

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 23 November 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Decision appointing a common legal representative of victims

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for William Samoei Ruto
Mr Kioko Kilukumi Musau
Mr David Hooper

Legal Representatives of Victims
Ms Sureta Chana
Mr Wilfred Nderitu

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Joel Kimutai Bosek
Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Chamber”) of the International Criminal Court in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (“Ruto and Sang case”), pursuant to Article 68(3) of the Rome Statute (“Statute”), Rule 90 of the Rules of Procedure and Evidence (“Rules”), Regulations 67 and 80 of the Regulations of the Court (“Regulations”) and Article 17(1)(c) of the Code of Professional Conduct for Counsel renders the following Decision appointing a common legal representative of victims.

1. On 3 October 2012, the Chamber issued its Decision on victims’ representation and participation (“Decision”), establishing the procedure and modalities for the representation and participation of victims in the *Ruto and Sang* case, setting criteria and providing guidelines to the Registry for the selection of a common legal representative for the trial phase of the case, and directing the Registry to submit a recommendation for the position of common legal representative to the Chamber within 30 days.¹ The Chamber also requested the Registry and the Office of Public Counsel for Victims (“OPCV”) to consult and submit, within 14 days, a joint proposal on the responsibilities and effective functioning of the new system of common legal representation.²
2. On 17 October 2012, the Registry and the OPCV each filed separate reports with the Chamber, submitting that they were unable to reach agreement regarding the division of responsibilities and effective functioning of the common legal representation system.³

¹ ICC-01/09-01/11-460.

² ICC-01/09-01/11-460, page 33.

³ OPCV’s Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System, 17 October 2012, ICC-01/09-01/11-462 with Public Annex and Registry’s Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System, 17 October 2012, ICC-01/09-01/11-463 with confidential annex 1, confidential *ex parte* annex 2 and public annexes 3 and 4.

3. On 5 November 2012, after conducting its selection process, the Registry filed its recommendation for the position of common legal representative of victims.⁴ The Registry also reported the steps taken during the selection process in order to arrive at its recommendation, including (i) a request for expression of interest sent to all lawyers on the Registry list of counsel and to the Law Society of Kenya; (ii) an initial review of the candidates who provided the information requested; (iii) an evaluation of written answers to questions on their proposed approach to the legal representation of victims; and (iv) a telephone interview.⁵
4. With regard to the current common legal representative of victims, Ms Sureta Chana, who was interviewed on the same basis as the other shortlist candidates, the Registry reported that she confirmed that she remained interested and available to represent victims in the case but indicated that she was unable to relocate to Kenya during the trial.⁶ Ms Chana additionally submitted that she did not believe that it was desirable for the common legal representative to be based in Kenya and that she could carry out her duties as common legal representative without maintaining a personal presence there.⁷ The Registry concluded that Ms Chana remained a “strong and suitable candidate” but questioned whether her unwillingness to maintain an ongoing personal presence in Kenya would “render the entire system envisaged by the Chamber unworkable.”⁸ Accordingly, the Registry recommended Ms Chana to the Chamber as a “viable option” and proposed an alternative candidate in the event that the Chamber determined that an ongoing presence in Kenya was a mandatory requirement.⁹

⁴ Recommendation for the position of Common Legal Representative of victims, 5 November 2012, ICC-01/09-01/11-467 with public annex 1 and confidential *ex parte* annexes 2, 3 and 4.

⁵ ICC-01/09-01/11-467, paras 1 – 13.

⁶ ICC-01/09-01/11-467, paras 14 – 15 and ICC-01/09-01/11-467-Conf-Exp-Anx2.

⁷ ICC-01/09-01/11-467-Conf-Exp-Anxs 2 and 3.

⁸ ICC-01/09-01/11-467-Conf-Exp-Anx3, para. 6.

⁹ ICC-01/09-01/11-467-Conf-Exp-Anx3, para. 13.

5. The Chamber has considered Ms Chana's application and noted her submissions regarding the requirement to be based in Kenya. The Chamber re-iterates that it considers this requirement to be very important to the overall functionality of the role envisaged for the common legal representative in the new system established by the Chamber in its Decision.¹⁰ For this reason, the Majority, Judge Eboe-Osuji dissenting, concludes that whilst Ms Chana demonstrates the required skills, knowledge and experience required for the position, her application cannot be accepted. The Chamber expresses its gratitude to Ms Chana for her service to the case thus far.
6. The alternative candidate proposed to the Chamber for the position of common legal representative is Mr Wilfred Nderitu. The Registry states that Mr Nderitu fulfils all of the criteria set out in the Decision and is willing to maintain an ongoing presence in Kenya.¹¹ The Registry has also provided the Chamber with Mr Nderitu's curriculum vitae and expression of interest.¹² The Chamber notes that Mr Nderitu has direct relevant experience for the position, including familiarity with international criminal law practice, knowledge of Kenya, familiarity with the case and experience in interacting with victims, including in the context of the post-election violence in Kenya.
7. On the basis of the criteria identified by the Chamber in its Decision and upon evaluation of the personal information and professional skills of Mr Nderitu, the Majority hereby decides to appoint Mr Wilfred Nderitu as common legal representative of all victims in the *Ruto and Sang* case.
8. With respect to the assistance to be provided by the OPCV to the common legal representative, it is the Chamber's view that victims should benefit from the highest-quality representation that is possible in the circumstances – both generally and in the

¹⁰ ICC-01/09-01/11-460, para. 60.

¹¹ ICC-01/09-01/11-467-Conf-Exp-Anx3, paras 10 – 12.

¹² ICC-01/09-01/11-467-Conf-Exp-Anx4.

courtroom. It is that consideration that primarily guides the Chamber's appointment of common legal representative for victims. It is neither the Chamber's desire nor intent to appoint such counsel and yet prevent him or her from representing victims in the manner warranted by their best interests, including making such appearances in the courtroom that are necessary in the circumstances. But the representation of the best interest of the victims will in many cases require that the common legal representative be in the field attending to the best interests of victims, while court proceedings are in progress. In such situations, it will be necessary for the common legal representative to be represented by members of the OPCV. The Chamber observes that the Registry appears to have interpreted the Decision to require the OPCV to provide staff fulfilling the qualifications of "counsel" within the meaning of Regulation 67 of the Regulations.¹³ The Chamber notes that, according to the Decision, the OPCV "will be acting on behalf of the Common Legal Representative when appearing before the Chamber".¹⁴ Equally, the Chamber recalls that the Decision provides for the common legal representative to appear in person upon request and at critical junctures involving victims' interests. As such, the Chamber is of the view that although the representative or representatives of the OPCV acting on behalf of the common legal representative in Court should have significant relevant courtroom experience, the representative or representatives of the OPCV need not fulfil the requirements of "counsel" within the meaning of Regulation 67 of the Regulations. Instead, at a minimum, they should fulfil the requirements for assistant counsel under Regulation 68 of the Regulations and Regulation 124 of the Regulations of the Registry.¹⁵ In such instances, the rule of 10-year post qualification standing prescribed in Regulation 67 should not operate to prevent any OPCV staff member from appearing on behalf of the common legal representative any more than the 10-year

¹³ ICC-01/09-01/11-463, paras 12 – 20.

¹⁴ ICC-01/09-01/11-460, para. 44.

¹⁵ See ICC-01/09-01/11-462, paras 18 – 19.

rule stands in the way of any counsel appearing to represent the Prosecutor or the lead Defence Counsel in a case.

9. In order to ensure the effective functioning of the common legal representation system, the common legal representative and the OPCV are directed to undertake discussions regarding their cooperation.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

TERMINATES Ms. Chana's appointment as common legal representative of victims in the *Ruto and Sang* case;

APPOINTS Mr Wilfred Nderitu as common legal representative of victims in the *Ruto and Sang* case;

DIRECTS the common legal representative and the OPCV to undertake discussions regarding their cooperation.

Judge Eboe-Osuji appends his dissenting opinion.

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



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 23 November 2012

At The Hague, The Netherlands

DISSENTING OPINION OF JUDGE EBOE-OSUJI

1. I am of the firm view that victims should benefit from the highest-quality representation that is possible in the circumstances—both in general and in the courtroom. It is that consideration that should primarily guide the appointment of counsel for victims. It is counter-productive to appoint such counsel and yet prevent him or her from representing the victims in the manner warranted by their best interests. Such top quality counsel should be able to make, with leave of the Chamber, such appearances in the courtroom as are necessary in the circumstances. But the representation of the best interests of the victims and the efficient conduct of litigation will in many cases require that the common legal representative be in the field attending to other aspects of the victims' interests, while court proceedings are in progress. In such situations, it will be necessary for the counsel for victims to be represented by members of the OPCV, under the same considerations that permit the Prosecutor or lead Defence Counsel to be represented by other counsel, bearing in mind the division of labour indicated by the Chamber in the decision of 3 October 2012 on victims' representation and participation.¹ To the extent that the Chamber's decision conveys the same message, I am in agreement.

2. But I disagree with the Chamber's decision that relieves from retainer counsel that has been representing victims all along and who has indicated a continuing interest so to do. And not to be ignored is that counsel's Kenyan nationality and her familiarity with the country.

3. In the decision of 3 October 2012, the Chamber had expressed the view that in the present case certain indicated objectives '*may best* be achieved with a Common Legal Representative based in Kenya.'² [Emphasis added.] But that was not an isolated pronouncement. Rather, the Chamber had, in that connection, pointed to a 'balance' that the Chamber 'must find' among a number of objectives. Those objectives 'include' the following in particular: '(a) the need to ensure that the participation of victims, through their legal representative, *is as meaningful as possible*, as opposed to purely symbolic; (b) the purpose of common legal representation, which is not only to represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial; (c) *the Chamber's duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity*; and (d) *the Chamber's obligation under Article 68(3) of the Statute to*

¹ *Prosecutor v Ruto and Sang (Decision on Victims' Representation and Participation)*, 3 October 2012, ICC-01/09-01/11-460, paras 40—44.

² *Ibid*, para 60.

*ensure that the manner in which victims participate is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.*³[Emphases added.]

4. In my view, it is very sensible to say that the balancing of these objectives—that the Chamber ‘must find’—‘*may best be achieved*’ if the victims’ representative is based in Kenya. But aside from those particular objectives and their balancing, it is a matter of eminent common sense to prompt a public functionary, who is assigning counsel to clients on legal aid, to consider that it *may be best* for lawyers to be based in a location that makes them more easily accessible to the clients they represent. This, of course, is without prejudice to the right of a fee-paying client to prefer, for whatever reason, that her lawyer be located as far away from her as possible.

5. I do not, however, consider that the Chamber’s statement that the indicated objectives ‘*may best be achieved*’ if the victims’ counsel is based in Kenya should now be applied as a peremptory edict that overrides all other considerations—that is to say, that counsel for victims *must* be based in Kenya *for the duration of the trial* or else be effectively disqualified. There may be circumstances in which the termination of victims’ counsel’s retainer, as was done in the Chamber’s decision, on grounds of failure or inability to commit to *full-time* location in Kenya *at all times* ‘may’ not be the ‘best’ thing that is required by the objectives indicated by the Chamber in the decision of 3 October 2012. That then makes willingness to reside in Kenya for lengthy periods one important factor—but not always the overriding one—to be taken into account in the appointment of counsel who will effectively represent the best interests of the victims. Indeed, the Chamber had indicated as much when it gave the following direction to the Registry: ‘In selecting a candidate, the Registry should consider the candidate’s knowledge of the details of the case and of the specific situation of the victim community and the candidate’s willingness and ability to maintain an ongoing presence in Kenya throughout the course of the proceedings.’⁴ The factor of willingness to be based in Kenya at all times for the duration of the case was not there indicated as exclusive or overriding. The Chamber had additionally directed the Registry to take into account an ‘established relationship of trust with the victims or ability to establish such a relationship,’⁵ among other things.

³ ICC-01/09-01/11-460, para 59.

⁴ *Ibid*, para 61.

⁵ *Ibid*.

6. Hence, one other important factor that must then be given its due weight is longstanding familiarity with the case as it has thus far been litigated at the Court. Longstanding familiarity becomes particularly important given the history of the case, the case file and records thus far generated and the date set for the commencement of trial. In those circumstances, one could readily see how most if not all of the objectives indicated by the Chamber in the 3 October 2012 decision are better achieved by assignment of counsel who have longstanding familiarity with the case and are able to maintain an otherwise sufficiently effective presence in Kenya, though not able to be based there on a full-time basis and at all times.

7. In my view, that factor of longstanding familiarity with the case was not given its due weight in the decision of the Chamber, given the availability and continuing interest of the long-serving victims' counsel whose retainer the Chamber has now terminated. I further note, as indicated earlier, that the counsel in question is a citizen of Kenya and is familiar with it, though she is now based in the UK on a full-time bases. Although unwilling to commit to be based in Kenya on a full-time basis and at all times, it is my view that her shared nationality with the victims and her familiarity with the country are factors that particularly enhance her already important advantage of longstanding familiarity with the case. They ought to have been weighed by the Chamber in favour of her continued representation of the victims.

8. I would have had no difficulty joining the Chamber, as I did in the decision on the second case,⁶ had all the candidates who had expressed interest been equally lacking in longstanding familiarity with the case. In that event, willingness to be based in Kenya on full-time basis for the duration of the case would have its obvious significance in light of the Chamber's decision of 3 October 2012.

Dated this 23 November 2012, at The Hague



Chile Eboe-Osuji
Judge

⁶ ICC-01/09-02/11-537.