



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

### Case Profiles and Q&A

(For the period of October 2015 to January 2016)

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

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

**Issue:** On 19 April 2015, Prosecutor Fatou Bensouda asked the Trial Chamber to allow the Prosecution to use 16 witness statements that were recorded before the trial. After the trial started, these 16 witnesses withdrew their statements or changed them and refused to come to the court to testify. It is believed that they did this because they were afraid to testify, or because pressure was put on them not to testify. The Prosecutor relied on Rule 68 for this request. Rule 68 allows the Prosecution to use statements that were recorded before the trial instead of calling the witness to the court to testify. But this is only allowed if witnesses are not able to testify or if they are dead or thought to be dead. This Rule 68 was introduced after the trial against Mr Ruto and Mr Sang already had started.

**Process:** On 19 August 2015, the Trial Chamber allowed the Prosecution to use the statements of 5 out of the 16 witnesses. The majority of the judges were of the view that the Prosecutor could rely on Rule 68 because

- the principle that new rules cannot apply to past issues (so-called principle of non-retroactivity) is only relevant for questions about the guilt or innocence but not for questions about the procedure. Rule 68 deals with the procedure so the principle does not apply here.
- the Prosecution is not asking to change anything that was allowed to the defence before. The Prosecution only wants use Rule 68 for future evidence.
- Rule 68 does not harm the accused because it is a neutral rule which anyone can use.

On 25 August 2015, the Defence teams of Mr Ruto and Mr Sang asked the Trial Chamber if they could appeal this decision. On 10 September 2015, Trial Chamber allowed the appeal to be sent to the Chamber of Appeals. The Trial Chamber thought that a further review by the Appeal Chamber of this issue was needed because these statements may have an effect on the final decision.

In the appeal, Mr Ruto and Mr Sang's defences argue that these recorded testimonies should not be used because they could affect the outcome of the trial. They said that using these testimonies would delay the trial and be unfair to the defendants. It would be unfair because the statements are full of evidence that is not confirmed and that was not tested by the defence in Court.

In response to the defence, the Prosecution said that the Trial Chamber's decision of 19 August 2015 gave a clear ruling which should be followed. They also said that the defence's argument about the delay and fairness of the trial were pure speculations with no concrete proof. The Prosecution also said that the witnesses were tampered with and that they were forced to withdraw their testimonies. According to the Prosecution, the case would be weak without the original statements of these witnesses.

As of 20 January 2016, the Appeals Chamber has not made a decision yet. But it is expected that a decision is released very soon.

## **2. What arguments were made on the motion for "no case to answer"?**

**Issue:** After the Prosecution finished their presentation of evidence, the defence can file a motion for "no case to answer". This is a submission by the defence which argues that the Prosecution did not present enough evidence for a conviction, so that the accused can be acquitted right away without the need to present any evidence against the accusations.

**Process:** The defence filed the motion for "no case to answer" in October 2015. Mr Ruto and Sang are asking the ICC to acquit them and to terminate the cases against them because the Prosecution didn't provide enough evidence against them. They also argued that the Prosecution bribed witnesses by promising them relocation for example, and coached them on their testimonies.

The court hearings to discuss this issue were planned for November 2015 but only began on 12 January and ended on 15 January 2016. During these four days, the Prosecution, the victims' lawyer and the defence lawyers spoke.

First, the Prosecution requested to hold the hearings without the public in the room (so-called closed session). This request was opposed by the defence because they said the public has a legitimate interest to know the quality of the evidence. The Chamber decided against holding the entire hearings in closed session. But the judges could close the hearings for certain types of sensitive evidence.

The Prosecution requested that the judges should decide on the motion for "no case to answer" by looking at how much evidence the Prosecution has presented so far. But the judges should not look at how strong or good the evidence is at this point. Only when the evidence is not credible at all, the judges should look at the quality. However, the judges did not agree with this. They were of the

view that they had to look a bit into how strong and good the evidence is to make sure the trial is fair and fast.

The Prosecution also said that when one looks at all the evidence together, it is clear that Mr Ruto headed an informal, secret network which was responsible for organising, paying and running attacks against Kikuyu as well as other civilians. The Prosecution also mentioned briefly how difficult it was to get and keep key evidence in this case.

Mr Ruto's defence team argued that the Prosecution has no direct evidence to show that Mr Ruto organized meetings to plan violence. According to them, the Prosecution did not have enough evidence to show that Mr Ruto was working with a network to commit crimes. They also pointed out that the Prosecution witnesses who withdrew their testimonies cannot be trusted.

The defence team for Mr Sang said there is no direct evidence that connects Mr Sang to the network which committed the crimes. There is no evidence to show that this network even existed. They argued that Mr Sang could not have incited and helped coordinate the attacks against civilians in the Rift Valley region through the Kass FM radio program because the Kenyan government had ordered a ban on live radio broadcasts on 30 December 2007. The defence lawyers also said that the statements that were withdrawn should not be seen as too important because the Appeals Chamber has not decided yet if they can be used. Finally, Mr Sang's defence team argued that the evidence presented by the Prosecution is not relevant for the crimes that Mr Sang is accused of.

In response to the defence, the victims' lawyer Wilfred Nderitu argued that at this point the Prosecution does not have to prove guilt "beyond a reasonable doubt", in other words at this point the judge does not have to be 100% convinced. He also pointed out that the Waki Report was very useful. It describes the political situation in Kenya during the post-election period in 2007-2008.

In response to the defence, the Prosecution answered that there were cases before where the evidence was weak at first but became stronger when the defence presented their counter-evidence. They also said that for now there is no need to prove all the details of the network that committed the crimes. It is enough to show that there was some form of a group.

### **3. What will happen next with the motion for "no case to answer"?**

If the motion is fully accepted by the Trial Chamber, Mr Ruto and Sang will be acquitted. It would mean that the Prosecution could not convince the judges that the evidence presented at this stage is strong enough to convict them. It would mark the end of the case.

If the motion is rejected by the Trial Chamber, the trial would continue. The defence can then decide if they want to present evidence for their defence or if they will not present any counter-evidence. But it would not yet mean that the judges think that Mr Ruto and Sang are guilty..

## Kenyatta Case - Q&A

### 1. Has there been a decision on non-cooperation yet?

**Issue:** Article 93 of the Rome Statute states that all States Parties have to cooperate fully with the ICC in its investigations and prosecutions. When a State Party does not cooperate, ICC judges can declare that the country did not cooperate and send the matter to the Assembly of States Parties (ASP) for further action against that country.

**Process:** On 29 November 2013, the Prosecution asked the Trial Chamber to declare that the Kenyan government did not cooperate with the ICC. They argued that the government of Kenya did not fulfil a request by the Prosecution to share information. On 3 December 2014, the Trial Chamber agreed that Kenya did not act in good faith, and had “been somewhat complacent”. However, the judges did not consider it necessary to send the matter to the ASP. The prosecution appealed this decision on 20 March 2015.

**Decision:** On 19 August 2015, the Appeals Chamber made a decision in favour of the Prosecution. They asked the Trial Chamber to make a new decision on this issue. But as of 20 January 2016, the Trial Chamber has not made a new decision yet.

### 2. Has there been a decision on the submission by the victims’ lawyer against the prosecution?

**Issue:** After the Prosecution withdrew the charge against Mr Kenyatta, the victims’ lawyer in the Kenyatta case, Mr Fergal Gaynor, asked the Pre-Trial Chamber to look into the Prosecutor’s decision to stop active investigations in Kenya. He also asked the Chamber to order the Prosecution to make sure that investigations and prosecutions are effective. He accused the prosecution of giving up and not taking action. He said they were “ineffective”. The submission is looking at the situation in Kenya in general without requesting investigations or prosecution of a specific person.

On 25 August 2015, in response to the victims’ lawyer, the Prosecutor argued that Mr Gaynor does not have the power to ask the Court to look into the decision to withdraw the charges. Only the Pre-Trial Chamber normally has this right. But in this case, not even the Pre-Trial Chamber has this power because there was not enough evidence. The Prosecutor also added that she will listen carefully to anyone who comes forward with new evidence. She will also ask for more arrest warrants or call witnesses to come to the court if the situation changes.

As of 20 January 2016, the Pre-Trial Chamber has not made a decision on the victims’ lawyer’s submission yet.

## 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>

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

	Kenyatta which led to the termination of the proceedings by the Trial Chamber on <b>13 March 2015</b> .
<b>Alleged Facts:</b>	<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>
<b>Charges:</b>	<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.</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.

	<ul style="list-style-type: none"> <li>• 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.</li>   <li>• 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.</li>   <li>• <b>Ruto</b> allegedly       <ul style="list-style-type: none"> <li>- planned and was responsible for the implementation of the common plan in the entire Rift Valley;</li> <li>- created a network of perpetrators to support the implementation of the common plan;</li> <li>- directly negotiated or supervised the purchase of guns and crude weapons;</li> <li>- gave instructions to the perpetrators as to who they had to kill and displace and whose property they had to destroy; and</li> <li>- 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.</li> </ul> </li>   <li>• <b>Sang</b> allegedly contributed to the implementation of the common plan by:       <ul style="list-style-type: none"> <li>- placing his show “Lee Nee Eme” at the disposal of the organisation;</li> <li>- advertising the organisation’s meetings;</li> <li>- fanning violence through spreading hate messages and explicitly</li> </ul> </li> </ul>
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	<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>