

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09 OA 2

Date: 10 March 2014

THE APPEALS CHAMBER

Before:

**Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka**

SITUATION IN THE REPUBLIC OF KENYA

Public redacted version

**Decision on Mr Matsanga's requests for reclassification of documents, for
suspension or arrest of the former and present Prosecutors and for arrest and
prosecution of the former Prosecutor**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Mr David Nyekorach-Matsanga

REGISTRY

Registrar
Mr Herman von Hebel

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The Appeals Chamber of the International Criminal Court,

Having before it the “A.motion of Amicus Curie [sic] by Mr. David Nyekorach-Matsanga to remove the word *Exparte-Confidential* on the materials before Appeal Chamber 5 [sic] and to publicly clear my name on the ruling of 11July [sic] 2012 case No. ICC-01/09 OA 2 in the case and decision on request for disqualification of the Chief Prosecutor against David Nyekorach-Matsanga” dated 14 October 2013 and registered on 16 October 2013 (ICC-01/09-122-Conf-Exp-Anx), the “Amicus Curiae motion by Dr.David Nyekorach- Matsanga against (OTP) for Prejury [sic], obstruction of justice, perverting the cause of Justice : ([sic] (former Chief Prosecutor and current Chief Prosecutor Fatou Bensouda) REASON : Failing to notify the Pre-Trial Chamber 2 [sic] and any other court on the new circumstances surrounding witness([sic] OTP 4 [REDACTED]), withholding recanted evidence of (OTP4) thereby Obstructing [sic] course of Justice and perverting course of Justice and use of intermediaries in procurement of witnesses and evidence that was filed in KENYA SITUATION ICC-01/09” dated 6 November 2013 and registered on 7 November 2013 (ICC-01/09-124-Conf), and the “Application for arrest and prosecution of Mr. Luis Moreno Ocampo for violation of article 70 and contempt of court order of Appeal Chamber 5 [sic] in the order assigned to the Registrar of ICC [sic] by Judge Erkki Kourula dated 5th June 2012 (ICC-STA42-01/12-1-CONF-EXP-ANX1)” dated 10 February 2014 and registered on 13 February 2014 (ICC-01/09-126-Conf-Anx1),

Issues the following

DECISION

The aforementioned requests are rejected.

REASONS

I. PROCEDURAL BACKGROUND

1. On 30 May 2012, Mr David Nyekorach-Matsanga (hereinafter: “Mr Nyekorach-Matsanga”) filed the “Confidential Application with Confidential Annexes of Dr. David Nyekorach-Matsanga for the Disqualification of the Prosecutor pursuant to

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article 42 (8) of the Statute”¹ (hereinafter: “Request for Disqualification”), pertaining to investigations initiated against him by the Prosecutor (at that time, Mr Moreno-Ocampo) for alleged offences against the administration of justice under article 70 of the Statute. While the Prosecutor did not provide information to the Appeals Chamber on the scope of this investigation, it was clear that the Request for Disqualification related at least to allegations that Mr Nyekorach-Matsanga knowingly sought to reveal the identity of an individual he believed to be a protected witness. Mr Nyekorach-Matsanga requested the disqualification of the Prosecutor from conducting the said investigations against him on the basis of article 42 of the Statute. In support of this request, he alleged that the Prosecutor was not impartial because Mr Nyekorach-Matsanga had made public complaints against him, which related to the former Prosecutor’s investigations in the situation in the Republic of Kenya (hereinafter: “Kenya”), including an accusation of perjury for withholding material evidence.

2. On 11 July 2012, the Appeals Chamber dismissed the Request for Disqualification² (hereinafter: “Decision on the Disqualification Request”). The Appeals Chamber found that Mr Nyekorach-Matsanga, as a person investigated under article 70 of the Statute, had standing to request the disqualification of the Prosecutor from those investigations.³ However, the Appeals Chamber found that this request was moot because it was “based on Mr Moreno-Ocampo’s alleged direct and personal interest in investigating Mr Nyekorach-Matsanga”,⁴ and Mr Moreno-Ocampo’s term of office had ended.⁵ The Appeals Chamber decided that the Request for Disqualification, as well as the voluminous annexes thereto, should remain

¹ ICC-01/09-89-Conf-Exp-Anx1 (OA 2). On 1 June 2012, the Registry transmitted this application dated 28 May 2012 by Mr Nyekorach-Matsanga to the Appeals Chamber, on a confidential *ex parte* basis (“Registry’s transmission of a submission received on 30 May 2012”, ICC-STA42-01/12-1-Conf-Exp, including over 300 pages of annexes). On 5 June 2012, the Appeals Chamber ordered the Registrar to assign this document a number under regulation 26 of the Regulations of the Registry in the situation in the Republic of Kenya; See “Decision on the Presiding Judge of the Appeals Chamber for the proceedings with respect to 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’ and order on re-numbering of documents”, ICC-01/09-87-Conf-Exp (OA 2), according to which, this document was transferred to the record of the Kenya situation (ICC-01/09).

² “Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga”, ICC-01/09-96-Conf-Exp (OA 2), with a redacted version dated 6 September 2012, ICC-01/09-96-Red.

³ Decision on the Disqualification Request, para. 17.

⁴ Decision on the Disqualification Request, para. 18.

⁵ Decision on the Disqualification Request, para. 19.

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confidential and *ex parte* because they pertained to an investigation against Mr Nyekorach-Matsanga relating to allegations that he had revealed the identity of a potential protected witness, as well as potential “defamatory allegations” against third parties, and in order to protect the identities of staff members of the Office of the Prosecutor.⁶

3. On 6 September 2012, the Appeals Chamber ordered the reclassification or the filing of public redacted versions of the filings of Mr Nyekorach-Matsanga and the Prosecutor.⁷

4. On 16 October 2012, the Appeals Chamber issued the “Order on the reclassification of certain documents”,⁸ reclassifying three further documents as public.⁹ The remainder of the documents pertaining to these proceedings remains classified as confidential and *ex parte*.

5. On 5 April 2013, Mr Nyekorach-Matsanga filed an application requesting reconsideration of the Decision on the Disqualification Request and seeking the

⁶ Decision on the Disqualification Request, paras 10-11.

⁷ “Decision on the reclassification or filing of public redacted versions of certain documents”, ICC-01/09-104-Conf-Exp (OA 2). In that decision, the Appeals Chamber reclassified as public the “Prosecution’s response to ‘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’”, 26 June 2012, ICC-01/09-93-Conf-Exp (OA 2). The Appeals Chamber also ordered the filing of public redacted versions of the following documents, that were filed on 13 September 2012: “Public redacted version of ICC-01/09-89-Conf-Exp-Anx1”, ICC-01/09-89-Anx1-Red (OA 2) (public redacted version of the Request for Disqualification); “Prosecution’s 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’”, ICC-01/09-90-Red (OA 2); and “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”, ICC-01/09-92-Red (OA 2).

⁸ ICC-01/09-107 (OA 2).

⁹ The “Decision on the Presiding Judge of the Appeals Chamber for the proceedings with respect to 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’ and order on re-numbering of documents”, 5 June 2012, ICC-01/09-87-Conf-Exp (OA 2), public redacted version ICC-01/09-87; the “Order on the submission of comments by the Prosecutor 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’”, 5 June 2012, ICC-01/09-88-Conf-Exp (OA 2), public redacted version ICC-01/09-88; and the “Registry’s transmission of a submission received on 30 May 2012” dated 1 June 2012 and registered on 5 June 2012, ICC-01/09-89-Conf-Exp (OA 2), public redacted version ICC-01/09-89.

disqualification of the current Prosecutor, Ms Fatou Bensouda¹⁰ (hereinafter: “Request for Reconsideration”).

6. On 22 April 2013, the Appeals Chamber dismissed the Request for Reconsideration, considering that “even if the Appeals Chamber were to reconsider the Decision of 11 July 2012 [...], the disqualification of the current Prosecutor could not be the result of such reconsideration because the Decision of 11 July 2012 did not pertain to her”.¹¹

7. On 16 October 2013, Mr Nyekorach-Matsanga filed the “A.motion of Amicus Curie [sic] by Mr. David Nyekorach- Matsanga to remove the word *Exparte-Confidential* on the materials before Appeal Chamber 5 [sic] and to publicly clear my name on the ruling of 11 July [sic] 2012 case No. ICC-01/09 OA 2 in the case and decision on request for disqualification of the Chief Prosecutor against David Nyekorach-Matsanga”,¹² (hereinafter: “Request for Reclassification”). Mr Nyekorach-Matsanga requests that the Appeals Chamber:

- 1) Consider the merits of the application for REMOVING THE WORD EXPARTE CONFIDENTIAL from which the said decision arose as well as new evidence submitted in this application that witnesses were procured in kenyan cases,
- 2) The court must order for arrest of all those whom [he] named as intermediaries [sic] who coached, bribed, procured, induced, and intimidated witnesses on behalf of ICC in Kenya like [it] ha[s] done to Walter Barasa since the President of ICC has failed to institute an independent inquiry into the matter.
- 3) Order an INDEPENDENT INQUIRY of all the matters surrounding WITNESS PROCUREMENT IN KENYA as submitted to the Appeals Chamber 5 [sic] for consideration in that motion and the present motion of removing *EXPARTE-CONFIDENTIAL* MOTION.
- 4) Order the Prosecutor to terminate ALL proceedings in KENYAN CASES forthwith since from the facts supplied in support of this motion, no

¹⁰ “Motion of Mr David Nyekorach Matsanga [sic] 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”, ICC-01/09-110 (OA 2).

¹¹ “Decision on the request for reconsideration of the decision for the disqualification of the Prosecutor against Mr David Nyekorach-Matsanga”, ICC-01/09-111 (OA 2) (hereinafter: “Decision of 22 April 2013”).

¹² ICC-01/09-122-Conf-Exp-Anx (OA 2), dated 14 October 2013.

reasonable basis exists for the the [sic] Prosecutor to proceed in Kenyan cases whose witnesses were bought [sic] by agents of ICC(OTP) [sic] like Walter Barasa whom [it] issued a warrant of arrest.

5) Order the unsealing of all [Mr Nyekorach-Matsanga's] documents placed under cover of *ex parte confidentiality ruling* in [his] application, the names of all Kenyans who participated in the scheme of procuring witnesses whom [Mr Nyekorach- Matsanga] listed as agents of OTP and save the ICC from collapse on African continent.

6) For any other any other orders the Hon Appeals Chamber 5 [sic] may deem fit and proper in the interest of justice to save ICC image on African continent and in the circumstances of this cases [sic] that have flawed evidence.¹³

8. Subsequently, Mr Nyekorach-Matsanga filed the confidential "Amicus Curiae motion by Dr.David Nyekorach- Matsanga against (OTP) for Prejury [sic], obstruction of justice, perverting the cause of Justice : ([sic] (former Chief Prosecutor and current Chief Prosecutor Fatou Bensouda) REASON : Failing to notify the Pre-Trial Chamber 2 [sic] and any other court on the new circumstances surrounding witness([sic] OTP 4 [REDACTED]), withholding recanted evidence of (OTP4) thereby Obstructing course of Justice and perverting course of Justice and use of intermediaries in procurement of witnesses and evidence that was filed in KENYA SITUATION ICC-01/09",¹⁴ which was dated 6 November 2013 and registered on 7 November 2013 (hereinafter: "Request for the Suspension or the Arrest of Former and Present Prosecutors"). Mr Nyekorach-Matsanga, *inter alia*, "urge[s] the Appeals Chamber 5 to order suspension or the arrest of the former Chief Prosecutor and current Chief Prosecutor ON CHARGES OF PERJURY",¹⁵ and requests the "[termination of] both cases that are before Trial Chamber V because of flawed evidence as contained in [his] applications before this court".¹⁶

9. On 13 February 2014, Mr Nyekorach-Matsanga filed the "Application for arrest and prosecution of Mr. Luis Moreno Ocampo for violation of article 70 and contempt of court order of Appeal Chamber 5 [sic] in the order assigned to the Registrar of ICC by Judge Erkki Kourula dated 5th June 2012 (ICC-STA42-01/12-1-CONF-EXP-ANX1)"¹⁷ (hereinafter: "Request for Arrest and Prosecution of the Former

¹³ Request for Reclassification, pp. 9-10.

¹⁴ ICC-01/09-124-Conf(OA 2).

¹⁵ Request for Suspension or Arrest of the Former and Present Prosecutors, para. 30.

¹⁶ Request for Suspension or Arrest of the Former and Present Prosecutors, para. 31.

¹⁷ ICC-01/09-126-Conf-Anx1 (OA 2).

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Prosecutor”). He annexed to this request the Appeals Chamber’s “Decision on the Presiding Judge of the Appeals Chamber for the proceedings with respect to 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’ and order on re-numbering of documents”.¹⁸ Mr Nyekorach-Matsanga, requests the Appeals Chamber to “order the arrest and prosecution of Luis Moreno Ocampo to face justice under Article 70 for tampering with cases before trial and for the contempt of court order on confidential material”,¹⁹ to “terminate both Kenyan cases”,²⁰ to “consider the merits of [his] application based on the order that [the Appeals Chamber] gave that classified the documents that [Mr Nyekorach-Matsanga has] given to the court and the order of the court of 5th June 2012”,²¹ to “order an independent investigation of all the matters submitted [...] in that motion”,²² and to “order [...] all unsealing of all the documents placed under the cover of confidentiality in [his] case”.²³

II. DETERMINATION BY THE APPEALS CHAMBER

10. The Appeals Chamber observes that Mr Nyekorach-Matsanga brought the Request for Reclassification, the Request for the Suspension or the Arrest of Former and Present Prosecutors and the Request for Arrest and Prosecution of the Former Prosecutor further to his original Request for Disqualification. Furthermore, all three requests seek, *inter alia*, the termination of the pending cases in the situation in Kenya based on allegations against the Office of the Prosecutor. Accordingly, the Appeals Chamber addresses the three requests in one decision.

11. The Appeals Chamber notes that Mr Nyekorach-Matsanga filed both the Request for Reclassification and the Request for Arrest and Prosecution of the Former Prosecutors publicly. Nevertheless, the Registry classified the two requests as confidential *ex parte*, Prosecutor only, indicating that it appears to contain

¹⁸ ICC-01/09-87 (OA 2). The Appeals Chamber rendered the said decision on 5 June 2012, as confidential, *ex parte* Prosecutor only, and reclassified it as public by order of 16 October 2012, ICC-01/09-107 (OA 2).

¹⁹ Request for Arrest and Prosecution of the Former Prosecutor, p. 5.

²⁰ Request for Arrest and Prosecution of the Former Prosecutor, p. 6.

²¹ Request for Arrest and Prosecution of the Former Prosecutor, p. 6.

²² Request for Arrest and Prosecution of the Former Prosecutor, p. 6.

²³ Request for Arrest and Prosecution of the Former Prosecutor, p. 6.

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confidential information.²⁴ The Request for the Suspension or the Arrest of Former and Present Prosecutors was filed as confidential, *ex parte*, Prosecutor only. On that basis, the Appeals Chamber renders the present decision confidentially, *ex parte*, Prosecutor only, with a public redacted version thereof.

12. The Appeals Chamber notes that the three requests lack in diligence and clarity. Regarding their substance, the Appeals Chamber notes that Mr Nyekorach-Matsanga neither presents any coherent legal or factual arguments in support of the requests, nor any supporting material underpinning them. Mr Nyekorach-Matsanga, for example, fails to explain what the basis for the Appeals Chamber's power to "order the termination of both Kenya cases that are before Trial Chamber V" would be and why he would have standing to request such an order.²⁵ The same applies as regards the Appeals Chamber's powers to "arrest or prosecute the former Chief Prosecutor" pursuant to article 70 of the Statute. Mr Nyekorach-Matsanga also fails to explain the relevance of the Appeals Chamber's decision that he annexed to his Request for Arrest and Prosecution of the Former Prosecutor, and to indicate to which statements of the former Prosecutor he refers, thereby failing to substantiate his allegation against the former Prosecutor that the latter violated article 70 of the Statute and committed the offence of "contempt" of a court order. Finally, concerning the style of the requests, the Appeals Chamber notes that, in particular, the Request for Reclassification and the Request for the Suspension or the Arrest of Former and Present Prosecutors are full of editorial errors.²⁶ Recalling that "it is incumbent upon the applicant to provide submissions in as comprehensible a manner as possible in order for the Appeals Chamber to determine the validity of the arguments",²⁷ the Appeals Chamber wishes to remind Mr Nyekorach-Matsanga once again of the diligence required when filing documents before the Court.

²⁴ See "Registry Transmission of a document received from Dr. David Nyekorach-Matsanga on 14 October 2013", 15 October 2013, ICC-01/09-122-Conf-Exp (OA 2) and "Registry transmission of documents received from Dr. David Nyekorach-Matsanga", 13 February 2014, ICC-01/09-126-Conf (OA 2).

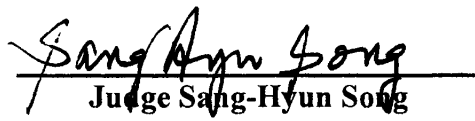
²⁵ Request for Reclassification, para. 9; *see also* Request for the Suspension or the Arrest of Former and Present Prosecutors, p. 10.

²⁶ *Inter alia*, both requests contain a considerable number of typographical errors, including the spelling of the applicant's own name and of the names of the accused in the pending cases in the Kenya situation. Furthermore, both requests contain inconsistent paragraph numbering (no paragraph numbers at all in the Request for Arrest and Prosecution of the Former Prosecutor), spacing and capitalisation issues.

²⁷ Decision of 22 April 2013, para. 4.

13. In these circumstances, the Appeals Chamber considers it appropriate to reject the Request for Reclassification, the Request for Suspension or Arrest of the Former and Present Prosecutors, and the Request for Arrest and Prosecution of the Former Prosecutor in their entirety.

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


Judge Sang-Hyun Song
Presiding Judge

Dated this 10th day of March 2014

At The Hague, The Netherlands