefore, an extension of the page limit is required in order for the

⁹ ICC-01/09-01/11-1813, para 23.

¹⁰ ICC-01/09-01/11-1813, para 23.

¹¹ ICC-01/09-01/11-1813.

¹² ICC-01/09-01/11-1938-Conf-Corr.

¹³ ICC-01/09-01/11-1938-Conf-Corr; ICC-01/09-01/11-1953-Red.

¹⁴ ICC-01/09-01/11-1955, para. 5.

Defence to address several substantive legal and factual issues arising from the admission of the lengthy statements of five witnesses.

8. The Defence submits that, as the purpose of a 'no case to answer' motion is to give effect to the accused's right to a fair trial, it is important for the Defence to be able to make their submissions effectively. It would therefore be reasonable to extend the page limit to 100 pages.¹⁵

III Classification

9. This request is filed confidentially because it refers to a Decision of the Chamber which was filed confidentially.

IV. Relief requested

10. For the reasons set out above, the Defence respectfully requests that the Trial Chamber extends the page limit to 100 pages.

Respectfully submitted,



Joseph Kipchumba Kigen-Katwa
On behalf of Mr Joshua arap Sang
Dated this 15th day of September 2015
In Nairobi, Kenya

¹⁵ ICC-01/09-01/11-1954.