International Criminal Court
Appeals Chamber - Courtroom 1
Situation: Republic of Kenya
In the case of The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali - ICC-01/09-02/11
Presiding Judge Akua Kuenyehia
Appeals Hearing
Thursday, 10 November 2011
(The hearing starts in open session at 3.00 p.m.)
THE COURT USHER: All rise. The International Criminal Court is now in session. Please be seated.
PRESIDING JUDGE KUENYEHIA: Good afternoon, everybody.
Court officer, could you please call the case.
THE COURT OFFICER: Good afternoon, Madam President. This is the situation in the Republic of Kenya, in the case of The Prosecutor versus Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, case reference ICC-01/09-02/11.
Thank you, your Honour.
PRESIDING JUDGE KUENYEHIA: Thank you very much. I would like to introduce myself. My name is Akua Kuenyehia, and I am the Presiding Judge on this appeal arising from the case of The Prosecutor against Muthaura and others.
May I ask the parties and participants to introduce themselves for the record, starting with the representative of the Defence, please?
MS TAYLOR: Good afternoon, Madam President. I am Melinda Taylor of the OPCD. I have been requested by Mr Karim Khan, the lead counsel for Ambassador Muthaura, to appear on his behalf today as regrettably he is unable to attend. I am

appearing with Mr Anand Shah, the case manager for Ambassador Muthaura. I am also appearing for the Defence team of General Ali. Mr Evans Monari has asked me to convey his sincerest apologies for being unable to be present today. Thank you.

PRESIDING JUDGE KUENYEHIA: Thank you.

MR GUARIGLIA: Good afternoon, your Honour. It is Fabricio Guariglia, senior appeals counsel in the Office of the Prosecutor, and appearing with me today are trial lawyer Adesola Adeboyejo and trial lawyer Olivia Struyven. Thank you.

PRESIDING JUDGE KUENYEHIA: Thank you very much.

Today, the Appeals Chamber is delivering its judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision with respect to the Question of Invalidating the Appointment of Counsel to the Defence" dated 20 July 2011. In today's summary, I will refer to this decision as the "impugned decision."

I shall now summarise the Appeals Chamber's judgment, but please note that the judgment itself, which will be filed and notified to the parties shortly, is authoritative and not the summary.

I would like to start with the procedural background and submissions.

The present appeal relates to a former staff member of the Office of the Prosecutor, Mr Essa Faal, who is now acting as counsel for the Defence in the present case. The Pre-Trial Chamber decided that he may continue to do so, despite the Prosecutor's objection.

Mr Faal joined the Office of the Prosecutor in January 2006, working on cases relating to the situation in Darfur, Sudan. He resigned from that position with effect from 31 March 2011. He subsequently joined the Defence team for Muthaura as co-counsel.

Acting on its own motion, in June 2011 the Pre-Trial Chamber sought submissions from the parties and the Registrar as to whether there was an impediment to this appointment. The Prosecutor submitted to the Pre-Trial Chamber that Mr Faal's appointment should be invalidated because of a conflict of interest resulting from his exposure to confidential information relating to the present case while working as a senior trial lawyer of the Office of the Prosecutor.

Having received a number of submissions, including those of the Defence and the Registrar, the Pre-Trial Chamber rendered on 20 July 2011 the impugned decision, stating that it was, and I quote, "... keen to preserve the integrity of the proceedings to the effect that they are conducted in a fair and transparent manner."

The Pre-Trial Chamber found that the standard for deciding the issue at hand was to be found in Article 12(1)(b) of the Code of Professional Conduct of Counsel. This provision stipulates that counsel is impeded from representing a client in a case "... in which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case." According to the same provision, the Chamber may however lift such an impediment in the interests of justice and at counsel's request.

As there was no suggestion that Mr Faal was involved during his time at the Office of the Prosecutor in the present case, the Chamber focused on the question of whether he has been privy to confidential information relating to the case. With reference to previous decisions of other Chambers, the Pre-Trial Chamber explained that for Mr Faal to be disqualified it had to be proved that he "... became aware of more than de minimis confidential information."

After having analysed the evidence put before it, the Pre-Trial Chamber concluded that, and I quote, "The Prosecutor has failed to satisfy the required standard of proof that Mr Faal was aware of more than [the] de minimis confidential information."

Accordingly, the Pre-Trial Chamber decided that Mr Faal may continue to represent Mr Muthaura.

Upon request by the Prosecutor, the Pre-Trial Chamber granted leave to appeal in respect of the following two issues:

(1) Whether as a matter of law Prosecution lawyers may join a Defence team in a case that was open at the time when the person worked for the Prosecution, or whether the person should be deemed as being privy to confidential information related to the case under Article 12(1)(b) of the Code of Professional Conduct; and

(2) Whether the correct test to determine that a person is "privy to confidential information" under Article 12(1)(b) is whether that person has become aware of more than de minimis confidential information related to the case.

On appeal, the Prosecutor argues that the Pre-Trial Chamber made several errors. He argues that the Pre-Trial Chamber failed to consider the issue as one affecting the fairness of the proceedings and erroneously focused on Article 12 of the Code. In his view, the Chamber should have applied what he refers to as an "objective test" for determining whether Mr Faal was privy to confidential information. Under this so-called "objective test", there should be a presumption that a senior trial lawyer working for the OTP has knowledge of more than de minimis confidential information relating to any case that was open at that time and that there was no need for him, the Prosecutor, to establish that Mr Faal had actual knowledge of such information.

He describes the practices of the OTP, which it is submitted require the sharing of confidential information. The Prosecutor argues with respect to the meaning of "privy to" in Article 12(1)(b) of the Code that a "possibility" test should apply in respect of whether a person had confidential information or not.

The Prosecutor also submits that, by requiring that the confidential information be more than de minimis, the Pre-Trial Chamber added an additional requirement that cannot be found in Article 12 of the Code. In the Prosecutor's view, this was incorrect.

The Defence refutes the Prosecutor's arguments and submits that the Pre-Trial Chamber applied the correct test to the issue at hand.

I will now turn to the determination of the merits of the case.

The Appeals Chamber notes that the issues on appeal are very closely linked. Therefore, they will be addressed together. In that order, the Appeals Chamber will first address the legal basis for the Pre-Trial Chamber's decision and the relevance of the Code to the issues at hand, secondly the interpretation of the words "privy to confidential information" in Article 12(1)(b) of the Code and, thirdly, the de minimis standard espoused by the Pre-Trial Chamber.

Before addressing these issues, the Appeals Chamber wishes to clarify its understanding of the impugned decision. It appears that the impugned decision is equivocal in its factual conclusion. The impugned decision could either be interpreted as concluding that Mr Faal had knowledge of confidential information relating to the case, but that this information was so insignificant that it was de minimis, or the impugned decision could be interpreted as concluding that Mr Faal did not have knowledge of any confidential information, be it de minimis or otherwise.

The Appeals Chamber decides to proceed with its analysis on the basis that the Pre-Trial Chamber concluded that, while Mr Faal was aware of some confidential information, that information was no more than de minimis.

As to the Prosecutor's arguments that the Pre-Trial Chamber erred in focusing on

Article 12 of the Code, the Appeals Chamber notes that the Pre-Trial Chamber expressly stated that it was considering the appointment of Mr Faal in order to protect the integrity of the proceedings and to ensure fairness. It was in that context that the Pre-Trial Chamber had regard to Article 12 of the Code. In the view of the Appeals Chamber, this approach was correct. For cases such as the present, relating to a possible impediment to representation because of counsel's previous employment with the Office of the Prosecution and exposure to confidential information, Article 12 of the Code was indeed the standard to apply. The Appeals Chamber notes that the Code is part of the Court's applicable law and that, contrary to the Prosecutor's submissions, the purpose of Article 12 is not only to regulate ethical or professional obligations of counsel, but also to further the fairness and integrity of the proceedings. Accordingly, the Appeals Chamber cannot see any error in the Pre-Trial Chamber's overall approach.

Turning to the interpretation of the words "privy to confidential information" in Article 12(1)(b) of the Code, the Appeals Chamber considers that those words must be given their ordinary meaning, having regard to the context, object and purpose of the Article.

The Appeals Chamber notes that "privy to" means "sharing in the knowledge of something secret or private." Accordingly, counsel is impeded from representing a client only in a case where he or she had knowledge of confidential information relating to the case. Potential knowledge, or possible knowledge, is not sufficient.

The Appeals Chamber finds that this reflects a fair balance in the context of impediments to representation and a fair trial, between the interests of the OTP, the right to legal assistance of the accused's choosing and not unduly restricting the future professional practice of former staff members of the Court.

In the view of the Appeals Chamber, this interpretation of Article 12 of the Code does not present an insurmountable burden for the Prosecutor in cases that he wishes to challenge the appointment of counsel. The Appeals Chamber also notes that the so-called "objective test" for which the Prosecutor argues finds no basis in Article 12 of the Code, or any other of the Court's legal instruments.

The Appeals Chamber underlines, however, that counsel must not take on a case in relation to which he or she was privy to any confidential information as a result of previous employment with the OTP. Counsel may only appear in such a situation if the impediment to representation is lifted by the Chamber.

The Chamber, acting upon counsel's request, may lift the impediment if this is in the interests of justice. Thus, the threshold for an impediment to representation is not a high one, and counsel who is a former staff member of the Court therefore must consider the issue with particular care. This is especially the case given the potential consequences of not applying the standard correctly, which may include disqualification from the case and disciplinary measures.

Accordingly, the Appeals Chamber expects counsel to err on the side of caution and either not agree to represent a client at all, or immediately bring the matter before the relevant Chamber prior to agreeing to represent a client if in any doubt about the application of the provisions to him or her.

I shall now turn to the de minimis standard adopted by the Pre-Trial Chamber. As set out above, the Pre-Trial Chamber was of the view that information that was of a de minimis character did not qualify as "confidential information" in terms of Article 12(1)(b) of the Code. Accordingly, if counsel was privy only to de minimis confidential information, he or she would not be impeded from representing a client.

In the view of the Appeals Chamber, this interpretation of Article 12(1)(b) of the Code finds no basis in the law. Article 12(1)(b) does not in any way qualify the words "confidential information." Rather, knowledge of any confidential information impedes counsel from representing a client. Article 12(1)(b) of the Code does, however, give the Chamber the power to lift the impediment to representation in the interests of justice.

What factors will have to be considered when assessing the interests of justice cannot be determined in the abstract, but only on the basis of the circumstances of each case. The nature of the confidential information, especially if it is of a de minimis character, may well be a factor that leads the Chamber to conclude that the impediment should be lifted. Other factors may include the rights of the accused, the position of counsel within the Defence team, concerns about the overall fairness or appearance of impropriety in relation to the proceedings arising in the specific circumstances out of the fact that counsel possessed confidential information relating to the case.

In sum, the Appeals Chamber concludes that the Pre-Trial Chamber erred when finding that the de minimis confidential information did not qualify as confidential information in terms of Article 12(1)(b) of the Code.

What then is the appropriate relief? On an appeal pursuant to Article 82(1)(b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed. This is as set out in Rule 158(1) of the Rules of Procedure and Evidence. Given that the Appeals Chamber has determined that the Pre-Trial Chamber applied the incorrect legal standard when addressing the facts of the case, the Appeals Chamber holds that it is appropriate to reverse the impugned decision.

The Appeals Chamber recall the ambiguity of the impugned decision as to whether or not Mr Faal had knowledge of any confidential information. In these circumstances, the Pre-Trial Chamber is directed to decide anew on the question of whether to invalidate his appointment as counsel in the light of today's judgment.

The Pre-Trial Chamber will first need to clarify whether Mr Faal had knowledge of any confidential information. In case of an affirmative answer, it will need to determine whether it is nevertheless in the interests of justice that Mr Faal should be part of the Defence.

The Appeals Chamber notes that the Defence has reserved the right to request that any impediment to representation be lifted under Article 12(1)(b) of the Code.

For these summarised reasons, the Appeals Chamber of the International Criminal Court unanimously delivers the following judgment:

The decision with respect to the question of invalidating the appointment of counsel to the Defence is reversed. The Pre-Trial Chamber is directed to decide anew on the question of whether to invalidate the appointment of Mr Faal as counsel in this case in the light of the present judgment.

This concludes my summary of the judgment. I would like to thank everybody here. Our interpreters and court reporters, thank you very much. The session is now over.

THE COURT USHER: All rise.

(The hearing ends in open session at 3.21 p.m.)