



Original: English

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

Date: 04 September 2011

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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

**URGENT
PUBLIC**

**DEFENCE REQUEST NOT TO DISCLOSE DEFENCE EVIDENCE ON 5
SEPTEMBER 2011 TO THE PROSECUTION UNTIL THE APPLICATION FOR
ADJOURNMENT IS DETERMINED**

Source: Defence

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:
Karim A.A. Khan QC and Kennedy
Ogetto
Counsel for Uhuru Muigai Kenyatta:
Steven Kay QC and Gillian Higgins
Counsel for Mohammed Hussein Ali:
Evans Monari and Gershom Otachi

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL BACKGROUND

1. On 15 December 2010, the Prosecutor submitted the “Prosecutor’s Application Pursuant to Article 58 as to Ambassador Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (the “Article 58 Application”).¹
2. On 8 March 2011, the Pre-Trial Chamber (the “PTC”) issued its “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” issuing, by a majority, summons for all three suspects.²
3. On 6 April 2011, the Single Judge issued her “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “First Disclosure Decision”) which set out the principles governing disclosure.³
4. The initial appearance took place on 8 April 2011. At this hearing the Pre-Trial Chamber (the “PTC”) scheduled the confirmation hearing to take place on 21 September 2011.
5. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” (the “Second Disclosure Decision”), in which she established the calendar for disclosure setting out the various time limits for

¹ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Prosecutor’s Application Pursuant to Article 58 as to Ambassador Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-31-Conf-Exp and its annexes.

² Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01.

³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48.

service by the Defence and Prosecution as well as deadlines for the submission of properly justified proposals for redactions.⁴

6. On 20 July 2011, the Single Judge ordered the Defence to notify the Chamber if they wished to call any *viva voce* witnesses at the confirmation hearing and if so, to identify the subject-matter and scope of their evidence.⁵
7. On 10 August 2011, the Pre-Trial Judge ordered the Defence to reduce the number of live witnesses they wished to call at the confirmation hearing to a maximum of two per Defence team and to notify the Pre-Trial Chamber by 15 August 2011 of the identity of their witnesses.⁶
8. The Prosecution has disclosed evidence to the Defence on the following dates: 3 June 2011,⁷ 24 June 2011,⁸ 19 July 2011,⁹ 25 July 2011,¹⁰ 29 July 2011,¹¹ 8 August 2011,¹² 19 August 2011,¹³ and 25 August 2011. The Prosecution disclosed the

⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of the Republic of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-02/11-64.

⁵ Pre-Trial Chamber II, "Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing", ICC-01/09-02/11-181, para. 8.

⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, 10 August 2011, ICC-01/09-02/11-226.

⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's First Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, 3 June 2011, ICC-01/09-02/11-100 + Anxs A~D & G + Conf-Anxs E, F & H.

⁸ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's First Communication of the Disclosure of Potentially Exculpatory Evidence and Second Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, 24 June 2011, ICC-01/09-02/11-135 + Anxs A ~ C and Conf-Anxs D - E.

⁹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's First Communication to the Defence of Redacted Incriminating Evidence Pursuant to Article 61(3)(b), Potentially Exculpatory Evidence Pursuant to Article 67(2) and Material Subject to Disclosure Pursuant to Rule 77, 19 July 2011, ICC-01/09-02/11-179-Conf and Conf-Anxs A-G

¹⁰ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Second Communication to the Defence of Redacted Potentially Exculpatory Evidence Pursuant to Article 67(2), 25 July 2011, ICC-01/09-02/11-193-Conf + Conf-AnxA

¹¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Third Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, 29 July 2011, ICC-01/09-02/11-204 + AnxA&B + Conf-AnxC

¹² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Second Communication of the Disclosure of Potentially Exculpatory Evidence and Fourth Communication of the Disclosure of Rule 77 Materials to the Defence, 8 August 2011, ICC-01/09-02/11-221 + AnxA + Conf-AnxB.

Document Containing the Charges, (the “DCC”), List of Evidence to be relied on at the confirmation hearing and related analysis tables on 19 August 2011.¹⁴

9. The PTC has to date issued five decisions upon the Prosecution’s redaction proposals on the following dates: 12 July 2011,¹⁵ 22 July 2011,¹⁶ 4 August 2011,¹⁷ 17 August 2011,¹⁸ and 19 August 2011.¹⁹
10. On 26 August 2011, the Muthaura team filed “Defence Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be Ordered to Re-File an Amended DCC and LoE” (“Preliminary Motion”).²⁰ This motion addressed defects in the DCC, the LoE and the timing and manner of the OTP’s disclosure. A corrigendum of the Preliminary Motion was filed on 28 August 2011.²¹
11. On 29 August 2011, the Defence for Uhuru Kenyatta and Mohammed Ali jointly filed “Defence Request for a Status Conference concerning the Prosecution’s disclosure of 19th August 2011 and the Document Containing the Charges and

¹³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Fourth Communication to the Defence of Redacted Incriminating Evidence Pursuant to Article 61(3)(b), ICC-01/09-02/11-259-Conf + Conf-Anxs

¹⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Document Containing the Charges, List of Evidence and Comprehensive In-Depth Analysis Chart of Evidence Included in the List of Evidence Submitted Pursuant to Article, 19 August 2011, ICC-01/09-02/11-257-AnxA + AnxA + Conf-Anxs B~C1toC5

¹⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted First Decision on the Prosecutor’s Request for Redactions, 12 July 2011, ICC-01/09-02/11-165-Conf-Red.

¹⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Second Decision on the Prosecutor’s Request for Redactions, 22 July 2011, ICC-01/09-02/11-178-Conf-Red.

¹⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Third Decision on the Prosecutor’s Request for Redactions, 4 August 2011, ICC-01/09-02/11-205-Conf-Red.

¹⁸ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Forth Decision on the Prosecutor’s Request for Redactions, 17 August 2011, ICC-01/09-02/11-236-Conf-Red.

¹⁹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Fifth Decision on the Prosecutor’s Request for Redactions, 19 August 2011, ICC-01/09-02/11-245-Conf-Red.

²⁰ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE, 26 August 2011, ICC-01/09-02/11-268.

²¹ Pre-Trial ChamberII, Prosecutor v Muthaura et al., Corrigendum to “Defence Preliminary Motion Alleging Defence in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC and LoE”, 28 August 2011, ICC-01/09-02/11-268-Corr + Anx.

Article 101 of the Rome Statute”.²² In this filing, the Defence set forth to the Pre-Trial Chamber the scale of the disclosure of new evidence by the Prosecution on 19 August 2011 and the major changes in the allegations against Uhuru Kenyatta in the DCC arising from the disclosure. The Defence therein made a request to the Pre-Trial Chamber for a status conference in the week of 29 August 2011.

12. On 2 September, the Defence for Uhuru Kenyatta filed its “Application under Article 61(3) and 67(1)(a) for an adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witnesses, With Confidential *Ex-Parte* Annex 1 and Confidential *Ex-Parte* Annex 2”,²³ in which it requested that the Confirmation Hearing scheduled for 21 September 2011 be adjourned for a period of 3 months and the Defence date for filing its list of evidence be appropriately altered to reflect a date 15 days before the revised confirmation date identified by the Pre-Trial Chamber (the “Kenyatta Application for an Adjournment”).²⁴
13. On 2 September 2011, the Prosecution submitted its amended DCC.²⁵
14. On 3 September, the Defence for Francis Muthaura filed its Defence Application for Adjournment of the Confirmation Hearing or in the Alternative Extension of Time to File an Amended List of Evidence (LoE).

²² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Request for a Status Conference Concerning the Prosecution’s Disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute, 29 August 2011, ICC-01/09-02/11-270 + Anx.

²³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Application by the Defence for Uhuru Kenyatta under Article 61(3) and 67(1)(a) for an adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alternation to their Selected Viva Voce Witnesses, With Confidential *Ex-Parte* Annex 1 and Confidential *Ex-Parte* Annex 2, 2 September 2011, ICC-01/09-02/11-281.

²⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Application by the Defence for Uhuru Kenyatta under Article 61(3) and 67(1)(a) for an adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alternation to their Selected Viva Voce Witnesses, With Confidential *Ex-Parte* Annex 1 and Confidential *Ex-Parte* Annex 2, 2 September 2011, ICC-01/09-02/11-281, at p. 11.

²⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Amended Document Containing the Charges and List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), (4) and (5), 2 September 2011, ICC-01/09-02/11-280+AnxA+Conf-AnxB.

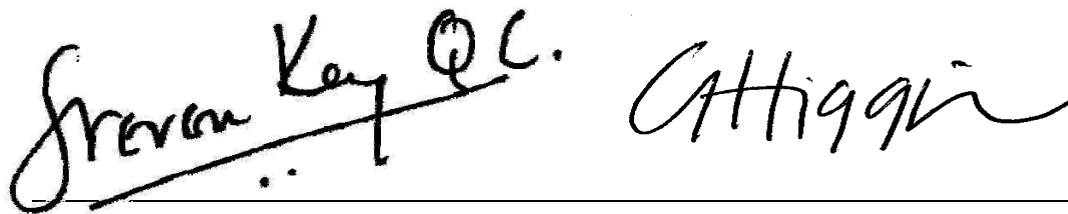
II. SUBMISSIONS

15. The Defence herein repeats the section headed “(iii) Substantial New Allegations in the Disclosure and the DCC” and the detailed “Annex 1” from the filing of 29th August 2011.²⁶ This motion also revealed the volume and extensive change in the direction of the Prosecutor’s case, which arises exclusively from the last scheduled disclosure on 19th August 2011.
16. As a result of this new information from the Prosecution and the extensive change in direction of the Prosecutor’s case, the Defence requests that its disclosure which is due to be submitted tomorrow, 5 September 2011, be held by the Registry and PTC only, and not communicated to the Prosecution until there has been a decision upon the Applications for an Adjournment.

III. RELIEF REQUESTED

16. The Defence requests the Pre-Trial Chamber to order that the disclosure due to be submitted on 5 September 2011 be held by the Registry and PTC only, and not communicated to the Prosecution until there has been a decision upon the Applications for an Adjournment.

²⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Annex 1 to Defence Request for a Status Conference Concerning the Prosecution’s Disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute, 29 August 2011, ICC-01/09-02/11-270-Anx1



Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta



Karim A. A. Khan QC
On behalf of Francis Kirimi Muthaura



Evans Monari and Gershom Otachi
On behalf of Mohammed Hussein Ali

Dated this, Sunday 4 September 2011

At The Hague, Netherlands