

1 International Criminal Court

2 Appeals Chamber - Courtroom 2

3 Situation: Darfur, Sudan

4 In the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh

5 Mohammed Jerbo Jamus - ICC-02/05-03/09

6 Presiding Judge Akua Kuenyehia

7 Appeals Hearing

8 Friday, 11 November 2011

9 (The hearing starts in open session at 2.58 p.m.)

10 THE COURT USHER: All rise. The International Criminal Court is now in session.

11 Please be seated.

12 PRESIDING JUDGE KUENYEHIA: Good afternoon. Could the court officer please

13 call the case.

14 THE COURT OFFICER: Good afternoon, Madam President. This is the situation in

15 Darfur, Sudan, in the case of The Prosecutor versus Abdallah Banda Abakaer Nourain

16 and Saleh Mohammed Jerbo Jamus, case number ICC-02/05-03/09. Thank you,

17 Madam President.

18 PRESIDING JUDGE KUENYEHIA: Thank you very much. May I ask the parties to

19 introduce themselves for the record, starting with the Defence, please.

20 MR KOUMJIAN: Good afternoon, your Honour. And counsel opposite. For the

21 Defence of Mr Abdallah Banda and Saleh Jerbo appearing today is Ibrahim Yillah,

22 Leigh Lawrie, Anand Shah and an intern with our team Mr Lawrence Youssefian and

23 myself Nicolas Koumjian. Good afternoon.

24 PRESIDING JUDGE KUENYEHIA: Thank you very much.

25 MR OMOFADE: Good afternoon, Madam President. For the Office of the

1 Prosecutor today is Manoj Sachdeva, trial lawyer; Alice Zago, trial lawyer and myself
2 Ade Omofade, also trial lawyer.

3 PRESIDING JUDGE KUENYEHIA: Thank you very much.

4 Today the Appeals Chamber is delivering its judgment on the appeal of the
5 Prosecutor against Trial Chamber IV's decision on the Prosecution's request to
6 invalidate the appointment of counsel to the Defence dated 30 June 2011. In today's
7 summary I will refer to this decision as the "impugned decision."

8 I shall now summarise the Appeals Chamber's judgment, but I would like to
9 emphasise that the judgment itself, which will be filed and notified to the parties
10 shortly, is the authoritative version and not this summary.

11 I would like to begin with a short procedural background and submissions.

12 The present appeal relates to a former staff member of the Office of the Prosecutor,
13 Mr Ibrahim Yillah, who is now acting as associate Defence counsel in the present case.

14 Mr Ibrahim Yillah worked during his employment with the OTP as a lawyer on the
15 situation in Uganda and on cases arising from the situation in the Democratic
16 Republic of the Congo and the Central African Republic. The Prosecutor applied to
17 the Trial Chamber to invalidate Mr Yillah's appointment as counsel because the
18 assignment of a recently departed lawyer to a Defence team creates a conflict of
19 interest. The Prosecutor described the working methods at his office and indicated
20 that any lawyer in his office has the possibility to get confidential information about
21 any pending case. He also argued that there should be a bar for former OTP staff
22 members from working in a Defence team in a case that was open at the time this
23 person was employed by the Prosecutor.

24 The Trial Chamber determined that Articles 64(2) and 64(3)(a) of the Statute form the
25 legal basis for the impugned decision as the Chamber had to deal with and I quote "a

1 dispute that may cause unfairness in the proceedings." The Trial Chamber then
2 found that the most appropriate provision to rely on in resolving the matter was
3 Article 12(1)(b) of the Code of Professional Conduct for Counsel. The Trial Chamber
4 applied the following standard with respect to Mr Yillah, and I quote, "whether
5 Mr Yillah became aware of more than the de minimis confidential information
6 relevant to the case which a member of the Defence team should not possess." In
7 applying this standard, the Trial Chamber found that based on the material presented
8 by the Prosecutor Mr Yillah had not been aware of any confidential information
9 relevant to the present case, or in the words of the Trial Chamber, and I quote, "the
10 Prosecution has not demonstrated that Mr Yillah indeed has confidential information
11 and knowledge pertaining to this specific case. Instead, the Prosecutor only suggests
12 the possibility."

13 On appeal, the Prosecutor raises arguments similar to those raised before the Trial
14 Chamber supporting his arguments for an "objective standard" by reference to
15 national and international jurisprudence; arguments which are refuted by the Defence.
16 The Prosecutor further avers that the standard applied by the Trial Chamber
17 establishes a burden of proof that cannot be met. Supporting his arguments, he
18 describes in some detail the organisation of his office. He is also of the opinion that
19 the Trial Chamber erred in requiring Mr Yillah to be, and I quote, "effectively in
20 possession of more than de minimis confidential information." The Defence rebuts
21 the arguments of the Prosecutor and also submits that the de minimis test did not
22 affect the outcome of the present case, as the Office of the Prosecutor had failed to
23 prove that Mr Yillah was privy to any confidential information.

24 I will now turn to the Appeals Chamber's determination of the merits of the appeal.
25 The Appeals Chamber recalls that, in considering whether there is an impediment to

1 Mr Yillah's appointment as an associate counsel for the Defence, the issue on appeal is
2 "whether as a matter of law Prosecution lawyers may join a Defence team in a case
3 that was open at the time when the person worked for the Prosecution, or whether
4 they should be barred for a period of time before joining a Defence team."

5 A similar question was addressed in yesterday's judgment of the Appeals Chamber in
6 the case of The Prosecutor and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and
7 Mohammed Hussein Ali. In what follows from now on, I will refer extensively to
8 the findings of the Appeals Chamber in this judgment, which I will call "Muthaura
9 OA 3 Judgment."

10 To start with, the Appeals Chamber finds that with reference to the Muthaura OA 3
11 Judgment that Article 64(2) of the Statute was the correct legal basis for the Trial
12 Chamber to act when moved by the Prosecutor to invalidate the appointment of
13 counsel.

14 Furthermore, for the same reasons as those given in the Muthaura OA3 Judgment, the
15 Appeals Chamber determines that the Trial Chamber correctly drew upon the
16 provisions of Article 12(1)(b) of the code.

17 The Appeals Chamber also recalls its finding made in the Muthaura OA 3 Judgment
18 that, and I quote, "being privy to confidential information" in Article 12(1)(b) of the
19 code must be interpreted as having had knowledge of confidential information.

20 Therefore, the Appeals Chamber finds that the Trial Chamber in the present case was
21 correct to interpret the words "privy to confidential information" as meaning "being
22 aware of" or being in "possession of confidential information," as there is no material
23 difference between those two phrases in the present context.

24 The Appeals Chamber notes that the arguments of the Prosecutor advocating for an
25 "objective standard" are very similar to the arguments addressed by the Appeals

1 Chamber in the Muthaura OA 3 Judgment. The main additional argument raised by
2 the Prosecutor in the present appeal relates to the purported existence of a general
3 principle of law establishing a ban on former Prosecutors joining the Defence
4 immediately after leaving the Office of the Prosecutor. Without intending to define
5 in any detail what is required to establish a general principle of law, the Appeals
6 Chamber notes that the practice in the five countries to which the Prosecutor has
7 referred is not consistent. Notably, as the Prosecutor accepts, the practice in one of
8 them (the United Kingdom) appears to be opposite to the one contended for by the
9 Prosecutor.

10 The Appeals Chamber further notes that the impugned decision did not establish that
11 Mr Yillah had knowledge of any confidential information, be it de minimis or
12 otherwise. Accordingly, the Appeals Chamber does not need to address whether the
13 required information was more than the de minimis. Nevertheless, attention is
14 drawn to the findings of the Appeals Chamber in the judgment in Muthaura OA 3.
15 In that judgment this matter is addressed in detail.

16 The appropriate relief.

17 On an appeal pursuant to Article 82(1)(d) of the Statute, the Appeals Chamber may
18 confirm, reverse or amend the decision appealed. Given that the Appeals Chamber
19 has determined that the Trial Chamber did not err when requiring that Mr Yillah
20 must have become aware of confidential information relating to the case in order to
21 be impeded from joining the Defence, the Appeals Chamber confirms the impugned
22 decision and dismisses the appeal.

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

25 The decision on the Prosecution's request to invalidate the appointment of counsel to

- 1 the Defence is confirmed and the appeal is dismissed.
- 2 This concludes my summary. It remains only for me to thank the parties, the
- 3 interpreters, the court reporters whom I cannot see. Thank you very much. The
- 4 session is over.
- 5 THE COURT USHER: All rise.
- 6 (The hearing ends in open session at 3.10.p.m.)