



Original: English

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

Date: 1 March 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
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

Prosecution response to the “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’”

Source: The Office of the Prosecutor

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

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1. The Prosecution hereby opposes the “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’” (“Application”).¹ In its Application, the Defence seeks to make further submissions concerning the disclosure of Witness 4’s prior statement for asylum purposes.
2. The Prosecution has already fully addressed this issue forthrightly and has even agreed, if the Chamber finds that there exists a legal basis, to the relief requested by the Muthaura Defence – that the confirmation decision be referred back to the Pre-Trial Chamber for reconsideration with respect to Mr Muthaura. The particular matter on which the Application seeks leave to reply is therefore a non-issue, both legally and factually, and the proposed additional submissions are not likely to assist the Chamber in ruling on Mr Muthaura’s Article 64 application.²
3. *First*, the matter on which the Application seeks leave to reply – whether the Prosecution’s Article 64 response “mischaracteris[es] the [pre-trial disclosure] error as an ‘oversight’”³ – is a non-issue as a matter of law. The key question for the Chamber in ruling on Mr Muthaura’s Article 64 application is whether it is possible, as a matter of law, to grant the relief sought. The Prosecution has not opposed the extraordinary step of sending Mr Muthaura’s case back to the Pre-Trial Chamber for reconsideration, should the Trial Chamber determine that there is a legal basis to grant such relief.⁴ In these circumstances, the principal question for the Chamber is

¹ ICC-01/09-02/11-668.

² ICC-01/09-02/11-628-Red.

³ *See, e.g.*, ICC-01/09-02/11-668, para 13 (asserting that Prosecution lawyers involved in the confirmation hearing “*must be presumed* to have possessed full knowledge that the information contained in the Affidavit was exculpatory in nature”) (emphasis added).

⁴ ICC-01/09-02/11-664-Red2, paras 44-46.

whether there is a legal basis for such a course of action. The Application seeks leave to make submissions on a matter that is irrelevant to this determination, and should therefore be denied.

4. *Second*, the matter on which the Defence seeks leave to reply is a non-issue as a matter of fact. The Prosecution's Article 64 response explains in detail why Witness 4's affidavit was not disclosed prior to the confirmation hearing.⁵ The Prosecution's explanation regarding the manner in which the disclosure error occurred is comprehensive and transparent. The Prosecution has taken responsibility for the error and acknowledged the impact it had on Mr Muthaura's ability to challenge Witness 4's evidence at the confirmation stage. Factually, there is nothing left to say. The additional submissions proposed by the Defence appear to be limited to *speculation* that Prosecution staff "couldn't have" missed the potential significance of paragraph 33 of the affidavit.⁶ Such speculation cannot be of any conceivable "benefit" to the Chamber in ruling on Mr Muthaura's Article 64 application.⁷ The issue should be adjudicated on the facts and the law, not speculation. The Chamber has the relevant facts and law before it; additional conjecture will not add any value.
5. *Third*, the Application improperly contains the Defence's substantive arguments.⁸ Although styled as a request for leave to reply, the eight-page Application is in fact a reply, containing substantive arguments. This tactic improperly circumvents the requirements of Regulation 24(5), and the

⁵ ICC-01/09-02/11-664-Red2, paras 31-41.

⁶ ICC-01/09-02/11-668, para 13.

⁷ ICC-01/09-02/11-530, para 5.

⁸ See, e.g., ICC-01/09-02/11-668, para 13.

Appeals Chamber has held that it constitutes a basis for denying a request for leave to reply.⁹

6. *Fourth*, the proposed topics for further submissions rehash arguments made in Mr Muthaura's Article 64 application. For example, the first two points on which leave to reply is sought (paragraph 13(i)-(ii) of the Application) are the same as assertions made in Mr Muthaura's Article 64 application.¹⁰
7. For the above reasons, the Prosecution submits that leave to reply should not be granted. In the alternative, if the Chamber is minded to grant leave to reply, the Prosecution requests that (i) the Prosecution be granted leave to submit a sur-reply, if it deems one necessary; and (ii) the extended time period requested by the Defence be denied. The Defence has provided no justification nor demonstrated good cause why the time limit specified in Regulation 34(c) should not be followed if leave to reply is granted. The request for additional time therefore fails to comply with Regulation 35's

⁹ See, e.g., Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga, 6 September 2012, ICC-01/09-96-Red, para 21 ("the Appeals Chamber notes and disapproves of the fact that Mr Nyekorach-Matsanga made substantive submissions in the Request for Leave to Reply instead of requesting leave by explaining why leave to reply should be granted to him and awaiting the Appeals Chamber's decision on the request before making substantive submissions"); Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', 13 February 2007, ICC-01/04-01/06-824 (OA 7), para 68 ("The Appeals Chamber disapproves of a practice of the filing of a substantive reply prior to leave being granted by the Appeals Chamber, which in and of itself may also give rise to the rejection of an application for leave"); see also Order on the application on behalf of victims a/1646/10 and a/1647/10 for leave to reply, ICC-02/05-03/09-242, 31 October 2011, para 3 ("Requests submitted pursuant to Regulation 24(5) of the Regulations should only include arguments as to why leave should be granted."); Decision on the "Requête aux fins d'être autorisés à soumettre un Addendum", 6 March 2012, ICC-02/05-03/09-304, para 6 ("a reply to a response may be filed only with the Chamber's leave in accordance with Regulation 24(5) of the Regulations").

¹⁰ Compare ICC-01/09-02/11-668, para 13(i) (asserting that Prosecution lawyers involved in the confirmation hearing "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") and para 13(ii) ("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") with ICC-01/09-02/11-628-Red, para 20 ("These submissions [regarding Witness 4's accounts] were false to the knowledge of the OTP. At no time did Prosecution counsel refer to the important contradictions in the [REDACTED] of Witness 4, even though they were fully aware of them. Submissions of Prosecution counsel were not tempered in the least by the knowledge that their key witness had given a fundamentally different account on a crucial issue falling for determination at confirmation.").

requirement that a request for variation of a time limit must “set[] out the grounds on which the variation is sought”. It should be denied on this basis.

Conclusion

8. For the foregoing reasons, the Prosecution respectfully requests that the Chamber deny the Application.



Fatou Bensouda,
Prosecutor

Dated this 1st of March 2013
At The Hague, The Netherlands