

Trial Hearing  
Witness: KEN-OTP-P-0743

(Open Session)

ICC-01/09-01/11

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  
5 and Joshua Arap Sang - ICC-01/09-01/11  
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera-Carbuccia  
7 and Judge Robert Fremr  
8 Trial Hearing  
9 Wednesday, 28 January 2015  
10 (The hearing starts in open session at 9.39 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 Court officer, please call the case.  
16 THE COURT OFFICER: (Interpretation) Thank you, your Honour.  
17 Situation in the Republic of Kenya, in the case of The Prosecutor versus William  
18 Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11.  
19 We are in open session.  
20 PRESIDING JUDGE EBOE-OSUJI: Thank you.  
21 Appearances.  
22 MR STEYNBERG: Good morning, Mr President. Good morning, your Honours.  
23 The Prosecution remains the same.  
24 PRESIDING JUDGE EBOE-OSUJI: Thank you.  
25 MR NARANTSETSEG: Good morning, your Honours. On our side the same.

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1 Thank you.

2 PRESIDING JUDGE EBOE-OSUJI: Thank you.

3 MR KIGEN-KATWA: Good morning, your Honours. Mr Sang's team remains the  
4 same and Mr Sang is present. Thank you.

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

6 MS ALAGENDRA: Good morning, Mr President, your Honours. For the record  
7 Mr Ruto is not present in court, he has been excused. Otherwise the Defence team  
8 remains the same.

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

10 And Mr (Redacted)?

11 MR (Redacted): (Via video link) Good morning, Mr President. And good  
12 morning to everyone else.

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

14 Witness, welcome back.

15 In a moment Ms Alagendra will continue, but so that we are managing our time well,  
16 Mr Steynberg, so far do you anticipate re-examination so far, and if so, how long do  
17 you think that would take?

18 MR STEYNBERG: Your Honours, I do have some issues I would like to clarify.

19 I don't imagine it would take more than half an hour, 45 minutes at the outset, at the  
20 utmost.

21 PRESIDING JUDGE EBOE-OSUJI: At the utmost. So, so far we can budget for 45  
22 minutes for you. It doesn't mean you use 45 minutes because, as we've done before,  
23 if we feel that the questions need not be asked, we will not let you, but we can budget  
24 45 minutes for you.

25 Ms Alagendra, as we ruled earlier, you have to finish by Thursday, and when we say

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1 Thursday we mean within that time we must also make allowance for re-examination,  
2 that means Thursday minus 45 minutes for Mr Steynberg. Do you understand that?

3 MS ALAGENDRA: I do, your Honour, and I will comply.

4 PRESIDING JUDGE EBOE-OSUJI: And we will not, just so you know, we will not  
5 be extending it. Okay.

6 One other matter the Chamber wishes to -- private session, please.

7 \*(Private session at 9.43 a.m.) Reclassified as Open session

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- 13 Q. Your Honours, perhaps this is a convenient time to break?
- 14 PRESIDING JUDGE EBOE-OSUJI: Yes. We will take our morning break now,
- 15 Witness. We will come back in 30 minutes.
- 16 The Court will rise.
- 17 THE COURT USHER: All rise.
- 18 (Recess taken at 10.57 a.m.)
- 19 (Upon resuming in open session at 11.37 a.m.)
- 20 THE COURT USHER: All rise.
- 21 Please be seated.
- 22 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 23 We're in open session, Ms Alagendra. Back to private, private session.
- 24 \*(Private session at 11.37 a.m.) Reclassified as Open session
- 25 (Redacted)

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Witness: KEN-OTP-P-0743

(Private Session)

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15 (Redacted)

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22 PRESIDING JUDGE EBOE-OSUJI: And that will be a good place to stop, and we  
23 will return at 2.30.

24 Witness, our lunch-break time. We'll see you at 2.30 our time.

25 Court will rise.

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1 THE COURT USHER: All rise.

2 (Recess taken at 12.59 p.m.)

3 (Upon resuming in open session at 2.37 p.m.)

4 THE COURT USHER: All rise.

5 Please be seated.

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

7 Witness, welcome back.

8 Ms Alagendra, we're in open session.

9 MS ALAGENDRA: Your Honours, if we can go into private session, and it will be, I  
10 think, possibly just 10 minutes in private, then we can come back into an open session,  
11 your Honour.

12 PRESIDING JUDGE EBOE-OSUJI: Private session.

13 \*(Private session at 2.38 p.m.) Reclassified as Open session

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

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4 MS ALAGENDRA: Your Honours, we can go into an open session.

5 PRESIDING JUDGE EBOE-OSUJI: Open session.

6 (Open session at 3.00 p.m.)

7 THE COURT OFFICER: (Interpretation) We are in open session, Mr President.

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

9 Ms Alagendra, the last thing you put to the witness, where is that?

10 MS ALAGENDRA: It's not in the bundle, your Honours. It's an extract from a  
11 witness interview of the person. I can provide the ERN where it comes from.

12 PRESIDING JUDGE EBOE-OSUJI: Yes, please.

13 MS ALAGENDRA: It's the interview of 9 August 2010, and it's KEN-OTP-0059-0447.

14 And this appears at page 0476, from lines 1012 to 1027.

15 PRESIDING JUDGE EBOE-OSUJI: So it's not in your bundle?

16 MS ALAGENDRA: No, your Honours.

17 PRESIDING JUDGE EBOE-OSUJI: Not the OTP bundle?

18 MS ALAGENDRA: No, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: Next time try putting the thing in the bundle so  
20 we can see it.

21 MS ALAGENDRA: I will do so, your Honour.

22 Q. Mr Witness, we are now in --

23 PRESIDING JUDGE EBOE-OSUJI: Yes. Witness, we're in open session now. And  
24 remember what I told you. I know we've been in private session for a long time.

25 We're now in the open session, so listen carefully to the question, just respond to that

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1 question and wait. If you need to make any clarification to an answer, let us know  
2 so we will remember to go into private session. We do not want you to give  
3 unintentionally an answer that will reveal your identity. Do you understand?

4 THE WITNESS: Yes, your Honour.

5 PRESIDING JUDGE EBOE-OSUJI: All right.

6 Proceed, Ms Alagendra.

7 One second, please.

8 (Trial Chamber confers)

9 PRESIDING JUDGE EBOE-OSUJI: Proceed please.

10 MS ALAGENDRA:

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12 (Redacted)

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- 1 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 2 (Redacted)
- 3 (Redacted)
- 4 (Redacted)
- 5 (Redacted)
- 6 (Redacted)
- 7 (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 MS ALAGENDRA: Your Honours, perhaps we can go into private.
- 11 PRESIDING JUDGE EBOE-OSUJI: We will go to private.
- 12 \*(Private session at 3.07 p.m.) Reclassified as Open session
- 13 (Redacted)
- 14 (Redacted)
- 15 (Redacted)
- 16 (Redacted)
- 17 (Redacted)
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7 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

8 Mr Steynberg, we don't want to have a mock trial exercise. There needs to be a

9 purpose to it. You've heard my question to Ms Alagendra, and she's saying she's

10 doing all of this because you may still insist that this witness may be used as a witness

11 to convict her client.

12 MR STEYNBERG: Your Honours, I've already stated during an earlier question

13 from the Bench that I would find it extremely difficult to argue that this -- any of this

14 witness's evidence should be accepted except where corroborated by other acceptable

15 evidence. So I think that that should provide sufficient guidance for my learned

16 friend.

17 MS ALAGENDRA: Your Honours, unfortunately, it doesn't. As your Honours had

18 pointed out earlier, my learned friend still has one foot in there, and we have to go

19 through this exercise.

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Trial Chamber confers)

25 PRESIDING JUDGE EBOE-OSUJI: Ms Alagendra, it seems clear from the Prosecutor

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1 that from his representations that he's not going to rely on this witness's testimony as  
2 such. Yes, he does say that except where the questions of corroboration; I'm not sure  
3 that that means that we have to dwell at large with every question that occurs to you  
4 as a line of question to demonstrate the lack of credibility of this witness on the charge  
5 against your client. The point is you can proceed, but we need some moderation.

6 MS ALAGENDRA: Your Honours, in light of what your Honours has said, could  
7 we request that we adjourn the examination for today so that we could reconsider our  
8 approach with this witness? And we will continue tomorrow morning and we may  
9 complete earlier, but definitely within the time that's been allocated to us, your  
10 Honour.

11 PRESIDING JUDGE EBOE-OSUJI: Within the time that has been allocated.

12 MS ALAGENDRA: Yes.

13 PRESIDING JUDGE EBOE-OSUJI: Indeed.

14 MS ALAGENDRA: Yes, your Honours. And, your Honour, if you will allow us,  
15 Mr Khan has a separate matter to raise with your Honours.

16 (Trial Chamber confers)

17 PRESIDING JUDGE EBOE-OSUJI: Audio feed back on for the witness.

18 THE COURT OFFICER: (Via video link) The audio is back on, Mr President.

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

20 Witness, it is now 20 minutes to 4. We ordinarily adjourn at 4. But we will be  
21 letting you off now, and we will continue tomorrow. Do you understand?

22 THE WITNESS: Yes, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 Court officer, you may escort the witness or usher him out of the room. Thank you.

25 THE COURT OFFICER: (Via video link) Yes, Mr President.

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1 (The witness escorted out of the video-link room)

2 THE COURT OFFICER: (Via video link) Mr President, the witness has been  
3 escorted out of the transmission room.

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

5 Mr Khan, before you speak on this, on the matter you have in mind --

6 (Redacted)

7 (Redacted)

8 MS ALAGENDRA: Yes, your Honours.

9 PRESIDING JUDGE EBOE-OSUJI: Good.

10 Mr Khan then.

11 MR KHAN: Mr President, I'm grateful. I'm not going to be too long, but I thought  
12 it really incumbent upon me to raise certain concerns with the Bench, both as a matter  
13 of record so the record is accurate and also to make sure that with the next witness we  
14 are not confronted with what we say is significant disadvantage. And the significant  
15 disadvantage to which I refer once again is what I have previously described as a  
16 disclosure regime in the OTP which is not fit for purpose. Your Honour, this witness  
17 has brought that once again to the fore.

18 Your Honour, we were handed or we were given before lunch a 14-page document

19 (Redacted)

20 (Redacted) That, of course, was disclosed after the

21 Prosecution's examination-in-chief and more than four or five years after the events  
22 themselves.

23 There has been no explanation offered for this disclosure breach. It's unjustified, but  
24 it's not in isolation, because, your Honour, what we have seen with this witness is that

25 (Redacted)

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13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 MR KHAN: (Redacted)

22 (Redacted)

23 Your Honour, just looking at this one witness we see a disclosure system which is

24 simply not working. It's not the case that the Defence get disclosure when witnesses

25 point out they have given things that have not been disclosed to the Defence. The

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1 disclosure system must be, we have every right to expect it to be free standing and for  
2 the Prosecution to disclose that which the Statute requires them to disclose. Your  
3 Honours, we've asked previously for the Prosecution to have a disclosure officer;  
4 that's been ruled upon. We've previously said the disclosure system has not worked.  
5 That's been endorsed, so to speak, by the Prosecution and by in fact the judiciary of  
6 this Court in the other Kenya situation and in judicial comment.  
7 Your Honour, despite these very blatant indicia or very blatant evidence that the  
8 system is broken and not fit for purpose, it does seem with the greatest of regret that  
9 it's business as usual in the OTP, and we are presented in the course of  
10 cross-examination with documents like a 14-page (Redacted)  
11 (Redacted)  
12 Your Honour, it's not good enough, and I am concerned, and I want the record to  
13 have that put in those clearest terms. It's the duty of the Prosecution to make sure  
14 they discharge their statutory obligations. So far we say they're not, and this  
15 instance of this witness brings that into the starkest relief.  
16 Your Honours, we don't want to revisit this once again in relation to the next witness,  
17 and of course, we don't know whether or not this flawed disclosure regime has  
18 already denied us, denied us evidence in relation to past witnesses. One is not filled  
19 with confidence given the state of play that we observe as far as disclosure practises  
20 are concerned in the OTP.  
21 Your Honours, I just bring it to the Bench's attention for the record. I'm grateful.  
22 PRESIDING JUDGE EBOE-OSUJI: Thank you.  
23 Mr Steynberg, do you need to react?  
24 MR STEYNBERG: Well, my learned friend has not sought any relief. And I've been  
25 given once again no notice of this request. So any response I might make would be

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1 hamstrung by those two factors.  
2 (Redacted)  
3 (Redacted)  
4 (Redacted)  
5 (Redacted)  
6 (Redacted)  
7 (Redacted)  
8 (Redacted)  
9 (Redacted)  
10 (Redacted) your Honours,  
11 the first observation I have to make is that relevance is an evolving concept. What  
12 may be relevant at one point in a trial or what may not be relevant at one point in a  
13 trial may become relevant at a later stage as a result, for instance, of what witnesses  
14 say during their evidence.  
15 The Prosecution maintains that (Redacted) is disclosable. If we  
16 have to disclose (Redacted)  
17 (Redacted)  
18 (Redacted)  
19 (Redacted), my learned friends would be buried under an avalanche of irrelevant  
20 disclosure we say which would be of no beneficial to them -- no benefit to them and a  
21 significant burden on the Prosecution.  
22 (Redacted)  
23 (Redacted)  
24 (Redacted)  
25 (Redacted)

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8 (Redacted)  
9 (Redacted)  
10 (Redacted)  
11 (Redacted)  
12 (Redacted)  
13 (Redacted)  
14 (Redacted) But in respect of the rest, your  
15 Honours, I respectfully submit that my learned friend is really exaggerating the issue  
16 to a large extent.  
17 MR KHAN: Mr President, may I say with your leave just three things? And indeed  
18 I'll try it, in fact, rather than to exaggerate to put a lid on it and to be exceptionally  
19 restrained.  
20 (Redacted)  
21 (Redacted)  
22 (Redacted)  
23 Your Honour, despite those questions and the answer given by the witness  
24 mentioning (Redacted), we didn't get disclosure in (Redacted) or any  
25 time until after the witness took the oath and had been questioned by the Prosecution.

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4 (Redacted)

5 (Redacted)

6 Upon asking that question, my learned friend, we say, had a statutory obligation to  
7 give the Defence disclosure because, of course, he thought that examination-in-chief  
8 was relevant, he had a basis for those questions; the Defence should not have been  
9 kept in the dark.

10 And, your Honour, one does say that a system cannot be improved unless a party  
11 accepts there is flaws. And one does not see any acceptance unfortunately of flaws  
12 and that's part of the problem.

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 So, your Honour, unless a party is willing to say they're not perfect, there is no room  
25 for improvement, because there is no problem. We say there is a massive problem,

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1 and the jurisprudence of this Court shows there is a problem. Your Honour, I think  
2 the record should reflect that. We really can do no more, because we have to work  
3 with what we are given by the OTP.

4 Your Honours, I'm grateful for the time. It's appreciated.

5 PRESIDING JUDGE EBOE-OSUJI: Indeed, we have to leave it at that. As you say,  
6 you raise it for the record. And the OTP, Mr Steynberg said he wasn't forewarned  
7 about your comments and yet he has reacted. And his reaction is not satisfactory to  
8 you obviously. You will know what to do at the end of the case if you feel that there  
9 had been serious obligations of disclosure that had infected the prospect of a fair trial.  
10 That would be your prerogative to make the necessary move, legal move that is called  
11 for in the circumstances.

12 You do raise a concern that you do not know whether you have got all the disclosures  
13 that were due to you in respect of other witnesses who have already testified. One  
14 understands why Defence counsel may feel justified or not in making -- in having that  
15 kind of concern. The Chamber only needs to reiterate that disclosure is a continuing  
16 obligation. And the Prosecution we trust understand that they're not here to win a  
17 case but to do justice. So we will leave it at that for now.

18 MR KHAN: I'm grateful.

19 MR KIGEN-KATWA: Mr President, my issue is completely different.

20 PRESIDING JUDGE EBOE-OSUJI: Yes.

21 MR KIGEN-KATWA: Yes, and I wish the mood was different. Mr President, I just  
22 wanted to mention that our case manager is retiring back to New Zealand, and I  
23 thought I should mention and wish her well in what she goes and does in New  
24 Zealand. Thank you, Mr President. Her name is Honor Lanham.

25 PRESIDING JUDGE EBOE-OSUJI: Yes. We try not to -- we've said this to the

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(Private Session)

ICC-01/09-01/11

- 1 Prosecutor off record before. Observation, of course, we wish everyone the best in
- 2 their professional career, be it Mr Garcia's promotion, but we prefer to communicate
- 3 things like this by email so we can also react to such felicitations. We try to keep
- 4 those things off the record.
- 5 Again, we wish Ms Lanham well and congratulations to Mr Garcia.
- 6 The Chamber will rise.
- 7 THE COURT USHER: All rise.
- 8 \*(The hearing ends in private session at 3.56 p.m.) Reclassified as Open session
- 9 RECLASSIFICATION REPORT
- 10 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
- 11 2013, the version of the transcript with its redactions becomes Public.