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No.: ICC-01/09-01/11
Date: 22 January 2016

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*

Public

**Prosecution's Response to the "Submission of material referred to by the Ruto
Defence during the Status Conference on 14 January 2016"**

Source: Office of the Prosecutor

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

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I. Introduction

1. On 19 January 2016, the Ruto Defence filed a copy of a Daily Nation newspaper article, dated 10 November 2000 (the “Article”),¹ which it referred to during the ‘no case to answer’ oral submissions at the NCTA Status Conference.² The Article is not in evidence and was not put to Witness 3³ during cross-examination⁴ or otherwise admitted *via* a bar table motion. Nevertheless, the Ruto Defence assert that the Article is “relevant to assessing the statement of Witness 3”.⁵ For the reasons set out below, the Article should not be considered by the Trial Chamber during its assessment of the No Case to Answer Motions⁶ and the submissions at the NCTA Status Conference (together, the “NCTA Submissions”).

II. Submissions

The Daily Nation Article is not in evidence and should not be considered by the Chamber at this stage

2. In its Decision No. 5 on the Conduct of Trial Proceedings,⁷ the Chamber stated that in its assessment of a ‘no case to answer’ motion it “shall consider as evidence only what has been ‘submitted and discussed [...] at trial’, and has been found to be admissible by the Chamber.”⁸ The Article, which the Ruto Defence referred to during their oral submissions at the NCTA Status Conference,⁹ and subsequently filed, was not submitted and discussed at trial, and has not been admitted in the

¹ ICC-01/09-01/11-2017-AnxA.

² ICC-01/09-01/11-T-211-CONF-ENG, 57:18-58:21.

³ “Witness 3” is as *per* the Ruto Defence PIS form used during oral submissions at the NCTA Status Conference (see ICC-01/09-01/11-T-211-CONF-ENG, 15:16).

⁴ The Article was also not included in the Ruto Defence’s Book of Extract (ICC-01/09-01/11-2009), its Addendum (ICC-01/09-01/11-2011) or its Corrigendum (ICC-01/09-01/11-2009-Conf-AnxA-Corr+Corr-Anx).

⁵ ICC-01/09-01/11-2017, para. 3.

⁶ ICC-01/09-01/11-1990-Conf, ICC-01/09-01/11-1991-Conf, ICC-01/09-01/11-2000-Conf and ICC-01/09-01/11-2005-Conf (together, the “No Case to Answer Motions”).

⁷ ICC-01/09-01/11-1334.

⁸ ICC-01/09-01/11-1334, para. 25 (footnote omitted).

⁹ ICC-01/09-01/11-T-211-CONF-ENG, 57:18-58:12.

record of the case by the Chamber. As such, the Article is not eligible for consideration at this 'no case to answer' stage.

3. Additionally, the Chamber stated in its Decision No. 2 on the Conduct of Trial Proceedings,¹⁰ that in cross-examining a witness on an issue relating to credibility, a "basic rule of fairness requires that such questions be put to the witness by any cross-examiner inclined to make an issue out of them later in the case [...] at first opportunity when the witness is on the stand."¹¹ The Article was not put to Witness 3 by the Ruto Defence during a cross-examination over three days, in which three different newspaper articles were put to the witness, including one from the Daily Nation itself.¹² This is despite the fact that Witness 3's statement was disclosed to the Defence in September 2013, over a year before this cross-examination. Thus, notwithstanding ample opportunity to do so, the Ruto Defence did not give Witness 3 a fair opportunity to comment on this article or on its content, and no *indicia* of reliability have been established in relation to it.

4. The Prosecution notes that the Ruto Defence has not explained why the Article was not produced in evidence at the appropriate time,¹³ or put to Witness 3 under cross examination. Nor do they provide any legal argument for why the Chamber should now have regard to this article, notwithstanding the Chamber's clear rulings in Decision No. 5 and Decision No. 2.

5. The Prosecution does not dispute the fact that reports exist of the death of a person named Francis Lotodo in the year 2000. However, the truth of such reports is not admitted, nor is the fact that the person referred to in the Article is the same Francis Lotodo referred to in the statement of Witness 3. Since the Ruto Defence only produced the article for the first time during the course of the NCTA Status

¹⁰ ICC-01/09-01/11-900.

¹¹ ICC-01/09-01/11-900, para.19.

¹² ICC-01/09-01/11-T-133-CONF-ENG, 42:1-20, 45:14-47:12 and 99:1-101:20.

¹³ Nor did the Ruto Defence seek admission of the Article *via* the 'bar table', as per Decision ICC-01/09-01/11-847-Corr, para.27.

Conference, the Prosecution has not had a reasonable opportunity to explore its veracity.

III. Conclusion

6. For the above reasons, the Ruto Defence's belated use of the Article during their oral submissions at the NCTA Status Conference, and their subsequent filing of the same, are contrary to the express guidance of the Chamber and inappropriate at this stage of the case. In these circumstances, the Prosecution submits that the Article should be disregarded in the Chamber's deliberations on the NCTA Submissions.



Fatou Bensouda, Prosecutor

Dated this 22nd day of January 2016

At The Hague, The Netherlands