

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 16 November 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

Public

**Decision on the “Application by the Defence of Ambassador Francis K. Muthaura
in Relation to Public Statement of the Prosecutor”**

Decision 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
Karim Khan, Essa Faal, Kennedy
Ogetto and Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohamed Hussein Ali
Evans Monari, John Philpot and
Gershom Otachi Bw'omanwa

Legal Representatives of the Victims
Morris Azuma Anyah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”),¹ hereby renders this decision on the “Application by the Defence of Ambassador Francis K. Muthaura in Relation to Public Statement of the Prosecutor” (the “Application”).²

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura (“Mr. Muthaura”), Uhuru Muigai Kenyatta, and Mohammed Hussein Ali (collectively, the “Suspects”) to appear before it.³ Pursuant to this decision, the Suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011 during which, *inter alia*, the Chamber set the date for the commencement of the confirmation of charges hearing for 21 September 2011.⁴

2. The confirmation of charges hearing took place between 21 September 2011 and 5 October 2011.

3. On 24 October 2011, the Defence of Mr. Muthaura submitted the Application, which relates to an interview given by the Prosecutor to a Kenyan television station on 6 October 2011.⁵ In the submission of the Defence, “during this interview the Prosecutor made statements which were manifestly false or otherwise wholly inaccurate thus prejudicing the integrity of the Court, its proceedings and prejudicing Ambassador Muthaura”.⁶ In particular, the Defence contends:

At page 8 of the annexed Transcript, the Prosecutor describes the probative evidence he elicited during his cross examination of Mr. Uhuru Kenyatta during the hearing. In the course of providing this information, Mr. Ocampo asserts that Uhuru Kenyatta confirmed that Ambassador Muthaura has “a bigger role” than had apparently been previously contended. This assertion was and is materially

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

² ICC-01/09-02/11-359 and annexes A and B.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-01.

⁴ ICC-01/09-02/11-T-1-ENG.

⁵ The transcript of the interview is appended to the Application as annex A.

⁶ ICC-01/09-02/11-359, para. 4.

incorrect. Evidence presented to the Chamber has been misstated and the Defence submit requires correction.⁷

4. The Defence requests “the intervention of the Chamber to order the Prosecutor to publicly correct his misstatement”.⁸ In the alternative, the Defence requests the Chamber to “render a public decision confirming that the Prosecutor has misstated the evidence presented at the hearing on the single issue raised above and remind the Prosecutor, again, to be ever vigilant in his interactions with the press and to be scrupulously fair and accurate in his public statements on cases before the court”.⁹

5. On 14 November 2011, the Prosecutor submitted the “Prosecution’s Response to the ‘Application by the Defence of Ambassador Francis K. Muthaura in relation to Public Statements of the Prosecutor’”, requesting that the Chamber dismiss the Application.¹⁰ The Prosecutor asserts that he “spent much of the interview explaining the confirmation process”,¹¹ and that:

He repeatedly stated that it is not his role to evaluate the evidence; that he would not comment on the evidence; that the parties presented their evidence and their views; that the judges would make a final determination in due course; and that all Kenyans must respect the Court’s process and preserve the peace. Finally, he expressed respect for the decision of the Accused to cooperate in these proceedings.¹²

6. In relation to the specific Defence allegation that he had mischaracterized the evidence, the Prosecutor responds:

Answering a question about the testimony of Kenyatta, the Prosecutor stated in very vague and general terms that “we explored with him how Mr Muthaura has a bigger role and we...he confirmed that.” This is not a misstatement of mischaracterization of the evidence at the hearing.¹³

7. The Single Judge notes article 21 of the Rome Statute.

⁷ ICC-01/09-02/11-359, para. 12.

⁸ ICC-01/09-02/11-359, para. 15.

⁹ ICC-01/09-02/11-359, para. 16.

¹⁰ ICC-01/09-02/11-367, para. 13.

¹¹ ICC-01/09-02/11-367, para. 8.

¹² ICC-01/09-02/11-367, para. 8.

¹³ ICC-01/09-02/11-367, para. 9.

8. The Single Judge recognizes that the Application raises issues which are of legitimate concern to the Defence. As held previously in this case:

Notwithstanding the absence of a specific statutory provision regulating the relationship between the parties and the press, it must be stated, as a matter of principle, that the safeguarding of the proper administration of justice and the integrity of the judicial proceedings requires the parties, participants and any person involved in the proceedings, to refrain from making public statements or engage in any other activity which could have an impact on the evidence or the merits of the case or could be perceived as showing a predetermination of the cause pending before the Court.¹⁴

9. However, having reviewed the Application and the annexed transcript, the Single Judge is of the view that the Prosecutor has not acted in violation of the principles set out above during the interview in question. While he indeed commented on the proceedings in the present case, it is also evident from the transcript that he was expressing his own view as Prosecutor on the conduct of the confirmation hearing and the evidence presented. In the opinion of the Single Judge, the transcript of the interview does not provide for a conclusion that the Prosecutor made a pre-determination of the pending case or interfered with the integrity of the proceedings before this Chamber. Therefore, the Application must be rejected.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

rejects the Application.

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

¹⁴ Pre-Trial Chamber II, "Decision on the Defence 'Application for Order to the Prosecutor Regarding Extra-Judicial Comments to the Press", ICC-01/09-02/11-83, para. 6.



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 16 November 2011

At The Hague, The Netherlands