



Original: English

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

Date: 14 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 A, B1, B2 and C1 to C12

**Application by the Defence for Ambassador Muthaura for Leave to add 15 items
of evidence to Its Amended List 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

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

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:

Karim A.A. Khan QC, Essa. M. Faal,
Kennedy Ogeto and Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta:

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali:

Evans Monari, Gregory Kehoe, John
Philpot and Gershom O. Bw'omanwa

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. BACKGROUND

1. On 7 September 2011, the Defence for Ambassador Muthaura (“the Defence”) filed its Application “for Leave to add five items of evidence and Re-filing of its Amended List of Evidence and Chart on Presentation of Evidence”, seeking leave of the Chamber to add five items of evidence to its Amended List of Evidence.¹
2. On 9 and 10 September 2011, the Defence received information from a witness whose name is already contained in its Amended List of Evidence. The said information was unavailable to the Defence prior to the expiration of the deadline for filing its List of Evidence on 5 September 2011.
3. Prior to noon on 13 September 2011, the Defence transmitted the said information to the Prosecution in order to enable the Prosecution to comply with its duties and obligations in accordance with Articles 54(1)(a) and 70 of the Statute. A copy of the letter transmitting the said items to the Prosecution is appended as Confidential Annex A to this application.
4. At the time of filing the present application, the Defence has not received any response from the Prosecution in relation to this matter.
5. Given the urgency and seriousness of the matter and its potential impact on the integrity and outcome of the confirmation hearing, the Defence hereby brings the matter to the Chamber’s attention in accordance with the Defence’s own obligations under Article 70 of the Statute as well as its obligations pursuant to Article 25(1) of the Code of Professional Conduct for Counsel Appearing before the Court. The Defence requests that the Chamber receives the application as Urgent and treats the matter expeditiously.

¹ ICC-01/09-02/11-305 with confidential annexes 1, 2, 4 and 5 and confidential *ex parte* Annex 3.

II. SUBMISSIONS

6. In this application, the Defence makes two requests: firstly, that independent counsel be appointed to investigate the allegations arising out of Confidential Annexes B and C appended to this application; secondly, that the Pre-Trial Chamber grant leave to the Defence to add the items of evidence contained in Confidential Annexes B and C to its Amended List of Evidence in order that it may be able to rely on same at the confirmation hearing.

7. Confidential Annexes B and C consist of a recorded video interview and supporting documents of a witness who alleges that certain individuals (believed to be witnesses that the Prosecution intend to rely upon as “core witnesses” in the forthcoming confirmation of charges hearing) may have committed offences against the administration of justice. The video recording (Confidential Annex B)² and its contents are self-explanatory. Viewed individually and collectively with the documents provided by the witness and accompanying the video (Confidential Annex C),³ the evidence presented by the Defence as part of this application is credible and surpasses the threshold required to warrant the Chamber’s intervention under Article 70 of the Statute.

8. Because of the seriousness and gravity of the allegations provided by the witness, the Defence took the additional step of bringing the matter to the Prosecution’s attention without delay (Confidential Annex A) to enable it to fulfil its responsibilities under Articles 54(1)(a) and 70 of the Statute. At the time of filing this application, the Prosecution has not responded to the Defence’s correspondence in this matter.

9. Matters affecting the administration of justice go the heart of the integrity of proceedings. The Defence expresses grave concern about the allegations that

² Confidential Annex B consists of three individual video files contained in Annexes B1 and B2.

³ Confidential Annex C consists of twelve (12) items – Confidential Annexes C1 to C12.

have been made which disclose an organised and sustained attempt to interfere with the administration of justice. The Defence notes that Chambers of this Court as well as Chambers of the *ad-hoc* tribunals have held similar matters to be of such serious nature that they require immediate action.⁴ Every court must be alert to protect its own processes. This is an independent duty to that of the parties not to present evidence they believe to be false.⁵

10. Both the Prosecution and the Defence may bring allegations against the administration of justice to the attention of the Chamber. In addition, the Chamber may act *proprio motu*.⁶ Given the gravity of the allegations and their potential to impact on the very integrity of the forthcoming proceedings, the Defence provided the underlying materials to the Prosecution in order for them to review the same and act consistently with the profound responsibilities of that office, entrusted to it by the Rome Statute. In addition, and given the imminence of the Confirmation Hearing, the Defence hereby brings this matter to the Chamber's attention with the request that the Chamber take appropriate action in accordance with its responsibilities under Article 70 of the Statute. The essential aim is that the fairness and integrity of these proceedings is safeguarded.
11. Article 70 does not impose a time-limit within which a party may bring allegations of offences against the administration of justice to the Chamber's attention. Given the seriousness of the allegations and their potential impact on the outcome of the present proceedings, the Defence requests that the Chamber deals with the matter expeditiously.

⁴ See ICC-01/04-01/07-T-190-Red-ENG, p. 1-5; ICC-01/04-01/07-2731; ICC-01/04-01/06-T-350-Red-ENG, p. 11-18; *Prosecutor v. Slobodan Milosevic*, Separate Opinion of Judge Bonomy on Contempt of Tribunal, 13 May 2005, para. 6.

⁵ See, for example, Article 70 of the Statute and Art 25(1) of the Code of Conduct of Counsel.

⁶ *Prosecutor v. Delalic et al*, Decision of the President on the Prosecution's Motion for the Production of Notes Exchanged between Zejnil Delalic and Zdravako Mucic, 11 November 1996.

12. The Defence submit that the present request self evidently meets the requisite standard of proof to warrant the Chamber's intervention under Article 70 of the Statute. Jurisprudence from the ad hoc Tribunals may be of persuasive effect in this regard and requires that there must be *prima facie* evidence of contempt before a Trial Chamber makes orders relating to contempt investigations or proceedings.⁷ In relation to allegations concerning false testimony, Tribunal case law requires that the Chamber must have "strong grounds" to initiate investigations of allegations of false testimony, which appears to be a higher standard than that applied to contempt proceedings.⁸

13. The evidence contained in Confidential Annexes B and C appended to this application is credible and meets all the requirements to initiate an investigation into the matter. It consists of video recording of the entire interview of the witness as well as supporting documentation to support the claims made by the witness. The witness has supported each and every allegation contained in the videotape with independent documentary evidence. The details contained in the video interview, together with the supporting materials attached hereto, establish strong grounds to believe that persons who may be Prosecution witnesses at the confirmation hearing may have committed an offence under Article 70 of the Statute.

14. The Defence respectfully submits that seriousness of the present allegations warrant the appointment of an independent ad-hoc counsel to investigate this matter. The Prosecution have been served with the evidence subject to this filing. If the individuals named are indeed anonymous Prosecution witnesses, and if the Prosecution intend to still rely upon these individuals as witnesses in the face of the evidence provided by the Defence, there will clearly be a conflict

⁷ *Prosecutor v. Nyiramasuhuko et al.*, Decision on the Prosecutor's allegations of contempt, the harmonisation of witness protection measures and warning to the Prosecution's counsel, 10 July 2001, para. 7.

⁸ Archbold International Criminal Courts, Practice, Procedure and Evidence, 3rd Edition, 2009, Karim AA Khan and Rodney Dixon, p. 1196, para. 1.

that would militate against the OTP having conduct of the requested investigation. Having made a decision to rely upon such evidence – and indeed offer it to the Chamber as “core evidence” in its quest to have the present charges confirmed, the OTP have a clear interest in the outcome of the investigation that may render the appointment of an independent investigator necessary. This course would ensure that the confirmation hearing proceeds as scheduled. At the same time, the Prosecution would retain its continuing obligation to fulfil its duties in accordance with Article 54(1)(a) and 70 of the Statute.

15. The Defence additionally requests that it be granted leave pursuant to Regulation 35(2) of the Court to add the items of evidence contained in Confidential Annexes B and C to its Amended List of Evidence and that it be permitted to use same in the confirmation hearing. By admitting this evidence, the Defence will be able to properly challenge the reliability of core prosecution evidence. The impugned evidence, if left unchallenged, has the capacity to occasion a serious miscarriage of justice and to bring the Court into disrepute.
16. The Defence will be seriously prejudiced if leave is not granted to enable it to add and rely on the attached items of evidence at the upcoming confirmation hearing. It will deprive the Defence of the opportunity to challenge evidence that may be offered at the confirmation hearing in breach of Article 70 of the Statute.

III. LEGAL BASIS FOR THE REQUEST

17. The Chamber has the overriding responsibility to preserve the integrity of the proceedings. In this context, the Chamber has the inherent jurisdiction to grant the present request. In addition, Article 64(3)(a) of the Statute confers on the Chamber the authority to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. Similarly, Article 69(3)

confers on all Chambers the authority to request the submission of all evidence necessary for the proper determination of the matters before it.

18. In relation to its request to add and rely on new items of evidence – attached as Confidential Annexes B and C to this application – the Defence submits that similar requests have been granted by Chambers of this Court pursuant to Regulation 35(2) of the Regulations of the Court. In addressing a similar request (albeit by the Prosecution on that occasion), Trial Chamber II reasoned 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.”⁹ The request to add Confidential Annexes B and C contained in this application meets all the requirements enunciated by Trial Chamber II in this regard.

19. Allowing the inclusion of the new items of evidence will not prejudice the Prosecutor, in view of his responsibilities as an officer of the Court and a Minister of Justice and his obligations under the Rome Statute – including to investigate incriminating and exonerating circumstances equally.

RELIEF SOUGHT

20. For the foregoing reasons, the Defence respectfully requests the following:
 - a) That the Chamber appoint an independent counsel to investigate matters arising from the allegations in the video interview and supporting documentation appended as Confidential Annexes B and C to this application and to report his/her findings to the Chamber; and

⁹ ICC-01/04-01/07-1552, para. 14.

- b) Leave of the Chamber to add the items of evidence contained in Confidential Annexes B and C to its Amended List of Evidence in order to enable the Defence to be able to rely on the same at the upcoming confirmation hearing.

Respectfully Submitted,

A handwritten signature in dark ink, consisting of a stylized 'K' followed by a horizontal line and a small flourish.

Karim A. A. Khan QC

Lead Counsel for Ambassador Francis Kirimi Muthaura

Dated this, 14th Day of September 2011

At The Hague, The Netherlands