

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09-01/11 OA 5

Date: 20 August 2013

THE APPEALS CHAMBER

Before:

**Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka**

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF THE PROSECUTOR v. WILLIAM SAMOEI RUTO AND
JOSHUA ARAP SANG**

Public document

Decision on the request for suspensive effect

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for Mr William Samoei Ruto
Mr Karim A. A. Khan
Mr David Hooper

Counsel for Mr Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Silas Chekera

REGISTRY

Registrar
Mr Herman von Hebel

AS

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber V(a) entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial” of 18 June 2013 (ICC-01/09-01/11-777),

Having before it the “Prosecution appeal against the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” of 29 July 2013 (ICC-01/09-01/11-831), in which a request pursuant to article 82 (3) of the Statute is made,

Renders unanimously the following

DECISION

The request for suspensive effect is granted.

REASONS

I. PROCEDURAL HISTORY

1. On 18 June 2013, Trial Chamber V(a) (hereinafter: “Trial Chamber”), by majority,¹ Judge Herrera Carbuccion dissenting,² granted the request of William Samoei Ruto (hereinafter: “Mr Ruto”) for permission not to be continuously present in Court during his trial, with the exception of specified hearings, in order to enable him to perform his functions, as Deputy President of Kenya, while remaining personally subject to the jurisdiction of the Court for purposes of the inquiry into his individual criminal responsibility in respect of the crimes over which the Court has jurisdiction (hereinafter: “Impugned Decision”).³

¹ “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, ICC-01/09-01/11-777.

² “Dissenting Opinion of Judge Herrera Carbuccion”, ICC-01/09-01/11-777-Anx2.

³ Impugned Decision, paras 1-3.

2. On 18 July 2013, the majority of the Trial Chamber,⁴ Judge Eboe-Osuji dissenting,⁵ granted the Prosecutor leave to appeal the Impugned Decision under article 82 (1) (d) of the Statute.

3. On 29 July 2013, the Prosecutor filed her document in support of the appeal⁶ (hereinafter: “Document in Support of the Appeal”), in which she, *inter alia*, requests that suspensive effect be granted under rule 156 (5) of the Rules of Procedure and Evidence, if the Appeals Chamber is unable to resolve the appeal before Mr Ruto’s trial commences on 10 September 2013. The Prosecutor submits that implementation of the Impugned Decision, which would excuse Mr Ruto from attending his trial after the opening statements have been delivered, would defeat the purpose of the appeal, as the trial would commence on the basis of an incorrect legal framework and, as a consequence, the proceedings would be tainted.⁷ The Prosecutor further submits that implementation of the Impugned Decision “would create an irreversible situation that could not be corrected” and would lead to consequences that “would be very difficult to correct and may be irreversible”, if the Impugned Decision were overturned and trial had to restart in Mr Ruto’s presence.⁸ Specifically, the Prosecutor indicates that witnesses who would testify in Mr Ruto’s absence may be unwilling or unable to return to testify again and as a result the Prosecutor would be deprived of part of her evidence.⁹

4. On 8 August 2013, Mr Ruto filed his response to the Document in Support of the Appeal¹⁰ (hereinafter: “Response to the Document in Support of the Appeal”). Mr Ruto submits that the Prosecutor’s request for suspensive effect should be dismissed.¹¹ Mr Ruto indicates that it is likely that the Appeals Chamber will render a decision in a “period which proves negligible when compared with the likely overall length of the actual trial” and that the Prosecutor herself “argues that absences of

⁴ “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’”, ICC-01/09-01/11-817.

⁵ “Dissenting Opinion of Judge Eboe-Osuji”, ICC-01/09-01/11-817-Anx.

⁶ “Prosecution appeal against the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’”, ICC-01/09-01/11-831 (OA 5).

⁷ Document in Support of the Appeal, para. 41.

⁸ Document in Support of the Appeal, para. 42.

⁹ Document in Support of the Appeal, para. 42.

¹⁰ “Defence response to the ‘Prosecution appeal against the “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial””, dated 8 August 2013 and registered on 12 August 2013, ICC-01/09-01/11-846 (OA 5).

¹¹ Response to the Document in Support of the Appeal, para. 42.

limited duration are permissible”.¹² Mr Ruto submits that a “detailed, unequivocal waiver signed by Mr. Ruto regarding the effects of any absence has already been lodged with the Court” and that this will “ensure that proceedings are safeguarded and will not be vitiated even if the appeal were to ultimately succeed”.¹³

II. MERITS

5. Article 82 (3) of the Statute provides:

An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

6. The Appeals Chamber recalls that the decision to order that an appeal has suspensive effect is discretionary and that, “when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances”.¹⁴ The Appeals Chamber has summarised the circumstances in which it has previously exercised its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) “would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant”, (ii) would lead to consequences that “would be very difficult to correct and may be irreversible”, or (iii) “could potentially defeat the purpose of the appeal”.¹⁵ [footnotes omitted.]

7. In this instance, for the purposes of accommodating the discharge of Mr Ruto’s duties as the Deputy President of Kenya, the Trial Chamber excused Mr Ruto from continued presence during the trial, with the exception of specified hearings at which his attendance is required.¹⁶ The Impugned Decision states that the presence of the accused during the trial is the “default position” and that the Trial

¹² Response to the Document in Support of the Appeal, para. 41.

¹³ Response to the Document in Support of the Appeal, para. 3.

¹⁴ *Prosecutor v. Mathieu Ngudjolo Chui*, “Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect”, 20 December 2012, ICC-01/04-02/12-12 (OA), para. 18, referring to previous jurisprudence.

¹⁵ *Prosecutor v. Germain Katanga*, “Decision on the request for suspensive effect of the appeal against Trial Chamber II’s decision on the implementation of regulation 55 of the Regulations of the Court”, 16 January 2013, ICC-01/04-01/07-3344 (OA 13), para. 6, referring to previous jurisprudence.

¹⁶ Impugned Decision, para. 104.

Chamber's "grant of the Defence request for Mr Ruto's excusal from continuous presence during the trial is an exception to the general rule".¹⁷

8. The Appeals Chamber recalls that, as far as article 82 (3) of the Statute is concerned, "[s]uspension involves the non-enforcement of a decision, the subject of an appeal".¹⁸ Therefore, without prejudice to the Appeals Chamber's ultimate decision on the merits of the Prosecutor's appeal, the grant of suspensive effect of the Impugned Decision would result in Mr Ruto being required to be present during the trial, pending the final determination of the Prosecutor's appeal.

9. For purposes of the present decision, the Appeals Chamber notes that the Impugned Decision dictates that Mr Ruto is required to be physically present in the courtroom at, *inter alia*, those hearings at which the opening statements of all parties and participants are delivered and those hearings at which victims present their views and concerns in person.¹⁹ The Prosecutor indicates that Mr Ruto's trial is currently scheduled to commence on 10 September 2013.²⁰ Therefore, if the Impugned Decision were to be implemented, Mr Ruto's absence from the trial would be permitted, in principle, following the delivery of the opening statements. Notably, Mr Ruto's presence would not be required at hearings at which witnesses are scheduled to testify, unless his attendance is otherwise specifically mandated by the Trial Chamber.²¹

10. The Appeals Chamber notes the Prosecutor's concerns regarding the trial proceeding on the basis of an incorrect legal framework and the difficulties that may arise should witnesses who testified in Mr Ruto's absence be unwilling or unable to return to testify again, if the Impugned Decision were to be overturned and the trial had to restart in Mr Ruto's presence.²² In all the circumstances of this case, the Appeals Chamber finds that the consequences of implementing the Impugned Decision prior to the issuance of the judgment on the Prosecutor's Appeal, would be difficult to correct and may be irreversible and that suspension of the Impugned

¹⁷ Impugned Decision, para. 104.

¹⁸ *Prosecutor v. Joseph Kony et al.*, "Decision on the Prosecutor's 'Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review'", 13 July 2006, ICC-02/04-01/05-92 (OA), para. 3.

¹⁹ Impugned Decision, para. 104.

²⁰ Document in Support of the Appeal, para. 40.

²¹ Impugned Decision, p. 52.

²² Document in Support of the Appeal, para. 42.

Decision is warranted. At this stage, the Appeals Chamber does not consider it appropriate to address the issue of whether the waiver signed by Mr Ruto would adequately safeguard proceedings in his absence, as this question forms part of the subject matter of the appeal.

11. Accordingly, and without prejudice to the Appeals Chamber's eventual decision on the merits of the Prosecutor's appeal against the Impugned Decision, the Request for Suspensive Effect is granted.

Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
on behalf of the Presiding Judge

Dated this 20th day of August 2013

At The Hague, The Netherlands