

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 9 September 2011

PRE-TRIAL CHAMBER II

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

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

Prosecution's Response to the Defence Requests to Add Evidence

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor
Adesola Adeboyejo

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:

Karim Khan, Kennedy Ogetto

Counsel for Uhuru Muigai Kenyatta:

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali:

Gregory Kehoe and Evans Monari

Legal Representatives of Victims

Morris Azuma Anyah

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy-Registrar

Victims and Witnesses Unit

Defence Support Section

Detention Section

**Victims Participation and Reparations Other
Section**

Summary

1. The Defence teams were requested to disclose by 5 September 2011 the evidence they intended to rely on at the confirmation hearing.
2. On 8 September 2011, the Prosecution was notified of a request by the Defence of Francis Kirimi Muthaura ("Mr. Muthaura") to add five new items of evidence. The same day, the Prosecution was notified of a request by the Defence of Mohammed Hussein Ali ("Mr. Ali") to add two missing pages.
3. On 9 September 2011 the Prosecution was notified of a request by the Defence of Uhuru Muigai Kenyatta ("Mr. Kenyatta") to replace 24 illegible pages.
4. The Prosecution herein objects to the addition of these new documents or pages on the basis (i) that they were not disclosed within the set time limit and (ii) that the Defence has not complied with Regulation 35(2) of the Regulations of the Court. If the Request was to be granted, in part or in whole, the Prosecution reserves its right to make objections regarding the use of these documents in court or their admission into evidence.

Background

5. On 6 April 2011, the Single Judge set out the regime for the disclosure of evidence. She encouraged the parties to fulfil their disclosure obligations "as soon as practicable, and not only on the date when the deadline as provided by the statutory documents expires".¹ She ordered the Defence to disclose their list of evidence, if any, no later than 15 days before the confirmation hearing in accordance with Rule 121(6).² She ordered the parties to submit the evidence in

¹ ICC-01/09-02/11-48, para. 11.

² ICC-01/09-02/11-48, para. 10.

due time and within official filing hours of the Registry.³ Finally, she ordered that the e-Court Protocol (attached to the decision) be followed.⁴

6. On 20 April 2011, the Single Judge ordered the Defence teams to disclose to the Prosecutor any evidence they intend to present at the confirmation hearing and the list of evidence, no later than 5 September 2011.⁵
7. On 5 September 2011, the Defence of Mr. Muthaura requested, and was granted two extensions of the time limit to submit its evidence. The same day, the Defence of Mr. Ali and the Defence of Mr. Kenyatta also requested, and were granted an extension of the time limit. For all Defence teams, the extended time limit was set at 5 September 2011, 11.59 pm.⁶
8. On 8 September 2011, the Prosecution received notification of a filing by the Defence for Mr. Muthaura to add five new items of evidence;⁷ and a filing by the Defence for Mr. Ali to add two missing pages.⁸
9. On 9 September 2011 the Prosecution received notification of a filing by the Defence for Mr. Kenyatta to replace 23 illegible pages.⁹

Submissions

10. The advanced notice of the material intended to be relied upon at the confirmation hearing is required to avoid unnecessary surprises or delays to the proceedings. There is flexibility to depart from this requirement based on good cause. If the

³ ICC-01/09-02/11-48, page 11, d).

⁴ ICC-01/09-02/11-48, paras. 16, 18, 19, 20, page 10 c).

⁵ ICC-01/09-02/11-64, page 13.

⁶ ICC-01/09-02/11-289 page 5 and ICC-01/09-02/11-299 page 7.

⁷ ICC-01/09-02/11-305.

⁸ ICC-01/09-02/11-306.

⁹ ICC-01/09-02/11-309-Conf-Exp.

departure itself is sought out of time, Regulation 35(2) requires the proponent to demonstrate that he could not, for reasons outside his control, file the application for an extension of time within the time limit.

11. Trial Chamber II stated in this respect that: *“When a party knows that it will not be able to meet a set time limit, but still has every intention of obtaining the material in order to present it at a later stage, it must ... file a formal application under regulation 35(2) before the deadline.”*¹⁰ It clarified that: *“it can only expect parties to file a request for extension before the time limit lapses when the party in question could reasonably have foreseen that it would still be able to obtain the additional evidence ... This is an issue which must be assessed on a case-by-case basis.”*¹¹
12. Trial Chamber II thus has ruled that even if it finds that the requirements of Regulation 35(2) have not been complied with, it can still grant the late addition of the material, if it is convinced that (i) the new material is either *“significantly more compelling than other items of evidence already disclosed to the Defence, or brings to light a previously unknown fact which has a significant bearing upon the case and ii) the late addition is not prejudicial to the fairness of the proceedings, especially in terms of providing the opponent with adequate time to respond to the new material.”*¹²
13. The Prosecution submits that the materials proffered by the Defence teams do not meet these criteria. None of the items were disclosed to the Prosecution within the extended time limit set by the Single Judge. No good cause was shown for the late disclosure and the Defence teams failed to demonstrate that they could not, for reasons outside their control, have filed the application for another extension before the deadline, as required by Regulation 35(2). Moreover, the items do not

¹⁰ ICC-01/04-01/07-1515-Corr, para. 33.

¹¹ ICC-01/04-01/07-3059, para. 19.

¹² See for example ICC-01/04-01/07-3059, para. 21.

bring to light any new significant facts to the case, nor are they more compelling than other items of evidence already disclosed.

Request by the Defence of Mr. Muthaura

14. The Defence of Mr. Muthaura requests to add five new items of evidence.

Statement and annexes A and B of Witness KEN-D12-PPPP-0053

15. The first three items, a witness statement (KEN-D012-0016-0001) and its two annexes (KEN-D012-0016-0007 and KEN-D012-0016-0010), were not disclosed to the Prosecution on 5 September 2011 as contended by the Defence, but on 6 September 2011.¹³ The request to add the items to the record of the case was filed on 7 September 2011 at 4.10 pm.¹⁴ The Prosecution was notified of the filing on 8 September 2011.

16. The (already twice extended) time limit set by the Single Judge was not respected. Nor is there any apparent good cause or justification. The witness statement was taken on 25 July 2011.¹⁵ Annex A and B were submitted by the witness and annexed to the statement.¹⁶ The Defence had over a month to ensure its timely disclosure. Moreover, the Defence referred to the statement and the annexes in its List of Evidence filed on 5 September 2011.¹⁷ The defence was therefore clearly in a

¹³ See date of the e-mail in ICC-01/09-02/11-305-Conf-Anx1, page 2. The Defence wrongly states that it provided the Prosecution with the statement and annexes on 5 September 2011, before the expiration of the time-limit (ICC-01/09-02/11-305 paras. 3 and 10).

¹⁴ i.e. outside the official filing hours of the Registry.

¹⁵ KEN-D012-0016-0001, page 1.

¹⁶ KEN-D012-0016-0001, para. 14. It should also be noted that Annex A, dated 26 November 2007, was printed from the web on 30 August 2011 (KEN-D012-0016-0007: see date on the left-hand side of the page, next to the web-address), and Annex B, dated 3 January 2008, was printed on 31 August 2011 (KEN-D012-0016-0010: see date on the left-hand side of the page, next to the web-address).

¹⁷ ICC-01/09-02/11-301-Conf-AnxA, page 11, line 53.

position to disclose the material in time or to request an extension within the set time limit.

17. In respect of the compelling nature or exceptional character of the material, the witness concerned, Witness KEN-D12-PPPP-0053, is one of 53 witnesses on whose statements the Defence relies.¹⁸ The burden on the Prosecution to deal with an overwhelming volume of disclosure, without having to also accept late-disclosed items, is clear, while the need by the Defence for this 53rd witness statement and its annexes less so. Regarding the annexes, the Defence stressed that the “substance of these annexes were already included in the defence’s LoE”.¹⁹ The Prosecution therefore submits that the requirements are not met and that the items should be excluded.

Audio file related to Witness KEN-D12-PPPP-0048

18. The fourth item, an audio-recording (KEN-D12-0017-0001) was disclosed to the Prosecution on 6 September 2011.²⁰ The request to add the item to the record of the case was filed on 7 September 2011 at 4.10 pm.²¹ The Prosecution was notified of the filing on 8 September 2011.
19. Similarly, the time limit set by the Single Judge was not respected without any good cause or justification. The recording is related to Witness KEN-D12-PPPP-0048, who was interviewed on 1 September 2011,²² and whose statement was

¹⁸ ICC-01/09-02/11-301-Conf-AnxB, page 11, line 53.

¹⁹ ICC-01/09-02/11-305, para. 4.

²⁰ See date of the e-mail in ICC-01/09-02/11-305-Conf-Anx2, page 2. Although it is the next day, we received the filing at 1.15 am, i.e. one hour and fifteen minutes after the deadline.

²¹ i.e. outside the official filing hours of the Registry.

²² KEN-D012-0010-0072, page 1. The Prosecution did not receive any additional information or meta-data in respect of the tape.

referred to in the Defence's List of Evidence filed on 5 September 2011.²³ The Defence could have disclosed the item on time.

20. In respect of the compelling nature or exceptional character of the material, the tape, approximately 30 seconds long, repeats what the witness declared in his statement at paragraphs 25 and 26.²⁴ The Prosecution therefore submits that the requirements are not met and that the item should be excluded.

Witness Statement

21. The last item, a witness statement, was attached to the request of the Defence, filed on 7 September 2011 at 4.10 pm²⁵, and which was notified to the Prosecution on 8 September 2011.
22. The statement describes 31 photographs taken in January 2008. The photographs have not been attached to the filing, nor have they been disclosed otherwise.
23. Once more, the Defence failed to show any good cause or provide a justification. The witness concerned received the photographs in February 2008,²⁶ and was interviewed by the Defence on 5 August 2008.²⁷ More importantly, the photographs have still not been disclosed to the Prosecution. The statement - without the photographs - is of no value. The Prosecution therefore submits that the material should be excluded.

²³ ICC-01/09-02/11-301-Conf-AnxA, page 10, line 48.

²⁴ KEN-D012-0010-0072, paras. 25 and 26.

²⁵ ICC-01/09-02/11-305-Conf-Exp-Anx3.

²⁶ ICC-01/09-02/11-305-Conf-Exp-Anx3, para. 1.

²⁷ KEN-D012-0008-0011, page 1 and KEN-D012-0008-0021, page 1.

Request by the Defence of Mr. Ali

24. The Defence for Mr. Ali requests to add two pages of evidence.²⁸ These pages have not yet been disclosed to the Prosecution. The request to add the items was filed on 7 September 2011 at 7.10 pm. The Prosecution was notified of the filing on 8 September 2011.
25. Since the pages have still not been disclosed, the Prosecution cannot make any submissions on the matter – except that it is clear that the pages are in the Defence's possession.²⁹ Given that no good cause or justifications have been identified in respect of the late disclosure or request, and the failure to attempt to ameliorate the prejudice by providing copies to the Prosecution even before the Defence application was resolved, the Prosecution submits that this request should be denied.

Request by the Defence of Mr. Kenyatta³⁰

26. The Defence of Mr. Kenyatta requests to replace 23 pages of evidence, namely the files from KEN-D13-0005-0816 to KEN-D13-0005-0839.³¹ When the Prosecution imported these files, it noticed that the files were either corrupted or wrongly processed and hence inaccessible to the OTP. In other words, the documents could not be reviewed by the Office, and thus proper disclosure between the parties did not take place.

²⁸ ICC-01/09-02/11-306, para.6.

²⁹ ICC-01/09-02/11-306, para.5.

³⁰ Although the request was filed ex parte, the Prosecution believes that it contains no content that justifies such classification. As a result, the Prosecution has included the discussion related to this request in the present filing.

³¹ ICC-01/09-02/11-309-Conf-Exp.

27. The request to add the pages was filed on 8 September 2011 at 10.42 pm. The Prosecution was notified of the filing on 9 September 2011.
28. Since the pages have still not been disclosed, the Prosecution cannot make any submissions on the matter – except, again, that it is clear that the pages are in the Defence’s possession.³² The Defence had ample opportunities to acquaint itself with the E-court process. Given that no good cause or justifications have been identified in respect of the late disclosure or request, the Prosecution submits that it be denied.

Additional problems

29. Finally, when reviewing the material disclosed by the Defence teams, the Prosecution has noted that the Ringtail databases they submitted did not follow some of the requirements established by the e-Court protocol.
30. More specifically, some of the materials were submitted without the proper Document ID (as ordered by the Single Judge³³) in that it did not follow the mandatory format SSS-PPP-FFFF-DDDD but instead a format SSS.PPP.FFFF.DDDD. This presented the Office with technical difficulties when integrating the material into Ringtail, which in turn resulted in serious delays in reviewing the material.
31. In addition, some documents submitted contained an additional dot and underscore at the beginning of the Document ID (for example, KEN-D13-0005-0815, 0824, 0825 and 0835) which delayed the transfer process.

³² ICC-01/09-02/11-309-Conf-Exp, para.9.

³³ ICC-01/09-02/11-48, para. 20.

32. Finally, the Office has also noticed specific problems in respect of the following documents:

- KEN-D12-0002-0136 is illegible;
- KEN-D12-0003-0054 is not complete and the ERN is not fully visible;
- KEN-D12-0010-0016 and 0017 show the same page of a document;
- KEN-D12-0010-0020 has no visible ERN;
- KEN-D12-0010-0070 has no visible ERN;
- KEN-D12-0011-0046, 0048, 0050, 0052, 0054, 0056, 0058 and 0060 are illegible;
- KEN-D12-0016-0001 appears under batch KEN-D12-0015 and no image file was provide;
- KEN-D13-0001-0253 is partially illegible;
- KEN-D13-0001-0339 has an incomplete ERN;
- KEN-D13-0001-0355 displays the wrong page number (appears as KEN-D13-0001-0356);
- KEN-D13-0002-0060 is partly illegible;
- KEN-D13-0002-0073 has an incomplete ERN;
- KEN-D13-0002-0096 has no visible ERN;
- KEN-D13-0002-0143 has no image file;
- KEN-D13-0003-0005 is partly illegible:
- There are no OCR (content) files for any documents in batch KEN-D13-0003 except for KEN-D13-0003-0176 (which means that the documents cannot be searched);
- KEN-D13-0005-0084 has an incomplete ERN;
- KEN-D13-0005-0139 has no visible ERN;
- KEN-D13-0005-0143 has no visible ERN;
- KEN-D13-0005-0172 to 0176 are partially illegible;
- KEN-D13-0005- 0406 has no visible ERN;
- KEN-D13-0005-0407 has an incomplete ERN;
- KEN-D13-0005-0431 has no visible ERN;

- KEN-D13-0005-0569 is illegible;
- KEN-D13-0005-0609 is illegible;
- KEN-D13-0005-0681 is partially illegible;
- KEN-D14-0002-0248 has no visible ERN;
- KEN-D14-0002-0249 has no visible ERN ;
- KEN-D14-0005-0044 has no visible ERN;
- KEN-D14-0005-0127 has no visible ERN;
- KEN-D14-0005-0131 has no visible ERN; and
- KEN-D14-0002-0323 has no (video) file.

33. As mentioned, the Defence teams had ample opportunities to acquaint themselves with the E-court process. Since these documents or pages were not disclosed properly to the Prosecution, the Prosecution requests that at least the (partly) invisible pages or documents be excluded from the evidence that the Defence teams can rely on at the Confirmation Hearing. In respect of the missing ERNs, the Prosecution request that the documents be replaced as soon as possible.

Conclusion

34. The Defence teams had ample opportunities to disclose their material on time. They were already granted one extension of the time limit (and in the case of Mr. Muthaura, two extensions). The Single Judge clarified in her 6 April 2011 decision that the Prosecution's evidence presented after the time limits "shall not be considered".³⁴ The Prosecution submits that the same principle should apply to the Defence teams.

35. For all the above-mentioned reasons, the Prosecution submits that the Defence requests should be denied and that the items of evidence that were not disclosed

³⁴ ICC-01/09-02/11-48, para. 9.

within the set time limit (including items that were disclosed but that are illegible or partially illegible) should not be considered by the Chamber.

36. Moreover, the Prosecution requests that the Defence teams re-submit documents that were disclosed with missing ERNs or with partial ERNs.



Luis Moreno-Ocampo, Prosecutor

Dated this 9th day of September 2011

At The Hague, The Netherlands