

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/05-03/09 OA

Date: 11 November 2011

THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF THE PROSECUTOR v. ABDALLAH BANDA ABAKAER
NOURAIN and SALEH MOHAMMED JERBO JAMUS**

Public document

Judgment

**on the appeal of the Prosecutor against the decision of Trial Chamber IV of 30
June 2011 entitled “Decision on the Prosecution’s Request to Invalidate the
Appointment of Counsel to the Defence”**



Judgment 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 the Defence

Mr Karim A. A. Khan
Mr Nicholas Koumjian

REGISTRY

Registrar

Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber IV entitled “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence” of 30 June 2011 (ICC-02/05-03/09-168),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence” is confirmed. The appeal is dismissed.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

1. On 8 June 2011, the Prosecutor filed the “Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence Team”¹ (hereinafter: “Request”), in which he objected to the proposed appointment of Mr Ibrahim Yillah as associate defence counsel to the defence team in this case. This was on the basis that Mr Yillah had resigned recently as trial lawyer from the Office of the Prosecutor (hereinafter: “OTP”) and that his assignment to the defence team would create a conflict of interest.² The Prosecutor submitted that lawyers who previously worked at the OTP “should be barred for a period of time, which should be no shorter than one year, to work for the defence in any case before the International Criminal Court”.³

2. From the Request, it appears that Mr Yillah started to work at the OTP as an Associate Trial Lawyer on 15 August 2005. He became a Trial Lawyer on 1 August

¹ ICC-02/05-03/09-160, registered on 9 June 2011.

² Request, para. 2.

³ Request, para. 4.

2008, from which position he resigned on 19 April 2011.⁴ On 4 May 2011, the OTP was informed of the proposed appointment of Mr Yillah as associate defence counsel on the defence team in this case.⁵ Prior to his resignation, Mr Yillah had worked for the OTP for a period of over five and a half years. His proposed appointment to the defence team in the present case was notified a little over two weeks thereafter.

3. During his employment with the OTP, Mr Yillah worked on the situation in Uganda, the case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (in the situation in the Democratic Republic of the Congo) and the case of *Prosecutor v. Jean-Pierre Bemba Gombo* (in the situation in the Central African Republic).⁶

4. On 15 June 2011, counsel for Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus (hereinafter: “Defence”) filed the “Defence Response to the ‘Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence Team’”⁷ (hereinafter: “Defence Response”), submitting that the Request should be summarily dismissed.

5. On 30 June 2011, Trial Chamber IV (hereinafter: “Trial Chamber”) issued the “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence”⁸ (hereinafter: “Impugned Decision”), in which it denied the Request.⁹

6. On 6 July 2011, the Prosecutor filed the “Prosecution’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence’ (ICC-02/05-03/09-168)”¹⁰ (hereinafter: “Application for Leave to Appeal”). The Prosecutor sought leave to appeal two issues, namely:

(i) “[w]hether, as a matter of law, Prosecution lawyers may join a defence team in a case that was open at the time when the person worked for the Prosecution, or whether they should be barred for a period of time before joining a defence team”¹¹; and

⁴ Request, para. 10.

⁵ Request, para. 5.

⁶ Request, para. 10.

⁷ ICC-02/05-03/09-163.

⁸ ICC-02/05-03/09-168.

⁹ Impugned Decision, p. 15.

¹⁰ ICC-02/05-03/09-173.

¹¹ Application for Leave to Appeal, para. 4; the Prosecutor asserted that this issue concerned the “legal test to be applied by the Chamber to determine impediments to representation and conflict of interest by counsel”.

(ii) “[w]hether the Chamber failed to properly consider and weigh the information provided by the Prosecution that Mr Yillah was privy to confidential information relating to the Banda and Jerbo case and whether it gave excessive weight to the assertion of Mr Yillah that he is unaware of any relevant confidential information”.¹²

7. On 13 July 2011, after having received the response of the Defence submitting that the Application for Leave to Appeal should be dismissed,¹³ the Trial Chamber issued its “Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence’”¹⁴ (hereinafter: “Decision on the Application for Leave to Appeal”), in which it granted leave to appeal the first of the Prosecutor’s two issues, but refused to grant leave to appeal the second issue.

B. Proceedings before the Appeals Chamber

8. On 25 July 2011, the Prosecutor filed the “Prosecution’s Appeal against Trial Chamber IV ‘Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence’”¹⁵ (hereinafter: “Document in Support of the Appeal”).

9. On 5 August 2011, the Defence filed the “Defence Response to Prosecution’s Appeal against Trial Chamber IV ‘Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence’”¹⁶ (hereinafter: “Response to the Document in Support of the Appeal”).

II. MERITS

A. Summary of the Impugned Decision

10. In determining whether there was an impediment to the representation of the accused by Mr Yillah, the Trial Chamber relied primarily upon the legal framework in the Rome Statute, previous decisions of other Chambers of the Court and the Code of Professional Conduct for counsel (hereinafter: “Code”). Although the Prosecutor relied extensively on national jurisprudence, the Trial Chamber did not derive any

¹² Application for Leave to Appeal, para. 4.

¹³ “Defence Response to Prosecution’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence’ (ICC-02/05-03/09-168)”, 8 July 2011, ICC-02/05-03/09-175, para. 24.

¹⁴ ICC-02/05-03/09-179, para. 28.

¹⁵ ICC-02/05-03/09-184 (OA).

¹⁶ ICC-02/05-03/09-188 (OA).

guidance from such references, given the wide differences in national practices in relation to the issue of a conflict of interest.¹⁷

11. The Trial Chamber held articles 12 (1) (b) and 16 of the Code to be applicable to Mr Yillah, who was considered to be a “defence counsel [...] practising at the [...] Court’ within the meaning of [a]rticle 1 of the Code”.¹⁸ The Trial Chamber noted that primary responsibility to ensure that there was no conflict of interest concerning a member of the defence team lay with counsel, in accordance with his or her professional obligations under the Code.¹⁹ However, in the event of a dispute that may cause unfairness, it was for the Trial Chamber to resolve the issue pursuant to articles 64 (2) and 64 (3) (a) of the Statute.²⁰

12. The Trial Chamber noted that article 12 (1) (b) of the Code prevented the appointment of counsel if he or she had been involved in or privy to confidential information relating to the case in which he or she seeks to appear.²¹ As Mr Yillah had not been involved in the present case, the Trial Chamber addressed only whether Mr Yillah had been privy to confidential information.²² By reference to article 12 (1) (b) of the Code and a previous decision of Trial Chamber III,²³ the Trial Chamber defined the determinative issue as being “whether Mr Yillah became aware of more than ‘*de minimis* confidential information’ relevant to the case which a member of the defence team should not possess”.²⁴

13. The Trial Chamber concluded as follows:

20. The Chamber notes that although the prosecution states that Mr Yillah became aware of confidential information relevant to the present case during his employment with the prosecution, this has been advanced essentially in general terms, without any particulars or any supporting material.

21. Although, Mr Yillah’s prior employment with the prosecution might have provided him insight into the functioning of the Office of the Prosecutor and provided him with knowledge pertaining to ongoing investigations, the

¹⁷ Impugned Decision, para. 8.

¹⁸ Impugned Decision, para. 10.

¹⁹ Impugned Decision, para. 11.

²⁰ Impugned Decision, para. 12.

²¹ Impugned Decision, para. 13.

²² Impugned Decision, paras 14-15.

²³ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the ‘Prosecution’s Request to Invalidate the Appointment of Legal Consultant to the Defence Team’”, 7 May 2010, ICC-01/05-01/08-769.

²⁴ Impugned Decision, para. 16.

Prosecution has not demonstrated that Mr Yillah indeed has confidential information and knowledge pertaining to this specific case. Instead, the prosecution only suggests the possibility.

22. As a result, the combination of lack of any proof that Mr Yillah is effectively in possession of confidential material and his unequivocal assertions that he is unaware of any relevant confidential material settles this matter. Absent any reasons for doubting Mr Yillah's integrity, the Chamber is entitled to rely on his clear undertakings. Therefore, the Chamber finds that there are no persuasive indications that a conflict of interests exists or that his appointment is prejudicial to the present proceedings.²⁵

B. The Prosecutor's submissions before the Appeals Chamber

14. The Prosecutor submits that the Trial Chamber erred (i) in refusing to apply an objective standard; and (ii) in requiring Mr Yillah to be "*effectively* in possession of 'more than *de minimis*' confidential information".²⁶

15. He submits that the Trial Chamber's conclusion was inconsistent with the duty to ensure a fair trial under article 64 of the Statute, given the unique characteristics of the Court and the OTP.²⁷ The Prosecutor further submits that "[h]ad the Chamber correctly applied an objective standard [...] it necessarily would have invalidated Mr Yillah's appointment."²⁸

16. The Prosecutor argues that counsel should be disqualified when his or her appointment creates an appearance of impropriety.²⁹ He supports this by an analysis of case law from national jurisdictions³⁰ and avers that there is an "objective principle that a former prosecutor cannot immediately join the Defence".³¹ He also refers to France, Italy, China and Germany, which impose, in his submission, a fixed period of time or other safeguards before a former prosecutor may appear for the defence.³²

17. On the basis of article 12 (1) (b) of the Code, he argues that the words "privity to confidential information" mean the objective possibility that the person had access to confidential information rather than the subjective "effective" possession standard

²⁵ Impugned Decision, paras 20-22.

²⁶ Document in Support of the Appeal, para. 2.

²⁷ Document in Support of the Appeal, para. 19.

²⁸ Document in Support of the Appeal, para. 20.

²⁹ See Document in Support of the Appeal, paras 28-30.

³⁰ See Document in Support of the Appeal, paras 29, 32.

³¹ Document in Support of the Appeal, para. 33.

³² Document in Support of the Appeal, para. 32.

required in the Impugned Decision.³³ He submits that “[r]equiring proof that the person had ‘effective possession’ of important confidential information places an unrealistic evidentiary burden that, in all but the most blatant cases, will be impossible to meet”.³⁴ The Prosecutor submits that the objective standard finds support in the standard applied by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the case of *Prosecutor v. Hadžihasanović and others*³⁵ and is consistent with domestic case-law in the United States, which required the disqualification of would-be defence lawyers who were previously in positions where they “could have received” or were “likely to have come across” sensitive or privileged prosecution information.³⁶

18. The Prosecutor submits that there was “a real possibility” that a lawyer working for the OTP at the time when a case was open was privy to confidential information with respect to that case.³⁷ In his view, allowing the lawyer to join the defence would give him or her an undue advantage over the prosecution, which could detrimentally impact the fairness of the proceedings and erode public confidence in them.³⁸ The Prosecutor submits that the working methods of the OTP require open discussion of factual, legal and policy issues, with the assumption that all such interactions would be unrestricted and confidential.³⁹ He submits that, during these discussions, OTP lawyers reveal confidential facts, assess strengths and weaknesses of a case and discuss policy or strategic options, and that such exchanges occurred both formally and informally.⁴⁰ He submits that requiring documentation of every piece of confidential information revealed in such conversations would render the OTP ineffective.⁴¹

19. As to the *de minimis* standard set out by the Trial Chamber, the Prosecutor argues that there is no requirement under article 12 (1) (b) of the Code that the

³³ See Document in Support of the Appeal, paras 2, 35.

³⁴ Document in Support of the Appeal, para. 36.

³⁵ “Decision on Prosecution’s Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as co-counsel to the Accused Kubura”, 26 March 2002, IT-01-47-PT, para. 46; Document in Support of the Appeal, para. 38.

³⁶ Document in Support of the Appeal, para. 39.

³⁷ Document in Support of the Appeal, para. 21.

³⁸ Document in Support of the Appeal, paras 21, 30.

³⁹ Document in Support of the Appeal, paras 3, 5, 24-27.

⁴⁰ Document in Support of the Appeal, para. 15; see also paras 24-25.

⁴¹ Document in Support of the Appeal, para. 15.

confidential information reached a sufficient level of importance and that, therefore, the Trial Chamber's standard was incorrect.⁴²

20. The Prosecutor requests the Appeals Chamber to reverse the Impugned Decision, formulate the correct legal test to be applied in such circumstances and either itself invalidate the appointment of Mr Yillah or remand the matter to the Trial Chamber with directions to do so.⁴³

C. The Defence Submissions before the Appeals Chamber

21. The Defence submits that the Impugned Decision did not contain any errors of law.⁴⁴ In the Defence's submission, the Impugned Decision applied the correct legal test of whether Mr Yillah was "privy to confidential information".⁴⁵

22. The Defence submits that article 12 (1) (b) of the Code only prevents lawyers from joining the defence if they were, *inter alia*, "'privy to confidential information' relating to the case".⁴⁶ The Defence submits that the Trial Chamber did not err in finding that Mr Yillah was not "effectively in possession of confidential material" because "'[i]n possession of' means the same as 'privy to'" and "[t]he word 'effectively' merely emphasis[ed] that it was for the OTP to prove that Mr. Yillah was [...] in possession of confidential material".⁴⁷ In that context, the Defence submits that the purpose of article 12 (1) (b) of the Code is to "balance the accused's right to be represented by counsel of their choosing against the risk [of the OTP being] disadvantaged by the Defence having access to confidential information".⁴⁸ In the view of the Defence, this balancing is also evidenced by the fact that the impediment may be lifted where it is in the interests of justice so to do.⁴⁹

23. The Defence submits that, in the present case, the OTP failed to discharge its burden of proof.⁵⁰ The Defence disputes that requiring the Prosecutor to substantiate his claim that a person has been made privy to confidential information was

⁴² Document in Support of the Appeal, paras 34-35.

⁴³ Document in Support of the Appeal, paras 4, 40.

⁴⁴ Response to the Document in Support of the Appeal, para. 1.

⁴⁵ Response to the Document in Support of the Appeal, para. 2.

⁴⁶ Response to the Document in Support of the Appeal, para. 16.

⁴⁷ Response to the Document in Support of the Appeal, paras 38-39; *see also* paras 32-33.

⁴⁸ Response to the Document in Support of the Appeal, para. 36.

⁴⁹ Response to the Document in Support of the Appeal, para. 36.

⁵⁰ Response to the Document in Support of the Appeal, para. 8.

unreasonable or impossible.⁵¹ The Defence also highlights that the Prosecutor did not explain exactly what OTP practices he feared would be revealed or “how knowledge of those practices by defence counsel would in any way damage the fairness of the proceedings”.⁵²

24. The Defence asserts that the Prosecutor is requesting the Appeals Chamber to implement “a wholesale rule change in conflict of interest matters”, which has no basis in the governing legal instruments of the Court or the applicable international jurisprudence.⁵³ The Defence submits that the “objective standard” proposed by the Prosecutor is not to be found within the applicable law of the ICC.⁵⁴ The Defence points out that article 12 (1) (b) of the Code expressly covers the situation of a staff member of the Court moving to represent a client before the Court.⁵⁵ The Defence submits that it is not possible to read that provision as imposing an absolute ban on OTP lawyers joining the defence in a case that was open at the time that they worked for the OTP.⁵⁶ Furthermore, the Defence argues that the jurisprudence of other international tribunals shows that prior association with the prosecutorial office did not, in itself, justify disqualification from becoming a defence counsel.⁵⁷ Additionally, the Defence submits that no general principle of national law barring a prosecutor from working as a defence counsel could be established in the present case pursuant to article 21 (1) (c) of the Statute.⁵⁸ The Defence avers that, in the national jurisdictions referred to by the Prosecutor, such a bar is expressly codified,⁵⁹ and that in many national jurisdictions, including the United States, Canada and The Gambia, movement between prosecution and defence is commonplace.⁶⁰ Finally, concerning the need to protect against impropriety, the Defence submits that the only case of direct relevance cited by the Prosecutor was “severely criticised” and not followed by

⁵¹ Response to the Document in Support of the Appeal, para. 22.

⁵² Response to the Document in Support of the Appeal, para. 24.

⁵³ Response to the Document in Support of the Appeal, para. 3.

⁵⁴ Response to the Document in Support of the Appeal, paras 9-16.

⁵⁵ Response to the Document in Support of the Appeal, para. 15.

⁵⁶ Response to the Document in Support of the Appeal, para. 16.

⁵⁷ Response to the Document in Support of the Appeal, paras 19-20.

⁵⁸ Response to the Document in Support of the Appeal, para. 29.

⁵⁹ Response to the Document in Support of the Appeal, para. 30.

⁶⁰ Response to the Document in Support of the Appeal, para. 26.

another U.S. federal appellate court, highlighting the inconsistent positions taken on this issue.⁶¹

25. Furthermore, the Defence submits that the “*de minimis*” test did not affect the outcome of the present case, as the OTP failed to prove that Mr Yillah was privy to any confidential information at all.⁶² As such, it is submitted that the Prosecutor seeks an advisory opinion on hypothetical points of law.⁶³

26. The Defence further contends that this appeal improperly seeks retrospectively and unilaterally to “amend the employment contracts of OTP lawyers [...] by barring them from joining ICC defence teams for a period of time regardless of whether [or not] a conflict of interest exists”.⁶⁴

27. The Defence, therefore, submits that the Impugned Decision should be confirmed and the appeal dismissed.⁶⁵

D. The determination of the Appeals Chamber

28. The Appeals Chamber recalls that, in considering whether there is an impediment to Mr Yillah’s appointment as an associate counsel of the Defence, the issue on appeal is,

[w]hether, as a matter of law, prosecution lawyers may join a defence team in a case that was open at the time when the person worked for the prosecution, or whether they should be barred for a period of time before joining a defence team.⁶⁶

29. A similar question was addressed in the judgment of the Appeals Chamber of 10 November 2011 in the case of *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*⁶⁷ (hereinafter: “*Muthaura OA 3 Judgment*”).

30. The Appeals Chamber notes that, while the proceedings leading to the *Muthaura OA 3 Judgment* were initiated by Pre-Trial Chamber II on its own motion,⁶⁸

⁶¹ Response to the Document in Support of the Appeal, para. 25.

⁶² Response to the Document in Support of the Appeal, para. 37.

⁶³ Response to the Document in Support of the Appeal, para. 37.

⁶⁴ Response to the Document in Support of the Appeal, para. 4; *see* paras 41-46.

⁶⁵ Response to the Document in Support of the Appeal, para. 48.

⁶⁶ Decision on the Application for Leave to Appeal, para. 2.

⁶⁷ ICC-01/09-02/11-365.

⁶⁸ *Muthaura OA 3 Judgment*, para. 45.

the present proceedings were initiated by the Prosecutor. In the *Muthaura OA 3 Judgment*, the Appeals Chamber held, in discussing the legal basis for the Pre-Trial Chamber to act, that “protecting the integrity of the proceedings – in particular their fairness and expedition in the specific context under consideration – is a matter that is necessarily within the jurisdiction of the Pre-Trial Chamber”.⁶⁹ For the same reasons, the Appeals Chamber finds in the present case that article 64 (2) of the Statute was the correct legal basis for the Trial Chamber to act upon the request of the Prosecutor to invalidate the appointment of counsel.

31. For the same reasons as those given in the *Muthaura OA 3 Judgment*,⁷⁰ the Appeals Chamber determines that the Trial Chamber correctly drew upon the provisions of article 12 (1) (b) of the Code. The Appeals Chamber also finds that, although Mr Yillah is not the lead counsel of the Defence in this case, he is practising before the Court as counsel within the meaning of article 1 of the Code and he is, therefore, bound by its provisions.

32. The crucial issue in this appeal is, therefore, the interpretation of the words being “privity to confidential information” in article 12 (1) (b) of the Code, which has been resolved by the *Muthaura OA 3 Judgment*.⁷¹ The Appeals Chamber adopts the reasons provided therein and finds that the Trial Chamber in the present case was correct to interpret the words “privity to confidential information” as meaning “being aware of” or being in “possession” of confidential information (there not being any material difference between those two phrases in the present context).

33. The Appeals Chamber notes that the arguments of the Prosecutor advocating for an “objective standard” are very similar to the arguments addressed by the Appeals Chamber in the *Muthaura OA 3 Judgment*.⁷² The main additional argument raised by the Prosecutor in the present appeal relates to the purported existence of a general principle of law establishing a ban for former prosecutors to join the defence immediately after leaving the prosecution.⁷³ Without intending to define in any detail what is required to establish a general principle of law, the Appeals Chamber notes

⁶⁹ *Muthaura OA 3 Judgment*, para. 46.

⁷⁰ See *Muthaura OA 3 Judgment*, paras 47-51.

⁷¹ See *Muthaura OA 3 Judgment*, paras 52-56, 64.

⁷² See *Muthaura OA 3 Judgment*, paras 58-63.

⁷³ Document in Support of the Appeal, para. 33.

that the practice in the five countries to which the Prosecutor has referred is not consistent. Notably, as the Prosecutor accepts,⁷⁴ the practice in one of them (the United Kingdom) appears to be opposite to the one contended for by the Prosecutor.

34. To the extent that the Trial Chamber required that the confidential information must have been of more than *de minimis* character, the Appeals Chamber reiterates its holdings in the *Muthaura OA 3 Judgment* that article 12 (1) (b) of the Code does not contain such a requirement.⁷⁵ Nevertheless, the Appeals Chamber recalls that in the present case the Trial Chamber unequivocally concluded that it had not been established that Mr Yillah had knowledge of *any* confidential information – be it *de minimis* or otherwise.⁷⁶ Accordingly, the fact that the Trial Chamber required the information to be more than *de minimis* was irrelevant for the Trial Chamber's rejection of the Prosecutor's request.

III. APPROPRIATE RELIEF

35. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). Given that the Appeals Chamber has determined that the Trial Chamber did not err when requiring that Mr Yillah must have become aware of confidential information relating to the case in order to be impeded from joining the Defence, the Appeals Chamber confirms the Impugned Decision and dismisses the appeal.

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



Judge Akua Kuenyehia
Presiding Judge

Dated this 11th day of November 2011

At The Hague, The Netherlands

⁷⁴ Document in Support of the Appeal, para. 32.

⁷⁵ *Muthaura OA 3 Judgment*, paras 65-70.

⁷⁶ See Impugned Decision, paras 21-22.