

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto
5 and Joshua Arap Sang - ICC-01/09-01/11
6 Presiding Judge Sang Hyun Song
7 Delivery of Judgement hearing
8 Friday, 25 October 2013
9 (Upon commencing in open session at 9.01 a.m.)

10 THE COURT USHER: All rise.

11 PRESIDING JUDGE SONG: (Microphone not activated) Please call the
12 case.

13 THE COURT OFFICER: (Interpretation) Situation in the Republic of
14 Kenya, in the case of The Prosecutor versus William Samoei Ruto and
15 Joshua Arap Sang, case reference ICC-01/09-01/11. And we are in public
16 session, Mr President.

17 PRESIDING JUDGE SONG: I would like to introduce myself. My name
18 is Judge Sang-Hyun Song, and I am the Presiding Judge on this particular
19 appeal arising from the case of the Prosecutor against
20 William Samoei Ruto and Joshua Arap Sang.

21 May I ask the parties to record their presence -- to register
22 their presence for the record. Perhaps starting with the Defence.

23 MR KHAN: Mr President, your Honour, good morning.
24 Mr William Ruto is present in court and sits immediately behind me in the
25 middle. And he's represented by David Hooper of Queen's Counsel,
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1 Mr Essa Faal, Ms Shyamala Alagendra of counsel. And we're assisted by
2 Ms Lee Lorry (* phon). And at the back Ms Shalini Jayaraj and
3 Ms grace Sullivan, trial support. Your Honours, my name is Karim Khan,
4 also of Queen's Counsel.

5 PRESIDING JUDGE SONG: Your group represents both Mr Ruto and
6 Mr Sang?

7 MR KHAN: Mr President, no. We have the honour of representing
8 Mr Ruto. My learned friend Mr Kigen-Katwa has the honour of representing
9 Mr Sang who is also in court.

10 PRESIDING JUDGE SONG: Okay. Then please, you just register your
11 presence for the record.

12 MR KIGEN-KATWA: Good morning, Mr President. My name is
13 Katwa Kigen. I represent Mr Sang together -- Mr Sang is present in
14 court. I represent him together with Mr Philemon Koech, Logan Hambrick,
15 and Judy Mionki, Mr President. Thank you.

16 PRESIDING JUDGE SONG: Thank you very much. Then may I ask the
17 Prosecutor to introduce themselves for the record.

18 MR GUARIGLIA: Good morning, your Honour. It's
19 Fabricio Guariglia, Prosecution Coordinator. And appearing with me today
20 me today are Mr Anton Steynberg, Senior Trial Lawyer;
21 Mr Benjamin Gumperb, Senior Trial Lawyer; and Mr Sam Lowery, Trial
22 Lawyer.

23 PRESIDING JUDGE SONG: Thank you very much. Today the
24 Appeals Chamber is delivering its judgement on the appeal by the
25 Prosecutor against the decision of Trial Chamber V(a) entitled:
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1 "Decision on Mr Ruto's Request for Excusal from Continuous Presence at
2 Trial." This decision was rendered on the 18 June 2013.

3 In today's summary, I will refer to this decision as the impugned
4 decision.

5 I shall now summarise the Appeals Chamber's judgement and the
6 reasons for it. This summary is not a part of the written judgement,
7 which is the only authoritative account of the Appeals Chamber's rulings
8 and reasons. The written judgement will be made available to the parties
9 at the conclusion of this hearing. The judgement is unanimous, with a
10 separate opinion by Judge Erkki Kourula and Judge Anita Usacka which I
11 will also briefly summarise in the end.

12 I shall start with the brief procedural history.

13 On 17 April 2013, Mr Ruto requested that the Trial Chamber grant
14 a waiver of his right to be present during the trial and conduct the
15 trial without requiring his attendance throughout the duration of the
16 proceedings. The Prosecutor and the participating victims opposed this
17 request.

18 In the impugned decision, the Trial Chamber granted, by majority,
19 with Judge Olga Herrera Carbuccion dissenting, Mr Ruto's request for
20 permission not to be continuously present in court during his trial
21 subject to certain conditions.

22 The impugned decision specified certain hearings for which
23 Mr Ruto must be physically present in the courtroom and indicated that
24 his absence from the trial at other times must always be seen to be
25 directed towards the performance of his duties of state. It was further
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1 specified that Mr Ruto must sign a waiver of his right to be present.

2 Further to an application from the Prosecutor on the 18 July
3 2013, the Trial Chamber granted leave to appeal the following two issues:
4 The scope of the requirement under Article 63(1) that the accused be
5 present during the trial, and whether, or to what extent, the
6 Trial Chamber has a discretionary power to excuse an accused from
7 attending most of the trial, and whether the test for an excusal of the
8 accused developed by the Trial Chamber is supported by the applicable
9 law.

10 The Prosecutor presents two grounds of appeal. Under her first
11 ground of appeal, the Prosecutor alleges that the Trial Chamber erred in
12 law by disregarding the attendance requirement under Article 63(1) of the
13 Statute and by excusing Mr Ruto from attending substantially all of his
14 trial. The second ground of appeal is that a Trial Chamber erred in law
15 by excusing Mr Ruto on the basis of his important functions.

16 The initial question which arises in the present appeal is
17 whether Article 63(1) of the Rome Statute is absolute in its terms, such
18 that any absence of an accused person during the trial would result in a
19 violation of that article, or whether the provision allows the
20 Trial Chamber some measure of discretion to excuse an accused person in
21 certain circumstances from attendance during the trial. In more specific
22 terms, the Appeals Chamber must determine whether the Trial Chamber erred
23 in law when it found that in exceptional circumstances the Chamber may
24 exercise its discretion to excuse an accused person on a case-by-case
25 basis from continuous presence at trial. The Appeals Chamber notes that
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1 Article 63 of the Statute establishes that the accused shall be present
2 during the trial, reflecting the central role of the accused person in
3 proceedings and the wider significance of the presence of the accused at
4 trial for the administration of justice. The accused person is not
5 merely a passive observer of the trial but the subject of the criminal
6 proceedings and, as such, an active participant therein.

7 However, the Appeals Chamber is not persuaded by the Prosecutor's
8 argument that a literal, contextual, and teleological interpretation of
9 Article 63 of the Statute shows that the removal of a disruptive accused
10 is the only exception to the requirement that the accused shall be
11 present during the trial.

12 In view of the rationale of Article 63 of the Statute and given
13 the complex nature of trials of international crimes, the interpretation
14 of Article 63(1) of the Statute advanced by the Prosecutor would prove to
15 be unduly rigid. The Appeals Chamber considers that a measure of
16 flexibility in the management of proceedings in such circumstances
17 accords with a duty of the Trial Chamber to ensure that a trial is fair
18 and expeditious and is conducted with full respect for the rights of the
19 accused and due regard for the protection of victims and witnesses under
20 Article 64(2) of the Statute.

21 The Appeals Chamber further notes that a trial may be continued
22 in the absence of the accused in accordance with the Article 63(2) of the
23 Statute when he or she continuously disrupts the trial. The
24 Appeals Chamber considers that the fact that a continuously disruptive
25 accused person may be excused from the courtroom against his will
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1 supports the conclusion that an excusal may be permissible if the accused
2 voluntarily waives his or her right to be present.

3 It may further be observed that the travaux préparatoires show
4 that, although a number of exceptions to the requirement of the accused's
5 presence at the trial other than that set out in Article 63(2) of the
6 Statute were discussed and ultimately deemed unnecessary, the question of
7 whether an accused person could be excused from attending the trial in
8 circumstances where he or she was in principle present for the trial but
9 had waived the right to be present, was not explicitly addressed.

10 However, it is noteworthy in this regard that during the Rome conference,
11 more peremptory language, I quote, "the trial shall not be held except in
12 the presence of the accused and his lawyer," was considered but not
13 adopted.

14 The Appeals Chamber finds that part of the rationale for
15 including Article 63(1) of the Statute was to enforce the right of the
16 accused to be present at trial and, in particular, to preclude any
17 interpretation of Article 67(1)(d) of the Statute that would allow for a
18 finding that the accused had implicitly waived his or her right to be
19 present by absconding or failing to appear for trial.

20 Therefore, the Appeals Chamber considers that Article 63(1) of
21 the Statute does not operate as an absolute bar in all circumstances to
22 the continuation of trial proceedings in the absence of the accused.

23 Accordingly, the Appeals Chamber concludes that the Trial Chamber
24 did not err in law when it found that in exceptional circumstances the
25 Chamber may exercise its discretion to excuse an accused person on a
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1 case-by-case basis from continuous presence at trial.

2 The Appeals Chamber will next address the question as to whether
3 the Trial Chamber properly exercised its discretion in the circumstances
4 of the present case.

5 The Trial Chamber held that the exceptional circumstances that
6 would make an excusal reasonable would include situations in which an
7 accused person has important functions of an extraordinary dimension to
8 perform.

9 The Trial Chamber then found that the functions of the deputy
10 president of Kenya meet these requirements and excused Mr Ruto from
11 attending all of the trial with the exception, inter alia, of the opening
12 and closing statements, the presentation in person of the views and
13 concerns of victims, the delivery of judgement, and any other attendance
14 directed by the Trial Chamber.

15 The Appeals Chamber will not interfere with a Chamber's exercise
16 of discretion merely because the Appeals Chamber, if it had the power,
17 might have made a different ruling. The Appeals Chamber's functions
18 extend to reviewing the exercise of discretion by a Chamber to ensure
19 that it was done properly. It will interfere with a Chamber's exercise
20 of discretion only when it is shown that that determination was vitiated
21 by an error of law, an error of fact, or a procedural error, and only if
22 the error materially affected the determination.

23 For the reasons that follow, the Appeals Chamber considers that
24 the Trial Chamber did not properly exercise its discretion in the instant
25 case.

1 The Appeals Chamber recalls that the presence of the accused must
2 remain the general rule, and that Article 63(1) of the Statute clearly
3 limits the Trial Chamber's discretion to excuse an accused person from
4 presence during the trial.

5 The restrictions on the removal of a disruptive accused
6 explicitly set out in Article 63(2) of the Statute are also instructive
7 in determining the limits of the Trial Chamber's discretion under
8 Article 63(1) of the Statute.

9 In view of the foregoing and in the interest of a fair and proper
10 administration of justice, the Appeals Chamber finds that the following
11 limitations exist: (i) the absence of the accused can only take place in
12 exceptional circumstances and must not become the rule; (ii) the
13 possibility of alternative measures must have been considered including,
14 but not limited to, changes to the trial schedule or a short adjournment
15 of the trial; (iii) any absence must be limited to that which is strictly
16 necessary; (iv) the accused must have explicitly waived his right to be
17 present at trial; (v) the rights of the accused must be fully ensured in
18 his or her absence, in particular through representation by counsel; and
19 (vi) the decision as to whether the accused may be excused from attending
20 part of his or her trial must be taken on a case-by-case basis with due
21 regard to the subject matter of the specific hearings that the accused
22 would not attend during the period for which excusal has been requested.

23 The Appeals Chamber finds that the Trial Chamber in the present
24 case interpreted the scope of its discretion too broadly and thereby
25 exceeded the limits of its discretionary power. In particular, the
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1 Trial Chamber provided Mr Ruto with what amounts to a blanket excusal
2 before the trial had even commenced, effectively making his absence the
3 general rule and his presence an exception. Furthermore, the
4 Trial Chamber excused Mr Ruto without first exploring whether there were
5 any alternative options.

6 Finally, the Trial Chamber did not exercise its discretion to
7 excuse Mr Ruto on a case-by-case basis at specific instances of the
8 proceedings and for a duration limited to that which was strictly
9 necessary.

10 In the above circumstances, the Appeals Chamber deems it
11 appropriate to reverse the impugned decision.

12 Judge Kourula and Judge Usacka join the majority in reversing the
13 impugned decision, but they disagree with the reasoning. In particular,
14 they disagree with the conclusion of the majority that the Trial Chamber
15 did not err in law when it found that in exceptional circumstances the
16 Chamber may exercise its discretion to excuse an accused person on a
17 case-by-case basis from continuous presence at trial.

18 According will Judge Kourula and Judge Usacka, the ordinary
19 meaning to be given to Article 63(1) of the Statute in its context and in
20 the light of its object and purpose, is clear: The accused person is
21 required to be present during the trial. In their view, this
22 interpretation is also supported by reference to the
23 travaux préparatoires.

24 Judge Kourula and Judge Usacka would have found that the
25 Trial Chamber erred in law when it found that Article 63(1) of the
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1 Statute does not impose a duty on the Chamber. They recall that pursuant
2 to Article 21(1) of the Statute, the Trial Chamber is bound to apply, in
3 the first place, this Statute, Elements of Crimes and its Rules of
4 Procedure and Evidence. According to Judge Kourula and Judge Usacka,
5 Article 63(1) of the Statute regulates the presence of the accused at
6 trial, and this provision was binding on the Trial Chamber in deciding on
7 Mr Ruto's request for excusal.

8 This concludes my summary of the judgement.

9 My last task is to thank the interpreters and court reporters.

10 The session is now closed.

11 (The hearing ends in open session at 9.29 a.m.)