



Original: English

No.: ICC-01/09-02/11
Date: 14 November 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Prosecution's Response to the "Application by the Defence of Ambassador Francis
K. Muthaura in relation to Public Statements of the Prosecutor"**

Source: Office of the Prosecutor

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

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Introduction

1. On 6 October 2011 the Prosecutor was interviewed by Mr Jeff Koinange. The interview was broadcast on the K24 Channel. On 24 October 2011, the Defence of Mr Francis Kirimi Muthaura (“Muthaura”) claimed that in the interview the Prosecutor misrepresented and mischaracterized evidence elicited during the testimony of Uhuru Muigai Kenyatta and requested the Chamber to remedy the situation.
2. The request should be dismissed.
3. In any case, the comments were both responsible and appropriate and in full respect of the Chamber decision and the “Integrated Strategy for External Relations, Public Information and Outreach”¹ adopted by the Court. The Prosecutor spent much of the interview explaining the confirmation process. He repeatedly stated that it is not his role to evaluate the evidence; that he would not comment on the evidence; that the parties presented their evidence and their views; that the judges would make a final determination in due course; and that all Kenyans must respect the Court’s process and preserve the peace. Finally, he expressed respect for the decision of the Accused to cooperate in these proceedings. The comments emphasized repeatedly and accurately the need to respect the rule of law, the supreme role of the judges, and the fairness and objectivity of the process.

Submissions

4. On 6 October 2011, after the Confirmation Hearing, the Prosecutor was interviewed by Mr Jeff Koinange.² On 24 October 2011, the Defence filed an

¹http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/Integrated+strategy/Integrated+Strategy+for+External+Relations_+Public+Information+and+Outreach.htm

² A transcript of the interview was provided by the Defence of Mr Muthaura as ICC-01/09-02/11-359-AnxA.

application claiming that the Prosecutor ‘misrepresented’ and ‘mischaracterized’ the evidence. It seeks, as a remedy, that the Chamber remind the Prosecutor of his obligation to be fair in his public statements and order him to correct the purported misstatements or, alternatively, that the Court issue a public decision correcting them.

5. The Defence claims that “The record of the Prosecutor’s interview with Mr. Jeff Koinange reveals that the Prosecutor has shown insufficient regard to the various judicial injunctions and admonitions that have been rendered by the Court in response to extra-judicial statements made by him in some cases before the Court”. First, the Defence complains generally and nonspecifically about “various remarks and observations by the Prosecutor during the same interview [...] all of which may demonstrate how fraught with danger interactions with the press in relation to discussions of evidence and other *sub judice* matters can be”³ The Defence then quotes the Prosecutor’s comment that Ambassador Muthaura had a “bigger role”, which quotation he amends by adding “than that apparently had been previously contended”⁴ – a substantive alternation that includes words the Prosecutor never said.
6. The Defence states that “the consequences of such misrepresentations on the integrity of the proceedings and the rights of the suspects cannot be understated”.⁵ The Defence requests the intervention of the Chamber to order the Prosecutor to publicly correct his misstatement;⁶ or in the alternative, requests the Chamber to render a public decision confirming that the Prosecutor has misstated the evidence presented at the hearing and remind the Prosecutor, again, to be

³ ICC-01/09-02/11-359, para. 11.

⁴ ICC-01/09-02/11-359, para. 12.

⁵ ICC-01/09-02/11-359, para. 14.

⁶ ICC-01/09-02/11-359, para. 15.

ever vigilant in his interactions with the press and to be scrupulously fair and accurate in his public statements on cases before the court.⁷

7. This request is wholly unjustified.
8. In line with the “Integrated Strategy for External Relations, Public Information and Outreach”⁸ adopted by the Court, the Prosecutor spent much of the interview explaining the confirmation process. He repeatedly stated that it is not his role to evaluate the evidence; that he would not comment on the evidence; that the parties presented their evidence and their views; that the judges would make a final determination in due course; and that all Kenyans must respect the Court’s process and preserve the peace. Finally, he expressed respect for the decision of the Accused to cooperate in these proceedings. As such, the Prosecutor highlighted the following:⁹

Page 1, last paragraph: *“And that is why only the judges, only a jury to make a final decision because the judges or the jury know the details, they know all the evidence, not just what they see in TV.”*

Page 2, third paragraph: *“The judges will decide.”*

Page 2 last paragraph and page 3 first paragraph: *“So but again I don’t like to use a TV program to evaluate evidence, this is for the judges. The judges will listen to our arguments and they know the evidence, they know the arguments by the other party and they will read and they will see. So today is a moment of different views, different perceptions.”...* This process now is not to define who is guilty or innocent. This process is just to define if our evidence enough to go to trial. So all these different views will be confronted in trial.”

Page 4, last paragraph: *“[...]. Kenya is an example because in Kenya everyone agreed to go to the court and to debate and to decide what happened and Kenya is moving ahead. With controversy, with fighting but moving ahead. I think is great.*

⁷ ICC-01/09-02/11-359, para. 16.

⁸ [http://www.icc-](http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/Integrated+strategy/Integrated+Strategy+for+External+Relations_+Public+Information+and+Outreach.htm)

[cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/Integrated+strategy/Integrated+Strategy+for+External+Relations_+Public+Information+and+Outreach.htm](http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/Integrated+strategy/Integrated+Strategy+for+External+Relations_+Public+Information+and+Outreach.htm)

⁹ These excerpts are taken from the transcript provided by the Defence of Mr Muthaura : ICC-01/09-02/11-359-AnxA. The page numbers refer to those on the document (as opposed to those of the Annex).

And now the next step in this long journey - I also said that. I always say will be long journey for the judges. People in Kenya have to understand the process. And this process now is a middle step. The judges will decide if we can go to trial. They are still not guilty but those whom the judges confirm the charges will go to trial."

Page 5 second paragraph: *"Yes the judges could dismiss but also they can let me present more evidence.."*

Page 5, fourth paragraph: *"We cannot make predictions as to what happens after January. So the next step now is January. Two aspects: court decision and what court decision is, Kenya in peace, respecting the process and deciding...moving forward but respecting the process."*

Page 7 seventh paragraph: *"This is about respect. Respect for the victims, respect for the law but also respect for Kenyatta, the suspect. We respect everyone but if they commit crimes in accordance with our view, we say that, and we present that, and we prove that."*

Page 8 second paragraph: *"we explored with [Kenyatta] how Muthaura has a bigger role and we...he confirmed that."*

Page 8, sixth paragraph: *"But the judges will decide. So is difficult for me to predict because it is early. We need to see details.."*

Page 9, first paragraph: *"(...) We are just proving the case in court. (...) Let this system working."*

Page 9, third paragraph: *"Next year the biggest journey... will be having beautiful peaceful elections and that I hope we are doing our contribution. But then it is up to you; to Kenyans to show leadership to manage the process and the first challenge will be January, the day of the Judges' decision."*

Page 10, seventh paragraph: *"The judges will decide. If they decide ... so I cannot tell you what I will do if they decide not to confirm the charges because I do not know the decision. I don't know how they evaluate depending on what they will say about the witness. "*

Page 11, first paragraph: *"This is very important for the world and is very important for Kenya. As I said before for me Kenya is showing respect. Kenya is moving forward and it is a very complex process and of course full of conflict and rallies and people with fear, but it is moving ahead. So I think this it is great."*

Page 11, eleventh paragraph: *"So I cannot tell you exactly what happens after but yes if the judges are confirming, we move to a second phase but maybe we'll add, we try to add all the charges. So there are different possibilities."*

Page 12, seventh paragraph: *"[The suspects] they came voluntarily and they spent weeks, days here...more than a week here. I think that shows respect and that's why I think they contribute a lot to this process and I think it is good for Kenya. They are leaders, they should do it but they did it so I think it is great. That's why on my side, you will never find me insulting them, no. I will charge them with crimes, not insulting them."*

Page 12, ninth paragraph: *"At the end of the day the success of this effort is not just about the ICC, it is how you in Kenya manages this and that's why I think you are managing very well. So I think it was a good effort and working well. I hope, keep working well."*

Page 12, eleventh paragraph: *"Let the judges decide."*

9. Contrary to the Defence accusation,¹⁰ the Prosecutor did not misrepresent or mischaracterise the evidence the testimony of Mr Kenyatta in one of the passages quoted above, from the second paragraph on page 8. Answering a question about the testimony of Kenyatta, the Prosecutor stated in very vague and general terms that "we explored with him how Mr Muthaura has a bigger role and we...he confirmed that." This is not a misstatement or mischaracterisation of the evidence at the hearing.

10. In fact, in his testimony at the confirmation hearing, Mr Kenyatta confirmed that:

- Mr Muthaura was in charge of the swearing-in ceremony of the members of cabinet;¹¹

¹⁰ ICC-01/09-02/11-359, para. 14 ; Specifically, the Defence contends : "On any reading, the testimony of Mr. Kenyatta during his testimony in chief, his cross-examination by the Prosecutor and his cross-examination by the Defence Team of Ambassador Muthaura vis a vis the role, conduct and responsibilities of Ambassador Muthaura, contradict the Prosecution's factual allegations".

¹¹ ICC-01/09-02/11-T-11-CONF-ENG, page 52 :

1 Q. Who in the name of Mr. -- President Kibaki called you to inform

2 you you were appointed minister?

3 A. Madam President, I was not called by anybody. The announcement

4 was made on national TV and radio. He made a live broadcast from

- Mr Muthaura was involved in the meetings that were held to try and resolve the impasse between President Kibaki and the Prime Minister, Honourable Raila Odinga, and to ensure that a cabinet was formed;¹²
- Mr Muthaura was present at several cabinet meetings;¹³ and
- Mr Muthaura was the 'master of ceremony' of the inauguration of President Kibaki and introduced the President. ¹⁴

5 State House, announcing ten members of his cabinet, and I was one of
6 them.

7 Q. So you formatted -- you learned about your membership in the
8 cabinet through TV?

9 A. Absolutely correct.

10 Q. And how you learn how to go to the swearing-in ceremony, with
11 whom you provide -- discussed details to go to the ceremony?

12 A. Madam President, once you have been nominated to a position, you
13 are then informed by the cabinet office as to when the swearing-in
14 ceremony will take place, where, and what time.

15 Q. Who informed you?

16 A. I think I was informed at the time by Mr. Mwale, who was, I
17 believe, the administrative secretary.

18 Q. Reporting to whom?

19 A. Mr. Mwale would report to Ambassador Muthaura.

¹² ICC-01/09-02/11-T-11-CONF-ENG, page 87 and page 88:

14 Q. And, sir, to the best of your knowledge are you aware if during
15 this period there were any secret meetings between

16 His Excellency President Kibaki and the prime minister, honourable
17 Raila Odinga, in order to find a solution?

18 A. I don't have any evidence, but indeed we did hear that there were
19 a number of meetings that were being held to try and resolve the impasse
20 and to ensure that a cabinet was formed. And that's why it took some
21 time to form cabinet after the accord was signed. But I am aware there
22 were some kind of meetings. We did hear of some kind of meetings that
23 were going on to resolve the impasse.

24 Q. And, sir, did you hear if Ambassador Muthaura had a role in any
25 of these meetings to find a resolution?

1 A. Again, I was not there but if I am to go on hearsay, we did hear
2 that Ambassador Muthaura and the PS, Aiza Hakiya (* phon) were also
3 involved in those discussions.

¹³ ICC-01/09-02/11-T-11-CONF-ENG, page 86 :

15 Q. Sir, my next question to you is: Could you tell the Court what
16 was the nature and extent of your contact with Ambassador Muthaura in the
17 month of January of 2008?

18 A. Madam President, the month of January I met Ambassador Muthaura
19 on the day of swearing-in, which I think was on the 10th. I met him also
20 when we had the first cabinet meeting and I think we had a number of
21 other cabinet meetings during that particular time where I did meet him.

11. Such tasks substantiate the Prosecutor's attribution of a "bigger role" in the governmental apparatus. Those words, therefore, were not a misrepresentation or a mischaracterisation of the evidence. Moreover, the comment (and the interview for that matter) is in line with the guidance provided by this Chamber regarding the relationship between the parties and the press.¹⁵
12. As previously stated,¹⁶ the Prosecutor has the right to speak publicly as long as he does not prejudice the Defence or violate legitimate orders of the Chamber.¹⁷ This interview does not prejudice the Defence in any way or call the Court into disrepute. It does not impact on the evidence or the merits of the case, nor could it be perceived as showing a predetermination of the cause pending before the Chamber. To the contrary, the Prosecutor was scrupulous in refusing to discuss the evidence and in emphasising the complete independence and impartiality of the judges to decide on the merits of the case. And by stressing these factors, and the need to respect the process of the rule of law, to the Kenyan public, the interview emphasized and thereby safeguarded the proper administration of justice and the integrity of the judicial proceedings.

¹⁴ ICC-01/09-02/11-T-11-CONF-ENG, page 89:

20 (...) And from there, I went to State House at
 21 approximately 5.00 p.m., when the inauguration ceremony was about to
 22 start. And even there we did not have any discussion with
 23 Ambassador Muthaura because I just took my seat and he was the master of
 24 ceremony at the function, introduced the function. The president was
 25 sworn in. The function lasted about an hour and we all left immediately (after that) (emphasis added)

¹⁵ ICC-01/09-02/11-83.

¹⁶ ICC-01/09-02/11-65.

¹⁷ E.g, ICC-02/05-01/09-112 ; ICC-01/04-01/10-51, para. 17

Conclusion

13. The Prosecution therefore requests that the Chamber dismiss the request in its entirety.



Luis Moreno-Ocampo, Prosecutor

Dated this 14th Day of November 2011

At The Hague, the Netherlands