

**Cour
Pénale
Internationale**



**International
Criminal
Court**

No. ICC-01/09 OA2

Original: English

Date: 21 June 2012

APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge

Judge Akua Kuenyehia

Judge Sanji Mmasenomo Monageng

Judge Erkki Kourula

Judge Anita Usacka

SITUATION IN THE REPUBLIC OF KENYA

PUBLIC REDACTED VERSION

CONFIDENTIAL, *EX PARTE*, APPLICATION OF DR. DAVID NYEKORACH- MATSANGA FOR LEAVE TO REPLY, PURSUANT TO REGULATIONS OF THE COURT, REGULATION 24(5), TO THE PROSECUTION'S CONFIDENTIAL COMMENTS, DATED 12 JUNE 2012

Source: The Defence for Dr David Nyekorach- Matsanga

Chief Charles A. Taku

Ms. Beth S. Lyons

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

The Office of the Prosecutor

Counsel for Dr. Nyekorach-Matsanga

Ms. Fatou Bensouda, Prosecutor

Chief Charles A. Taku

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REGISTRY

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Ms. Silvana Arbia, Registrar

CONFIDENTIAL APPLICATION OF DR. DAVID NYEKORACH-MATSANGA FOR LEAVE TO REPLY, PURSUANT TO REGULATIONS OF THE COURT, REGULATION 24(5), TO THE PROSECUTION'S CONFIDENTIAL COMMENTS, DATED 12 JUNE 2012

- 1. On 12 June 2012, the Prosecution filed its Comments on the "Confidential Application with Confidential Annexes of Dr. David Nyekorach-Matsanga for the Disqualification of the Prosecutor Pursuant to Article 42(8) of the Statute." ("Comments")**
- 2. Counsel for the Applicant, Dr. David Nyekorach-Matsanga, received the Prosecution's Comments via DHL on 15 June 2012.**
- 3. The Applicant requested the right to reply to the Prosecution's submissions in his Application, dated 28 May 2012.**
- 4. The Applicant respectfully urges this Court, pursuant to Regulation 24(5), and in the interests of justice, to grant leave to Reply, and to accept this submission for the purpose of clarifying the Prosecution's factual errors.**
- 5. As a general observation, the Prosecution fails to respond specifically to the merits of the Applicant's original Confidential Application ("Application") and the submitted evidence. For example, at Para. 11, the Prosecution states its blanket dismissal of all the allegations, but disputes the specifics of none. This does little, if anything, to further the process of establishing the truth in the matters alleged.**
- 6. The Applicant submits that the Prosecution misrepresents the Application in Para. 2. The basis for the Application is not solely the Applicant's Complaint (Annex B); it includes, *inter alia*, the Prosecution's inconsistent reasons for the investigation of the Applicant (Annex D) and Prosecution's investigation of matter in which the**

then former Chief Prosecutor, Mr. Luis Moreno-Ocampo and hence the current Chief Prosecutor Fatou Bensouda had an interest in its outcome.

7. At its Comments, paras. 6 and 11, the Prosecution makes serious allegations against the Application, yet he offers no evidence to dispute its allegations. In fact, the Prosecution appears to be minimizing the necessity of providing any evidence, since the Prosecution has determined that the Appeals Chamber does not have to address any assertions made in the Application when they were the reasons for seeking his disqualification. Yet, his reply offers no legal support for its position that “the Application fails as a matter of law.” (Comments, para. 6).
8. Under Article 54(1) of the Rome Statute, the Prosecutor has the duty, “in order to establish the truth,” to “extend the investigation to cover *all* facts and evidence. . .and, in so doing, investigate incriminating and exonerating circumstances equally.” (italics added). The Prosecution has demonstrated his biases and deep resentment of the Applicant in his reply through his support for the intermediaries he relied on in his investigation in the Kenya Case and who are subject of criminal investigations by the legal authorities of the Republic of Kenya for defamation and witness tampering pursuant to a complaint filed by the Applicant.¹
9. The credibility of the intermediaries, which the Applicant has stated interfered with the judicial process through subordination of and tampering with witnesses as well as Witness No. 4, upon whom the Prosecutor relied clearly falls within this category. Yet, the Prosecutor, in lieu of a response to specific allegations raised, simply attacks the Applicant.²

¹ Annex F, correspondence from the Hon. Attorney of Kenya [REDACTED].

² Comments, para. 6-9 of the Prosecutor’s reply.

10. **The Applicant's role in exposing or bringing to the notice of the Court the behavior of the Chief Prosecutor contained in documents submitted by him during the investigations conducted on the 12 and 13 April 2012 in opposition to the Prosecutor and the Office of the Prosecutor pursuing investigation against him, as well the exhibits submitted in support of this Application, has created reasons for the disqualification of the Chief Prosecutor from investigating him.**
11. **Furthermore, the Applicant has credible evidence in his possession to establish that the Prosecution erred in using intermediaries to conduct investigations in Kenya and failed to notify the Pre-trial Chamber as required by law as well as any circumstances that might pervert the course of justice and dent the image of the ICC.**
12. **As to the standing issue, the Prosecution admits that it is "presently investigating him [the Applicant] for possible violations of Article 70." Based on this, the Applicant has a direct and significant personal interest in the allegations concerning credibility. The Prosecution is warning the Applicant that he may be charged with a crime under Article 70. The Prosecution refuses to take the opportunity of its Comments at para.10 to support its allegation that the Applicant "lacks knowledge of the correct facts."**
13. **In addition to the above, the Applicant submits that in the exercise of his internationally protected right accorded to all citizens the world over, especially citizens of East Africa like the Applicant who was affected by the PEV of Kenya of 2007-2008, he has consistently pointed out the shortfalls of the Prosecution concerning the careless manner in which the Office of the Prosecutor conducted investigations in Kenya.**
14. **The Applicant therefore, submits that fundamental fairness demands that the Prosecution whom he has consistently accused of corruption in all the Kenyan**

cases and subornation of witnesses should not be permitted to investigate the same accuser or to investigate the same complaints and interpret the Rome Statute in a manner adverse to the Applicant and/or the interests of Justice. Rather, fundamental fairness demands that it is the duty of the ICC Appeals Chamber to constitute an independent Panel to investigate claims made by the Applicant.

15. Significantly, the Applicant emphasizes that he has not refused to be investigated and charged if a credible, independent and unbiased investigation concludes that he be charged under Article 70. Indeed, he accepted to be investigated. Rather, the Applicant is opposed to the same Prosecution that he accused of perjury investigating, charging and prosecuting him using the ICC mechanisms

16. The Prosecution does not cite any jurisprudence³ (Comments, para. 11) to support its objection to the Applicant's requested remedy for disclosures. The Prosecution's opposition appears to be inconsistent with the overall objectives of fairness and due process. This conclusion is based on the facts that the Applicant has provided substantiated reasons to challenge the Prosecution's independence and impartiality in this investigation, and the Applicant's request for an independent and neutral Investigator/Prosecutor⁴ has been objectively rejected by the Prosecution. The objections by the Prosecution without any factual or legal basis in support, is based on the fact that the Prosecution does not have facts to present to the Appeals Chamber to counter the Applicant's credible criticism of its Kenyan investigations.

³ Comment, Para. 11

⁴ See Application, para. 16; annex C, confidential urgent request for an independent/neutral investigation in the article 70 (C) of Dr David Matsanga.

17. It is generally accepted in most jurisdictions that an officer of the Court cannot investigate or prosecute his or her own alleged wrongdoing. At para. 2, the Prosecution fails to address the principle that the Prosecutor cannot be impartial in investigating allegations which concern his conduct involving allegations of high corruption alleged by the Applicant⁵. As the documents submitted in the Application, Annexes A and B establish, the Applicant has been critical of the Prosecution for 5 years in all African cases⁶. Moreover, the Prosecution has already concluded in its reply that information provided to the Appeals Chamber is defamatory (para. 12) of [REDACTED] who were the same intermediaries at the core of the corruption and witness tampering allegation made by the Applicant and thus will be at the centre of an investigation by an independent panel created by Appeals Chamber.

18. As to para. 4, the Applicant refers the Appeals Chamber to its Application, especially para. 30 and Annex D⁷. In response to Chief Taku's explicit request as to whether there is an order of protection "of the said witness PW4", [REDACTED] replied and indicated that an order of protection is not being referred by the OTP. In the Prosecutor's comments to this application, he took an ambivalent position that he did not accept or deny whether the same witness was under the Court's protection orders.

19. The Prosecution comments, at para. 11, that Article 42 requires a reasonable doubt standard for disqualification. There exists a long acrimonious history between the Prosecution and the Applicant spurning over now over five years. The Applicant submits that his Application meets this legal standard of disqualification.

⁵ See annex B for details of accusations made by the Applicant against the Prosecutor.

⁶ The Applicant submitted evidence of his long standing criticism of the Prosecutor's intervention and investigations in Africa and the state of animosity that this criticism generated over the years between the Prosecutor and the Applicant, during the investigations conducted on the 12 and 13 April 2012.

⁷ Annex D are correspondences between Applicant's counsel, Chief Charles A. Taku and [REDACTED], representing the OTP.

20. In addition, the Applicant notes that the Prosecution only quotes a portion of the first sentence of Article 42(7). It states that “Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted *on any ground.*” (*italics added*) The last clause suggests a non-restrictive interpretation of grounds which could result in disqualification.
21. The Prosecution’s Comments at paras. 7 and 9 are admissions that [REDACTED] are potential witnesses against the Applicant in this investigation and seeks to use the court powers to protect them from the scrutiny of an independent panel set by the Appeals Chamber.
22. The Prosecution’s Comments, at paras. 7 and 9, concerning the reasonable and significant fears expressed in the Application and in its Annex D, totally reject and ridicule the Applicant’s concerns. The Prosecution’s position is not consistent with its obligations and duties under the Rome Statute, and does not inspire confidence that the Prosecutor can proceed in an independent and unbiased manner.
23. This concern is further supported by the fact that the Prosecution has already concluded that the Applicant has made defamatory and potential allegations against [REDACTED], without explaining the grounds for this assertion (Comments, para. 12). In these Comments, the Prosecutor displays his biases, and his inability to consider the biases of these potential witnesses. Considered alone, or in the aggregate with Annexes D, E, F, G, G1, the Prosecutor confirms and supports the Application.
24. The Prosecution belittles the Applicant’s allegations at para. 8, and does not address or refute the Applicant’s position that the reliance on these [REDACTED] as indicative of the Prosecution’s bias and lack of independence. The Prosecution

displays its biases at para. 12, by concluding that the Application makes “defamatory allegations” against [REDACTED].

25. Lastly, in respect to the Comments, para. 12, the Applicant submits that he has neither made defamatory allegations against [REDACTED], nor has he revealed the identities of Prosecution staff. In addition, the Prosecution’s inclusion of [REDACTED] is not found in the Application.

26. At para. 12, the Prosecution maintains that the Application’s confidential classification should be maintained. The three reasons given are not based on the facts. First, as indicated in the correspondences in Annex D, there is no evidence that the witness is a protected witness. In addition, the Prosecution’s position contradicts its Reply, footnote 3, which states “The Prosecution neither confirms nor denies whether Dr. Nyekorach- Matsanga has correctly *knowingly* identified the Witness No. 4. . .” This clearly challenges the Prosecution’s assertions at paras. 4 and 5.

27. Second, the Prosecution’s representations of a [REDACTED] misrepresent the Application. The person is not named in the Application. The Applicant is confused as to why this name even appears in the Prosecution’s Response.

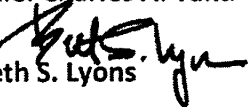
28. Third, the Prosecution does not provide any reason why the names of his office staff in this investigation should be kept confidential. The Applicant refers to Annex C, Counsel Chief Taku’s letter to the Chief Prosecutor, urging him to disqualify himself. [REDACTED]. Contrary to the Prosecution’s bald and unfounded assertion, the identity of his office staff was not on the material submitted in this annex.

29. In sum, the Applicant has raised numerous specific allegations in his Application for the Prosecutor’s Disqualification as per the Rome Statute. However, the absence of a meaningful response by the Prosecution in its Comments to this serious matter underscores the importance of an independent panel to investigate him and the importance of holding a hearing in the interest of fairness and due process in this matter.

30. For the reasons stated above, the Applicant respectfully prays that the Appeals Chamber grants leave to reply, and accepts this submission as a reply.

Respectfully submitted,

 12.9.12
Chief Charles A. Taku

 12.9.12
Beth S. Lyons

Counsel for Applicant, Dr. David Nyekorach-Matsanga