

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 27 October 2014

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v. WILLIAM SAMOEI RUTO
AND JOSHUA ARAP SANG***

Confidential

Sang Defence Request for Reclassification of Nine Confidential Exhibits

Source: Defence for Mr. Joshua arap Sang

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. In accordance with the principle of public proceedings, the Defence for Mr. Joshua arap Sang ("Defence") requests that nine Defence exhibits currently registered as "Confidential" be reclassified as "Public".

2. The nine exhibits for which reclassification is sought are:
 - i. KEN-D11-0012-0001 – EVD-T-D11-00007: Kass FM Audio, 18 February 2008;
 - ii. KEN-D11-0012-0002 – EVD-T-D11-00008: Translation of above;
 - iii. KEN-OTP-0048-0118 – EVD-T-D11-00009: BBC Monitoring Service Summaries;
 - iv. KEN-D11-0011-0029 – EVD-T-D11-00010: Kass FM Audio, 21 September 2007;
 - v. KEN-D11-0012-0110 – EVD-T-D11-00011: Translation of above;
 - vi. KEN-D11-0013-0023 – EVD-T-D11-00012: Kass FM Audio, 30 November 2007;
 - vii. KEN-D11-0013-0024 – EVD-T-D11-00013: Translation of above;
 - viii. KEN-OTP-0075-0041 – EVD-T-D11-00014: Kass FM Audio, 22 February 2008; and
 - ix. KEN-OTP-0099-0495 – EVD-T-D11-00015: Translation of above.

3. The Defence submits that these materials all originate from public sources and there is no risk to ongoing investigations or the safety of any individual from reclassifying these exhibits as public. Moreover, the Defence has made use of these items in open sessions during trial or references to these items have been included in public redacted transcripts.

4. This request has been filed as confidential given it refers to exhibits currently classified as "Confidential". However, if the relief sought is granted, then the Defence would request that the present filing be reclassified as public pursuant to Regulation 23*bis*(3) of the Regulations of the Court.

II. PROCEDURAL HISTORY

5. The Kass FM audio of 18 February 2008 and its accompanying transcript/translation¹ were admitted into evidence on 4 November 2013 during the cross-examination of P-0268. When admitted into evidence, these items were registered on the record as confidential.²
6. Further during the cross-examination of P-0268 on 4 November 2013, the BBC Monitoring Service's Summaries were admitted into evidence.³ A Prosecution document, these summaries had originally been disclosed to the Defence as confidential.⁴ When admitted into evidence, the Court Officer did not read a specific confidentiality classification into the record at that time, and the original classification was retained on ECourt.
7. The Kass FM audio of 21 September 2007 and its transcript/translation⁵ were admitted into evidence on 5 November 2013 during the continued cross-examination of P-0268.⁶ The Defence had disclosed these as public items.⁷ However, at the time of admission no specific confidentiality classification was read into the record and they were registered on ECourt as confidential exhibits.
8. The Kass FM audio of 30 November 2007 and its transcript/translation⁸ were marked for identification as confidential documents on 5 November 2013, again during the cross-examination of P-0268.⁹ When admitted into evidence on 22 January 2014 during the cross-examination of P-0356, the confidentiality classification was not amended.¹⁰

¹ KEN-D11-0012-0001 – EVD-T-D11-00007 (Audio) and KEN-D11-0012-0002 – EVD-T-D11-00008 (Transcript/Translation).

² ICC-01/09-01/11-65-Red-ENG, 4 November 2013, p 124, lines 2-9.

³ *Ibid*, p 124, line 25 – p 125, line 2.

⁴ INCRIM Package 5, 5 July 2011.

⁵ KEN-D11-0011-0029 – EVD-T-D11-00010 (Audio) and KEN-D11-0012-0110 – EVD-T-D11-00011 (Transcript/Translation).

⁶ ICC-01/09-01/11-66-Red-ENG, 5 November 2013, p 19, line 25 – p 20, line 9.

⁷ 131025 P-0268 Cross Materials, 25 October 2013.

⁸ KEN-D11-0013-0023 – EVD-T-D11-00012 (Audio) and KEN-D11-0013-0024 – EVD-T-D11-00013 (Transcript/Translation).

⁹ ICC-01/09-01/11-66-Red-ENG, 5 November 2013, p 51, lines 10-21.

¹⁰ ICC-01/09-01/11-78-Red-ENG, 22 January 2014, p 93, line 3 – p 94, line 2.

9. Finally, the Kass FM audio of 22 February 2008 and its transcript/translation¹¹ were also admitted into evidence on 5 November 2013 during the cross-examination of P-0268.¹² At that time they were entered into the record as confidential exhibits,¹³ this reflected the original classification given to them by the Prosecution.¹⁴

III. APPLICABLE LAW

10. Article 64(7) of the Rome Statute provides that “[t]he trial shall be held in public”. This norm may be departed from in special circumstances in accordance with Article 68 or to protect confidential or sensitive information to be given in evidence. In addition, Article 67(1) in part provides that “[i]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this statute.”
11. With regard to the power of the Trial Chamber to reclassify documents or disclose part of the record, Regulation 23*bis*(3) of the Regulations of the Court provides that documents may be reclassified by the Trial Chamber upon request by a participant of *proprio motu* “where the basis for the classification no longer exists.”
12. Upon application by the Defence for Mr. Sang and Mr. William Samoei Ruto, the Single Judge of Pre-Trial Chamber II reclassified as public 67 confidential exhibits admitted during the Confirmation Hearing, and four confidential documents filed in advance of the Confirmation Hearing.¹⁵ In doing so, the Single Judge relied on Article 67(1) and Regulation 23*bis*(3) and held that upon review of the material and “cognizant of the principle of publicity of proceedings”, reclassification was appropriate.¹⁶ Regulation 23*bis*(3) was also relied on in part by this Trial

¹¹ KEN-OTP-0075-0041 – EVD-T-D11-00014 (Audio) and KEN-OTP-0099-0495 – EVD-T-D11-00015 (Transcript/Translation).

¹² ICC-01/09-01/11-66-Red-ENG, 5 November 2013, p 65, lines 7-14.

¹³ *Ibid.*

¹⁴ R77 Package 18, 21 December 2012 and INCRIM Package 40, 8 April 2013.

¹⁵ Decision on the “Defense Submissions Concerning Reclassification of Certain Confidential Defence Documents”, ICC-01/09-01/11-351, 14 October 2011.

¹⁶ *Ibid.*, paras 10-11.

Chamber in its decision to reclassify certain exhibits¹⁷ admitted pursuant to its *Decision on the Prosecution's Request for Admission of Documentary Evidence*.¹⁸

IV. SUBMISSIONS

13. All of the materials subject to this application concern Kass FM broadcasts. Kass FM airs to the public at large, and accordingly the four audios and their accompanying transcript/translations¹⁹ emanate from the public domain. The BBC Monitoring Summaries, while not audio in format, also cover Kass FM programming and provide an overview of the content of various broadcasts made in 2008 and onwards. Given the public nature of this material, all nine exhibits have either been used by the Defence in open session following their admission²⁰ or used in part in open session during P-0268's testimony,²¹ and all nine exhibits were included in public redacted transcripts concerning P-0268's testimony.²²
14. It is submitted that reclassifying these exhibits as public does not pose any threat to ongoing Defence investigations or to the safety of any individual.
15. Furthermore, all other Defence exhibits concerning Kass FM programmes are registered as public,²³ and thus the reclassification sought will ensure

¹⁷ Order on the Classification of Items Admitted Pursuant to Decision on the Prosecution's Request for Admission of Documentary Evidence, ICC-01/09-01/11-1420, 7 July 2014.

¹⁸ ICC-01/09-01/11-1353, 10 June 2014.

¹⁹ KEN-D11-0012-0001 – EVD-T-D11-00007; KEN-D11-0012-0002 – EVD-T-D11-00008; KEN-D11-0011-0029 – EVD-T-D11-00010; KEN-D11-0012-0110 – EVD-T-D11-00011; KEN-D11-0013-0023 – EVD-T-D11-00012; KEN-D11-0013-0024 – EVD-T-D11-00013; KEN-OTP-0075-0041 – EVD-T-D11-00014; KEN-OTP-0099-0495 – EVD-T-D11-00015.

²⁰ See, for example: BBC Summaries, EVD-T-D11-00009 – ICC-01/09-01/11-T-103-Red-ENG, pp 21-25 and ICC-01/09-01/11-T-150-Conf, 6 October 2014, pp 42-43; Audio EVD-T-D11-00012 – ICC-01/09-01/11-T-78-Red-ENG, 22 January 2014, pp 81-91.

²¹ Audio EVD-T-D11-00014 – ICC-01/09-01/11-T-66-Red-ENG, 5 November 2013, pp 52-63.

²² Audio EVD-T-D11-00007 and Translation EVD-T-D11-00008 - ICC-01/09-01/11-T-65-Red-ENG, 4 November 2013, pp 91-97; BBC Summary EVD-T-D11-00009 - ICC-01/09-01/11-T-65-Red-ENG, 4 November 2013, pp 119-122; Audio EVD-T-D11-00010 and Translation EVD-T-D11-00011 - ICC-01/09-01/11-T-66-Red-ENG, 5 November 2013, pp 8-19; Audio EVD-T-D11-00012 and Translation EVD-T-D11-00013 - ICC-01/09-01/11-T-66-Red-ENG, 5 November 2013, pp 20-42; and Audio EVD-T-D11-00014 and Translation EVD-T-D11-00015 - ICC-01/09-01/11-T-66-Red-ENG, 5 November 2013, pp 52-63.

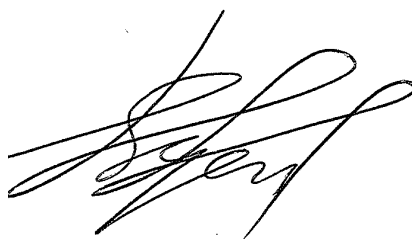
²³ KEN-D11-0006-0023, track 0025 – EVD-T-D11-00016 (Audio) and KEN-D11-0008-0001 – EVD-T-D11-00017 (Transcript/Translation); KEN-D11-0013-0040 - EVD-T-D11-00020 (Audio) and KEN-D11-0013-0090 – EVD-T-D11-00021 (Transcript/Translation); KEN-D11-0013-0039 – EVD-T-D11-00022 (Audio) and KEN-D11-0013-0290 – EVD-T-D11-00023 (Transcript/Translation); KEN-D09-0024-0012 – EVD-T-D11-00024 (Audio) and KEN-D09-0024-0013 – EVD-T-D11-00025 (Transcript/Translation); KEN-OTP-0075-0042 - EVD-T-D11-00027 (Audio), KEN-OTP-0106-0312 - EVD-T-D11-00028 (Translation) and KEN-OTP-0106-0477 - EVD-T-D11-00029 (Transcript); KEN-D11-0013-0067 - EVD-T-D11-00030 (Audio) and KEN-D11-0013-0200 - EVD-T-D11-00031 (Translation); KEN-D11-0013-0071 - EVD-T-D11-00032 (Audio) and KEN-D11-0013-0272 - EVD-T-D11-00033 (Translation); KEN-D11-0013-0053 - EVD-T-D11-

consistency across these exhibits. It will also permit the Defence to use these nine exhibits in a public redacted version of its "no case to answer" Motion or final brief.

V. RELIEF REQUESTED

16. For the abovementioned reasons, the Defence respectfully requests that Trial Chamber V(A) reclassify as public the following exhibits, as there is no basis for their continued classification as "Confidential":

- i. KEN-D11-0012-0001 – EVD-T-D11-00007
- ii. KEN-D11-0012-0002 – EVD-T-D11-00008
- iii. KEN-OTP-0048-0118 – EVD-T-D11-00009
- iv. KEN-D11-0011-0029 – EVD-T-D11-00010
- v. KEN-D11-0012-0110 – EVD-T-D11-00011
- vi. KEN-D11-0013-0023 – EVD-T-D11-00012
- vii. KEN-D11-0013-0024 – EVD-T-D11-00013
- viii. KEN-OTP-0075-0041 – EVD-T-D11-00014
- ix. KEN-OTP-0099-0495 – EVD-T-D11-00015



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 27th day of October 2014
In Nairobi, Kenya

00046 (Audio) and KEN-D11-0014-0193 - EVD-T-D11-00047 (Translation); KEN-D11-0013-0028 - EVD-T-D11-00048 (Audio) and KEN-D11-0014-0568 - EVD-T-D11-00049 (Transcript/Translation).