



Original: English

No.: ICC-01/09 OA2

Date: 5 April 2013

APPEALS CHAMBER

Before: Judge Sang-Hyun Sung, Presiding Judge
Judge Sanji Mmasenomo Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Usacka

SITUATION IN THE REPUBLIC KENYA

PUBLIC

Motion of Mr David Nyekorach Matsanga for Reconsideration of Decision on Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga dated 11 July 2012 *with Public Annexes A,B,C as PUBLIC documents. Annex A letter to OTP PUBLIC , Annex B status conference one as Public document , and Annex C status conference two as PUBLIC.*

Case No. ICC-01/09 OA 2

Source: The Defence for Dr. David Nyekorach-Matsanga
Chief Charles A. Taku

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

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor

Counsel for the Defence

Chief Charles A. Taku

REGISTRY

Registrar

Ms Silvana Arbia

APPLICATION FOR RECONSIDERATION.

1. The Applicant, Dr David Nyekorach-Matsanga brings this application before the Hon Appeals Chamber and seeks a reconsideration of the Decision of this Honourable Appeals Chamber dated 11 July 2012¹ on the basis set out here under and seeks the remedies specified in the Application seeking the disqualification of the Chief Prosecutor dated 28 May 2012. The legal and factual grounds on which this application is based are set out in paragraph hereunder.

PROCEDURAL HISTORY.

2. On the 19 March 2012, the Prosecutor of the ICC notified Dr David Nyekeroach-Matsanga that he intended to commence investigation against him under article 70 of the Statute of the ICC. The said investigation took place in Nairobi Kenya on the 12 and 13 April 2012.

3. During this investigation, Dr David Nyekeroach- Matsanga produced and tendered a plethora of documents and exhibits in his defense concerning allegations brought against him by the Prosecutor concerning the publication on one of his media outlets of documents, material and an affidavit made by an individual alleged by the Prosecutor then to be witness No. 4 in Case No. 2 in the Situation in the Republic of Kenya.

4. The Applicant during the interview made several allegations and requested an independent inquiry concerning alleged subordination of witnesses, careless investigations and perjury by the Chief Prosecutor Mr Moreno- Ocampo in concealing the affidavit of witness No. 4 in which he recanted his evidence against the accused during the confirmation hearing in Case No. 2 before the Pre-trial Chamber No.II of the ICC.

3. On the 28 day of May 2012, the Applicant filed « Confidential Application with Confidential Annexes of Dr David Nyekeroach-Matsanga for the disqualification of the Prosecutor pursuant to article 42 (8) of the Statute » (ICC-01/09-89-Conf-Exp- Anx 1(OA 2) PP-2-16.

3. On the 11 July 2012, the Appeals Chamber determined that it had jurisdiction to entertain the application pursuant to article 42 (8)(a) of the Statute of the Court because « a person being investigated for offenses under article 70 of the Statute may request disqualification of the Prosecutor from that particular investigation (i.e, the investigation of that person under article 70 of the Statute)²

4. On 11 July 2012, the Hon. Appeals Chamber dismissed the Application in limine and determined that « Mr Moreno Ocampo's term of office began of 16 June 2003, and pursuant to article 42 (4) of the Statute lasted 9 years. His term of office ended on 15 June 2012. With

¹ Decision on the Request for Disqualificator in the Investigation against David Nyekorach-Matsanga.

² Para.17 of the Decision.

Mr Moreno Ocampo having left office, the request to disqualify him has been rendered moot and must be dismissed as such.³

5. The Appeals Chamber considered it unnecessary to consider the other remedies sought by the Applicant all of which were aimed at facilitating the merits of the request for disqualification.⁴

6. Consequently, the Appeals Chamber made it clear that it « . . . [it] does not pronounce itself upon the allegations of either Mr. Nyekorach-Matanga or the Prosecutor. » on the allegations related to the investigation, particularly in reference to the identity of a protected witness and to the alleged « defamatory allegations » against alleged third parties.⁵

7. The investigations which the then Chief Prosecutor commenced against Dr David Nyekeroach-Matsanga on the 12 April 2012 is pending almost a year since he left. The new Chief Prosecutor inherited and adopted very much the same methods that formed the basis of the application to disqualify and thus the conduct attributed to Mr Moreno- Ocampo in that motion remains unchanged almost a year since he left. The Applicant has co-operated with the Prosecutor in this investigation which has lasted close to one year. There is therefore an significant legal and factual basis for a reconsideration of the decision dismissing that motion given the new evidence and changed circumstances specified hereunder.

8. The Investigators who are charged with the investigations in this case promised on record to provide the Applicant with the transcripts and audio recordings of the interview conducted on the 12 and 13 April 2012 to enable him authenticate and effect any corrections prior to any further action on the matter but till the date of filing this motion, the Prosecutor has not complied with that undertaking causing the Appellant great prejudice.

9. The Prosecutor has failed to inform or notify the Applicant about his situation after the investigation and rather adopted and pursued the tactics and methods put in place by her predecessor Mr Moreno- Ocampo necessitating a reconsideration of the decision in this matter.

10. The Appellant accused Moreno- Ocampo of concealing exculpatory evidence against the accused in Case No II during the confirmation of the indictment, presenting incriminating evidence obtained from Witness No. 4 whereas, he had in his custody, affidavit evidence from the said Witness supplied by his lawyer to the effect that he had recanted his evidence against the accused.

³ Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekeroach-Matsanga paras.2 and 19

⁴ Para. 20 of the Decision.

⁵ Decision, para. 10.

11. The Current Chief Prosecutor proceeded to maintain the Applicant under investigations for close to a year eventhough she possessed evidence suggesting that the information he submitted prior to, during and after investigations proved that Witness No. 4 had been suborned to lie against the accuseds, and that her predecessor had obstructed the cause of justice by withholding this information from the Hon Judges at the Pre-trial, Trial and Appellate levels of the ICC despite ample opportunities to inform the court and the accuseds.

12. The currently Prosecutor in failing to inform the Pre-trial Chamber, the Appeals Chamber which was seized of this application and the applicant that there were no reasonable grounds to proceed against him has brought the administration of justice into disrepute and thus warrants a reconsideration of the decision to disqualify her as well.

LEGAL STANDARD FOR RECONSIDERATION.

13. On the admissibility of this application, the Appeals Chamber decided that it has original jurisdiction to entertain the substantive matter and proceeded to consider and delivered the decision which is subject of this application.

14. A Chamber may reconsider its own decision if a new fact is discovered that was unknown to the Chamber at the time, if there is a material change in circumstances, or where there is reason to believe that a previous decision was erroneous and therefore prejudicial to either party.⁶

15. The Applicant recognizes that a reconsideration is an exceptional measure⁷, and respectfully submits that there are very compelling circumstances submitted here under to warrant an urgent reconsideration of the decision and to grant all the remedies sought.

LEGAL BASIS AND FACTUAL BASIS FOR A GRANT OF THIS APPLICATION.

13. Although Mr Moreno- Ocampo against whom the substantive application was directed left prior to a determination of the application to disqualify him, the new Chief Prosecutor inherited the investigations and aggravated the conduct on the basis of which the applicant sought his disqualification.

14. The Chief Prosecutor failed to promptly inform the Appeals Chamber that the basis to proceed with the investigations that prompted the motion to disqualify did not exist prior to the decision on which reconsideration is sought.

15. Prior to and during the Status conference in Case No II in the Situation in the Republic of Kenya, the Chief Prosecutor informed Trial Chamber V hearing the case that she didnot

⁶ Prosecutor Vs Ndindiliyimana et al No.ICTR -2000-56-T Decision of Bizimungu's Motion for Reconsideration of Chamber's 19 March Decision on disclosure of Prosecution Material 3rd November 2004 at para.21.

⁷ Prosecutor Vs Edouard Keremera et al. NO.ICTR -98-44-PT, Decisions on Defense Motions for Reconsideration of Protective Measures 29 August 2005 Para.8

intend to call Witness No. 4 to testify in that case and that she would seek a termination of the case against Mr Francis Mathuara whose indictment depended solely on the evidence provided by that witness⁸.

16. On the 13 March 2013, the Chief Prosecutor effectively withdrew the Case against Mr Francis Mathuara based in the main on the fact that Witness No 4 had recanted his witness statements made to the Prosecutor, lied against the two accused in Case No.II, Francis Mathuara and Uhuru Kenyatta and that the confirmation of charges against the two had in the case of Mr Mathuara been based solely on the witness statements of this witness and that of Uhuru Kenyatta was also based significantly on the statement of the same witness.

17. The information on which the Chief Prosecutor relied on to make these representations formed the basis of the investigations initiated against the Applicant on the 12 and 13 April 2013 and continuing.

18. The Chief Prosecutor Fatou Bensouda had ample opportunity after taking over from Mr Moreno Ocampo to investigate the information supplied by the Applicant during investigation and submitted with his application to disqualify Mr Moreno Ocampo. She had ample opportunity to conduct urgent and proper investigations and inform the Trial Chambers, Pre-trial Chambers, the Appeals Chamber and the Applicant that there was no reasonable grounds on which to proceed against him or promptly admit that the information supplied by the applicant was correct and drop all charges or investigations flowing from the information provided by that witness or connected to him in whatsoever manner.

19. In her application to withdraw the case against Mr Francis Mathuara, the Prosecutor made several unsubstantiated allegations of alleged corruption by unspecified individuals of the purported Witness No. 4.

20. The fact that the Applicant remains a subject of investigation for close to a year on information supplied concerning the subordination of Witness No. 4 by him which turns out to be correct, to the Appeals Chamber and the Prosecutor and admitted by the Prosecutor's public, press and court statements, causes significant prejudice to the applicant and warrants a reconsideration of the Decision on Applicant's Request to disqualify the Prosecutor or order a termination of the investigation against him and a thorough independent investigations as requested by the Applicant in his application dated 28 May 2012.

21.. On the 19 March 2013, the Applicant formally requested the Prosecutor to terminate the said investigations commenced against him since April 12, 2012 citing significant prejudice and egregious violations of his fundamental human rights and the Statute of the ICC⁹.

⁸ Transcript of the Status Conference in ICC-01/09-02/11 The Prosecutor Vs Francis Kirimi Muthaura and Uhuru Muigai Kenyatta 14/2/2013 .

22. No citizen of the freeworld and a truth seeker like that the Applicant deserves being subjected to an abusive protracted investigative process and unwarranted acts of intimidation and blackmail complained about in his application to disqualify without an appropriate remedy.

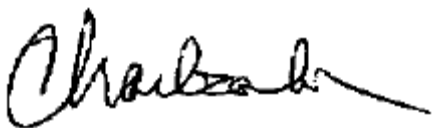
22. This application is therefore based on new evidence provided by the Chief Prosecutor that directly confirms and corroborates most of the information provided to the Appeals Chamber in support of the Applicant's application to disqualify the Chief Prosecutor from conducting investigations against the Applicant.¹⁰

For the following reasons :

The Applicant respectfully prays the Appeals Chamber to :

- 1) Reconsider its Decision dated the 6 July 2012, on legal and factual grounds stated above,
- 2) Consider the merits of the application from which the said decision arose as well as new evidence submitted in this application,
- 3) Order an independent investigation of all the matters submitted to the Appeals Chamber to for consideration in that motion and the present motion.
- 4) Order the Prosecutor to terminate the investigations forthwith since from the facts supplied in support of this motion, no reasonable basis exists for the Prosecutor to proceed against the Applicant.
- 5) Order that all unsealing of all the documents placed under cover of confidentiality in that case, safe information concerning the identity of Prosecutor's Investigators,
- 6) And for any other order of orders the Hon Appeals Chamber may deem fit and proper in the interest of justice and in the circumstances of this case.

DATED THIS 5 TH APRIL 2013.



Chief Charles A. Taku

Counsel for Dr. David Nyekerach-Matsanga

⁹ Urgent request for termination of the investigation and interviews initiated against Dr David Nyekerach-Matsanga by the ICC Prosecutor Pursuant to article 53 of the Rome Statute dated 19 March 2013.

¹⁰ Transcript of Status Conferences Trial Chamber V dated 11 March 2013 and 14 February 2013.