



Original: **English**

No.: ICC-01/09-01/11

Date: **23 September 2013**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding
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***

**URGENT
Public**

Defence request for reconsideration of the “Decision on the request for suspensive effect” and variation of time limits pursuant to Regulation 35 of the Regulations of the Court

Source: Defence for Mr. William Samoei Ruto

Document 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. James Stewart, Deputy Prosecutor
 Mr. Anton Steynberg, Senior Trial
 Lawyer

Counsel for William Ruto

Mr. Karim A.A. Khan QC
 Mr. David Hooper QC
 Mr. Essa Faal
 Ms. Shyamala Alagendra

Counsel for Joshua Sang

Mr. Joseph Kipchumba Kigen-Katwa
 Ms. Caroline Buisman

Legal Representatives of the Victims

Mr. Wilfred Nderitu

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for
Victims**

Ms. Paolina Massida

**The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr. Herman von Hebel

Counsel Support Section**Deputy Registrar****Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other
Trial Chamber V(A)**

I. Introduction

1. The Appeals Chamber is currently seized of the *Prosecution's appeal against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"* ("Appeal").¹
2. In the Appeal, the Prosecutor, *inter alia*, requested that the Appeals Chamber suspend the effect of the impugned decision.² On 20 August 2013, the Appeals Chamber issued the "Decision on the request for suspensive effect" ("Decision")³ in which the Chamber granted the Prosecutor's request. As a result, and as observed by the Trial Chamber this morning, currently "it has no discretion to continue the trial in Mr. Ruto's absence".⁴
3. As the Appeals Chamber is aware, there is an on-going terrorist attack taking place in a shopping mall in Nairobi. This attack – which started on Saturday 21st September 2013 and continues at the time of filing - has left scores dead and a huge number of people injured. In view of this situation, Trial Chamber V(A) issued an urgent decision this morning permitting Mr. Ruto to be excused from proceedings for a period of one week (subject to review) in order to return to Kenya to attend to his constitutional duties.
4. Given that: (i) the Appeal remains pending before the Appeals Chamber; (ii) the interests of victims and witnesses are implicated by the present situation; and (iii) the stated preference of Trial Chamber V(A) and the Victims and Witnesses Unit ("VWU") is that the testimony of P-0536 continues notwithstanding the absence of Mr. Ruto,⁵ the defence for Mr. William Samoei Ruto ("Defence") respectfully requests that the Appeals Chamber reconsider the Decision.

¹ ICC-01/09-01/11-831.

² Appeal, para. 40.

³ ICC-01/09-01/11-862.

⁴ Draft Transcript, Part 2, 23 September 2013, p. 8, lines 20-21.

⁵ *Ibid*, p. 7, lines 17-25; p. 8, lines 11-15.

II. Applicable Law

5. According to this Court's jurisprudence, reconsideration of a decision may be appropriate where the applying party shows "*new facts or circumstances that may influence that decision*",⁶ or when decisions "*are manifestly unsound and their consequences are manifestly unsatisfactory*".⁷

III. Submissions

6. The tragic events currently unfolding in Kenya throw into relief the problems posed by the Appeal and the Decision in terms of conducting this trial in an efficient and practical manner. These events constitute "*new facts or circumstances*" which demonstrate that reconsideration of the Decision is warranted to avoid unsatisfactory and unintended consequences such as delays in proceedings or interruptions to the testimony of witnesses. In the instant case, the interests of victims and witnesses are clearly implicated as the current witness' testimony cannot proceed despite the clear preference of the witness and, indeed, the VWU, that it do so.
7. The Defence observes that Mr. Ruto's excusal is warranted in the circumstances. The internal security docket falls under the responsibility of the Deputy President of the Republic of Kenya. In this regard, *Al-Shabab* presents a real and present danger to the security of the Republic of Kenya and the region. The excusal granted by the Trial Chamber to Mr. Ruto has facilitated Kenya's ability to respond in the most effective and focused manner to the terrorist threat currently underway and its immediate aftermath and consequences by permitting Kenya's democratically elected Deputy Head of State to return home to attend to these matters of State and national security.

⁶ *Prosecutor v. Bemba*, Trial Chamber III, Public Redacted Version of the Decision on the "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo" of 2 September 2011, 6 September 2011, ICC-01/05-01/08-1691-Red, para. 17.

⁷ *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 18.

8. While Mr. Ruto's excusal may be warranted, the Defence submits that this should not mean that the trial cannot continue in his absence, at the very least during the period in which the Appeal is pending. The witness on the stand wishes to continue, the Trial Chamber wishes to continue, VWU wishes to continue and the Defence wishes to continue.⁸
9. The Defence recalls its previous submissions regarding the practical and legal effect which Mr. Ruto's absence will have on proceedings and again points to the precedent provided by the *Bemba* case which provides assurance that proceedings can continue in the absence of an accused without serious consequences for the integrity of proceedings.⁹ Plus Mr. Ruto has provided a detailed and unequivocal waiver.¹⁰
10. Lifting the suspensive effect of the impugned decision, will leave the attendance or otherwise of Mr. Ruto to the discretion of the Trial Chamber consistent with its statutory duties including those set out in Article 64 of the Rome Statute. In the present circumstances, the Defence submits that this result will correctly balance all the competing interests presently at issue in a fair and efficient manner.

IV. Request pursuant to Regulation 35(2) of the Regulations of the Court

11. The Defence also respectfully requests that the time limit for filing responses to this request be shortened pursuant to Regulation 35(2) of the Regulations of the Court ("Regulations"). The Defence submits that "good cause" exists for the shortening of the response time limit given that it is in the interests of the administration of justice and of all parties and participants to resolve this matter as soon as possible. Further, the Trial Chamber has determined that Mr. Ruto may only be excused from trial proceedings for one week, subject to review.

⁸ In relation to the stated clear preference of the Trial Chamber, the Presiding Judge noted that, in light of, "in particular, the impact an adjournment may have on the current witness and other witnesses expected to testify immediately after her, the preference of the Chamber would be to continue the testimony of Witness 536 and to proceed with the testimony of the upcoming witnesses as recommended by the VWU" (see Draft Transcript, Part 2, p. 8, lines 11-15).

⁹ ICC-01/09-01/11-846, paras. 39-41.

¹⁰ ICC-01/09-01/11-782.

V. Relief Requested

12. For the reasons stated above, the Defence respectfully requests that the Appeals Chamber reconsider the Decision.

13. The Defence also respectfully requests that the Appeals Chamber, pursuant to Regulation 35(2) of the Regulations, shorten the deadline for responses to this request.

Respectfully submitted,



Karim A.A. Khan QC
Lead Counsel for Mr. William Samoei Ruto

Dated this 23rd Day of September 2013
At The Hague, The Netherlands