

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuca
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

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

**Public redacted version of
Decision on Defence Request for Disclosure of Material related to Witness 613**

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

The Office of the Prosecutor

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Mr James Stewart
Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper
Mr Essa Faal
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Counsel for Joshua Arap Sang

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Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, according to Articles 67(2) and 68(1) of the Rome Statute (the ‘Statute’) and Rules 77 and 81 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on Defence Request for Disclosure of Material related to Witness 613’.

I. Procedural history

1. Prior to making any application to the Chamber, the defence team for Mr Ruto (the ‘Ruto Defence’) had requested, *inter partes*, the disclosure of the unredacted receipts for school fees provided to the Office of the Prosecutor (‘Prosecution’) by witness P-0613 (‘Witness 613’) for [REDACTD] children. The Prosecution refused to disclose the requested material, informing the Ruto Defence that the witness was under the care of the Victims and Witnesses Unit (‘VWU’) and suggesting that the Ruto Defence seek the material from the VWU.¹
2. Shortly after, the Ruto Defence requested the VWU to confirm [REDACTD], in order to ascertain if the receipts for school fees could be disclosed. In its response, the VWU informed the Ruto Defence that it is not able to provide any information about previous or current locations of individuals [REDACTD].²
3. Further, the Ruto Defence had requested the Prosecution to disclose the birth certificates of the children of Witness 613. In its response, the Prosecution refused disclosure, informing the Ruto Defence that the VWU’s recommendation was that disclosure should not be effected for security reasons.³ Upon request for clarification, the VWU informed the Ruto Defence that it operated under the

¹ Ruto Defence request for disclosure related to P-0613, 30 September 2014, ICC-01/09-01/11-1564-Conf (the ‘Request’), para. 7, with confidential Annexes A to F. *See also* Annex B to the Request, ICC-01/09-01/11-1564-Conf-AnxB.

² Request, ICC-01/09-01/11-1564-Conf, para. 7 and Annex C to the Request, ICC-01/09-01/11-1564-Conf-AnxC.

³ Request, ICC-01/09-01/11-1564-Conf, para. 11; Annex D to the Request, ICC-01/09-01/11-1564-Conf-AnxD.

principle that any identifying information regarding individuals under its care should remain as restricted as possible.⁴

4. On 30 September 2014, the Ruto Defence filed its Request with the Chamber, seeking an order to the Prosecution to disclose the birth certificates and unredacted receipts for school fees paid by Witness 613 for [REDACTD] children (together 'Requested Material').⁵
5. On 21 October 2014, the Prosecution filed its response, seeking the Request to be dismissed ('Response').⁶

II. Submissions

6. The Ruto Defence avers that the Requested Material is 'exculpatory and/or clearly material to the preparation of the defence'.⁷ It submits that Witness 613 stated during her testimony that [REDACTD]. It further submits that she acknowledged that she had received money from the Court to pay her children's school fees.⁸
7. The Ruto Defence avers that the credibility of Witness 613 has become an important issue in the case and that the Ruto Defence has previously challenged Witness 613's motivation for becoming a witness, including whether she was motivated by financial incentives.⁹ Another witness, who testified after Witness 613, stated that the children were not attending a paid school and 'that [REDACTD] children to extort money from the Court'.¹⁰

⁴ Request, ICC-01/09-01/11-1564-Conf, paras 12-14; Annex D to the Request, ICC-01/09-01/11-1564-Conf-AnxD.

⁵ Request, ICC-01/09-01/11-1564-Conf, paras 1 and 10.

⁶ Prosecution's Response to "Ruto Defence Request for Disclosure Related to P-0613", ICC-01/09-01/11-1614-Conf-Exp, Prosecution and VWU only, with three Annexes A-C, confidential *ex parte*, Prosecution and VWU only. A confidential redacted version was filed on the same day.

⁷ Request, ICC-01/09-01/11-1564-Conf, para. 21.

⁸ Request, ICC-01/09-01/11-1564-Conf, paras 2-3.

⁹ Request, ICC-01/09-01/11-1564-Conf, para. 22.

¹⁰ Request, ICC-01/09-01/11-1564-Conf, para. 23.

8. According to the Ruto Defence, the birth certificates are material to the preparation of the defence because they support the witness's claim that she is responsible for the children's financial welfare. It is submitted that the materiality of the unredacted receipts of the school fees is based on their relation to the financial claims made by Witness 613.¹¹
9. The Ruto Defence argues that the requested disclosure would pose no security risks.¹² With regard to the disclosure of the unredacted school fee receipts, the Ruto Defence submits that this information is now of a historical nature and that therefore its disclosure cannot create a security risk sufficient to prevent disclosure.
10. In its Response, the Prosecution submits that the Requested Material may be relevant to the preparation of the defence on a *prima facie* level but that the disclosure of current or past locations or any identifying information would constitute a threat to the security of Witness 613 and her dependants.¹³ Additionally, the Prosecution submits that the Ruto Defence is already in possession of a 'substantial amount of information regarding the payment of school fees' and that the information that would be disclosed additionally is not substantial.¹⁴ Further, it avers that the Requested Material is a 'collateral issue' as it pertains only to the credibility of one Prosecution witness.¹⁵

III. Analysis

11. The Chamber recalls the following in respect of disclosure:

¹¹ Request, ICC-01/09-01/11-1564-Conf, para. 24.

¹² Request, ICC-01/09-01/11-1564-Conf, para. 25.

¹³ Response, ICC-01/09-01/11-1614-Conf-Red, paras 20 and 22.

¹⁴ Response, ICC-01/09-01/11-1614-Conf-Red, para. 27.

¹⁵ Response, ICC-01/09-01/11-1614-Conf-Red, para. 27.

- i) Article 67(2) of the Statute provides that all evidence that ‘may affect the credibility of prosecution evidence’ must be disclosed to the defence as soon as practicable.
- ii) Pursuant to Rule 77 of the Rules, items that are ‘material to the preparation of the defence’ are also subject to disclosure. The Appeals Chamber clarified that Rule 77 contains a two stage assessment.¹⁶ First, it must be determined if the item is material to the preparation of the defence, which is to be interpreted broadly.¹⁷ Once a document has been established to be material to the preparation of the defence, the disclosure obligation extends to the entire document.¹⁸ Second, it must then be determined whether the Statute or Rules 81 or 82 of the Rules restrict the disclosure of the item.¹⁹

12. In respect of the request to disclose the birth certificates of Witness 613’s children the Chamber notes that the Ruto Defence argues that these documents are relevant to the assessment of Witness 613’s claim to be financially responsible for [REDACTD] children.²⁰ Neither the number of the children, nor the fact that [REDACTD] are disputed. The Defence’s line of inquiry seems to focus on whether Witness 613 has lawfully obtained legal guardianship over all [REDACTD].²¹ The Chamber does not consider that the provision of the birth certificates can assist in the determination of this issue, since this type of

¹⁶ Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jarnus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, ICC-02/05-03/09-501, OA4 (‘Banda and Jerbo OA4 Judgment’), para. 35.

¹⁷ Appeals Chamber. *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 June 2008, ICC-01/04-01/06-1433, OA11, paras 77-78. See also, Banda and Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 38.

¹⁸ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s request for non-disclosure in relation to document “OTP/DRC/COD-190/JCCD-pt”, 27 May 2013, ICC-01/04-01/06-3031 A5 A6, para. 12.

¹⁹ Banda and Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 35.

²⁰ Request, ICC-01/09-01/11-1564-Conf, para. 24.

²¹ Request, ICC-01/09-01/11-1564-Conf, para. 4. See also the Ruto Defence’s enquiries to the Prosecution in the Annex, ICC-01/09-01/11-1564-Conf-AnxA.

document does not contain any information regarding a possible subsequent change of legal guardianship. Consequently, these documents do not appear to constitute evidence that might affect the credibility of the witness, nor is their relevance to the preparation of the defence apparent. Accordingly, the Chamber rejects the Request with regard to the disclosure of the birth certificates.

13. In respect of the school fee receipts, the Chamber considers them to be material for the preparation of the defence and therefore subject to disclosure under Rule 77 of the Rules.
14. The Chamber recalls the criteria for non-disclosure of information under Rule 81(2) and 81(4) of Rules, as established by the Appeals Chamber: (i) the existence of an objectively justifiable risk to the person concerned or which may prejudice further or ongoing investigations; (ii) the risk must arise from disclosing the particular information to the defence; (iii) the infeasibility or insufficiency of less restrictive measures; (iv) an assessment as to whether the non-disclosure sought is prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial; and (v) the obligation to periodically review the decision should circumstances change.²²
15. The Chamber is persuaded that a full disclosure, and subsequent potential use of the information, including for further investigations, would increase the risk of revealing the current place of residence of the witness and her children or at least create the possibility of tracing the current location. The Chamber notes that [REDACTD], which signifies that the competent authorities of the Court have determined there to be an objective security risk for this witness and her dependants. Accordingly, the Chamber is of the view that the disclosure to the

²² Appeals Chamber, *Prosecutor v. Germain Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475 OA (‘Katanga OA Judgment’), paras 71 - 73 and 97.

Defence of the unredacted school fee receipts would create an objectively justifiable risk.

16. The Chamber further considers that there are no less restrictive measures than the disclosure of partly redacted school fee receipts.
17. Regarding the rights of the accused, the Chamber recalls that, in assessing the application of redactions under Rule 81(4) of the Rules, the Appeals Chamber has indicated that the principle of proportionality applies.²³ Moreover, the Appeals Chamber stated that the relevance of the material in question to the Defence should be carefully assessed, and that '[i]f, having carried out that assessment, the Chamber concludes that the information concerned is not relevant to the Defence, that is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence'.²⁴
18. In this case, the Chamber notes that the redacted information contained in the school fee receipts would, at most, relate only to the collateral issue of the credibility of one Prosecution witness, on a point of marginal relevance. In some jurisdictions, the *collateral evidence rule* general requires that 'the answers given by a witness to questions put to him [or her] in cross-examination concerning collateral facts must be treated as final. They may or may not be accepted by the [trier of fact], but the cross-examiner must take them for better or worse, and cannot contradict them by other evidence.'²⁵ The rule has been described as 'a

²³ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, para. 34.

²⁴ Katanga OA Judgment, ICC-01/04-01/07-475, para. 72(c).

²⁵ Colin Tapper, *Cross & Tapper on Evidence*, (12th edn, OUP 2010) p. 320. It is noted that traditionally under the collateral evidence rule in common law jurisdictions evidence presented solely for the purpose of contradicting the evidence of a witness on a matter going only to credibility, that is on a collateral matter, could be excluded. *See e.g.*: in Canada *R. v. Jackson and Woods* (1974), 20 C.C.C. (2d) 113 (Ont. H.C.J.), *R. v. Dyck* (1970), 2 C.C.C. 283 (B.C.C.A.) and *R. v. Shewfelt* (1972), 6 C.C.C. (2d) 304 (B.C.C.A.); and in the U.K. *Harris v. Tippett* (1811) 2 Camp 637, *Palmer v. Trower* (1852) 8 Exch. 247, *R. v. Watson* (1817) 32 State Tr. 1 and *R. v. Fahy* (2002) EWCA Crim 525. More

sound general rule, based on the desirability of avoiding a multiplicity of issues.’²⁶ The Chamber is certainly not bound to follow this rule, especially as it is applied in national jurisdictions. But, its good sense (as indicated by its purpose of avoidance of multiplicity of issues and bringing an end to litigation) recommends a place for it in the practice and procedures of this Court.

19. Indeed, the Chamber has consistently emphasised the necessity of maintaining the focus of the trial firmly on the main charges in this case and of delimiting the scope of litigation on ancillary matters. It is to be recalled, in this respect, that Article 69(4) of the Statute provides that in ruling on the relevance or admissibility of evidence the Chamber may take into account, *inter alia*, ‘the probative value of the evidence and any prejudice that such evidence may cause to a fair trial’. In the Chamber’s view, the concept of a fair trial must include the principle of expeditiousness of proceedings: not only for the accused, but also for the prosecution, the victims and the public—all of whom have an interest in bringing the litigation to an end. The Chamber is mindful that Article 69(4) has received more frequent application in the context of admission of evidence, than within the framework of disclosure or inspection requests made pursuant to Article 67(2) of the Statute or Rule 77 of the Rules, respectively. Nonetheless, the Chamber considers that given the context from which the Request arose, being the examination of a witness while on the stand, it is appropriate that Article 69(4) should guide the decision called for by the Request, in consequence of the Chamber’s foreseeability of the purpose for which the disclosure is ultimately sought.

recently the rule has been softened to permit greater discretion, but the essence of the rule remains, *see e.g. R. v. Aalders* (1993) 2 S.C.R. 482.

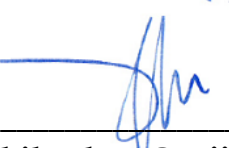
²⁶ *Cross & Tapper, ibid.*

20. In light of the foregoing analysis, and noting also the information already in the possession of the Defence relating to this matter, the Chamber considers that the redactions are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
21. Accordingly, the Chamber rejects the Request with regard to the disclosure of unredacted school fee receipts.
22. The Chamber reminds the Prosecution that this assessment needs to be reviewed periodically should the circumstances change. This change relates to the existence of a threat to the safety of the witness and her dependants as well as the relevance of the redacted information.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.


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



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 12 January 2015
At The Hague, The Netherlands