Cour Pénale Internationale

International Criminal Court

Original: English

No. ICC-01/09-02/11 OA
Date: 28 July 2011

THE APPEALS CHAMBER

Before: **Judge Daniel David Ntanda Nsereko, Presiding Judge**
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA and MOHAMMED HUSSEIN ALI

Public document

Decision on the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility"

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

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

Counsel for Francis Kirimi Muthaura
Mr Karim A. A. Khan
Mr Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins

Counsel for Mohammed Hussein Ali
Mr Evans Monari
Mr Gershom Otachi Bw'omanwa

The Office of Public Counsel for Victims
Ms Paolina Massida

States Representatives
Mr Geoffrey Nice
Mr Rodney Dixon

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" of 30 May 2011 (ICC-01/09-02/11-96),

Having before it the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility" of 4 July 2011 (ICC-01/09-02/11-153),

Renders unanimously the following

DECISION

The "Filing of the Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility" is rejected.

REASONS

I. PROCEDURAL HISTORY AND ARGUMENTS OF THE PARTIES AND PARTICIPANTS

1. On 31 March 2001, the Republic of Kenya (hereinafter: "Kenya") filed the "Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute"[1] in which it challenged the admissibility of the case against Mr Muthaura, Mr Kenyatta and Mr Ali as well as that of another case in the situation in Kenya against Mr William Samoei Ruto, Mr Henry Kiprono Kosgey and Mr Joshua Arap Sang. On 30 May 2011, Pre-Trial Chamber II (hereinafter: "the Pre-Trial Chamber") issued its "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"[2] (hereinafter: "Impugned Decision") wherein it found the case against Mr Muthaura,

[1] ICC-01/09-02/11-26.
[2] ICC-01/09-02/11-96.

Mr Kenyatta and Mr Ali to be admissible. On 6 June 2011, Kenya submitted its Appeal against the Impugned Decision.[3]

2. On 20 June 2011, Kenya filed the "Document in Support of the 'Appeal of the Government of Kenya against the decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute'"[4] (hereinafter: "Document in Support of the Appeal"), in which it indicated that it would "file updated reports on the investigation during the appellate proceedings".[5] In a footnote to its expression of intent to file updated reports during the appellate proceedings, Kenya stated:

> As has been held by the Appeals Chamber the admissibility of a case is determined on the facts as they exist at the time of the proceedings concerning the admissibility challenge because admissibility depends on the investigative and prosecutorial activities of States which may change over time. The proceedings concerning admissibility are ongoing before the Appeals Chamber and all relevant facts concerning the State's investigative activities can be taken into account.[6]

3. On 4 July 2011, Kenya submitted the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility"[7] (hereinafter: "Updated Investigation Report"). Kenya requests the Appeals Chamber to accept the Updated Investigation Report "as further confirmation that the national investigation into the six ICC suspects is ongoing and progressing expeditiously"[8] and "as further unequivocal evidence of the Government of Kenya's intentions and of its conduct in currently investigating the six suspects".[9] Kenya reiterates its argument that "[t]he Appeals Chamber has acknowledged that national investigations and prosecutions may develop and change over time, and that therefore the determination of admissibility is an ongoing process which must be decided on the facts as they exist at the time of the admissibility proceedings".[10] In another footnote, Kenya states that "[i]t would be illogical and a needless waste of court time and

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[3] "Appeal of the Government of Kenya against the 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", ICC-01/09-02/11-104.
[4] ICC-01/09-02/11-130. A Corrigendum thereto was filed on 21 June 2011, ICC-01/09-02/11-130-Corr.
[5] Document in Support of the Appeal, para. 52.
[6] Document in Support of the Appeal, para. 52, fn. 42.
[7] ICC-01/09-02/11-153.
[8] Updated Investigation Report, para. 3.
[9] Updated Investigation Report, para. 4.
[10] Updated Investigation Report, para. 3.

resources if the Government of Kenya would be required to file a second admissibility application in order to submit its latest investigative report to the Court".[11]

4. On 12 July 2011, the Prosecutor filed the "Prosecution's response to the 'Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'"[12] (hereinafter: "Response to the Document in Support of the Appeal"). With respect to the Updated Investigation Report, the Prosecutor argues that "the Appeals Chamber should dismiss this report *in limine*".[13] The Prosecutor advances four reasons for dismissing *in limine* the Updated Investigation Report. First, Kenya is presenting additional evidence without first filing an application to do so as required by regulation 62 of the Regulations of the Court.[14] Second, as the Updated Investigation Report concerns events subsequent to the filing by Kenya of its challenge to the admissibility of the case, it is irrelevant to the question of whether the Pre-Trial Chamber committed an error in finding the case admissible.[15] Third, the Report provides no proof of concrete investigative steps against the suspects in this case.[16] Fourth, the report is unclear, inconsistent and lacks probative value.[17]

5. On 14 July 2011, the Appeals Chamber ordered Mr Muthaura, Mr Kenyatta and Mr Ali to file, by 10h00 on Tuesday 19 July 2011, any observations as to whether the Appeals Chamber should accept or should dismiss *in limine* the Updated Investigation Report.[18]

6. On 15 July 2011, Mr Ali filed the "Defence observations on 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'"[19] in which he endorsed the position of Kenya and made no further submissions.

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[11] Updated Investigation Report, para. 3 fn. 3.
[12] ICC-01/09-02/11-168.
[13] Response to the Document in Support of the Appeal, para. 35.
[14] Response to the Document in Support of the Appeal, para. 35.
[15] Response to the Document in Support of the Appeal, para. 35.
[16] Response to the Document in Support of the Appeal, para. 35.
[17] Response to the Document in Support of the Appeal, para. 35.
[18] "Order on the filing of observations in relation to the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'", ICC-01/09-02/11-171.
[19] ICC-01/09-02/11-173.

7. On 19 July 2011, the Office of Public Counsel for Victims (hereinafter: "OPCV") filed the "Victims Observations on the Government of Kenya's Appeal Concerning Admissibility of Proceedings"[20] (hereinafter: "Observations of the OPCV"). The victims represented by the OPCV adopt the submissions of the Prosecutor with respect to the Updated Investigation Report and argue that it should be dismissed *in limine*.[21] They argue that, if the Appeals Chamber were to accept the Updated Investigation Report, it would depart from the normal standards of review and deference and would become a court of first instance.[22] They argue that no "prudential consideration" justifies the Appeals Chamber taking on such a role.[23]

II. MERITS

8. Kenya does not cite any particular provision of the Statute, Rules of Procedure and Evidence or Regulations of the Court as a basis for the filing of the Updated Investigation Report. Instead, it relies solely on the jurisprudence of the Appeals Chamber as the basis for filing the Updated Investigation Report. The Appeals Chamber finds that, far from providing an adequate legal basis for the submission of the Updated Investigation Report, the Appeals Chamber's jurisprudence requires that it be rejected.

9. In the "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case" (hereinafter: "*Katanga* OA 8 Judgment"), the Appeals Chamber stated, as Kenya correctly notes, that "the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge".[24] However, contrary to Kenya's submissions, the expression "time of the proceedings" used by the Appeals Chamber in that judgment clearly referred to the time of the proceedings on the admissibility challenge before the Pre-Trial Chamber and not to the subsequent proceedings on appeal. Moreover, the Appeals Chamber also held that events which fall outside the scope of the relevant pre-trial or trial

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[20] ICC-01/09-02/11-177.
[21] Observations of the OPCV, para. 44.
[22] Observations of the OPCV, paras 45-46.
[23] Observations of the OPCV, para. 48.
[24] 25 September 2009, ICC-01/04-01/07-1497 (OA 8), para. 56.

proceedings fall outside the scope of the appeal concerning those proceedings and should be rejected *in limine*.[25]

10. The other case relied on by Kenya is equally unhelpful to its cause. First, the decision cited by Kenya is, in fact, a decision of Pre-Trial Chamber II and not of the Appeals Chamber as Kenya mistakenly claims.[26] Second, that decision provides no support to Kenya's argument that the Appeals Chamber should consider facts which post-date the relevant pre-trial proceedings. To the contrary, that decision envisioned that, in the event of changing circumstances, it would be for the Pre-Trial Chamber to decide anew on the admissibility of a case.[27] Third, in its judgment on an appeal brought against that decision, the Appeals Chamber confirmed that the function of the Appeals Chamber is "to determine whether the determination [by the Pre-Trial Chamber] on the admissibility of the case or the jurisdiction of the Court was in accord with the law".[28] The function of the Appeals Chamber is not to decide anew on the admissibility of the case.

11. As reflected above and as elsewhere held by the Appeals Chamber, proceedings on appeal do not constitute a mere continuation of proceedings before the Pre-Trial Chamber, but rather "a separate and distinct stage of the proceedings".[29] They are corrective in nature, conducted with the purpose of reviewing the proceedings before the Pre-Trial Chamber.[30] To conflate the proceedings before the Pre-Trial and

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[25] *Katanga* OA 8 Judgment, para. 57 (rejecting *in limine* a challenge by Mr Katanga to the validity of the arrest warrant issued against him on the grounds that that challenge fell beyond the scope of the proceedings related to the admissibility challenge and therefore also beyond the scope of the proceedings on appeal).
[26] Pre-Trial Chamber II, *Prosecutor v. Joseph Kony et al.*, "Decision on the Admissibility of the case under article 19(1) of the Statute", 10 March 2009, ICC-02/04-01/05-377.
[27] *Ibid.*, paras 28-29.
[28] *Prosecutor v. Joseph Kony* et al., "Judgment on the appeal of the Defence against the 'Decision on the Admissibility of the case under article 19(1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408, para. 80.
[29] *Prosecutor v. Thomas Lubanga Dyilo*, "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 líberté [*sic*] provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824, para. 43.
[30] *See, e.g.*, *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011entitled 'Decision on the Defence Request for Interim Release'", 14 July 2011, ICC-01/04-01/10-283, para. 15 (quoting *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), para. 62).

Appeals Chamber, as Kenya seeks to do, would render the two sets of proceedings indistinguishable and the concept of appeal incoherent.

12. As a corrective measure, the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber. The instant proceedings before the Pre-Trial Chamber concluded with the issuance of the Impugned Decision. Facts which postdate the Impugned Decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal. As the Updated Investigation Report concerns facts which postdate the Impugned Decision, it is not relevant for this appeal and must be rejected *in limine*.

13. The Appeals Chamber is also not persuaded by Kenya's argument that the Appeals Chamber should accept the Updated Investigation Report in order to avoid Kenya having to bring a second challenge to the admissibility of the case. Article 19 of the Statute clearly distinguishes the bringing of a second challenge to the admissibility of the case from the bringing of an appeal against a Pre-Trial or Trial Chamber's decision on admissibility.[31] If Kenya finds that the requirements for bringing a further challenge to the admissibility of proceedings are met, it should seek to bring such a challenge in accordance with article 19 (4) of the Statute rather than through appeals proceedings.

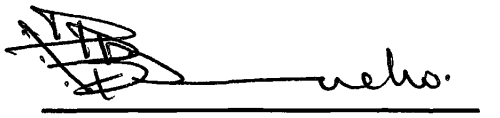
14. Given that the Updated Investigation Report falls beyond the scope of the proceedings subject to the present appeal, the Appeals Chamber finds it unnecessary to consider whether, as implied by the Prosecutor, regulation 62 of the Regulations of the Court applies to appeals under rules 154 and 155 of the Rules of Procedure and Evidence and, if so, whether Kenya should have complied with its requirements. The Appeals Chamber also considers it unnecessary and inappropriate to engage the Prosecutor's other arguments which relate to the substance of the Updated Investigation Report.

15. The rejection of the Updated Investigation Report is without prejudice to the Appeals Chamber's consideration of whether the Pre-Trial Chamber committed a procedural error by not receiving further reports on the status of investigations being

[31] *Compare* article 19 (4) and article 19 (6).

carried out by Kenya.[32] This issue will be addressed by the Appeals Chamber in its judgment, on the basis of the facts as they stood at the time of the Impugned Decision.

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



Judge Daniel David Ntanda Nsereko
Presiding Judge

Dated this 28th day of July 2011

At The Hague, The Netherlands

[32] *See* Document in Support of the Appeal, para. 50.