

# REDRESS

## Kenyan Cases before the International Criminal Court (ICC)

### Case Profiles and Q&A

(For the period of June to September 2015)

#### Ruto and Sang Case - Q&A

#### 1. Can the Prosecutor use witness statements when the witness recanted his/her testimony?

**Issue:** On 19 April 2015, Prosecutor Fatou Bensouda requested that Trial Chamber V(a) admit as evidence previously recorded statements of 16 witnesses who have since either refused to testify or whose testimonies were significantly changed from the statements they had originally given to the Prosecution. The Prosecutor argued that the reason why these witnesses went back on their statements or refused to testify was because of a “scheme to intimidate and bribe them”. She used Rule 68 (c), (d) of the ICC’s Rules of Procedure and Evidence, and Article 69 of the Rome Statute, in support of her application.

Rule 68 subsection 2(c) relates to how a Trial Chamber may introduce a previously recorded testimony of a witness if that person is reasonably unable to testify or if they are dead or presumed dead. Subsection (d) relates to how a Trial Chamber may introduce into evidence a previously recorded testimony of a witness if that witness has been interfered with. Article 69 sets out how a trial chamber can admit evidence.

The lawyers for Mr Ruto and Mr Sang have argued that the Trial Chamber should reject the Prosecutor’s application. They asserted that Rule 68 was amended after the trial had already started. They thus argue that applying it in this case would violate the principle of non-retroactivity. According to this principle, a new regulation cannot be applied to past events. They also submitted that the Prosecution’s allegations of witness bribery and intimidation have not been properly tested in court.

**Decision:** On 19 August 2015, Trial Chamber V(a) granted the Prosecution’s request to use previously recorded statements of 5 of the 16 witnesses who recanted previous declarations or failed to testify. The judges disagreed, however, as to which legal provisions were applicable in reaching the decision.

All judges agreed that though the prior recorded testimonies were not made under oath, they were still taken in the ordinary course of the investigations, that the witnesses were not coerced into making the statements, and that a translation was at their disposal. Finally, the judges noted that the witnesses were fully aware that their declarations would be presented to the court as evidence.

In granting the Prosecution's request, the judges rejected the arguments of the defence. The majority of the judges were of the view that:

- The principle of non-retroactivity applies to matters of substance more than to those of procedure. In the present case, Article 68 does not fall under this principle.
- The amended Rule 68 is not applied to past events. In fact, the Prosecution's request does not seek to alter anything which the defence has previously been granted. On the contrary, the prosecution is seeking to apply the provision in the future to introduce evidence.
- Even if Rule 68 was applied to past events, it does not harm the accused because it is neutral rule which every party can use.

On 25 August 2015, the Defence teams of Mr Ruto and Mr Sang requested permission to appeal this decision. On 10 September 2015, Trial Chamber V(A) allowed the appeal to proceed to the Chamber of Appeals.

## **2. Why did Trial Chamber V(a) reject the application by the Kenyan Government to make submissions concerning the applicability of Rule 68?**

**Issue:** Rule 68 determines when witness statements that were recorded previously can be used as evidence instead of calling them to testify in court. This Rule was amended by consensus during the Assembly of State Party's (ASP) 12<sup>th</sup> session, in November 2013. Kenya lobbied to have the Kenyan cases exempt from the amended Rule. The Kenyan Government sought to make submissions on whether the Rule should be applied in the present case. Attorney General Githu Muigai argued that having participated in the 2013 negotiations the Government could help to shed light on the "negotiation and adoption of the amended Rule 68".

**Decision:** On 29 May 2015, the Trial Chamber rejected the Government's application. It stated that the observations from the Kenyan Government were not necessary nor appropriate to assist the Chamber in its legal interpretation and application of the Rule.

### **3. Why does the Prosecutor want to use witness statements that were recanted?**

The Prosecutor has given a number of reasons for the use of previously recorded statements regarding some witnesses:

- It would assist the fair evaluation of these witnesses' testimony.
- These witnesses' change of heart was due to interference by people acting for the benefit of the accused.
- Admitting their previous statements would stop the accused from trying to influence witnesses in the future. Otherwise, it would send the wrong message and encourage others to influence witnesses in the future.
- The very mission of the court to end impunity would be at risk if an accused could evade justice through improper interference with Prosecution witnesses.

### **4. What steps have been taken regarding those accused of tempering with witnesses?**

Philip Kipkoech Bett and Paul Gicheru, two people suspected of corruptly influencing witnesses have been arrested on 30 July 2015. They have been presented to the High Court in Kenya in accordance with Kenyan law. This arrest warrant was made public on 10 September 2015. A spokeswoman of the Prosecution has said these arrests were linked to the case against William Ruto.

### **5. Has the defence filed a motion for "no case to answer" yet?**

**Issue:** The defence team for Mr Ruto and Sang has not yet filed a motion for "no case to answer", which means a submission by the defence that the Prosecution did not present enough evidence for a conviction and that therefore the accused can be acquitted right away without the need to present any evidence to counter the accusations. The defence teams requested an extension of time to do this but this request was rejected by the Trial Chamber. They must file the motion within 14 days after the Prosecution finished presenting its witnesses.

### **6. What will happen next?**

With regard to the admission of the recanted testimonies:

On 25 August 2015, the defence of Mr Ruto and Mr Sang sought to appeal the court's decision which admitted the use of prior recorded testimony. On 10 September 2015, the Trial Chamber

V(A) allowed the appeal to proceed to the Appeals Chamber. As a next step, the Appeals Chamber will decide whether or not to reverse the decision regarding the admission of the recanted testimonies.

With regard to the Trial:

On 10 September 2015, the Prosecution formally closed the presentation of its evidence. The Legal Representative of Victims (LRV) can now present any relevant evidence to the court, if he decides to do so. It is not publicly known whether the LRV will do that. The trial will continue while the Appeals Chamber is deciding on the use of prior recorded testimonies.

## Kenyatta Case - Q&A

### 1. What is the decision on non-cooperation?

**Issue:** Article 93 of the Rome Statute states that all State Parties have to cooperate fully with the ICC in its investigations and prosecutions. When a State Party fails to cooperate, ICC judges may make a finding of non-cooperation and refer the matter to the Assembly of States Parties (ASP) for further action.

On 29 November 2013, the Prosecution applied for a finding of non-cooperation against the Kenyan Government, arguing that it did not comply with a cooperation request in the case against President Kenyatta.

On 3 December 2014, Trial Chamber V(B) agreed that Kenya had failed to act in good faith, and has “been somewhat complacent”. However, it did not consider it necessary to refer Kenya to the ASP. The prosecution appealed this decision on 20 March 2015.

**Decision:** On 19 August 2015, the Appeals Chamber granted the appeal and requested that the Trial Chamber rule anew.

The Appeals Chamber ruled that the Trial Chamber has the discretion to refer the case to the ASP once it found that a state was not cooperating. That means that a referral to the ASP does not have to happen automatically when a state does not cooperate. But according to the Appeals Chamber, the Trial Chamber did not clearly establish if all judicial remedies to obtain the requested evidence in Kenya have been exhausted yet. Therefore, it is not clear to the Appeals Chamber if Kenya cooperated or not. The Trial Chamber has to decide again on this.

Additionally, the Appeals Chamber found that the Trial Chamber should not have mixed the status of the criminal proceedings against Mr Kenyatta with the issues relating to the Kenyan Government’s cooperation. The Trial Chamber had denied to refer the case to the ASP because it would have delayed the trial against Mr Kenyatta. The Appeals Chamber noted that the criminal proceedings and the question of non-cooperation involve different parties: on one hand the individual, on the other hand the state. Even though there is a connection between the non-cooperation and Mr Kenyatta’s case, the interests are different. Therefore, the Appeals Chamber found that the Trial Chamber used its discretion in a wrong way and ordered the Trial Chamber to decide again if Kenya should be referred to the ASP.

## 2. What mechanisms does the ASP have in cases of non-cooperation?

According to the Assembly's Procedures Relating to Non-Cooperation, a referral to the ASP would trigger a formal public response from the ASP. The President of the ASP can issue a formal letter to the Kenyan Government, reminding it of its obligation to cooperate, and requesting its views on the matter. After the Kenyan Government has responded and explained how it would cooperate with the Court in the future, the ASP would then issue a report on the outcome of the dialogue, which could be discussed in plenary session of the next Assembly. The response of the ASP is non-judicial and the ASP does not have the mandate to impose sanctions on states but its report would be shared with the UN Security Council which could impose sanctions.

## 3. What will happen next?

Concerning the issue of non-cooperation:

The Trial Chamber has called for new observations on the issue of non-cooperation and will issue a new decision in due course.

Concerning the issue of termination of the case:

The prosecution stated that they remain open to receiving further evidence and would file new charges if the new evidence establishes the crimes and Mr Kenyatta's responsibility. There is no time limit under the Rome Statute to re-start a prosecution.

## 4. Could the case against Mr Kenyatta resume?

**YES:** The Trial Chamber indicated in December 2014 that in the event of a withdrawal of charges by the prosecution, the prosecution could at a later date bring new charges against the accused based on similar facts if sufficient evidence is available.

### 1. What submission did the victims' lawyer file against the prosecution?

On 3 August 2015, the LRV representing victims in the Kenyatta case requested Pre-Trial Chamber II to review the Prosecutor's decision to stop active investigations. He also asked the Chamber to order the prosecution to take measures to ensure effective investigations and prosecution. He accuses the prosecution of "prosecutorial surrender and inaction" and of being "ineffective". The submission is looking at the situation in Kenya in general without requesting investigations or prosecution of a specific person. The LRV is requesting the Chamber to find "that the Prosecutor failed to take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court in Kenya II".

LRV Fergal Gaynor argues that:

- The Prosecutor has raised the expectations of the victims only to disappoint them, by failing to investigate the case properly.
- The Prosecutor has failed to undertake an "effective" investigation and prosecution by not taking advantage of all measures open to her under the Rome Statute. These measures include seeking effective remedies against obstruction of justice by states or individuals, using evidence gathering powers, as well as specific investigative powers on the territory of a state. The lack of cooperation by the Kenyan Government is no excuse as the Prosecution should have requested a declaration of non-cooperation at an earlier stage.
- Unlike in the case against Mr Ruto and Mr Sang, no one has been charged for corruptly influencing witnesses in relation to the Kenyatta case.

On 25 August 2015, in its application to dismiss the LRV's claims, the Prosecutor argued that the LRV does not have power to ask for a review of the decision to withdraw the charges, only the Pre-Trial Chamber has this right. According to the Prosecution, since the reason for the withdrawal of charges was that there is insufficient evidence, the Pre-Trial Chamber does not have the power to review the Prosecutor's decision.

The Prosecution stated that it will "continue its dialogue with the victims, and [...] will continue to monitor the Kenyan situation". The Prosecutor also added that she will listen carefully to anyone who comes forward with evidence, file further applications for arrest warrants or summonses to appear if circumstances change.

## 2. Are the investigations in Kenya officially closed?

**NO:** On 25 August 2015, in its response to the LRV's request to review the decision to stop active investigations, the Prosecutor declared that she had made no decision "not to proceed" with the investigations in the Kenyan situation. Though there is no "active" investigation at present, the investigations are not officially closed. On the contrary, the Prosecutor has expressed her intention to proceed "when circumstances will enable effective investigations."



## CASE PROFILES

<b>Case Name:</b>	<b>The Prosecutor v. Uhuru Muigai Kenyatta</b>
<b>Name and position of Accused:</b>	Uhuru Muigai Kenyatta (President of the Republic of Kenya since April 2013)
<b>Procedural History:</b>	<p>On <b>31 March 2010</b>, the Prosecution’s request to open investigations against Kenyatta, Francis Kirimi Muthaura (former Public Service Chief) and Mohammed Hussein Ali (former Commissioner of the Kenya Police) was granted.</p> <p>On <b>23 January 2012</b>, Pre-Trial Chamber II confirmed the charges against Kenyatta and Muthaura. The Chamber did not confirm the charges against Ali because the Prosecution had not presented enough evidence to connect the Kenyan Police to the attacks carried out. The proceedings against Ali were terminated.</p> <p>On <b>11 March 2013</b>, the Prosecution withdrew the charges against Muthaura because there was not sufficient evidence to prove the charges “beyond a reasonable doubt”. The Prosecution indicated that this was the result of the loss of a key witness who had withdrawn his/her testimony. This witness claimed to have received bribes from the accused in the case. In addition, other potential witnesses had died and the Kenyan Government failed to cooperate to gather evidence in Kenya. As a result, on <b>18 March 2013</b>, Trial Chamber V terminated the proceedings against Muthaura.</p> <p>Even though the Trial Chamber had scheduled the trial to begin on 11 April 2013 it has not started yet. On <b>5 September 2014</b>, the Prosecution<sup>1</sup> requested that the trial be adjourned indefinitely until the Kenyan Government fulfilled the request for cooperation.</p> <p>On <b>10 September 2014</b>, the defence opposed the Prosecution’s request for a further adjournment and requested the Chamber to terminate the proceedings against Kenyatta. The requests were discussed in court on <b>8 October 2014</b>.</p> <p>On <b>5 December 2014</b>, the Prosecutor withdrew the charges against</p>

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<sup>1</sup> ICC-01/09-02/11-944.

	<p>Kenyatta which led to the termination of the proceedings by the Trial Chamber on <b>13 March 2015</b>.</p>
<p><b>Alleged Facts:</b></p>	<p>The Pre-Trial Chamber found that there are substantial grounds to believe that:</p> <ul style="list-style-type: none"> <li>• From 24 until 28 January 2008, the Mungiki criminal organisation allegedly carried out a widespread and systematic attack against the non-Kikuyu population perceived as supporting the Orange Democratic Movement (ODM) (mostly belonging to Luo, Luhya and Kalenjin ethnic groups) in Nakuru and Naivasha.</li> <li>• The attacks in or around Nakuru and Naivasha resulted in a large number of killings, displacement of thousands of people, rape, severe physical injuries, mental suffering and destruction of property.</li> <li>• Between at least November 2007 and January 2008, Muthaura, Kenyatta and members of the Mungiki, allegedly created a common plan to commit these attacks. According to the alleged plan, it was envisaged that the Mungiki would carry out the attack with the purpose of keeping the (PNU) in power. In exchange, the Mungiki were allegedly promised an end to government repression and protection of their interests.</li> <li>• The contribution of Kenyatta to the implementation of the common plan was allegedly essential. More specifically, Kenyatta’s contribution allegedly consisted of providing institutional support, on behalf of the PNU Coalition, to secure the agreement with the Mungiki for the purpose of the commission of the crimes and for the execution on the ground of the common plan by the Mungiki in Nakuru and Naivasha.</li> </ul>
<p><b>Charges:</b></p>	<p><u>Crimes charged:</u>  Kenyatta is charged with the crimes against humanity of</p> <ul style="list-style-type: none"> <li>• murder,</li> <li>• forcible transfer,</li> <li>• rape,</li> <li>• persecution, and</li> <li>• other inhumane acts.</li> </ul> <p><u>Level of responsibility:</u>  Kenyatta is accused of being criminally responsible as an “indirect co-</p>

	perpetrator”.
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<b>Case Name:</b>	<b>The Prosecutor v. Wiliam Samoei Ruto and Joshua Arap Sang</b>
<b>Name and position of Accused:</b>	Wiliam Samoei Ruto (Kenya's current Deputy President) and Joshua Arap Sang (Kenyan journalist, head of operations at Kass FM in Nairobi)
<b>Procedural History:</b>	<p>On <b>31 March 2010</b>, the Prosecution's request to open investigations against William Samoei Ruto, Henry Kiprono Kosgey (former Industrialisation Minister) and Joshua Arap Sang was granted.</p> <p>On <b>23 January 2012</b>, Pre-Trial Chamber II confirmed the charges against Ruto and Sang.<sup>2</sup> However, the charges against Kosgey were dropped as the Chamber found that the Prosecutor's evidence was not enough according to the Rome Statute because the Prosecution referred to one anonymous and insufficiently corroborated witness.</p> <p>On <b>3 October 2012</b>, Trial Chamber V ruled on the modalities of victims' participation for this case.<sup>3</sup> The Chamber distinguished between direct individual participation and participation through the Common Legal Representative (CLR). Victims who wish to appear in person before the Court need to file an individual application. Victims who do not wish to appear in person before the Court only need to register with the Victims Protection and Reparation Section (VPRS).</p> <p>On <b>10 September 2013</b>, the trial against Ruto and Sang started. The Chamber has been hearing witnesses for the Prosecution ever since.</p>
<b>Alleged Facts:</b>	<p>Pre-Trial Chamber II found that there are substantial grounds to believe that:</p> <ul style="list-style-type: none"> <li>• Immediately after the announcement of the results of the presidential election, and specifically from 30 December 2007 until 16 January 2008, an attack was carried out by different groups of Kalenjin people, in locations including Turbo town, the greater Eldoret area (encompassing Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town, in the Uasin Gishu and Nandi Districts, the Republic of Kenya. The attack allegedly targeted the civilian population, namely the Kikuyu, Kamba and Kisii ethnic groups, which were perceived as Party of National Unity (PNU) supporters. The attack allegedly was based on a joint, combined and pre-determined strategy.</li> </ul>

<sup>2</sup> ICC-01/09-01/11-373.

<sup>3</sup> ICC-01/09-01/11-460.

- In particular, the violence in the Uasin Gishu District (encompassing Turbo town and the Eldoret area) allegedly resulted in more than 230 people killed, 505 people injured and more than 5,000 people displaced. In the Nandi District (encompassing Kapsabet town and Nandi Hills town), the attack allegedly ended in the death of at least 7 persons and thousands of persons were forced to seek refuge at Nandi Hills police station and in the surrounding areas. A number of houses and business premises were also looted and burned.
- Allegedly, there was a common plan to punish PNU supporters in the event that the 2007 presidential elections were rigged. The plan allegedly aimed at expelling them from the Rift Valley to create a uniform Orange Democratic Movement (ODM) voting block. In order to implement the agreed plan, a network of perpetrators was allegedly established with the purpose of evicting members of the Kikuyu, Kisii, and Kamba communities. This network was allegedly under the command of leaders and had an established hierarchy. This network allegedly possessed the means to carry out a widespread or systematic attack against the civilian population because its members had access to and used a considerable amount of capital, guns, crude weapons and manpower.
- **Ruto** allegedly
  - planned and was responsible for the implementation of the common plan in the entire Rift Valley;
  - created a network of perpetrators to support the implementation of the common plan;
  - directly negotiated or supervised the purchase of guns and crude weapons;
  - gave instructions to the perpetrators as to who they had to kill and displace and whose property they had to destroy; and
  - established a rewarding mechanism with fixed amounts of money to be paid to the perpetrators upon the successful murder of PNU supporters or the destruction of their properties.
- **Sang** allegedly contributed to the implementation of the common plan by:
  - placing his show “Lee Nee Eme” at the disposal of the organisation;
  - advertising the organisation’s meetings;
  - fanning violence through spreading hate messages and explicitly

	<p>revealing a desire to expel the Kikuyus; and</p> <ul style="list-style-type: none"> <li>- broadcasting false news regarding alleged murder(s) of Kalenjin people in order to inflame the violent atmosphere.</li> </ul>
<p><b>Charges:</b></p>	<p>The accused Ruto and Sang are being tried jointly in the same trial, for the same crimes, but with different levels of responsibility.</p> <p><u>Crimes charged:</u></p> <p>Both are charged with crimes against humanity of</p> <ul style="list-style-type: none"> <li>• murder,</li> <li>• deportation or forcible transfer of population, and</li> <li>• persecution.</li> </ul> <p><u>Levels of responsibility :</u></p> <p><b>Ruto</b> is alleged to be an “indirect co-perpetrator” for crimes against humanity committed against supporters of the PNU. The Pre-Trial Chamber found that he provided “essential contributions” to the implementation of the common plan by organising and coordinating the commission of widespread and systematic attacks.</p> <p><b>Sang</b> is alleged to have “contributed to the commission” of the same three crimes. He is not charged as co-perpetrator because the Pre-Trial Chamber found that his contribution to the commission of the crimes “was not essential”.</p>