

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto and Joshua Arap
5 Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion
7 and Judge Robert Fremr
8 Trial Hearing
9 Monday, 23 September 2013
10 (The hearing starts in open session at 11.51 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 When we were in the ex parte session this morning, Mr Steynberg, you indicated you
16 had some submissions to make which we thought was -- we did not hear you then.
17 We wanted that you make any such submissions in the presence of your colleagues
18 on the opposite side.
19 You may proceed.
20 MR STEYNBERG: Indeed, your Honours, and perhaps I should make it clear that
21 even at that time I did make it very clear that these submissions would be made
22 inter partes.
23 PRESIDING JUDGE EBOE-OSUJI: Yes, you did.
24 MR STEYNBERG: I just wanted to bring to the Chamber's attention the fact that
25 the -- firstly, the provision of the Constitution to which my learned friend

1 Mr Kigen-Katwa referred to, 149 and 150, deals on the face of it with the permanent
2 removal and replacement of the deputy president, and that's certainly not -- certainly
3 the Prosecution doesn't suggest that that should be done and that would -- could
4 possibly be characterised as a regime change and that's not what we had in mind, but
5 in the Prosecution's submission the answer is to be found in Section 147 of the
6 Constitution which details what in fact are the responsibilities and functions of the
7 deputy president.

8 147(1) reads, "The deputy president shall be the principal assistant of the president
9 and shall deputise for the president in the execution of the president's functions," and
10 subsection (2) provides, "The deputy president shall perform the functions conferred
11 by this Constitution and any other functions of the president as the president may
12 assign."

13 The point I wish to make from this is that the functions of the deputy president are
14 largely within the discretion of the president himself and, if one looks at the functions
15 of the president --

16 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, so that we don't prolong the
17 discussion, I believe that what provoked any reference to the Constitution was your
18 suggestion that the deputy president may delegate his functions to somebody else
19 when he's not in the country, and the question that arose was whether the
20 Constitution permits the deputy president to make such a delegation of his own
21 functions and powers.

22 MR STEYNBERG: The answer to that, from my reading of the Constitution -- and of
23 course I'm not a Kenyan constitutional expert, that is clear. But from my reading,
24 although it does not provide for the deputy president to deputise the functions, it
25 provides a discretion to the president to assign those functions to an appropriate

1 person.

2 It says -- so my submission is that there is a solution in that the president may assign
3 necessary functions to another responsible person who may continue in the absence
4 of the deputy president. So there is a solution -- all I'm saying is that there is a
5 solution to be had if it is desired, and on that basis I think that in the time granted the
6 Kenyan government, in consultation with Mr Ruto and with the president, should
7 certainly be able to make arrangements to provide for Mr Ruto's absence after Sunday
8 this week.

9 PRESIDING JUDGE EBOE-OSUJI: Including assignment by the president -- are you
10 saying the president is empowered constitutionally to assign the functions of the
11 deputy president to somebody else?

12 MR STEYNBERG: No, your Honours. What I'm saying is that -- well, not the
13 function of a deputy president that, "You will be acting as deputy president," but
14 whatever functions the deputy president performs are performed at the pleasure of
15 the president, as I read it, and at the pleasure of the president, as I read this
16 Constitution, they may be assigned to somebody else.

17 On that basis, my submission is that the absence of the deputy president, or the
18 presence of the deputy president, is not essential to the -- to the resolution of the
19 aftermath of this crisis, and that is all I wanted to say.

20 Oh -- yes, thank you, your Honour. That's all.

21 MR KHAN: Your Honour --

22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you're on your feet.

23 MR KHAN: -- in our respectful submission, the Prosecution are tying themselves
24 into knots.

25 Guidance may be gleaned from -- as a general principle from Article 69(8) of the

1 Statute, that in most circumstances it's not for this Court to start ruling on the
2 application of the domestic laws of a State.

3 Not only my learned friend has accepted, like myself, is not a constitutional expert of
4 Kenya, but neither are we Kenyans. If submissions are needed on this issue, in our
5 respectful submission the Attorney-General of the Republic of Kenya would be the
6 appropriate officer of State to come and speak about the Constitution for which he is
7 the principal legal adviser to the government.

8 But, your Honour, the Prosecution's submission really is characterised, we say, by
9 unfortunately a characteristic that an argument is being constructed that is aimed at
10 achieving certain objectives that the Prosecutor for whatever reason wishes to pursue,
11 whereas we say the proper and principled approach is to start with the law, with the
12 application of principle and fairness and logic, and then follow those principles to get
13 to the result.

14 But, your Honour, once there's an imperative, whether it's that the president for
15 whatever reason or the deputy president for whatever reason physically sits in
16 The Hague come what may, or for any other application that's said to have been
17 somehow to the benefit of the country, that is somehow viewed as unsavoury or
18 inconvenient for the Prosecution, it seems that the arguments that are being presented
19 simply don't withstand scrutiny.

20 So, your Honours, from a constitutional point of view, in our respectful submission,
21 my learned friend doesn't have standing, expertise or enough sound legal argument
22 to make the arguments that he put forward.

23 The other aspect is that as I understand matters - and we have eminent lawyers from
24 the Kenyan Bar here that will speak with far more authority than myself - the
25 president of course is the highest elected official and Head of State.

1 There is under the new Constitution a presidency of which the deputy is an important
2 elected part. It's not an addendum at the pleasure, as it were, of the president.
3 They are mandated by the electorate to fill that office and there are certain
4 responsibilities that arise.

5 By way of interest, the security docket - the internal security docket - is actually under
6 the portfolio of the deputy president of the Republic of Kenya. That's the way that
7 Kenya has arranged its affairs and, with the greatest of respect, it's not for outsiders to
8 start to say how Kenya should arrange its affairs. It is a sovereign country and it can
9 arrange its affairs with maturity, the way it thinks best.

10 Your Honour, we say that whatever -- however one looks at it, the arguments are that
11 the -- there is very good cause, as the Trial Chamber has found, for the Deputy
12 President, Mr Ruto, not to be here to deal with issues of State. The more pertinent
13 matter really is whether or not we proceed with the witness. We're happy to do so if
14 the Court are so minded, or alternatively it's the period of the adjournment.

15 Your Honours, apart from that I have nothing really to add, because with the greatest
16 of respect there really isn't substance to the application that's been made by my
17 learned friend, or the submissions made in relation to the constitutional interpretation
18 of the Republic of Kenya.

19 PRESIDING JUDGE EBOE-OSUJI: Very well, Mr Khan, but what Article 69(8) says
20 is, quote, "When deciding on the relevance or admissibility of evidence collected by a
21 State, the Court shall not rule on the application of the State's national law," unquote.
22 So that says what it says. I mean, it does not mean that on other matters when the
23 Constitution of a State says what it says in language that we can all understand, that
24 affects the operation or the proceedings before the Chamber, the Chamber may not
25 take it into account, but we don't need to debate the point.

1 MR KHAN: I'm grateful.

2 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa Kigen, do you have anything to say in
3 response to - strictly in response to - the Prosecutor's submissions on the
4 Constitution?

5 MR KIGEN-KATWA: Only one observation, Mr President and your Honours. The
6 Article 147 -- the Article 147 that my learned friend has referred to in subsection (2)
7 states that, "The deputy president shall perform the functions conferred by this
8 Constitution and any other functions of the president as the president may assign," so
9 that even reading from that article alone there are some specific assignments that the
10 deputy president has and that are not subject to the president.

11 That's all I wish to say, Mr President and your Honours.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu, you knew I would come to you.

13 MR NDERITU: Thank you, Mr President, your Honours. I really don't have much
14 to add, but only to say that the deputy president under Article 147 is a principal
15 assistant and, until there is notification of the assignment of the roles, then perhaps
16 we have jumped the gun.

17 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

18 Having concluded that additional submission on the Constitution, the Chamber will
19 render its ruling on the application.

20 Here is the ruling: The Chamber was seized yesterday afternoon of an urgent
21 request by the Ruto Defence for an adjournment of the trial, quote, "... until such time
22 as the security situation in Kenya resolves itself, or an order of the Trial Chamber is
23 issued," unquote. That request was motivated by the matters we discussed this
24 morning concerning the security situation at the Westgate Mall.

25 The Sang Defence responded supporting this request, or in the alternative requesting

1 that Mr Ruto be excused from attendance at the trial, but in either event raising no
2 objection.

3 The Prosecution also responded yesterday evening indicating that, while they feel a
4 case in law has not been made out, they would not oppose a limited one-week
5 adjournment subject to the views of the VWU on the impact such an adjournment
6 may have on current and upcoming witnesses.

7 The VWU has reported to the Chamber in that regard. In their report, the VWU
8 recommended that the testimony of Witness 536 should continue immediately
9 without interruption. According to the VWU, this recommendation is justified by
10 their own independent assessment of the safety and psychological well-being of the
11 witness, as well as the specific views of the witness herself.

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 The VWU has been directed to file their report with the Registry in order that it is a
16 formal part of the record.

17 The Legal Representative has also made submissions in which he does not oppose an
18 adjournment for a reasonable period.

19 The parties and participants made further oral submissions this morning of which the
20 Chamber has taken note.

21 The Chamber recalls that earlier this morning, and in light of the urgency of the
22 situation, it granted an excusal from the proceedings to Mr Ruto for a period of one
23 week, subject to review. The remaining question now before the Chamber is
24 whether or not to adjourn the trial during his absence.

25 Noting in particular the impact an adjournment may have on the current witness and

1 other witnesses expected to testify immediately after her, the preference of the
2 Chamber would be to continue the testimony of Witness 536 and to proceed with the
3 testimony of the upcoming witnesses as recommended by the VWU.
4 However, the Chamber considers that the Appeals Chamber's decision on suspensive
5 effect and the question currently pending before the Appeals Chamber regarding
6 Mr Ruto's request for excusal from continual -- continuous presence at trial would be
7 implicated by such a ruling.
8 Therefore the Chamber considers that, in the circumstances, it has no discretion to
9 continue the trial in Mr Ruto's absence as a function of the Appeals Chamber's
10 suspensive effect decision.
11 It is noted that the decision of the majority of the Trial Chamber on suspensive -- on
12 continuous presence at trial, filing number 777, had required the presence of Mr Ruto
13 when victims present their views and concerns in person.
14 It is the Chamber's view that the Chamber would consequently have had a discretion
15 in the current circumstances to excuse Mr Ruto at this point in the trial as, although
16 the current witness is a dual-status witness, we're not yet at the stage where views
17 and concerns of victims are being presented.
18 The Chamber notes that the Defence for Mr Ruto has indicated an intention to file
19 today a request to the Appeals Chamber for reconsideration of its decision on
20 suspensive effect. This approach is in line with the preference of this Chamber on
21 the matter.
22 Until such time as the Appeals Chamber has made a determination on this urgent
23 matter, or the expiry of the one-week period for which Mr Ruto has been
24 excused - whichever is earlier - the trial is hereby adjourned.
25 It is additionally noted that the Ruto Defence have indicated that a one-week

- 1 adjournment may not be sufficient and that they may make a request for an extension.
- 2 Such a request, if any, may be made and responses will be heard at a status
- 3 conference to be held this Friday. The Chamber will issue a decision on the matter, if
- 4 required, at that time.
- 5 This concludes the Chamber's oral ruling on the outstanding matter.
- 6 That being the case, the proceedings are adjourned as indicated.
- 7 THE COURT USHER: All rise.
- 8 (The hearing ends in open session at 12.10 p.m.)