

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-02/11

Date: 15 April 2015

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. UHURU MUIGAI KENYATTA

Public

Response of the Government of the Republic of Kenya to 'Victims' request to participate in the Prosecutor's appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute"

Source: The Government of the Republic of Kenya

Document 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. James Stewart
Ms. Helen Brady

Counsel for the Defence

Mr. Steven Kay
Ms. Gillian Higgins

Legal Representatives of the Victims

Mr. Fergal Gaynor

State's Representatives

Mr. Githu Muigai, SC Attorney General
of the Republic of Kenya

Office of Public Counsel for Victims

Ms. Paolina Massidda
Ms. Caroline Walter

REGISTRY

Registrar

Mr. Herman von Hebel

I. INTRODUCTION

1. On 1 April 2015 the Appeals Chamber of the International Criminal Court ('the Appeals Chamber') issued '*Corrected version of "Order concerning the filing of a response", 31 March 2015, ICC-01/09-02/11-1011*'¹ ('Order of 1 April 2015') inviting Mr. Uhuru Muigai Kenyatta and the Government of the Republic of Kenya to file a response to the '*Victims' request to participate in the Prosecutor's appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"*'² ('Victims' Request').
2. The Government of the Republic of Kenya will demonstrate that the Victims' Request is chronically defective and should be dismissed for failure to satisfy the requirements of the Appeals Chamber for victims' participation in appeals brought under **Article 82 (1) (d)**.

II. RELEVANT PROCEDURAL HISTORY

3. On 9 March 2014, Trial Chamber V(B) ('the Trial Chamber ') issued '*Decision on Prosecution's request for leave to appeal*'³ granting the request of the Prosecution to appeal the Trial Chamber's '*Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute*'⁴ ('Decision of 3 December 2014') in which it rejected the application of the Office of the Prosecutor ('Prosecution') for a finding, pursuant to **Article 87(7)** of the Rome Statute, that the Republic of Kenya 'has failed to comply with the Prosecution's request to produce financial and other records of the Accused'⁵ and thereby requested the Trial Chamber to refer the matter to the Assembly of States Parties ('the Assembly').

¹ (Public) ICC-01/09-02/11-1011-Corr, 1 April 2015.

² (Public) ICC-01/09-02/11-1009, 27 March 2015.

³ (Public) ICC-01/09-02/11-908, 31 March 2014.

⁴ (Public) ICC-01/09-02/11-982, 3 December 2014.

⁵ (Public) ICC-01/09-02/11-866, 2 December 2013.

3. On 20 March 2015 the Prosecution filed *'Prosecution appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"*⁶.
4. On 27 March 2015 the Legal Representative of Victims filed the Victims' Request.
5. On 1 April 2015 the Appeals Chamber issued the Order of 1 April 2015 inviting Mr. Uhuru Muigai Kenyatta and the Government of the Republic of Kenya to their responses to the Victims' Request.
6. On 2 April 2015 the Prosecution filed *'Prosecution Response to Victims' request to participate in the Prosecutor's appeal against the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"*⁷.

III. SUBMISSIONS

7. The Government of the Republic of Kenya submits that the Victims' Request is untenable since it fails to satisfy all the four mandatory requirements set by the Appeals Chamber for victims' participation in appeals brought under **Article 82 (1) (d)**. More recently, the Appeals Chamber reiterated the four requirements for victims' participation in the *'Decision on the participation of victims in the appeal'*⁸ where it stated as follows at paragraph 11:

'11. The Appeals Chamber has held that, with respect to victims' participation in appeals brought under article 82 (1) (d) of the Statute, the following four cumulative criteria enumerated in article 68 (3) of the Statute must be fulfilled: (i) the individuals seeking participation must be victims in the case; (ii) their personal interests must be affected by the issues on appeal; (iii) their participation must be at an appropriate stage of the proceedings; and (iv) the manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused and a fair and impartial trial.'

⁶ See note 2 above.

⁷ (Public) ICC-01/09-02/11-1012, 2 April 2015.

⁸ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (Public) ICC-02/05-03/09-470, 6 May 2013.

In particular, the Government of the Republic of Kenya's submissions will demonstrate that the Victims' Request failed to meet the test of the second requirement which requires that the victims' 'personal interests must be affected by the issues on appeal'.

8. The Government of the Republic of Kenya wishes to emphasise the seriousness of the Appeals Chamber on the satisfaction of all of the four requirements for victims' participation in the appeal proceedings, and particularly the weight it places on the cardinal requirement of 'personal interests must be affected by the issues on appeal' by reiterating the Appeals Chamber observations in the '*Decision on the participation of victims in the appeal*⁹ where the Appeals Chamber stated as follows in dismissing the victims' application for participation based on the victims' failure to satisfy the cardinal requirement:

'14. In light of the above, the Appeals Chamber finds that the Victims' personal interests are not affected by the issues on appeal. The Appeals Chamber therefore dismisses the Victims' Application on that basis and will not examine the remaining criteria...'¹⁰

'Personal interests must be affected by the issues on appeal'

9. In respect of the second requirement, the victims' arguments, between paragraphs 23 and 30, fail to establish the effect of the issues on appeal on the personal interests of victims and instead set out their own views and perception on cooperation between the Prosecution and the Government of the Republic of Kenya. Where the victims mention their interest, which is a very small part of the eight paragraphs referred to above, they demonstrate how their interests have allegedly suffered because of Prosecution's failure to conduct trial of the case, instead of demonstrating how their personal interests have been affected by the non-referral of the Republic of Kenya to the Assembly of States for the alleged non-compliance with some of the Prosecution's requests for assistance, which the Prosecution has stated that even if all the requests were to be complied with, this would not necessarily assist its readiness for trial. In particular, the Trial Chamber in its '*Decision on*

⁹ See note 8.

¹⁰ See note 8, para. 14.

*the Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute*¹¹ observed as follows in relation to the Prosecution's readiness for trial:

'...However, it is apparent that such a referral might result in further uncertainty and potential delay for the proceedings. Moreover, considering the Prosecution's concession that the evidence fell below the standard required for trial and that the possibility of obtaining the necessary evidence, even if the Revised Request was to be fully executed, is still nothing more than speculative, the Chamber is not persuaded that a referral to the ASP would facilitate a fair trial or the interests of justice. In any case, in this specific case, the Chamber does not consider it appropriate for the proceedings to be further prolonged under the current circumstances.'¹²

Moreover, the requirement of establishing how the victims' personal interests would be affected is emphasised in the Appeal Chamber's '*Decision on the participation of victims in the appeal*'¹³, which states in part as follows:

'13. The Appeals Chamber is not persuaded by the arguments put forward by the victims in relation to their personal interests. In particular, the Appeals Chamber notes that several of their submissions relate to how their personal interests would be affected by the determination of the Contested Issues, rather than by the disclosure of the Requested Material...'¹⁴

10. The issues on appeal relate solely to the relationship between the Prosecution and the Government of the Republic of Kenya on cooperation on the implementation of the Prosecution's requests for assistance and this has no bearing on the personal interests of the victims. On this issue, the Appeals Chamber in the '*Decision on the participation of victims in the appeal*'¹⁵, in rejecting the victims' request to participate in the appeal in the relevant case, observed as follows:

'12. In relation to whether the Victims' personal interests are affected in the case at hand, the Appeals Chamber notes that the issues on appeal concern the scope of the Prosecutor's obligations under rule 77 of the Rules of Procedure and Evidence to disclose the Requested Material to Mr Banda and Mr Jerbo. The Appeals Chamber considers that these issues are, as such, unrelated to the personal interests of the Victims because they relate solely to

¹¹ *Prosecutor v. Uhuru Muigai Kenyatta*, (Public) ICC-01/09-02/11-982.

¹² See note 4, para. 82.

¹³ See note 8.

¹⁴ See note 8, para. 13.

¹⁵ See note 8.

the relationship between the accused and the Prosecutor [emphasis added]...¹⁶

11. Moreover, the Government of the Republic of Kenya wishes to point out the error in the Victims' Request application of Pre-Trial Chamber I's '*Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council*'¹⁷.

Paragraph 30 of the Victims' Request in part reads as follows:

'...On the same day as the Impugned Decision, Pre-Trial Chamber I reaffirmed that victims have a legitimate interest in relation to cooperation and referral issues...'

However, in the decision of Pre-Trial Chamber I referred to by the victims, the Pre-Trial Chamber stated as follows:

'29. Also the rights of the victims of the crimes attributed to Saif Al-Islam Gaddafi are affected by Libya's failure to surrender him to the Court. In the absence of any proceeding aimed at determining whether he is criminally responsible for the crimes that resulted in the harm claimed by the victims, they are deprived of their right to have justice delivered, notwithstanding the Court's jurisdiction over the case. As recently underlined by the legal representative of victims who have communicated with the Court and participated in the admissibility proceedings in the present case, "the victims have been waiting for justice for more than two years now" and "[t]he refusal of Libyan authorities to surrender and/or delay in the transfer of the suspect to the Court can only prejudice the interests of the victims in the proceedings".

It is clear that, contrary to what the victims state in their request, the Pre-Trial Chamber I decision referred to the issue of Libya's failure to surrender an accused person to the Court which hampered proceedings against the accused to determine his criminal responsibility for the crimes that resulted in the harm claimed by the victims in the relevant case.

Although the Pre-Trial Chamber I decision related to cooperation between the Court and Libya on the surrender of an accused person, the issue of cooperation for determination by the Pre-Trial Chamber I, that is, surrender of an accused to the Court failure of which hampered criminal prosecution proceedings, was substantially different from the issue in the present appeal

¹⁶ See note 8, para. 12.

¹⁷ *Prosecutor v. Saif Al-Islam Gaddafi*, (Public) ICC-01/11-01/11-577, 10 December 2014, para. 29.

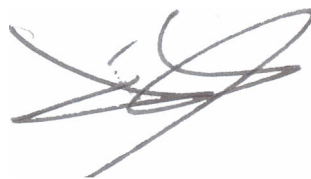
proceedings, that is, purported non-compliance with some of the Prosecution's requests for assistance in ongoing substantial criminal proceedings before the Court.

In addition, the Pre-Trial Chamber I in its decision, partly stated above, referred to the interest of victims to have an accused person present before the Court to face criminal proceedings brought against the accused person. However, the present case relates to the victims' participation in the appeal before the Appeals Chamber, in a case where the accused person has voluntarily presented himself before the Pre-Trial Chamber and later the Trial Chamber to face criminal proceedings, and has had proceedings against him withdrawn for the Prosecution's lack of the required evidence to prosecute the case, owing to the Prosecution's own incompetence which has previously been referred to by the Trial Chamber.

IV. RELIEF REQUESTED

12. The Government of the Republic of Kenya respectfully requests that the Victims' Request be dismissed for the gross failure to satisfy the cardinal requirement of 'personal interests must be affected by the issues on appeal'.

Respectfully Submitted,



Githu Muigai, SC

Attorney General of the Republic of Kenya

Dated 15 April 2015
At Nairobi, Kenya