

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09-02/11 OA 4

Date: 23 April 2012

THE APPEALS CHAMBER

Before:
Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
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 “Notification regarding the Legal Representation of
Participating Victims in the Appeal Proceedings”**

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 Khan

Mr Essa Faal

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Victims

Mr Morris Anyah

REGISTRY

Registrar

Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Uhuru Muigai Kenyatta and Mr Francis Kirimi Muthaura, pursuant to article 82 (1) (a) of the Statute, against the decision of Pre-Trial Chamber II entitled “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” of 23 January 2012 (ICC-01/09-02/11-382-Conf),

Having before it the “Notification regarding the Legal Representation of Participating Victims in the Appeal Proceedings” of 19 March 2012 (ICC-01/09-02/11-409),

Renders unanimously the following

DECISION

The request and alternative request made in the “Notification regarding the Legal Representation of Participating Victims in the Appeal Proceedings” are rejected.

REASONS

I. PROCEDURAL HISTORY

1. This decision relates to the legal representation of victims participating in the appeal of Mr Uhuru Muigai Kenyatta and Mr Francis Kirimi Muthaura, pursuant to article 82 (1) (a) of the Statute, against the decision of Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) of 23 January 2012 entitled “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”¹ (hereinafter: “Impugned Decision”).

2. On 26 August 2011, the Pre-Trial Chamber rendered the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”² (hereinafter: “Decision on Victims’ Participation”). In that decision, the Pre-Trial Chamber granted applications of several individuals for participation as victims in the proceedings (hereinafter: “Victims”)³ and appointed Mr Morris Anyah

¹ ICC-01/09-02/11-382-Conf.

² ICC-01/09-02/11-267.

³ Decision on Victims’ Participation, pp. 45-46.

(hereinafter: “Legal Representative”) “as common legal representative of all the victims admitted to participate by the present decision”.⁴

3. On 30 January 2012, Mr Kenyatta and Mr Muthaura filed the “Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’”.⁵

4. On 2 February 2012, the Appeals Chamber issued the “Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence”⁶ (hereinafter: “Directions”), *inter alia* inviting the Victims to “submit observations on the document in support of the appeal and on the response thereto”.

5. On 9 March 2012, the Pre-Trial Chamber rendered the “Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges”⁷ (hereinafter: “Decision on Leave to Appeal”), rejecting applications by Mr Muthaura and Mr Kenyatta for leave to appeal the Impugned Decision under article 82 (1) (d) of the Statute.

6. On 13 March 2012, the Victims filed the “Observations pursuant to Article 19 (3) of the Rome Statute and Rule 59 (3) of the Rules of Procedure and Evidence”⁸ (hereinafter: “Victims’ Observations”).

7. On 19 March 2012, the Victims filed the “Notification regarding the Legal Representation of Participating Victims in these Appeals Proceedings”⁹ (hereinafter: “Notification”). The Victims recall that the Pre-Trial Chamber, in the Decision on Victims’ Participation, appointed the Legal Representative to represent them, and that they had understood this appointment to include the present appeals proceedings, as the Decision on Victims’ Participation made reference to the confirmation of charges

⁴ Decision on Victims’ Participation, p. 46.

⁵ ICC-01/09-02/11-383 (OA 4).

⁶ ICC-01/09-02/11-394 (OA 4).

⁷ ICC-01/09-02/11-406.

⁸ ICC-01/09-02/11-408 (OA 4).

⁹ ICC-01/09-02/11-409 (OA 4).

hearing as well as to “related proceedings”.¹⁰ They note, however, that by letter dated 13 March 2012¹¹ (hereinafter: “Conclusion Letter”), the Registry’s Counsel Support Section (hereinafter: “CSS”) informed the Legal Representative that all proceedings before the Pre-Trial Chamber in relation to the case at hand have been concluded and that the Decision on Leave to Appeal “also effectively concluded [the Legal Representative’s] mandate and appointment as common legal representative of all victims admitted to participate in this case and this phase of [the] proceedings”.¹² CSS also requested the Legal Representative to conclude all pending matters “no later than 26 March 2012”,¹³ and informed him that “any involvement or activity that you envision to perform in this case after the 26 March 2012 must be requested in advance and pre-approved by the Registry. Any activities done outside a prior request and approval shall not be covered by the legal aid scheme of the Court under which you currently operate”.¹⁴

8. The Victims also refer to Pre-Trial Chamber’s “Decision on the ‘Urgent Request by the Victims’ Representative for an order from the Chamber requiring the Registrar to provide appropriate resources for the current mission in Kenya”¹⁵ rendered on 9 March 2012 in relation to the case *Prosecutor v. William Samoei Ruto et al.* (hereinafter: “*Ruto Decision*”). They note that in that decision, the Pre-Trial Chamber rejected *in limine*, for lack of standing, a request by the legal representative of victims in that case to order the Registry to make available resources for a mission to Kenya.¹⁶ The Pre-Trial Chamber noted that the legal representative’s mandate “was limited to the confirmation of charges hearing and related proceedings, and thus did not include, in and of itself, future involvement in the case”, as this would be “tantamount to predetermining a possible different approach to victims’ common legal representation by the Trial Chamber to be constituted pursuant to article 61(11) of the Statute”.¹⁷ The Pre-Trial Chamber also noted that “the proceedings before the [Pre-Trial] Chamber that are related to the confirmation of charges have come to an

¹⁰ Notification, paras 18-19.

¹¹ ICC-01/09-02/11-409-Conf-Exp-AnxA (OA 4).

¹² Conclusion Letter, p. 2.

¹³ Conclusion Letter, p. 2.

¹⁴ Conclusion Letter, p. 3.

¹⁵ ICC-01/09-01/11-398.

¹⁶ Notification, paras 20 *et seq.*

¹⁷ *Ruto Decision*, para. 14.

end”,¹⁸ and that the purpose of the legal representative’s mission to Kenya “goes beyond the mandate specified in the [Decision on Victims’ Participation]”.¹⁹

9. In light of the developments summarised above, the Victims argue that there are two questions that need to be resolved, namely: if the Legal Representative’s mandate to represent the Victims ended with the Decision on Leave to Appeal of 9 March 2012, under which authority could the Legal Representative file the Victims’ Observations on 13 March 2012?²⁰ And, if the mandate of the Legal Representative expired on 9 March 2012, on which basis could the Conclusion Letter extend it to 26 March 2012?²¹ As to the first question, the Victims argue that when filing the Victims’ Observations, the Legal Representative was acting in good faith, based on his understanding of the Decision on Victims’ Participation and the Directions the Appeals Chamber had issued.²² As to the second question, the Victims submit that the Conclusion Letter could not extend the Legal Representative’s mandate, which had been set by the Pre-Trial Chamber in the Decision on Victims’ Participation and which had ended on 9 March 2012 with the Decision on Leave to Appeal.²³

10. The Victims go on to argue that they are entitled to legal representation in the present appeals proceedings for a variety of reasons and that the Appeals Chamber is the right forum to decide this issue of representation.²⁴ They request the Appeals Chamber to issue:

(i) An order appointing qualified legal counsel (whether or not the undersigned Legal Representative) to represent the victim-participants in these appeals proceedings *nunc pro tunc* to 9 March 2012 until the conclusion of the appeals proceedings or, alternatively,

(ii) An order directing the Registrar to appoint counsel, as such.²⁵

11. On 27 March 2012, and shortly before the Appeals Chamber issued an order seeking submissions from the Registrar,²⁶ the Registrar filed “The Registrar’s

¹⁸ *Ruto* Decision, para. 16.

¹⁹ *Ruto* Decision, para. 17.

²⁰ Notification, para. 23.

²¹ Notification, para. 23.

²² Notification, paras 24-25.

²³ Notification, paras 26-28.

²⁴ Notification, paras 29-39.

²⁵ Notification, para. 40, footnote omitted.

Observations on the ‘Notification regarding the Legal Representation of Participating Victims in these Appeals Proceedings’ dated 19 March 2012”²⁷ (hereinafter: “Registrar’s Observations”). The Registrar recalls the proceedings before the Pre-Trial Chamber leading to the Legal Representative’s appointment.²⁸ She submits that the Conclusion Letter did not usurp any powers belonging to the Pre-Trial Chamber,²⁹ but simply informed the Legal Representative of “the direct implication of the end of the Pre Trial phase to his mandate as indicated by the Pre Trial Chamber”.³⁰ She underlines that “the deadline of the 26 March 2012 indicated in the [Conclusion Letter] [...] was only for a proper administrative management of the Court’s legal aid scheme under which the Legal representative and his team members operated”.³¹

12. The Registrar states that she is aware of the present appeals proceedings and the fact that the Appeals Chamber invited the Legal Representative to make submissions on the appeal.³² She also states that:

[S]hould this Chamber require the intervention of the Legal representative at any relevant stage, for any matter directly related to this ongoing appeal, in the context where the Counsel has already participated in submissions in response to directions of this Chamber, the Registry shall consider this specific activity eligible for remuneration under the Court’s legal aid scheme, in accordance with the Registry’s letter to Counsel.³³

13. The Registrar attaches to her filing a letter from CSS to the Legal Representative dated 14 September 2011 on his appointment³⁴ (hereinafter: “Appointment Letter”). The Appointment Letter states that it “officially formalizes [the Legal Representative’s] appointment in conformity with the [Decision on Victims’ Participation]”.³⁵ It explains that “the services to be provided in [the Legal Representative’s] capacity as common legal representative will be remunerated for the

²⁶ “Order on the submission of observations by the Registrar on the ‘Notification regarding the Legal Representation of Participating Victims in these Appeals Proceedings’”, ICC-01/09-02/11-413 (OA 4).

²⁷ ICC-01/09-02/11-412 (OA 4).

²⁸ Registrar’s Observations, paras 3 *et seq.*

²⁹ Registrar’s Observations, para. 19.

³⁰ Registrar’s Observations, para. 17 (footnote omitted).

³¹ Registrar’s Observations, para. 20 (footnote omitted).

³² Registrar’s Observations, para. 21.

³³ Registrar’s Observations, para. 22 (footnote omitted).

³⁴ ICC-01/09-02/11-412-Conf-Anx (OA 4). Although the document was filed confidentially, the Appeals Chamber considers it necessary to refer to some parts of it in this public decision, which, however, do not disclose any information that, in the assessment of the Appeals Chamber, must remain confidential.

³⁵ Appointment Letter, p. 2.

pre-trial proceedings in accordance with the Court's legal aid system".³⁶ It states furthermore that the Legal Representative's "mandate will be valid for the exclusive purposes indicated by the Chamber in its decision, and shall remain effective as of the date of the said decision unless terminated in accordance with the legal texts of the Court"³⁷ and that "payment of all member [sic] of your team will be reconsidered in the event of suspension of the proceedings of the case or intervention of any factors deemed relevant by the Registrar. Similarly, no payment shall be in principle paid after the end of the closing statements of the trial, except in cases where reasonable activities for the representation of the interests of the victims are required during this period".³⁸

II. MERITS

14. The request and alternative request made in the Notification are premised on the understanding that the Legal Representative's representation of the Victims has ended or never included the proceedings before this Chamber. As will be explained below, this understanding is incorrect.

15. The Pre-Trial Chamber appointed the Legal Representative in the Decision on Victims' Participation "as common legal representative of all the victims admitted to participate by the present decision".³⁹ The Pre-Trial Chamber explained that "the scope of the [Decision on Victims' Participation] is limited to the participation of victims at the confirmation of charges hearing and in the related proceedings".⁴⁰ The reference to the confirmation hearing and related proceedings was repeated elsewhere in the decision, including in the first paragraph of the section on the appointment of a common legal representative.⁴¹ In the *Ruto* Decision, the Pre-Trial Chamber addressed the scope of the legal representative of victims in the case of *Prosecutor v. William Samoei Ruto et al.*, who had been appointed by the Pre-Trial Chamber in identical terms as the Legal Representative in the case at hand.⁴² The Pre-Trial Chamber stated that the legal representative's mandate was limited to the

³⁶ Appointment Letter, p. 2.

³⁷ Appointment Letter, p. 2.

³⁸ Appointment Letter, p. 3.

³⁹ Decision on Victims' Participation, p. 46.

⁴⁰ Decision on Victims' Participation, para. 17.

⁴¹ Decision on Victims' Participation, para. 77.

⁴² "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", 5 August 2011, ICC-01/09-01/11-249.

“confirmation of charges hearing and related proceedings”,⁴³ which have now come to an end.⁴⁴ Thus, the terms of the appointment of the Legal Representative in the Decision on Victims’ Participation and the statements made by the Pre-Trial Chamber in the *Ruto* Decision in a comparable context, indeed raise the question of whether the Legal Representative continues to represent the Victims, including in the present proceedings, given that the proceedings before the Pre-Trial Chamber have come to an end.

16. In this regard, the Appeals Chamber recalls that the relationship between counsel and his or her clients is regulated by the Code of Professional Conduct for counsel (hereinafter: “Code”). Under article 11 of the Code, acceptance by counsel of a request for representation from a Chamber establishes a representation agreement, which, under article 2 (2) of the Code “binds counsel to his or her client before the Court”. The duration and eventual termination of the representation agreement is governed by article 17 (1) of the Code (entitled “Duration of the representation agreement”), which stipulates as follows:

Counsel shall advise and represent a client until:

- (a) The case before the Court has been finally determined, including all appeals;
- (b) Counsel has withdrawn from the agreement in accordance with article 16 or 18 of this Code; or
- (c) A counsel assigned by the Court has been withdrawn.

17. The Appeals Chamber notes that this provision ensures that there are no gaps in the legal representation of a client, even if a case continues before the Appeals Chamber. The application of article 17 (1) of the Code to the case at hand leads to a practical result: it ensures that the Victims remain represented unless and until the case is concluded, the Legal Representative withdraws, or is withdrawn by the Pre-Trial Chamber, the Trial Chamber or indeed the Appeals Chamber. In contrast, limiting the legal representation from the outset to the proceedings before the Pre-Trial Chamber would have led to a situation in which, as soon as the case moves to the Trial Chamber, as well as in respect of all proceedings before the Appeals

⁴³ *Ruto* Decision, para. 14.

⁴⁴ *Ruto* Decision, para. 16.

Chamber, the Victims would be without legal representation. In such a situation, the Trial or Appeals Chamber would not even have an interlocutor with whom to address the arrangements for the participation of the Victims.

18. In the view of the Appeals Chamber, and given the practical implications, if the Pre-Trial Chamber had wanted to limit the mandate of the Legal Representative from the start to the proceedings before the Pre-Trial Chamber, thereby modifying the provisions on the duration of a representation agreement under article 17 of the Code, it would have had to do so expressly and with clear reference to article 17 of the Code. However, in the Decision on Victims' Participation, the Pre-Trial Chamber did not consider article 17 of the Code and its impact on the continuing representation of the Victims by the Legal Representative. The Appeals Chamber notes the Pre-Trial Chamber's concern not to predetermine the question of the legal representation of the Victims at the trial phase of the proceedings. Nevertheless, the application to the case at hand of article 17 of the Code does not lead to any such predetermination or limit the Trial Chamber's powers to regulate, within the Court's legal framework, the common representation of victims at the trial, if any. The Trial Chamber remains free to take any decision within that framework to regulate the legal representation of the Victims. The result of the application of article 17 of the Code is simply that the Victims are currently represented. Accordingly, having regard to the legal framework, the effect of the Decision on Victims' Participation is not that the Victims are currently unrepresented; rather, unless and until the representation agreement is brought to an end pursuant to article 17 of the Code, the Legal Representative continues to represent the Victims, including in the present appeals proceedings.

19. As to the Victims' arguments relating to the Conclusion Letter, the Appeals Chamber notes that given the legal framework regarding legal representation of victims participating in the proceedings, the Conclusion Letter could not modify or bring to an end the representation agreement between the Legal Representative and the Victims. In this regard, the Appeals Chamber notes the submissions of the Registrar that the Conclusion Letter was not meant to alter the Legal Representative's mandate, but simply to implement the Pre-Trial Chamber's decision.

20. Accordingly, the Appeals Chamber finds that the Legal Representative continues to represent the Victims participating in the proceedings. The request and

alternative request made in the Notification must be rejected. The Appeals Chamber underlines that the question of whether the Legal Representative continues to represent the Victims must be distinguished from the scope of legal assistance paid by the Court, a matter not addressed by the present decision.

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



Judge Akua Kuenyehia
Presiding Judge

Dated this 23rd day of April 2012

At The Hague, The Netherlands