

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 1 March 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA
AND
*UHURU MUIGAI KENYATTA***

Public

Muthaura Defence Application for Leave to Reply to the “Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber”

Sources: Defence for Francis Kirimi Muthaura

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

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I. Introduction

1. The Defence for Ambassador Francis Muthaura (“Defence”) requests the Trial Chamber (“Chamber”) to grant it leave to reply to the “Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber” (“Response”),¹ which was notified to the Defence on 26 February 2013.

2. The Defence respectfully submits that the Response merits a reply. The Defence is compelled to conclude that the Prosecution withheld critical information from the Chamber. The withheld information demonstrates that the Prosecution’s failure to disclose the exculpatory Affidavit of Prosecution Witness 4 was not, as the Prosecution submits, an innocent “error” of a junior “reviewer” who did not possess sufficient case knowledge for him/her to have identified the exculpatory nature of the information contained in the said Affidavit.² If the Defence is permitted to submit a reply on this one discrete issue, it will demonstrate that the Prosecution has incorrectly and/or incompletely described the salient facts regarding the non-disclosure of the Affidavit.

3. The non-disclosure of the Affidavit was a central pillar of the Defence’s submissions in its Article 64(4) Application,³ and it is essential that the Chamber have before it all relevant facts when deliberating on the Defence Application.

¹ ICC-01/09-02/11-664-Red2.

² *Ibid.*, para. 38.

³ Public Redacted Version of “Defence Application pursuant to Article 64(4) for an order to refer back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary issue of the Validity of the Decision on the Confirmation of Charges or for an order striking out new facts alleged in the Prosecution’s Pre-Trial Brief and Request for an extension of the page limit pursuant to Regulation 37(2)”, 7 February 2013, ICC-01/09-02/11-628-Red, paras. 13-23.

4. The importance of the Article 64(4) Application to the fundamental fair trial rights of Ambassador Muthaura and the underlying validity of the confirmation decision upon which this trial is based, as well as the Chamber's ability to appropriately evaluate the conduct of the Prosecution in this case, further supports leave being granted to submit a reply on this discrete issue.
5. In the event the Chamber grants leave to submit a reply, the Defence requests that the time limit specified in Regulation 34(c) of the Regulations of the Court ("Regulations") be extended so that the reply is to be filed within ten days of notification of the Chamber's decision to grant leave.

II. Standard for Granting Leave to Reply

6. Regulation 24(5) of the Regulations sets out that: *"Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations."*
7. Regulation 34(c) of the Regulations further provides: *"Subject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response."*
8. Leave to reply may be granted by a Chamber when the applying party or participant has shown "good cause".⁴ Pre-Trial and Trial Chambers of this Court have determined that such 'good cause' exists when new and distinct issues of law and fact are raised in the response and where the importance and

⁴ See e.g. *Prosecutor v. Bemba*, Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, 27 November 2008, ICC-01/05-01/08-294, para. 3 ("Having considered the Application, the Single Judge is of the opinion that the Defence has shown good cause to grant leave to reply to the Prosecutor's Response.").

potential effect of the issues contained in the original application and response necessitate additional submissions being made.⁵

9. This Chamber has previously applied a holistic approach when considering an application for leave to reply.⁶

III. Good Cause Exists for Granting Leave to Reply

10. On the issue of the Prosecution's non-disclose prior to the confirmation hearing in whole, redacted or summary format the critical PEXO information contained at paragraphs 14 and 33 of Witness 4's affidavit, the Defence, in the Article 64(4) Application, submitted, *inter alia*, that it was "*compelled to conclude that the OTP deliberately concealed the true nature of the [affidavit] from the Single Judge*"⁷ and that "*it appears that the OTP misled the Court regarding the reliability of Witness 4*" given "*that in its oral and written submissions during the confirmation hearing, the OTP, with full knowledge of Witness 4's exculpatory evidence, emphasised or asserted in the strongest terms possible, the consistency of Witness 4 on the issue of his attendance to the aforementioned meetings.*"⁸
11. In the Response, the Prosecution submits that the legal standard for referring a confirmation decision back to the Pre-Trial Chamber for reconsideration "*might argu[ably] [be] a different standard [...] when prosecutorial bad faith is at issue*", but that "*the Defence accusation of deliberate prosecutorial misconduct is untrue*".⁹ Instead, the Prosecution, while admitting that "*the affidavit could and should have*

⁵ See e.g. *Prosecutor v. Mbarushimana*, Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material", 24 February 2011, ICC-01/04-01/10-61; *Prosecutor v. Katanga & Ngudjolo*, Decision on the Application of the Defence for Germain Katanga to file a reply (regulation 24 of the *Regulations of the Court*), 27 March 2009, ICC-01/04-01/07-1004tENG.

⁶ Decision on the prosecution request for leave to reply, 14 November 2012, ICC-01/09-02/11-530, para. 5 ("In all the circumstances, the Chamber is of the view that it may benefit from receiving further observations from the prosecution concerning the three issues raised in paragraph 2 of the Request.").

⁷ Article 64(4) Application, para. 18.

⁸ *Ibid.*, para. 20 (internal citations omitted).

⁹ Response, para. 7.

been disclosed to the Defence prior to the confirmation hearing”, characterises this non-disclosure as an error, and submits that “a review of the relevant records demonstrates that the potential significance of paragraph 33 was not discovered until after the confirmation hearing, many months after the Prosecution had submitted its redactions application to the Pre-Trial Chamber”.¹⁰

12. The Prosecution informs that the information contained in the *“Prosecution’s Ringtail records reveal that the affidavit was reviewed for relevance and disclosure by at least two Prosecution staff prior to the confirmation hearing”, but that “[t]he reviewer” failed to recognize the critical importance of the PEXO information at paragraph 33 concerning the Nairobi Club meeting because this reviewer, apparently, was not “familiar with Witness 4’s statements that he attended the Nairobi Club meeting [...], and through an oversight, the inconsistency was not identified during the disclosure review”.¹¹*
13. The Defence seeks leave to file submissions on the discrete issue of the narrative put forth by the Prosecution on the internal review of Witness 4’s affidavit conducted prior to the commencement of the confirmation hearing, including mischaracterising the error as an ‘oversight’. In particular, if granted leave, the Defence will place before the Chamber information demonstrating that :
 - (i) The Prosecution Trial Lawyer who first received the Affidavit had in fact participated in interviews with Witness 4, and in the Confirmation Hearings when submissions were made regarding the stated “consistency” of Witness 4’s account. That lawyer and other trial attorneys in this case who were present and participated in the hearings, and who were involved in the preparation and filing of the final written submissions of the Prosecution at the Confirmation stage,

¹⁰ *Ibid.* para. 37.

¹¹ *Ibid.*, para. 38 (emphasis added).

must be presumed to have possessed full knowledge that the information contained in the Affidavit was exculpatory in nature – and that submissions made to the Court regarding the consistency and credibility of Witness 4's account were false.

- (ii) The Trial Lawyer charged with carriage of this case, and the former Prosecutor, Mr. Luis Moreno-Ocampo, apparently reviewed the Affidavit and accompanying filings at the time redactions were requested. What is more, the same individuals made submissions to the Court both orally and later in writing vigorously asserting that Witness 4's accounts were credible and consistent.
 - (iii) The Defence will seek to make additional submissions relevant to the assertion that this "error" can simply be passed off as a one-off mistake attributable to and blamed on apparently junior "reviewers" who were not acquainted with the facts or the gravity of the non-disclosure.
14. Such submissions will demonstrate that the conduct of the Prosecution in this case was not an excusable "error" or "oversight", but is best described as conduct which has led to serious prejudice to Ambassador Muthaura and a miscarriage of justice in this case. This information would be of relevance and pertinent for the Chamber's evaluation of the credibility and sufficiency of the Prosecution's submissions on this alleged 'error' and 'oversight', and therefore relevant to the Trial Chamber's determination of the Article 64 Application filed by the Defence of Ambassador Muthaura.
15. The Defence was not, of course, privy to the information and explanations that the Prosecution has now provided regarding its internal evidence/disclosure review process with respect to Witness 4's affidavit. The Defence submits that

this information constitutes ‘new facts’ and that the Chamber “may benefit from receiving further observations”¹² from the Defence on this issue. Accordingly, the Defence submits that good cause exists for the granting of leave to reply to the Response on the discrete issue of the Prosecution’s submissions on its evidence/disclosure review of the affidavit of Witness 4 prior to the confirmation hearing. Additional submissions on this issue are particularly warranted given the importance of the Article 64(4) Application to the fair trial rights of Ambassador Muthaura and the validity of the trial proceedings in this case, as well as the Chamber’s ability to properly evaluate the conduct of the Office of the Prosecutor in this case.

Relief Requested

For the reasons set out above, the Defence respectfully applies to the Chamber for leave to reply to the discrete issue identified at paragraph 13 above.

Should the Chamber grant this application for leave to submit a reply, the Defence requests that the time limit specified in Regulation 34(c) of the Regulations be extended so that the reply is to be filed within ten days of notification of the Chamber’s decision to grant leave.

Respectfully Submitted,



Karim A. A. Khan QC

Lead Counsel for Ambassador Muthaura

Dated this 1st Day of March 2013
At Nairobi, Kenya

¹² Decision on the prosecution request for leave to reply, 14 November 2012, ICC-01/09-02/11-530, para. 5.