

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 1 August 2011

THE APPEALS CHAMBER

Before:

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

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

**Decision on the Application on behalf of the Government of Kenya for Leave to
Reply to the “Prosecution’s 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”**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for Francis Kirimi Muthaura
Mr Karim A. A. Khan
Mr Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Mr Gillian Higgins

Counsel for Mohammed Hussein Ali
Mr Evens Monari
Mr Gershom Otachi Bw'omanwa

The Office of Public Counsel for Victims
Ms Paolina Massida

States Representatives
Mr Geoffrey Nice
Mr Rodney Dixon

REGISTRY

Registrar
Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Republic of Kenya (hereinafter: “Kenya”) against the decision of Pre-Trial Chamber II entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute” of 30 May 2011 (ICC-01/09-02/11-96),

Having before it the “Application on behalf of the Government of Kenya for Leave to Reply to the ‘Prosecution’s 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”” of 20 July 2011 (ICC-01/09-02/11-180 (OA), hereinafter: “Application to Reply”),

Unanimously,

Renders the following

DECISION

The Application to Reply is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 30 May 2011, Pre-Trial Chamber II (hereinafter: “the Pre-Trial Chamber”) issued its “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”¹ (hereinafter: “Impugned Decision”) wherein it found the case against Mr Muthaura, Mr Kenyatta and Mr Ali to be admissible. On 6 June 2011, Kenya filed its appeal against the Impugned Decision.²

2. On 20 June 2011, Kenya filed its “Document in Support of the ‘Appeal of the Government of Kenya against the Decision on the Application by the Government of

¹ ICC-01/09-01/11-101.

² “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’”, ICC-01/09-02/11-104.

Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”³ (hereinafter: “Document in Support of the Appeal”).

3. On 12 July 2011, the Prosecutor filed the “Prosecution’s 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’”⁴ (hereinafter: “Response to the Document in Support of the Appeal”).

4. On 20 July 2011, Kenya filed his Application to Reply in which it sought leave to reply to the Response to the Document in Support of the Appeal under regulation 24 (5) of the Regulations of the Court. Kenya submits that the Response to the Document in Support of the Appeal contains “new and erroneous assertions of law and fact” which are “central to the appeal”.⁵

5. On 21 July 2011, the Appeals Chamber ordered the Prosecutor, Mr Muthaura, Mr Kenyatta and Mr Ali to file, before 26 July 2011, observations on whether the Application to Reply should be granted or rejected.⁶

6. On 22 July 2011, the Prosecutor filed his observations (hereinafter: “Prosecutor’s Observations”),⁷ submitting that the Application to Reply should be dismissed

7. No suspect filed any observations.

II. MERITS

8. The Appeals Chamber observes that Kenya seeks leave to reply under regulation 24 (5) of the Regulations of the Court. The Appeals Chamber nevertheless recalls that it has previously held that replies to responses to documents in support of

³ ICC-01/09-02/11-130. A Corrigendum thereto was filed on 21 June 2011, ICC-01/09-02/11-130-Corr.

⁴ ICC-01/09-02/11-168.

⁵ Application to Reply, para. 3; *see also* paras 13-20, 21-24, 25 and 26.

⁶ “Order on the filing of observations in relation to the Application on behalf of the Republic of Kenya for Leave to Reply to the ‘Prosecution’s 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’”, ICC-01/09-02/11-186 (OA).

⁷ “Prosecution’s response to the Application on behalf of the Government of Kenya for Leave to Reply to the ‘Prosecution’s response to the ‘Prosecution’s 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’”, ICC-01/09-02/11-190.

appeal may not be filed pursuant to regulation 24 (5) of the Regulations of the Court for appeals brought under rule 154 and 155 of the Rules of Procedure and Evidence. This is because “the more specific provisions of subsection 1 of Section 4 of Chapter 3 of the regulations of the Court do not foresee replies to responses to documents in support of appeals.”⁸ Therefore, the present application is rejected.

9. However, the Appeals Chamber has held that it has discretion under regulation 28 of the Regulations of the Court to order further submissions by parties or participants when it is “necessary for the proper disposal of the Appeal [...] bearing in mind the principle of equality of arms and the need for expeditious proceedings”.⁹ The Appeals Chamber observes that while Kenya does not invoke regulation 28 of the Regulations of the Court, the Prosecutor¹⁰ expressly refers to it in his observations, submitting that the regulation does not apply to the circumstances of this case.

10. The Appeals Chamber is not persuaded that further observations from Kenya would be necessary for the proper disposal of the appeal. In this respect, the Appeals Chamber notes that Kenya raises several matters that it would address if its application were granted, namely: (a) the relevant time for determination of the admissibility challenge (b) the definition and evidence of “an investigation”; and (c) the alleged erroneous assertions in the Prosecutor’s responses.¹¹ None of these issues warrant further submissions as they are already before the Appeals Chamber or, in the view of the Appeals Chamber, appear to be mere disagreements with the Prosecutor’s arguments.

11. For these reasons, the Appeals Chamber does not deem it necessary to use its discretion pursuant to regulation 28 of the Regulations of the Court, to order any further submissions from Kenya.

⁸ “Decision on the Prosecutor’s ‘Application for Leave to Reply to “Conclusions de la défense en réponse au mémoire d’appel du Procureur”’, 12 September 2006, ICC-01/04-01/06-424 (OA3), para. 6; and “Decision on the Prosecution’s Request for Leave to Reply”, 18 January 2008, ICC-01/04-01/07-148 (OA), para. 6.

⁹ “Decision on the Prosecutor’s ‘Application for Leave to Reply to “Conclusions de la défense en réponse au mémoire d’appel du Procureur”’, 12 September 2006, ICC-01/04-01/06-424 (OA3), para. 7. *See also* “Decision on the ‘Prosecution’s Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the decisions to Stay the Proceedings and Release the Accused’”, 13 October 2008, ICC-01/04-01/06-1476 (OA 12 and OA 13), para. 3.

¹⁰ Prosecutor’s Observations, paras 5-6.

¹¹ Application to Reply, paras 13-25.



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

A handwritten signature in black ink, appearing to read 'D. Nsereko', written over a horizontal line.

Judge Daniel David Ntanda Nsereko
Presiding Judge

Dated this 1st day of August 2011

At The Hague, The Netherlands