



Original: **English**

No.: ICC-01/09-02/11 OA

Date: 27 July 2011

THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Erkki Kourula

SITUATION IN THE REPUBLIC OF KENYA

*IN THE CASE OF THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI*

Public Document

**Prosecution's response to the "Victims Observations on the Government of
Kenya's Appeal Concerning Admissibility of Proceedings"**

Source: Office of the Prosecutor

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

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Procedural Background

1. On 6 June 2011, the Government of Kenya ("Appellant") filed its "Appeal of the Government of Kenya against the 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute'" ("Notice of Appeal").¹
2. On 13 June 2011, the Appeals Chamber gave its "Directions on the Submission of Observations pursuant to article 19 (3) of the Rome Statute and Rule 59 (3) of the Rules of Procedure and Evidence" ("Directions")²; directing the Office of the Public Counsel for Victims ("OPCV") to submit a document containing consolidated observations to the Appeal Brief. The Republic of Kenya, the Defence Counsels and the Prosecution were instructed to file responses seven days after the notification of the said consolidated observations.³
3. On 20 June 2011, the Appellant filed its "Document in Support of the 'Appeal of the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute'" ("Appeal Brief").⁴
4. On 12 July 2011, The Prosecution filed its "Prosecutions response to the Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute" ("Prosecution's Response").⁵
5. On 19 July 2011, the Office of the OPCV submitted the "Victims Observation on the Government of Kenya's Appeal concerning Admissibility of the proceedings ("Victims Observations").⁶
6. The Prosecution hereby files its response to the Victims Observations.

¹ ICC-01/09-02/11-104 ("Appeal Notice")

² ICC-01/09-02/11-116 ("Directions")

³ Directions, p.3

⁴ ICC-01/09-02/11-130; Corrigendum filed on 22 June 2011, ICC-01/09-02/11-130-Corr ("Appeal Brief")

⁵ ICC-01/09-02/11-168 ("Prosecution's Response")

⁶ ICC-01/09-02/11-177 ("Victims Observations")

7. The Prosecution hereby files its response to the Victims Observations.

Submissions

8. The Observations confirm several key elements supporting the Prosecution's Response to the Appellant's submissions. First, the Victims confirm the elusive nature of the Appellant's submissions before the Pre-Trial Chamber, its profound misunderstanding of the substantive and procedural requirements of an admissibility challenge and ultimately, its failure to present any tangible evidence substantiating its claim that the case against the suspects was being investigated at the national level.⁷ This further shows that the Pre-Trial Chamber's findings were perfectly reasonable.
9. Second, the Observations also support the position that the Appellant's reliance on appeal on the report from the Director of Criminal Investigations from 5 May 2011, one of the main pillars of its appeal, is misplaced. The letter fails to demonstrate the existence of an ongoing investigation at the time of the challenge, and taken at its highest, can only be considered to reflect the intention to commence an investigation.⁸ The Pre-Trial Chamber's finding that the Appellant had failed to provide any information about the alleged investigative steps undertaken is accordingly correct and should remain undisturbed. Similar considerations apply to the Appellant's reliance on alleged instructions to counsel from the Commissioner of Police, which, as both Prosecution and Victims note, are mere assertions made by counsel without any substantiation. The alleged instructions themselves, including their content, are not on the record.⁹
10. Finally, the Prosecution concurs with the observation that the Appellant should not be allowed to alter the nature of the appeal proceedings. This appeal is not an opportunity for the Appellant to litigate de novo its admissibility claim, including

⁷ Observations, paras.6-16, inter alia.

⁸ Prosecution Response, paras.47-48.

⁹ Observations, para.32 and Prosecution's Response, paras.39 and 69.

the existence of a national investigation involving the same case.¹⁰ Rather, the appeal is confined to the question whether the Pre-Trial Chamber's determination is vitiated by error, be it factual, legal or procedural. In the absence of a demonstration of a reversible error on appeal, the impugned findings should remain undisturbed.¹¹ The Appellant has failed to make such a showing.

Conclusion

11. The Prosecution reiterates its request that the appeal be dismissed in its entirety.



Luis Moreno-Ocampo,

Prosecutor

Dated this 27th day of July 2011

At The Hague, The Netherlands

¹⁰ Observations, paras.44 et seq.

¹¹ ICC-02/04-01/05-408OA3, para.80.