

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 Akua Kuenyehia
7 Appeals Hearing
8 Thursday, 9 October 2014
9 (The hearing starts in open session at 3.01 p.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE KUENYEHIA: Good afternoon. The Court is in session.
14 Would the court officer please call the case.
15 THE COURT OFFICER: Good afternoon. Yes, your Honour.
16 Situation in the Republic of Kenya, in the case of The Prosecutor versus William
17 Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11.
18 And for the record, we are in open session.
19 PRESIDING JUDGE KUENYEHIA: Thank you.
20 May I ask the parties to introduce themselves for the record, starting with the Office
21 of the Prosecutor please.
22 MS BRADY: Good afternoon, your Honour. Helen Brady appearing on behalf of
23 the Prosecution. With me today are Mr Anton Steynberg, senior trial lawyer;
24 Mr Matthew Cross, appeals counsel; Ms Priya Narayanan, appeals counsel; and
25 Mr Rod Rastan, legal adviser. Thank you.

1 PRESIDING JUDGE KUENYEHIA: Thank you very much.

2 The Defence for Mr Ruto.

3 MR FAAL: May it please your Honour. Essa Faal for Mr William Ruto.

4 Appearing with me is Ms Shalini Jayaraj. Thank you.

5 PRESIDING JUDGE KUENYEHIA: Thank you very much.

6 Defence for Mr Sang please.

7 MS BUISMAN: Good afternoon, your Honour. Caroline Buisman representing

8 Joshua Arap Sang, who is not here with us today, but I'm with Joel Bosek and

9 Marie-Ange Ukwigize.

10 PRESIDING JUDGE KUENYEHIA: Thank you very much.

11 Today the Appeals Chamber is delivering its judgment in the appeals by Mr Ruto and

12 Mr Sang against the decision of Trial Chamber V(a) entitled "Decision on Prosecutor's

13 application for witness summonses and resulting request for State Party cooperation."

14 The decision was rendered on 17 April 2014.

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

16 I shall now summarise the Appeals Chamber's judgment which was taken

17 unanimously. Please note that only the judgment is the authoritative version and

18 this will be notified to the parties shortly after this session. This summary is not

19 authoritative.

20 I shall start with the procedural background.

21 The present appeals arose from requests by the Prosecutor first filed in November last

22 year before Trial Chamber V(a) to issue summonses to witnesses to appear either

23 before the Court sitting in situ or by way of a video link and to request Kenya to

24 cooperate in enforcing these summonses, if necessary by way of compelling the

25 witnesses to appear.

1 Following extensive litigation before the Trial Chamber, it rendered on 17 April 2014
2 the impugned decision. It decided by majority, Judge Herrera Carbuccion dissenting
3 to grant the Prosecutor's request in respect of eight witnesses.

4 Following requests by the Defence on 23 May 2014, the Trial Chamber granted
5 Mr Ruto's and Mr Sang's leave to appeal the impugned decision on two issues,
6 namely: (i) "Whether a Chamber has the power to compel the testimony of
7 witnesses"; and (ii) "Whether ... Kenya, a State party to the Rome Statute, is under an
8 obligation to cooperate with the Court to serve summonses and assist in compelling
9 the appearance of witnesses subject to a subpoena."

10 In relation to the ensuing proceedings before the Appeals Chamber, it is convenient to
11 recall that the Appeals Chamber rejected a request that the appeals should have a
12 suspensive effect.

13 On 10 June 2014, the Appeals Chamber granted Kenya's request for leave to make
14 observations under Rule 103 of the Rules of Procedure and Evidence which it filed.

15 In addition, on 14 July 2014, Kenya filed a clarification to its submissions. In
16 response to this clarification, the Prosecutor urged the Appeals Chamber not to allow
17 them.

18 I shall now turn the merits of the present appeals.

19 As I have mentioned, the present appeals arise from requests by the Prosecutor that
20 the Trial Chamber order witnesses to appear to give testimony in Kenya, either before
21 the Trial Chamber sitting in situ or by way of a video link. In the impugned decision,
22 the Trial Chamber ordered the witnesses concerned to appear before the Court in the
23 manner sought by the Prosecutor and requested Kenya to facilitate their appearance
24 by way of compulsory measures as necessary.

25 In making these orders, the Trial Chamber primarily relied on the doctrine of inherent

1 or implied powers, principles of customary international criminal procedural law and
2 the rule of good faith. The Trial Chamber also referred to the applicable provisions
3 of Statute; namely, Article 64(6)(b) of the Statute regarding the power to compel a
4 witness to appear before the Court and, two, Article 91 -- 93(1)(e) and (l) of the Statute
5 regarding Kenya's obligation to cooperate in respect of enforcement of summons.

6 The two main issues before the Appeals Chamber are: whether the Trial Chamber has
7 the power to compel the appearance of witnesses; and, two, whether Kenya is under
8 an obligation to cooperate with the Court to serve summonses and assist in
9 compelling the appearance of witnesses before the Court.

10 I shall now deal with the first issue, namely, whether the Trial Chamber has the
11 power to compel the appearance of witnesses.

12 Among the arguments raised by Mr Ruto and Mr Sang, they first aver that the Trial
13 Chamber erred in resorting to the doctrine of implied powers and to customary
14 international criminal procedure in relation to the issuance of summonses. In their
15 opinion, this is incorrect because the question of compelling the appearance of a
16 witness is expressly and comprehensively dealt with in the Court's legal framework.

17 With respect to the scope of Article 64(6)(b) of the Statute, they both argued that Trial
18 Chambers have no power to issue binding orders to States, but can only request their
19 cooperation. They submit that Article 64(6)(b) of the Statute does not grant the
20 Court a subpoena power to compel any witness to be called or re-called against his or
21 her will.

22 They further argue that pursuant to Rule 65 of the Rules of Procedure and Evidence,
23 only witnesses who appear before the Court can be compelled to testify and
24 subsequently be sanctioned under Rule 171 of the Rules of Procedure and Evidence if
25 they refuse to do so. In their view, sanctioning of witnesses refusing to appear

1 before the Court violates the principle of *nullum crimen sine lege* enshrined in Article
2 22(1) of the Statute.

3 Contrary to Mr Ruto and Mr Sang's contentions, the Prosecutor submits that: (i)
4 resorting to the implied powers doctrine was not an error that materially affected the
5 impugned decision; and (ii) that Article 64(6)(b) of the Statute provides the Court with
6 the power to request the service and enforcement of witness summonses to be given
7 effect through Part 9 of the Statute.

8 In her view, Articles 70 and 64(6)(b) of the Statute are consistent with -- insofar as
9 domestic law would be applicable in relation to the issue of compellability of
10 witnesses.

11 The Prosecutor further contends that Rule 65 of the Rules of Procedure and Evidence
12 only addresses the situation of witnesses who appear before the Court and as such, is
13 a narrower provision than Article 64(6)(b) of the Statute. In her view, Article 64(6)(b)
14 of the Statute does not apply only to witnesses already before the Court because it
15 would make Article 64(6)(d) of the Statute redundant and would be inconsistent with
16 the plain terms of Article 64(6)(b) of the Statute.

17 As explained further in this judgment, the Appeals Chamber considers that exploring
18 the import of the concept of implied powers or customary international criminal
19 procedure in circumstances where the Court's legal framework provides for a
20 conclusive legal basis is incorrect.

21 In relation to the issue at hand, the Appeals Chamber finds that Article 64(6)(b) of the
22 Statute expressly states that Trial Chambers have the power to require the appearance
23 of witnesses before the Court. The plain meaning of the term "require" is something
24 more than a voluntary action expected from someone else. The Appeals Chamber
25 also notes that there is no evidence in the drafting history of Article 64(6)(b) of the

1 Statute to suggest that the drafters intended to limit the power of the Court to require
2 the attendance of witnesses before it for the purposes of giving evidence.

3 The Appeals Chamber notes the arguments advanced by Mr Ruto and Mr Sang that
4 the principle of legality would be contravened if the Court had the power to compel
5 witnesses to appear before it because the penalties in case of noncompliance are not
6 set out. However, the Appeals Chamber recalls that Article 22 of the Statute refers to
7 conduct constituting a crime within the jurisdiction of the Court.

8 The Appeals Chamber finds that a witness's refusal to comply with an order to
9 appear before the Court would constitute, at most, misconduct within the meaning of
10 Article 71 of the Statute. Accordingly, the Appeals Chamber considers that the
11 arguments relating to Article 22 of the Statute are misplaced and rejects them.

12 The Appeals Chamber is also not persuaded by the argument that the absence in the
13 Statute of any sanction in case of noncompliance shows that the Court has no power
14 to compel witnesses to appear before it, this is because it disregards the fact that it
15 would be for the State enforcing a request to stipulate such sanctions in its domestic
16 law.

17 Furthermore, the Appeals Chamber recalls that, once a witness is brought before the
18 Court in accordance with the relevant provisions under domestic law, the Court will
19 take over the exercise of jurisdiction and, therefore, Rules 65 and 171 of the Rules of
20 Procedure and Evidence would become applicable. Pursuant to Rule 171, the
21 sanction in case of refusal to comply with the Court's order to provide testimony
22 could be, in particular, the imposition of a fine.

23 In the light of the above, the Appeals Chamber finds that Article 64(6)(b) of the
24 Statute gives to a Trial Chamber the power to compel a witness before it, thereby
25 creating a legal obligation for the individual concerned. Accordingly, the Trial

1 Chamber did not err when it concluded that it was vested with such a power, and the
2 first ground of appeal is therefore rejected.

3 I shall now turn to the second issue, namely, whether Kenya is under an obligation to
4 cooperate with the Court to serve summonses and assist in compelling the
5 appearance of witnesses before the Court.

6 Mr Sang mainly avers that the reference made in Article 64(6)(b) of the Statute to
7 Chapter 9 on cooperation with States indicates that the Chamber has to rely on State
8 cooperation to give effect to it. In his view, Article 93(1)(e) of the Statute, which
9 provides that States are under an obligation to facilitate voluntary appearance of
10 witnesses, is the most relevant provision in Chapter 9 and cannot be ignored by
11 analysing Article 64(6)(b) of the Statute in isolation.

12 Similarly, Mr Ruto essentially argues that Article 64(6)(b) of the Statute cannot be
13 considered as a stand-alone provision; rather it must be read in conjunction with
14 Article 93(1)(b), 93(1)(e), 93(7) of the Statute and Rule 193 of the Rules of Procedure
15 and Evidence as these provisions establish the applicable regime regarding the
16 appearance of witnesses.

17 He adds that there is nothing in the Statute, either under Part 6 or Part 9 that provides
18 for the compellability of the appearance of witnesses.

19 Mr Ruto argues that, and I quote, "The Trial Chamber may well, pursuant to Article
20 64(6)(b) create an international obligation of persons to appear before the Court, but
21 that States are under no duty to enforce that obligation," unquote. In essence, both
22 Mr Ruto and Mr Sang submit that no distinction is to be made between the physical
23 appearance of a witness in The Hague and testimony by video conferencing. Any
24 appearance before the Court being in situ or via video link must be voluntary in
25 principle. Consequently, the Trial Chamber would lack the authority to seek State's

1 cooperation to compel the appearance of unwilling witnesses.

2 Mr Ruto and Mr Sang further aver that under its domestic law, Kenya is only
3 required to serve Court issued summonses and facilitate the voluntary appearance of
4 witnesses. They also interpret section 86 of the Kenyan International Crimes Act
5 (which I shall refer to as the "ICA"), which implements Article 93(1)(d) of the Statute,
6 as only granting a Chamber the power to request States to serve documents,
7 including summonses to witnesses rather than their enforcement.

8 The Prosecutor submits that the Trial Chamber correctly found that the provisions
9 under Part 9 of the Statute regarding international cooperation and judicial assistance,
10 and I quote, "give effect to the Court's power under Article 64(6)(b) and do not detract
11 from it," unquote.

12 In the Prosecutor's view, the argument advanced by Mr Sang and Mr Ruto that
13 witness appearance at the Court must be voluntary under Article 93(1)(e) of the
14 Statute is inconsistent with the plain text of the Statute as well as with its drafting
15 history. She maintains that such a reading of Article 93(1)(e) of the Statute would
16 frustrate the intention behind Article 64(6)(b) of the Statute by rendering the term
17 "require" in that provision meaningless.

18 The Prosecutor further submits that Article 93(3) of the Statute lends additional
19 support to the obligation of a State to comply with requests made under Article
20 93(1)(l) of the Statute as the requested State is expected to promptly consult with the
21 Court, if it cannot comply with such requests.

22 The Prosecution submits that Article 93(1)(b) of the Statute could also constitute an
23 alternative basis for the taking of evidence from a witness under oath, including
24 testimony, through State cooperation. The Prosecution considers that the
25 aforementioned provision empowers the Court to request state cooperation for the

1 implementation of the following two measures: One, the taking of evidence by a
2 Trial Chamber sitting in situ with recourse to domestic powers to compel
3 witnesses -- witness attendance as necessary and compelling the appearance of a
4 witness at a location on the requested State's territory for the purpose of taking their
5 testimony via video link.

6 Regarding Kenya's domestic law, the Prosecutor contends that the Trial Chamber
7 correctly found that nothing in the ICA prohibits Kenya from cooperating with the
8 Court in the manner requested. To that effect, she argues that the ICA gives direct
9 force of law to, inter alia, Articles 64(6)(b), Article 93(1)(d) and Article 93(1)(l) of the
10 Statute.

11 In Kenya's view, enforcing summons issued by the Court would controvert multiple
12 provisions of the Kenyan Constitution and law. Kenya submits that it is prepared to
13 serve the witness summons called to testify; however, given its legislative framework,
14 it has no obligation to assist in compelling the appearance of unwilling witnesses
15 subject to a subpoena.

16 The Appeals Chamber notes that the second issue under appeal comprises two
17 separate questions, namely: (i) whether Kenya is under an obligation to cooperate
18 with the Court to serve summonses; and (ii) whether Kenya is under an obligation to
19 assist in compelling the appearance of witnesses before the Court sitting in situ or by
20 way of video link.

21 The Appeals Chamber finds that the first question is directly addressed by Article
22 93(1)(d) of the Statute and section 86 of the ICA. Accordingly, any further
23 consideration on this question is not required and the parties seem to agree that
24 Kenya indeed has to serve the summonses upon the witnesses. Accordingly, the
25 Appeals Chamber limits its further analysis to the question of whether Kenya is under

1 an obligation to compel the witnesses to appear before the Court in the way
2 contemplated in the impugned decision if they do not wish to do so voluntarily.
3 In relation to the principle of voluntary appearance before the Court, the Appeals
4 Chamber is not persuaded by Mr Ruto and Mr Sang's argument that, based on Article
5 93(1)(e) of the Statute, State Parties are obliged to cooperate with the Court only in
6 respect to voluntary appearance of witnesses before the Court. In that regard, the
7 drafting history of this provision shows that at issue in the negotiations in relation to
8 that provision was whether the Court should have the power to request State
9 cooperation in relation to compelling a witness to travel internationally to the seat of
10 the Court. There is no indication in the -- there is no indication that the drafters
11 discarded the idea that the Court may request a State Party to compel a witness to
12 appear before it when such appearance does not involve international travel. To the
13 contrary, the drafting history shows that during the negotiations, alternative ways of
14 receiving the testimony of witnesses who refused to travel to the Court were
15 discussed. It was proposed that their testimony could be obtained through
16 cooperation provided by the State of residence of the witness, I quote: "The requested
17 State would use the means of compulsion allowed under its internal law and provide
18 the International Criminal Court with a transcript of the examination and
19 cross-examination." The possibility of receiving the testimony of a recalcitrant
20 witness by way of video link was also proposed as an alternative. A further
21 suggestion referred to the hearing of evidence by the Court on the territory of the
22 State of residence of the witness.
23 Similarly, the Appeals Chamber is not persuaded by the argument that a principle of
24 voluntary appearance can be derived from Article 93(7) of the Statute. This is
25 because the drafting history of Article 93 referred to above indicates that the concern

1 of States was related to the forcible international transfer of persons under their
2 jurisdiction. The foregoing consideration explains why Article 93(7) of the Statute
3 also requires a consent of persons in custody when the Court requests that they be
4 transferred to appear before it, in order to testify: clearly, such transfer would involve
5 international travel.

6 Accordingly, there is no principle of voluntary appearance that would bar the type of
7 cooperation sought by the impugned decision as it does not involve international
8 travel.

9 The Appeals Chamber is equally not persuaded by the argument that previous
10 jurisprudence of this Court confirms the existence of a principle of voluntary
11 appearance. The Chamber notes that when viewed in context, the relevant
12 jurisprudence is ambiguous and does not provide any detailed reasoning from the
13 relevant Chamber. In any event, the Appeals Chamber recalls that pursuant to
14 Article 21(2) of the Statute, it is in no way bound by previous decisions and findings
15 of other Chambers.

16 In relation to the legal basis for the request for cooperation, the Appeals Chamber
17 notes that the Trial Chamber relied on Article 93(1)(d) and (l) of the Statute to
18 conclude that Kenya was under an obligation to serve summonses and assist in
19 compelling witnesses to testify before the Court.

20 In relation to Article 93(1)(d) of the Statute and in line with the arguments advanced
21 by the parties and Kenya, the Appeals Chamber considered that this provision
22 provides a legal basis for the service of summonses, but not for their enforcement.

23 Accordingly, there is no need to need to consider that provision any further.

24 In respect of the enforcement of the summonses, the Appeals Chamber finds that
25 Article 93(1)(b) of the Statute provides the legal basis for the request for State

1 cooperation made in the impugned decision. This is because the plain wording of
2 the provision is not limited to the taking of evidence by domestic authorities and
3 therefore also covers the taking of evidence on a State Party's territory, either by the
4 Court sitting in situ or by way of video link. In keeping with the *lex specialis*
5 principle, it is therefore unnecessary to consider the general provision of Article
6 93(1)(l) of the Statute.

7 In sum, the Appeals Chamber finds no error in the Trial Chamber's finding that
8 Kenya is obliged to cooperate in compelling the appearance of witnesses before the
9 Court either sitting in situ or by way of video link.

10 For the reasons referred to, the Appeals Chamber determines that no appealable
11 errors have been identified.

12 The Appeals Chamber therefore confirms the impugned decision.

13 This concludes my summary of the judgment. It only remains for me to thank the
14 parties, the court officers, the interpreters and court reporters and also our audience
15 in the gallery. Thank you very much.

16 The session is now closed.

17 THE COURT USHER: All rise.

18 (The hearing ends in open session at 3.28 p.m.)