

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 and
5 Joshua Arap Sang - ICC-01/09-01/11
6 Presiding Judge Piotr Hofmański, Judge Silvia Fernández de Gurmendi,
7 Judge Christine Van den Wyngaert, Judge Howard Morrison and Judge Péter Kovács
8 Appeals Judgment
9 Friday, 12 February 2016
10 (The hearing starts in open session at 4.31 p.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE HOFMAŃSKI: Good afternoon.
15 Would the court officer please call the case.
16 THE COURT OFFICER: Thank you, Mr President.
17 This is the situation in the Republic of Kenya in the case of The Prosecutor versus
18 William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11.
19 We are in open session, Mr President.
20 PRESIDING JUDGE HOFMAŃSKI: Thank you very much.
21 My name is Piotr Hofmański and I am the Presiding Judge of the appeal arising from the
22 case of the Prosecutor against William Samoei Ruto and Joshua Arap Sang. The other
23 Judges of the Appeals Chamber on this appeal are Judge Fernández de Gurmendi,
24 Judge Christine Van den Wyngaert, Judge Howard Morrison and Judge Péter Kovács.
25 May I ask the parties and participants to introduce themselves for the record, starting with

1 the Office of The Prosecutor, please.

2 MS BRADY: Good afternoon, your Honour. Helen Brady, senior appeals counsel,
3 appearing on behalf of the Prosecution, and I'm here today with Mr Anton Steynberg,
4 senior trial lawyer, Mr Matthew Cross, appeals counsel, and Mr George Mugwanya,
5 appeals counsel. Thank you.

6 PRESIDING JUDGE HOFMAŃSKI: Thank you very much.

7 And Defence for Mr Ruto.

8 MR KHAN: Mr President, good afternoon. Mr Ruto is represented by myself
9 Karim Khan of Queen's Counsel, along with Mr Essa Faal, Dato' Shyamala Alagendra to
10 my right, our legal assistants Ms Shalini Jayaraj, Ms Clara Rodriguez, Ms Grace Sullivan.
11 And at the back are our two hard-working interns, Ms Farah Mahmood and
12 Mr Bart van Hattum. Thank you.

13 PRESIDING JUDGE HOFMAŃSKI: Thank you very much.

14 Defence for Mr Sang.

15 MS BUISMAN: Good afternoon, Mr President. My name's Caroline Buisman, I'm here
16 representing Joshua Arap Sang together with Marie-Ange Ukwigize and Cynthia Bondi.

17 PRESIDING JUDGE HOFMAŃSKI: Thank you very much.

18 And Legal Representative for Victims please.

19 MR MAWIRA: Good afternoon, Mr President. This is James Mawira. I'm the case
20 manager for the Legal Representatives for Victims.

21 PRESIDING JUDGE HOFMAŃSKI: Thank you very much.

22 Today the Appeals Chamber is delivering its judgment on the appeals of Mr Ruto and
23 Mr Sang against the decision of Trial Chamber V(A) entitled, "Decision on Prosecution
24 request for admission of prior recorded testimony" rendered on 19 August 2015. In
25 today's summary, I will refer to the decision as the impugned decision.

1 I shall now summarize the Appeals Chamber's judgment, which was taken unanimously.
2 The summary is not part of the written judgment, which is only authoritative account of
3 the Appeals Chamber's ruling and reasons. The written judgment will be made available
4 to the parties and participants at the conclusion of this hearing.

5 By way of procedural background, the present appeals arose out of a request by the
6 Prosecutor filed on 29 April 2015 to admit prior recorded testimony of a number of
7 witnesses for the truth of its contents under amended Rule 68 of the Rules of Procedure
8 and Evidence, or alternatively under Article 69, paragraphs 2 and 4 of the Statute.

9 Following responses by the accused and the receipt of further oral submissions from the
10 parties and participants, the Trial Chamber rendered, on 19 August 2015, the impugned
11 decision. It decides to grant in part the Prosecutor's request to admit prior recorded
12 testimony into evidence pursuant to amended Rule 68, paragraph 2(c) and (d) of the
13 Rules.

14 On 10 September 2015, the Trial Chamber granted Mr Ruto's and Mr Sang's requests for
15 leave to appeal the impugned decision in relation to seven issues.

16 On 5 October 2015, Mr Ruto and Mr Sang filed their documents in support of the appeal
17 and on 26 October 2015 the Prosecutor and the victims submitted their responses to the
18 documents in support of the appeal. On 12 October 2015, the Appeals Chamber granted
19 the African Union's request for leave to make observations under Rule 103 of the Rules,
20 which were then filed.

21 I shall now turn to the merits of the present appeals.

22 In relation to the first ground of appeal, Mr Sang and the African Union submit that Court
23 officials gave undertakings to Kenya that amended Rule 68 of the Rules would not be
24 applied to the present case. The African Union also contends that certain State Parties
25 made unilateral declarations to the same effect.

1 In her response, the Prosecutor submits that she did not give any such undertakings. In
2 addition, the Prosecutor and the victims contend that the allegations raised by Mr Sang
3 and the African Union do not show an error in the impugned decision.

4 As explained in more detail in its judgment, the Appeals Chamber considers that neither
5 the text of amended Rule 68 of the Rules nor the resolution of Assembly of States Parties
6 adopting the amendment make any reference to the amended Rule not applying to a
7 specific case or to pending cases more generally.

8 The Appeals Chamber notes the emphasis placed by the drafters of the amended Rule of
9 Article 51, paragraph 4 of the Statute and finds that the text of the resolution expressly
10 contemplates that amended Rule 68 of the Rules may be applied retroactively, provided it
11 would not be to the detriment of the suspect or the accused.

12 Furthermore, the Appeals Chamber notes that no specific evidence has been produced to
13 support the assertion that the explicit undertaking was given by the Court officials.

14 Neither is there evidence available reflecting a general intention by the States Parties that
15 amended Rule 68 should not apply to a specific case.

16 Finally, in relation to the alleged statement by some State Parties during the negotiation of
17 amended Rule 68 regarding their understanding of the non-retroactive application of that
18 provision, the Appeals Chamber observes that no documentary evidence is available to
19 support the conclusion that other States agree to or otherwise endorsed these alleged
20 statements. In addition, such agreement cannot be presumed from their silence.

21 Accordingly, the Appeals Chamber does not find anything in the drafting history of
22 amended Rule 68 of the Rules to reveal an error in the conclusion of the Trial Chamber
23 that the amended Rule may apply in this case, subject to a consideration of the
24 requirements of Article 51, paragraph 4 of the Statute.

25 Turning to the arguments relevant to the Article, Mr Ruto and Mr Sang submit further

1 under the first ground of appeal that the Trial Chamber erred in finding that Article 24,
2 paragraph 2 of the Statute only applies to amendments to provisions of substantive law
3 and that Article 51, paragraph 4 would be redundant if Article 24, paragraph 2 of the
4 Statute covered all amendments to the Rules.

5 Mr Ruto and Mr Sang also argue that the Trial Chamber erred in finding that amended
6 Rule 68 was applied neither retroactively, nor to the detriment of the person who is being,
7 inter alia, prosecuted as set out in Article 51, paragraph 4 of the Statute.

8 Mr Ruto and Mr Sang submit that the Trial Chamber erred in finding that the Rule did not
9 have retroactive effect because the Prosecutor's request was, in the opinion of the Trial
10 Chamber, not seeking to alter anything which the Defence has previously been granted or
11 been entitled to as a matter of right.

12 Mr Ruto and Mr Sang further argue that the Trial Chamber erred by failing to undertake a
13 case-by-case analysis in order to determine that the detrimental effect of the Rule change.
14 They further submit that detriment is established when the situation of a person in an
15 ongoing case is altered to his or her disadvantage, damage or harm.

16 In their responses, both the Prosecutor and the Victims argue that Article 24, paragraph 2
17 of the Statute only relates to substantive law and that it does not apply to the present case.
18 Therefore, they argue that the Trial Chamber did not err in considering only Article 51,
19 paragraph 4 of the Statute.

20 The Prosecutor further submits that while Article 51, paragraph 4 of the Statute applies to
21 amended Rule 68 of the Rules, its use was not prohibited in this case because the
22 application of amended Rule 68 was neither retroactive nor to the detriment of the
23 accused.

24 The Prosecutor argues that for the sake of legal certainty and fairness, Article 51,
25 paragraph 4 of the Statute requires an abstract assessment of detriment. She also submits

1 that the Trial Chamber correctly interpreted the notion of detriment based upon a
2 standard of whether the fair trial rights of the accused would be prejudiced, rather than
3 one which merely considered disadvantage of the accused. The Victims contend that
4 there is no detriment to the accused on account of the mere introduction of the evidence.
5 In its judgment, the Appeals Chamber considers that in light of its clear wording,
6 Article 51, paragraph 4 of the Statute is applicable to the circumstances of the present case.
7 And it further finds that, in principle, Article 24, paragraph 2 of the Statute concerns
8 substantive law.

9 The Appeals Chamber finds that, even assuming that the law applicable referred to in
10 Article 24, paragraph 2 of the Statute could potentially include certain procedural law as
11 well as substantive law, this provision is not applicable to the amendments of the Rules
12 which are governed by the specific provisions of Article 51, paragraph 4 of the Statute.
13 Therefore, the Appeals Chamber finds no error in the Trial Chamber's conclusion that
14 Article 51, paragraph 4, of the Statute is the appropriate provision to consider in the
15 circumstances of the present case.

16 Turning to the issue of whether amended Rule 68 was applied retroactively, the Appeals
17 Chamber considers that in order to determine whether a procedural rule has been applied
18 retroactively, it is necessary to determine the point in time at which the procedural regime
19 governing the proceedings became applicable to the parties and in particular to the
20 accused.

21 For reasons explained in more detail in its judgment, the Appeals Chamber considers that
22 at the commencement of the trial there was a clear procedural regime with respect to the
23 introduction of prior recorded testimony on which the accused could rely. Therefore, the
24 Appeals Chamber finds that, in the case at hand, the date of the start of the trial is the
25 appropriate point at which the procedural regime governing the proceedings became

1 applicable to the accused. Accordingly, the Appeals Chamber finds that the amended
2 Rule 68 of the Rules was applied retroactively in the ongoing trial proceedings within the
3 meaning of Article 51, paragraph 4 of the Statute.

4 The Appeals Chamber observes that the Trial Chamber appears to have based its
5 interpretation of detriment on prejudice to the rights to the accused. However, there is
6 no indication in Article 51, paragraph 4 of the Statute that detriment is meant to be purely
7 limited to prejudice to the rights of the accused. The Appeals Chamber further notes that
8 the text of Article 51, paragraph 4 of the Statute differs from that of the equivalent
9 provision at the ad hoc tribunals, which expressly refers to the rights of the accused.

10 For these reasons, the Appeals Chamber considers that the term "detriment" should be
11 interpreted broadly and not be limited to prejudice to the rights of the person who is
12 being prosecuted. The Appeals Chamber finds that "detriment" within the meaning of
13 Article 51, paragraph 4 of the Statute is disadvantage, loss, damage or harm to the
14 accused, including, but not limited to, the rights of that person.

15 In that regard, the Appeals Chamber stipulates that it is not any disadvantage caused by
16 the detriment of a rule that is sufficient for a finding of detriment under Article 51,
17 paragraph 4 of the Statute. Detriment in the sense of Article 51, paragraph 4 of the
18 Statute needs to meet a certain threshold, which is that the overall position of the accused
19 in the proceedings be negatively affected by the disadvantage.

20 The Appeals Chamber notes at the outset of the Prosecutor's argument that the challenged
21 evidence would have been admissible under Article 69, paragraph 2 and 4, or under
22 Article 69, paragraph 3 of the Statute, even before the amendment to Rule 68 of the Rules
23 took effect. For reasons fully explained in its judgment, the Appeals Chamber considers
24 that Rule 68 of the Rules is an exception to the principle of orality enshrined in Article 69,
25 paragraph 2 of the Statute.

1 The Appeals Chamber notes that Rule 68 of the Rules, former and current, sets out certain
2 scenarios in which prior recorded testimony may be admitted into evidence. It follows
3 that where the specific circumstances of a case fall within the parameters set out in Rule 68
4 of the Rules, the legal requirements of that provision must be observed for the prior
5 recorded testimony to be admissible. If those requirements are not met, recourse to
6 Article 69, paragraph 2 and 4 of the Statute is not permissible given that such a course of
7 action would render Rule 68 of the Rules meaningless and would enable the party seeking
8 the introduction of the evidence to avoid the stringency of the latter provision.

9 As regards the Prosecutor's further argument in relation to Article 69, paragraph 3 of the
10 Statute, the Appeals Chamber notes that the Trial Chamber did not address the issue of
11 whether the evidence could have been admitted under Article 69, paragraph 3 before the
12 amendment, or Rule 68 in the impugned decision, nor was Article 69, paragraph 3 of the
13 Statute a part of the relief sought by the Prosecutor in her alternative request for
14 admission.

15 As such, any determination as to whether the evidence would or would not have been
16 admitted under Article 69, paragraph 3 of the Statute is wholly speculative and therefore
17 the Prosecutor's argument in this regard will not be considered further.

18 The Appeals Chamber notes that Article 51, paragraph 4 of the Statute refers to
19 application of an amendment to the Rules. It follows that the assessment of detriment
20 pursuant to this Article involves not only an analysis of the amended law, but also how
21 that law was applied in a particular case.

22 The Appeals Chamber considers that the submissions of Mr Ruto and Mr Sang that they
23 have suffered detriment, while relevant, cannot, without more, be determinative of
24 whether the amended Rule was applied in the present case to the detriment of the
25 accused.

1 The Appeals Chamber notes that the prior recorded testimony admitted into evidence
2 under amended Rule 68 in the present case would not have been admissible under former
3 Rule 68 of the Rules. Accordingly, in the case at hand, incriminatory evidence was
4 admitted that could not previously have been introduced in written form.

5 The Appeals Chamber considers that the prior recorded testimony was admitted without
6 any proper opportunity for the accused to cross-examine the witness.

7 The Appeals Chamber notes that some witnesses testified in court and recanted the
8 content of their prior recorded testimony. In these circumstances, even if the accused
9 had an opportunity to question the witness because they appeared before the Court, the
10 Appeals Chamber considers that, in the absence of the Prosecutor eliciting incriminating
11 evidence from the witness in examination-in-chief, such questioning does not amount to a
12 meaningful cross-examination. It follows that evidence was admitted for the truth of its
13 contents in circumstances in which those witnesses denied the allegations made in that
14 evidence and meaningful cross-examination was not possible.

15 In conclusion, the Appeals Chamber finds that the application of the amended Rule
16 resulted in: First, additional exceptions to the principle of orality and restrictions on the
17 right to cross-examine witnesses; and second, as a consequence, the admission of evidence,
18 not previously admissible in that form under former Rule 68 of the Rules or Article 69,
19 paragraph 2 and 4 of the Statute, which could be used against the accused in Article 74
20 decision. Considering these disadvantages, the Appeals Chamber finds that the
21 application of this rule affected negatively the overall position of Mr Sang and Mr Ruto in
22 the proceedings at hand. Accordingly, the Appeals Chamber holds that the Trial
23 Chamber applied amended Rule 68 of the Rules retroactively to the detriment of the
24 accused.

25 In applying the amended Rule, the Trial Chamber committed legal errors in interpreting

1 the notion of detriment too narrowly, in finding that the Rule had not been applied
2 retroactively and in finding that this had not been detrimental to the accused. As it
3 would not have been open to the Trial Chamber, for the reasons outlined above, to admit
4 the evidence under the former Rule, the Appeals Chamber considers that the Trial
5 Chamber's errors materially affected the impugned decision.

6 In light of the Appeals Chamber's conclusion in respect of the first ground of appeal, the
7 Appeals Chamber need not address the remaining grounds of appeal.

8 For these reasons, the Appeals Chamber decides to reverse the impugned decision to the
9 extent that prior recorded testimony was admitted under amended Rule 68 of the Rules
10 for the truth of its contents.

11 And this concludes my summary of the judgment.

12 I thank the interpreters, the court reporters.

13 And the session is now closed.

14 THE COURT USHER: All rise.

15 (The hearing ends in open session at 4.57 p.m.)