



Original: English

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

Date: 3 August 2011

IN THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public Document

Request for an Oral Hearing Pursuant to Rule 156(3)

Source: The Government of the Republic of Kenya, represented by Sir
Geoffrey Nice QC and Rodney Dixon

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for Francis Kirimi Muthaura

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Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and
Gillian Higgins

Counsel for Mohammed Hussein Ali

Evans Monari and Gregory Kehoe

Legal Representatives of Victims

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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**The Office of Public Counsel for the
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States Representatives

Sir Geoffrey Nice QC
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Amicus Curiae

REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Fiona McKay

Other

Request for an oral hearing by the Government of Kenya

1. The Government of Kenya requests the Appeals Chamber to grant an oral hearing for its appeal on the admissibility of the two Kenyan cases before the ICC pursuant to Rule 156(3).¹
2. The Government of Kenya submits that the Pre-Trial Chamber made a fundamental and obvious error in finding that there was *no* national investigation in any form taking place into the six Suspects.² The Government of Kenya's submissions, statements and reports about its investigation have been found to amount to nothing at all. Kenya's substantial judicial and police reforms and all of the steps it has taken since the Post-Election Violence to end impunity have been dismissed by the Pre-Trial Chamber as merely "speculative". The Government of Kenya, through the Attorney-General and its Counsel should be given an opportunity to address the Appeals Chamber directly in its appeal against these very serious (and erroneous) findings.
3. The Government of Kenya requests that the Attorney-General and its Counsel are permitted to appear before the Appeals Chamber to answer any concerns and questions the Appeals Chamber may have about the merits of the Government of Kenya's appeal.
4. The Government of Kenya was refused an oral hearing before the Pre-Trial Chamber. (Indeed, every single one of the Government of Kenya's requests have to date been rejected by the ICC.) The submissions and statements of a State Party of the ICC on issues as central to the ICC's jurisdiction as complementarity should not be rejected by the ICC without hearing in person from the State's Attorney-General and its legal representatives.
5. The Government of Kenya submits that it is well-recognised in courts throughout the world that an oral hearing is a most effective way of scrutinising the merits and value of the parties' submissions. Further, it is through an oral hearing that the public nature

¹ 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", 6 June 2011 (hereinafter "Appeal of the Admissibility Decision").

² "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-01/09-01/11-101, ICC-01/09-02/11-96, 30 May 2011 (hereinafter "Admissibility Decision").

of the proceedings can best be guaranteed especially given the intense public interest in this case in Kenya, in Africa and the wider international community.

6. The ICC should not avoid such a hearing when the issues at stake are so vital to Kenya (and to many other countries in Africa and elsewhere). Granting an oral hearing, in the submission of the Government of Kenya, will not unduly delay the proceedings as a whole or cause any prejudice within the proceedings. It will instead serve to enhance the quality of the litigation about the important issues in dispute and to augment public confidence in the proceedings before the Court.
7. Rule 156(3) provides that the “[t]he appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing.”³ Further, Rule 156(4) states that “[t]he appeal shall be heard as expeditiously as possible.”⁴
8. The jurisprudence of the Appeals Chamber concerning requests for an oral hearing pursuant to Rule 156(3) has highlighted that the request must advance “any reasons why the Appeals Chamber should depart from the abovementioned rule that the appeals proceedings shall be in writing”⁵ and must also demonstrate that granting an oral hearing will not “delay the consideration of the appeal in contravention of rule 156(4).”⁶
9. In the submission of the Government of Kenya, as noted above, there are good reasons for the Appeals Chamber to grant an oral hearing in this case. No State Party has yet made an admissibility application on the basis of the principle of complementarity before the ICC. The determination of the Government of Kenya’s application should be regarded as setting the appropriate standard for this case and for future cases.
10. Kenya, as a State Party, should be accorded the respect to which all States Parties should be entitled – on critical issues to their national interest, States Parties should be

³ Rule 156(3).

⁴ Rule 156(4).

⁵ *Prosecutor v. Bemba*, Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled “Decision on the Admissibility and Abuse of Process Challenges”, ICC-01/05-01/08-962-Corr, 19 October 2010, para. 25.

⁶ *Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, ICC-01/04-01/06-2582, 8 October 2010, para. 27.

permitted to appear before the ICC and be heard by the Court that they have established to prosecute serious international crimes on the basis of the principle of complementarity. These requests should be exceptional and properly made only in respect of the most important issues as in the present appeal.

11. There are undeniably a number of complex legal and factual issues to be determined in the present appeal. In the submission of the Government of Kenya an oral hearing could greatly assist the Appeals Chamber's consideration of these issues, which include the requirements of a national investigation, the evidence sufficient to prove an on-going national investigation, the applicable procedure for determining admissibility applications under Rule 58, the definition of "case" in Articles 17 and 19, the application of the "same person same conduct" test, and the relationship of a State's requests for assistance from the ICC with admissibility. None of these issues has been previously determined by the Appeals Chamber. As Trial Chamber III has noted, an oral hearing is most helpful in dealing with the difficult and uncharted legal problems at the heart of admissibility and complementarity.⁷

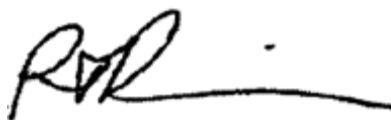
12. In particular, the present appeal deals with the novel legal issues of whether the national investigation must be completed, or nearly completed, to render the case inadmissible before the ICC, and of whether the principle of complementarity requires the ICC Prosecutor and the State Party concerned to have made precisely the same conclusions based on the available evidence about the persons under investigation at any particular stage of the investigation, especially when the Prosecutor has refused to cooperate with the State Party (as in the present case). These are clearly complicated and difficult legal questions which cannot be comprehensively dealt with in written submissions alone. They require the interaction of oral argument in which the Appeals Chamber could outline its questions and concerns so that the parties have an opportunity to address them directly and in which the parties can respond to each others' arguments.

13. The outcome of the present appeal will have far-reaching consequences for Kenya and its people. The public will be able to see and assess the legal submissions of the

⁷ *Prosecutor v. Bemba*, Status Conference Hearing, ICC-01/05-01/08, 27 April 2010, pg. 69, ln. 3-10. The Presiding Judge noted that the hearing to consider "some extremely focused and well-argued submissions [has] enabled us to address what is a relatively complicated issue extremely expeditiously and helpfully." See also *Prosecutor v. Bemba*, Status Conference with Registry, OTP, Defence and OPCV, ICC-01/05-01/08, 8 March 2010, pg. 11, ln.9 - pg. 12, ln. 2.

parties and the approach of the Court through an oral hearing. It will help guarantee that the public will not feel excluded from the international legal process which has a fundamental effect on the future of the criminal justice system in Kenya. By granting an oral hearing the public could observe the Court's application of the principle of complementarity.

14. An oral hearing will not unnecessarily delay the appellate proceedings or the proceedings as a whole. Given the specific request for such a hearing and the circumstances in which it is made, it would be unfair to refuse it on the basis that the hearing would lengthen the proceedings. The requirement that an appeal should be heard as expeditiously as possible should be balanced against the imperative of providing the State Party with an opportunity to be heard by the Appeals Chamber on issues that are vital to its sovereignty and national interest, and to answer the questions and concerns of the Appeals Chamber.
15. The Government of Kenya therefore respectfully requests the Appeals Chamber to grant an oral hearing for its appeal on admissibility. For all of the reasons outlined above, the Government of Kenya urges the Appeals Chamber not to reject its request on the basis that the written pleadings are sufficient.



Sir Geoffrey Nice QC
Rodney Dixon
Counsel on behalf of the Government of the Republic of Kenya

Dated 3rd August 2011
London, United Kingdom