



Original: English

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

Date: 11 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 MOHAMED HUSSEIN ALI

Public Document

**Response to Government of Kenya's "Request for an Oral Hearing Pursuant to
Rule 156(3)"**

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Luis Moreno-Ocampo

Fatou Bensouda

Counsel for the Defence

Evans Monari

Gershom Otachi Bw'omanwa

Steven Kay

Gillian Higgins

Karim A.A. Khan

Kennedy Ogetto

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

(Participation/Reparation)

Christopher Gosnell

**The Office of Public Counsel for
Victims**

Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Sir Geoffrey Nice

Rodney Dixon

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Deputy Registrar

Didier Preira

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Procedural Background

1. On 4 August 2011, the Government of Kenya filed its “Request for an Oral Hearing Pursuant to Rule 156(3)” of the Rules of Procedure and Evidence (the “Request”) in which it requested that the Attorney General and its Counsel be permitted to appear before the Appeals Chamber in order to answer any “concerns” or “questions” about the merits of the appeal.¹

2. On 5 August 2011, the Appeals Chamber ordered the Prosecutor, Mr Muthaura, Mr Kenyatta, Mr Ali and the victims participating in the appeal proceedings to file their responses to the Request, if any, by Thursday 11 August 2011.²

3. Accordingly, the Office of the Public Counsel for victims (the “OPCV” or the “Office”), as the legal representative of all victims participating in the appeal, hereby files its response to the Government of Kenya’s Request.

Response of the OPCV

4. The OPCV first submits that the Request introduced by the Government of Kenya is untimely. The Office notes that the Government of Kenya did not raise the present issue in its appeal³ nor did it bring the Request to the attention of the

¹ See the “Request for an Oral Hearing Pursuant to Rule 156(3)”, No. ICC-01/09-02/11-210, 4 August 2011 (the “Request”).

² See the “Order on the filing of a response to the Republic of Kenya’s ‘Request for an Oral Hearing Pursuant to Rule 156 (3)’”, No. ICC-01/09-02/11-217 OA, 5 August 2011.

³ See the “Corrigendum to the ‘Document in Support of 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’”, No. ICC-01/09-02/11-130-Corr and the “Appeal of the Government of Kenya against the ‘Decision on the Application by the Government of Kenya

Appeals Chamber shortly after the latter had issued its Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute.⁴ The Government of Kenya has instead chosen to wait until all filings by the participants in the present appeal were made, and after its request for leave to reply was rejected.⁵

5. Moreover, the Government of Kenya shows no good reason as to why such a request could not be part of its earlier filings before the Appeals Chamber. The OPCV therefore submits that the Request inappropriately seeks to reopen the exchange of submissions after the exhaustion of the procedure determined by the Appeals Chambers.

6. Furthermore, the OPCV underlines that, contrary to the Government's submission, granting the Request will, unavoidably, cause considerable delays to the present proceedings with an adverse effect on "the quality of litigation".⁶ Indeed, all the legal issues raised in the Request and for which the Government of Kenya seeks an oral hearing were comprehensively dealt with by way of written submissions, both before the Pre-Trial Chamber and on appeal.

7. As to the issues of fact which the Government intends to clarify, the Office submits that the Request fails to demonstrate the manner in which the proposed oral submissions could be of assistance to the Appeals Chamber. Either the Government of Kenya will repeat factual allegations that are already on record, or it will engage in the prohibited practice of adducing new factual information and evidence that were

Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", No. ICC-01/09-02/11-109, 6 June 2011.

⁴ See the "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", No. ICC-01/09-02/11-116, 13 June 2011.

⁵ See the "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'", No. ICC-01/09-02/11-206, 1st August 2011.

⁶ See the Request, *supra* note 1, par. 6.

not brought to the consideration of the Pre-Trial Chamber. Either way, the OPCV is of the opinion that the Request ought to be rejected.

8. Finally, the OPCV takes note of the Appeals Chamber's decision dated 28 July 2011, in which it declined to consider the filing by the Government of Kenya of an "updated investigation report".⁷ The Appeals Chamber emphasised that the "*function of the Appeals Chamber is not to decide anew on the admissibility of the case*" and that "*the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber*".⁸ The Government of Kenya's submission that the Appeals Chamber is under an obligation to hear the Attorney-General in person is therefore unfounded and contravenes the conclusions of the Appeals Chamber. In this regard, the Request is no more than a renewed attempt by the Government of Kenya to alter the scope of the appellate proceedings, which is limited to reviewing decisions at first instance without delving into new factual statements.

FOR THE ABOVE-MENTIONED REASONS, the OPCV respectfully requests the Appeals Chamber to dismiss the Government of Kenya's Request.



Paolina Massidda
Principal Counsel

Dated this 11th day of August 2011

At The Hague, The Netherlands

⁷ See the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility", No. ICC-01/09-02/11-153, 4 July 2011.

⁸ See the "Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'", No. ICC-01/09-02/11-202, 28 July 2011, paras. 9-10.