

Situation in the Republic of Kenya

The Prosecutor v. William Samoei Ruto and

Joshua Arap Sang

ICC-01/09-01/11

Questions and answers arising from the decision of no-case to answer in the case of *Prosecutor v Ruto and Sang*

1. WHY WAS THE CASE STOPPED?

The case stopped, because at the end of the case for the prosecution, the Defence requested the Chamber to terminate the case and acquit the accused, on the basis that the evidence presented by the prosecution was weak.

2. WAS THE DEFENCE REQUEST UNUSUAL?

No. Although it was the first time that such a request was made in a case at the ICC, it is really a generally available request in many national jurisdictions, as well as at the ICTR and the ICTY. In some jurisdictions, it is known as a 'submission or motion of no case to answer'. In other jurisdictions it is called 'submission or motion for directed verdict of acquittal' or 'request for judgment of acquittal' or 'motion for non-suit'. It goes by various names. But the objective of the motion and the essential elements of the procedure are the same.

3. DID THE CHAMBER ACCEPT THE SUBMISSIONS OF THE DEFENCE?

Partly. The Chamber by majority accepted that the case for the prosecution was weak and, therefore, the case should be terminated. To that extent, the Defence submissions were successful. But the Defence submissions were not successful as regards granting judgments of acquittal. The Chamber declined to enter a judgment of acquittal. In particular, the Chamber made it clear that the case could be prosecuted afresh in future.

4. HOW MANY OPINIONS DID THE JUDGES DELIVER IN THIS CASE?

There were three judges in the case. Each of them delivered a separate opinion.

5. IF THE THREE EXPRESSED THEMSELVES DIFFERENTLY, WHAT THEN WAS THE DECISION OF THE CHAMBER?

The Chamber's decision was by majority. Judge Eboe-Osuji (the presiding judge) and Judge Fremr were in the majority. They agreed that the evidence presented in the prosecution case was weak and that the case should be terminated as a result; but that a judgment of acquittal should not be entered. Judge Herrera Carbuccion delivered a dissenting opinion.

6. IS THERE A DIFFERENCE BETWEEN TERMINATING THE CASE AND NOT ENTERING A JUDGMENT OF ACQUITTAL?

There is a difference, and it is legally significant. A judgment of acquittal means that an accused person has been found to be 'not guilty' of the crimes charged against him or her. In many jurisdictions, including before the ICC, such a finding may prevent the future prosecution of the accused again for the same crimes. But, in terminating the case against Mr Ruto and Mr Sang, it was made clear that they could be prosecuted afresh in future.

7. WHY DID THE CHAMBER MAJORITY DECLINE TO ENTER A JUDGMENT OF ACQUITTAL?

Judge Eboe-Osuji was of the view that, because there was evidence which suggested that witnesses had been interfered with and because there had been political interference in a manner that was likely to have intimidated witnesses, the case should be declared a mistrial, leaving by that the possibility for a future prosecution afresh. Although Judge Fremr expressed a preference for entering an acquittal, he accepted that there had been witness interference and political meddling which the accused had profited from even though there was no evidence of their personal involvement in it. He therefore accepted that the special circumstances of the case justified leaving open the opportunity to re-prosecute the accused.

8. WAS THE CHAMBER ITSELF INTIMIDATED BY THE POLITICAL MEDDLING?

Not at all. The Chamber had noted on various occasions that it was not impressed by conducts that amounted to political meddling and that the Chamber itself would not be swayed in any way by such manner of interference or other external pressures.

9. IS IT CORRECT TO UNDERSTAND THAT THE EFFECT OF THE WITNESS INTERFERENCE OR POLITICAL MEDDLING WAS THE TERMINATION OF THE CASE?

No. That is an incorrect understanding. The case was not terminated because of witness interference or political meddling that was likely to have intimidated witnesses. The case was terminated because the majority of the judges had accepted the Defence submission that the prosecution evidence had been too weak to justify continuing the trial. The effect that the witness interference and political meddling had on the Chamber's decision was that it prevented the Chamber from granting Mr Ruto and Mr Sang outright acquittals, although the majority had accepted the Defence arguments that the prosecution case had been weak.

10. BUT WHY WAS THAT IMPORTANT IN RELATION TO THE DECISION ON THE DEFENCE MOTION OF NO CASE TO ANSWER?

It was considered important, because, as Judge Eboe-Osuji explained it, if the case for the prosecution was weak, he needed to be sure that the weakness in the prosecution case was not as a result of witness interference and political intimidation of witnesses.

11. DID THE CHAMBER MAJORITY DECLARE A 'MISTRIAL'?

No. Of the two judges in the Majority, only Judge Eboe-Osuji considered that a 'mistrial' was the right way to describe what had occurred. His colleague, the Judge Fremr, specifically declined to describe it as a 'mistrial'.

12. WHAT IS A 'MISTRIAL'?

In some national jurisdictions, a mistrial occurs when a judge brings a trial to an end without a determination on the merits (or deciding the ultimate question of whether or not the accused person is guilty as charged), because of serious procedural error that irreparably damaged the integrity of the proceedings; or because the circumstances under which the proceedings took place were such that it was impossible to conduct a free and fair trial.

13. WHEN JUDGE EBOE-OSUJI CONCLUDED HIS REASONING BY SAYING THAT HE WOULD DECLARE A MISTRIAL 'DUE TO TROUBLING INCIDENCE OF WITNESS INTERFERENCE AND INTOLERABLE POLITICAL MEDDLING' DOES THIS NOT MEAN THAT THE CHAMBER TERMINATED THE CASE BECAUSE THE CHAMBER HAD BEEN AFFECTED BY 'INTOLERABLE POLITICAL MEDDLING'?

No. As Judge Eboe-Osuji had very clearly explained in his reasons, what made the political meddling critical was its likelihood of resulting in the intimidation of prosecution witnesses and their families. It was made equally clear that the Chamber itself was untroubled and impervious to the political meddling.

14. DID THE JUDGES BLAME THE ACCUSED FOR THE WITNESS INTERFERENCE OR POLITICAL MEDDLING?

No. The Prosecutor never alleged that there was evidence of personal involvement of either accused in the witness interference or political meddling that could intimidate witnesses. The judges did not find such evidence either.

15. SHOULDN'T AN OUTRIGHT ACQUITTAL HAVE BEEN A MORE JUST RESULT, IF THE JUDGES FOUND NO EVIDENCE OF PERSONAL INVOLVEMENT OF THE ACCUSED IN THE WITNESS INTERFERENCE OR POLITICAL MEDDLING THAT COULD INTIMIDATE WITNESSES?

Judge Eboe-Osuji and Judge Fremr were very much alive to that question, but they decided that a judgment of acquittal was not the more just result. Judge Eboe-Osuji considered, first, that the evidence of personal involvement of the accused in the interference might have produced a more severe consequence for the accused. This is because such evidence might have been a basis not only to find that the accused had a case to answer, but also might have been a basis for conviction. Furthermore, Judge Eboe-Osuji considered (with examples given) that a mistrial can be declared in a case, even though the accused could not be blamed for the procedural error or wrongful circumstances that irreparably damaged the integrity of the proceedings or made it impossible to conduct a free and fair trial. Judge Fremr did not believe declaring a mistrial was appropriate under the circumstances, but he accepted that the special circumstances of the case made it appropriate to leave open the opportunity to re-prosecute the accused, should any new evidence that was not available to the Prosecution during the trial warrant such a course of action.

16. WHAT HAPPENS TO THE ACCUSED NOW?

The accused are no longer the subject of legal proceedings against them before the ICC. If the Prosecutor were to find new evidence, she would have to apply to the Pre-Trial Chamber in order to have the charges confirmed again.

17. IS THE ICC'S INVOLVEMENT WITH KENYA OVER?

No. In addition to the possibility that the Prosecutor may prosecute the accused afresh in future, the Prosecutor may also continue her investigations into allegations of witness interference and bring charges under article 70 of the Statute.

There is also nothing to prevent other individuals from being charged with responsibility for the post-election violence before the ICC.

18. WILL THE TERMINATION OF THE CASE AGAINST MR RUTO AND MR SANG BRING TO AN END THE ICC'S INVOLVEMENT WITH THE WITNESSES WHO GAVE EVIDENCE DURING THE TRIAL?

No. The witnesses who testified in this case and who are under the protection of the Court will continue to be protected by the Court.

19. WILL THE VICTIMS GET REPARATION?

Since the Chamber did not convict either accused, the Chamber is not in a position to issue reparation award against them. However, Judge Eboe-Osuji, in his separate opinion, specifically left open certain questions concerning the possibility that the Government of Kenya or the international community should address the harm to the victims of the post-election violence, either as a matter of the obligation of the Government or as a matter of grace from either quarter. This reflection however is not part of the Chamber majority's decision.

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