

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 March 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
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***

**Confidential
DISSENTING OPINION OF JUDGE EBOE-OSUJI**

Confidential redacted version of the "Decision on the request of the Prosecution for review of the Registrar's decision regarding Witness 24"

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 the Defence
For William Samoei Ruto :
Mr. David Hooper
Mr. Kioko Kilukumi Musau
For Joshua Arap Sang :
Mr. Joseph Kipchumba Kigen-Katwa
Mr. Silas Chekera

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia, Registrar

Defence Support Section

Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

DISSENTING OPINION OF JUDGE EBOE-OSUJI

(to the Decision of the Majority dated 5 March 2013)

1. I am unable to agree with my highly esteemed colleagues in the Majority in their decision. Their decision ignores or downplays critical considerations that ought to be taken into account. In view of those considerations, I would quash the Registrar's decision and order her to re-evaluate the assistance afforded the witness.

2. It is certainly not my desire readily to direct the Registrar as to the precise quantum of assistance to give to any particular witness in the ICC's protection programme. The Registrar deserves a margin of appreciation or curial deference in carrying out that part of her functions.

3. I am, however, unable to ignore what are, in my view, significant rational flaws implicated in the mind-set that moved the VWU's decision, made on behalf of the Registrar. The flaws hinged on (i) the VWU's presumption of bad faith against the witness; and (ii) their failure to take into account critical factors, that not only may have negated that presumption of bad faith, but would also have indicated a decision that is more objectively supported as reasonable.

4. The VWU's submissions largely indicated their presumption that what motivated this witness in taking the position that culminated in the Prosecution's current application was the witness's inclination to take improper advantage of the ICC process, to enhance his own station in life—and to hold the Court and its functionaries hostages for that purpose. In support of this presumption, the VWU cited the timing of the witness's request [REDACTED]. That suspicious timing, according to the VWU, is the psychological period during which the Prosecution must finalise the disclosure of the witness's identity as a confirmed witness for the Prosecution. As the Registrar's representative put it during the hearing of 6 February 2013:

Now, in we put ourselves within the specific framework of what we are talking about here, *we're a few days before disclosure*, so it's the last time that an individual will have the means in order to request or demand something and this is something which I'm not very comfortable with. *If it had been asked for last year, well, no, it happens now; now at the time where we have come to disclosure.* So of course we have to take that into account as well. *So I don't want to be a hostage, or I don't think the Court should be held hostage in this regard, of somebody who manifestly could take advantage of this window of opportunity that's opened up in order to receive certain means, and*

if we open the door to this then we have a massive amount of witnesses for the moment, so this is going to have to be applied to others.¹ [Emphasis added.]

5. The difficulty with this presumption of bad faith against the witness is that the Prosecution did effectively contradict it. The Prosecution informed the Chamber in the presence of the VWU that, contrary to the VWU allegation, the witness had in fact been complaining about the really serious hardship in his living conditions under the witness protection programme, well before the psychological period. The witness's cry for help dates as far back as May and September *last year*²—and not just 'a few days' to the deadline for the Prosecution's disclosure obligation—when the witness complained about hard times and made a request [REDACTED]. He may not have, prior to January this year, communicated his request in the precise terms of a request [REDACTED]; but he had, according to the Prosecution, been complaining about his economic dire straits well before January this year. Indeed, during the session of 6 February 2013, the Registrar's representative did appear to have acknowledged that a request was made in September last year³—i.e. before the psychological period alleged by the VWU. Notwithstanding that the request in question might not have been the specific request for [REDACTED], it was an early complaint of economic hardship that predated the period of 'just a few days' ahead of the time-limit for Prosecution's disclosure obligation.

6. That is a significant consideration in my mind. So, too, is the fact that the initial assessment of the VWU did not mention whether or not the witness is [REDACTED]. Notably, in the course of the 6 February 2013 hearing, the Chamber directed the VWU to provide that piece of information. In complying, the VWU reported that the witness apparently [REDACTED]. Yet, the VWU sought to minimise the import of that crucial piece of information by insisting that any view of the witness as now living [REDACTED] ought to be attenuated by the fact that [REDACTED]. But, the VWU does not indicate whether [REDACTED]. Either way, the provision of [REDACTED] will not attenuate the fact that he lives [REDACTED].

7. As a final consideration, the VWU did not rebut the submission of the Prosecution that [REDACTED], the witness's economic circumstances [REDACTED]. Indeed, the assessment of the VWU made [REDACTED] tends towards the corroboration of that suggestion. That the witness may have belonged to [REDACTED] is critical in the face of the VWU supposition that the witness is

¹ Transcript of the hearing of 6 February 2013, p 5.

² Transcript of 6 February 2013, p 20.

³ Transcript of 6 February 2013, p 23.

merely motivated by the desire to take undue advantage of the ICC process—and hold it ‘hostage’—in order to enhance his own economic station in life. That factor is truly inconvenient to the VWU submission—made in relation to this witness—as follows: ‘the protection programme cannot be used to raise the social level of somebody. That’s not the aim and it’s also not the aim to make it possible for that person to be richer than before. That’s not the aim.’⁴ It is difficult to see how this witness can be accused of seeking to use the programme to make himself ‘richer than before’, if [REDACTED].

8. In the circumstances, the VWU characterisation of the witness as a mere ICC profiteer was wholly unwarranted in my view. And the Majority have not validated that characterisation in their own decision. But, it is not enough to ignore that characterisation as if it was never made. In my view, its very making goes to the core of the reasonableness of the VWU decision. It was a significant taint on the decision. And to ignore it would be to white-wash the VWU decision.


9. In my view, witnesses who come to assist the Court, often at personal risks to themselves and their families and friends, must—as article 68(1) of the Rome Statute requires—be treated with ‘dignity’. It is one thing to accept that the Court’s witness protection programme is unable to guarantee for every witness the more dignified economic station in life (such as a lifestyle that is ‘solidly in the middle class’) to which a particular witness was accustomed before. But, it is quite another matter to make unwarranted allegations of ‘fleecing the system’, so to speak, against a witness who has objectively verifiable reasons to complain against his current economic conditions under the witness protection programme, such as [REDACTED], and who has no control over his life as such. That is to exacerbate indignity, and not its amelioration in the true spirit of article 68(1) of the Rome Statute.

⁴ Transcript of 6 February 2013, p 6.

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

Dated this 6 March 2013

At The Hague, the Netherlands



Chile Eboe-Osuji
Judge