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

Date: 07 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

**PUBLIC
URGENT**

**with Confidential Annexes 1, 2, 4 and 5 and Confidential *Ex parte* Annex 3 only
available to the Prosecution and Defence**

**Application by the Defence for Ambassador Muthaura for Leave to add five items
of evidence and Re-filing of its Amended List of Evidence and Chart on
Presentation of Evidence**

Source: Defence

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

The Office of the Prosecutor

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Ms. Fatou Bensouda, Deputy Prosecutor

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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**

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Mr. Didier Daniel Preira, Deputy
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. On 5 September 2011, the Defence requested and was granted two extensions of time to file a complete List of Evidence (“LoE”) and chart on presentation of Defence evidence because of the persistent technical problems it encountered both in the uploading of its evidence into the Court’s RINGTAIL system as well as intermittent internet and power interruptions encountered in Kenya that day.¹
2. Pursuant to Regulation 35(2) of the Regulations of the Court (“Regulations”) and the inherent jurisdiction of the Court, the Defence for Ambassador Muthaura hereby seeks leave to add five items of evidence into the record of the case. The Defence re-files its amended list of evidence and chart on presentation of evidence originally filed on 5 September 2011.²
3. The first item identified in this application is a witness statement. This statement is included in the Defence’s LoE and presentation of evidence chart filed on 5th September 2011.³ The Defence was unable to upload the statement into RINGTAIL.⁴ To mitigate this problem the Defence emailed the statement to the Prosecution on the 5th September 2011 by the filing deadline.⁵
4. The second and third items identified in this application⁶ are two public source documents referenced by the witness and annexed to the above mentioned witness statement. As the statement itself could not be uploaded, the Defence also did not upload these annexes. However, the two items constituting the

¹ ICC-01/09-02/11-289 and ICC-01/09-02/11-299.

² ICC-01/09-02/11-301.

³ KEN-D12-0016-0001.

⁴ First, the Defence realised during the upload process that the accompanying text file necessary to allow for content searching the document was not properly created. Second, the document’s location in Ringtail was accidentally created in the 15th level of the Defence Ringtail (“KEN-D12-0015”) and not the appropriate 16th level – in accordance with the ERN assigned to the document, “KEN-D12-0016-0001” – which resulted in an error when attempting to upload the .tiff images of this document.

⁵ The Defence’s e-mail to the Prosecution is attached as Annex 1 to this application.

⁶ Listed as KEN-D12-0016-0007 and KEN-D12-0016-0010 in the LoE.

substance of these annexes were already included in the Defence's LoE and chart on presentation of evidence and disclosed in the 5th September Disclosure Package as KEN-D12-0001-0314 and KEN-D12-0004-0135.

5. The fourth item identified in this application is an audio file.⁷ The Defence could not upload this into RINGTAIL due to technical difficulties⁸ and did not obtain an ERN number for the same. In order to mitigate the problem it attempted to email the audio file to the Prosecution before the filing deadline.⁹ The limited capacity of the ICC server to accept this attachment meant that this attempt was unsuccessful. A CD containing the same material was served on the Prosecution at around 1.15 am on 6th September 2011.¹⁰
6. The fifth item identified in this application is in a different category and was not in the Defence's possession by the filing deadline of 5 September 2011. It only came to light in the early morning of the 6th September 2011. This item relates to a witness already included in the Defence's List of Evidence ("LoE"). This newly acquired evidence is relevant and probative and, the Defence submit, its admission would assist the Chamber in its determination.
7. To ensure that its LoE and in-depth analysis chart are accurate, the Defence has undertaken a comparative analysis of its LoE, chart on presentation of evidence and the actual evidence uploaded into RINGTAIL in order to ensure consistency. Various minor errors detected in the LoE and chart on presentation of evidence – including classification of documents as public or confidential – necessitates the re-filing of an amended LoE and chart on presentation of evidence. The LoE and chart on presentation of evidence have been submitted

⁷ This file has now been uploaded into the Defence RINGTAIL and assigned ERN number: KEN-D12-0017-0001.

⁸ Specifically, the Defence was unable to convert the audio file from its original ".m4a" format into the ".wma" format required for use in Ringtail.

⁹ The Prosecution's e-mail is attached as Annex 2 to this application.

¹⁰ Ibid.

in track-changes for the Chamber and the parties to view the amendments which have been effected.

8. Granting the relief requested will not prejudice the preparation of the Prosecution because it has already been given notice of the first four items mentioned above. Similarly, admission of the fifth item will not prejudice the Prosecution because the information it provides does not necessitate fresh investigations, but rather sheds light of information previously disclosed by the Prosecution as part of its case.¹¹

SUBMISSIONS

APPLICATION FOR LEAVE TO UPLOAD AND FILE WITNESS STATEMENT AND ITS ANNEXES INTO E-COURT AND THE RECORD OF THE CASE

9. The Defence filed and served on the Registry, the items of evidence it intends to rely on for the confirmation hearing. The items were also disclosed to the Prosecution.¹²
10. Before the expiration of the time-limit imposed by the Single Judge, the Defence encountered technical difficulties which prevented it from uploading one witness statement (KEN-D12-0016-0001 together with annexes KEN-D12-0016-0007 and KEN-D12-0016-0010) into RINGTAIL and immediately alerted the Prosecution to these difficulties. To mitigate this problem, the Defence provided the Prosecution with the full witness statement and annexes to the statement by e-mail before the expiration of the time-limit. In the e-mail, the Defence informed the Prosecution of the technical difficulties encountered that have necessitated disclosure of the said statement by e-mail and further undertook to

¹¹ The Defence files the annexes to this application as confidential or confidential ex parte as they discuss Defence evidence.

¹² ICC-01/09-02/11-300.

consult the Court's technical team in the morning of the 6th September 2011 to assist it in uploading the said statement into RINGTAIL.¹³

11. For these reasons and in light of the adequate notice given to the Prosecution of the said item of evidence, the Defence submits that no prejudice has been occasioned to the Prosecution. The requirement of fair notice has been met. Accordingly, the Defence seeks leave of the Chamber to upload the said witness statement and its two annexes into E-court and file same into the record of the case.

APPLICATION FOR LEAVE TO ADD AN AUDIO RECORDING NOT PREVIOUSLY UPLOADED BUT DISCLOSED TO THE PROSECUTION INTO THE RECORD OF THE CASE

12. Before the expiration of time limit set by the Single Judge on 5 September 2011, the Defence sought to upload and file into E-court, an audio recording (now uploaded into the Defence RINGTAIL as KEN-D12-0017-0001) relevant to its case. Despite its best efforts, the team in Kenya was unable to convert the audio file from its original “.m4a” format into the “.wma” format required for use in Ringtail. The Defence alerted the Prosecution to this problem and efforts were made, before the expiration of the extended deadline set by the Single Judge, to transmit this attachment via the secure ICC e-mail addresses of Prosecution team members. These attempts were unsuccessful. The Defence informed Ms. Adeboyejo by e-mail that it would seek technical assistance on the 6th September with the Registry's IT Unit in order to ensure that the same was properly uploaded into RINGTAIL. The file was burnt onto a CD and personally served on the Prosecution at approximately 1.15am on 6th September 2011 and receipt confirmed.¹⁴ Since that time, team's Hague-based case manager

¹³ See Annex 1 attached to this application (Defence e-mail to the Prosecution).

¹⁴ See Annex 2 to this application.

was able to resolve the format conversion issue, and the audio file has been uploaded into the Defence RINGTAIL.

13. By attempting to provide the Prosecution with a copy of the said piece of evidence and serving a CD with the same item included, the Defence has complied with its legal obligations to provide fair and timely notice of the evidence it intends to rely on for the confirmation hearing. As such, the Defence submit that no prejudice will be occasioned to the Prosecution in its preparation were leave granted to the Defence to formally upload this item of evidence and include it in the record of the case.

APPLICATION FOR LEAVE TO ADD A NEW ITEM OF EVIDENCE INTO ITS LIST OF EVIDENCE AND RECORD OF THE CASE

14. The Defence also seeks leave to add evidence in the form of photographs and a supplementary witness statement exhibiting the same from a witness, who although included in the Defence's LoE filed on the 5th September 2011, provided the Defence team with these photographs on 6th September 2011. The witness in question called a member of the Defence Team on or about 8 p.m of the 5th September 2011, the deadline for submission of the LoE, to inform him that she had located relevant evidence that she was willing to share with the Defence. The Defence Team member met the witness outside Nairobi on 6th September 2011. During the meeting, the witness provided additional materials in the form of photographs, which the Defence now seeks to admit.
15. As stated, the production of this piece of evidence depended solely on the prompting of the witness without any investigative activity on the part of the Defence Team. The Defence submits that this constitutes exceptional circumstance under Regulation 35(2) to warrant the exercise of the Chamber's discretion in favour of granting the request. In addition, the evidence in question (consisting of photographs taken on 27th January 2008) is relevant and

probative. Its admission would help to shed more light on the events and actions taken by the Police in Naivasha. Receiving this evidence will not be prejudicial to the Prosecution because the Prosecution has already investigated this matter, hence the allegations in its DCC.¹⁵

16. The Defence appends to this application, the statement of the witness describing the photos she provided as Confidential, *Ex parte* Defence and Prosecution Only Annex 3 to this application. A review of the said statement discloses its relevance to issues falling for determination by the Chamber at the confirmation of charges hearing.
17. The Chamber will be in a position to make an assessment as to whether the said piece of evidence would assist it in its determination. In the present circumstances, the Defence requests its admission and that it be permitted file and add same to its LoE, chart of presentation of evidence and to upload the same into E-court.

RE-FILING OF AN AMENDED LIST OF EVIDENCE AND CHART ON PRESENTATION OF EVIDENCE

18. The Defence submits its amended LoE and chart on presentation of evidence as Annexes 4 and 5 to this application to reflect items of evidence which have been uploaded into E-court and disclosed to the Prosecution and Registry on 5 September 2011, but which do not appear in the LoE and chart on presentation of evidence filed on 5 September 2011.¹⁶ The Fifth item affected by the present request, for which the Defence seeks admission has not been uploaded into RINGTAIL and is not reflected in the amendments because it is only disclosed to the Prosecution and the Chamber for the first time as an attachment to this application. It is marked as Annex 3 appended to this application. As such, the

¹⁵ ICC-01/09-02/11-280-AnxA, para. 45 amongst other allegations relation to Police conduct.

¹⁶ ICC-01/09-02/11-301.

amendments are designed solely to include the documents in the LoE and chart on presentation of evidence, which although disclosed to the Prosecution, have not been accurately reflected in the LoE and chart on presentation of evidence.

The affected documents are:

- a) KEN-D12-0008-0043;
- b) KEN-D12-0016-0069
- c) KEN-D12-0010-0001
- d) KEN-D12-0010-0021
- e) KEN-D12-0010-0023
- f) KEN-D12-0010-0068
- g) KEN-D12-0010-0069
- h) KEN-D12-0010-0071
- i) KEN-D12-0011-0069
- j) KEN-D12-0008-0003
- k) KEN-D12-0004-0177
- l) KEN-D12-0005-0001
- m) KEN-D12-0005-0002
- n) KEN-D12-0005-0003
- o) KEN-D12-0005-0004
- p) KEN-D12-0005-0005
- q) KEN-D12-0005-0006
- r) KEN-D12-0005-0007
- s) KEN-D12-0005-0008
- t) KEN-D12-0005-0009
- u) KEN-D12-0005-0010
- v) KEN-D12-0005-0011
- w) KEN-D12-0005-0012
- x) KEN- D12-0014-0001
- y) KEN-D12-0004-0163

19. No prejudice is occasioned by the Prosecution or any of the parties on account of these amendments because the Prosecution and all other parties already have notice of the actual documents.

LEGAL BASIS FOR THE REQUEST

20. The Chamber has inherent jurisdiction to grant the various requests contained in this application, including the first four requests for uploading and filing the affected items into the record of the case for proper use in court proceedings. In addition, Article 64(3)(a) confers on the Chamber the power to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. Similarly, Article 69(3) confers on the Trial Chamber and equally on the Pre-Trial Chamber the authority to request the submission of all evidence that it considers necessary for its determination.
21. In relation to its request to add and rely on a new item of evidence - attached as Annex 3 to this application, the Defence notes that similar requests have been granted by Chambers of this Court pursuant to Regulation 35(2). In treating a similar request, Trial Chamber II reasoned that that it would grant such requests if “the new material is either significantly more compelling than other items of evidence previously disclosed to the Defence or brings to light a previously unknown fact which has a significant bearing upon the case and late admission will not cause undue prejudice to the Defence in relation to the latter’s right to have adequate time and facilities to prepare in accordance with article 67 (1) of the Statute.”¹⁷ The fifth request contained in this application meets all the requirements enunciated by Trial Chamber II in this regard.

RELIEF SOUGHT

¹⁷ ICC-01/04-01/07-1552, para. 14.

22. For the foregoing reasons, the Defence respectfully requests the following:

- a) Leave of the Chamber to upload witness statement- KEN-D12-0016-0001 together with annexes to the statement- KEN-D12-0016-0007 and KEN-D12-0016-0010 (all of which have been disclosed to the Prosecution) into E-court and file same into the record of the case;
- b) Leave to file and add into the case record, audio recording KEN-D12-0017-0001 previously disclosed to the Prosecution, but not uploaded into RINGTAIL;
- c) Leave to add a new item of evidence appended as Annex 3 to this submission to its LoE and chart on presentation of evidence and to file same into the record of the case and;
- d) That the Chamber receives its amended LoE and in-depth analysis chart appended hereto as Annexes 4 and 5 respectively as properly filed.

Respectfully Submitted,



Karim A. A. Khan QC

Lead Counsel for Ambassador Francis Kirimi Muthaura

Dated this, 7th September 2011

At Nairobi, Kenya