

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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 with Confidential Annexes A and B
URGENT**

**Urgent Request to Replace One *Viva Voce* Witness due to Unforeseen
Circumstances**

Source: Defence for General Mohammed Hussein Ali

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

Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 05 September 2011, the Defence for Mohammed Hussein Ali (the "Defence") disclosed its evidence which it intends to present at the Confirmation of Charges Hearing (the "Hearing") and its List of Evidence (the "LoE").
2. In its LoE, the Defence listed two *viva voce* witnesses. The second *viva voce* witness, KEN-D14-P-002, is scheduled to testify during the second half of the day on 04 October 2011.¹
3. The Defence requests that the Pre-Trial Chamber (the "Chamber") allow the Defence to withdraw the aforementioned witness from its list of *viva voce* witnesses being called at the Hearing and replace the witness with another witness identified herein.
4. The Defence respectfully proposes to replace Witness KEN-D14-P-002 with a different *viva voce* witness (the "New Witness"). For reasons advanced herein, the Defence submits that these unforeseen circumstances constitute an exceptional circumstance under regulation 35(2) of the Regulations of the Court (the "Regulations") that warrants the exercise of the Chamber's discretion in favour of granting this request.

Submissions

5. Late in the afternoon on 13 September 2011, Lead Counsel for the Defence contacted the Case Manager in The Hague to inform him that Witness KEN-D14-P-002 will not be able to testify.² It was also relayed to the Defence that

¹ ICC-01/09-02/11-321 Anx.

² Please see attached Confidential Annex B.

these issues also inhibit Witness KEN-D14-P002 from testifying by way of video-link technology under rule 67(1) of the Rules of Procedure and Evidence and Article 69(2) of the Rome Statute. The Defence notified its contact in the Victims and Witnesses Unit earlier today of this development and of the request we put forth below.

6. The Defence submits that the Chamber has the inherent power to allow the Defence to withdraw Witness KEN-D14-P-002.³ The Defence contends that this does not prejudice the prosecution since the Prosecutor has access to this witness's statement through eCourt and Ringtail.
7. The Defence further submits that the Chamber has an inherent power to grant the request to replace Witness KEN-D14-P-002 by virtue of Article 64(3)(a) which confers on the Chamber the power to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.
8. Such an inherent power has been exercised before by Trial Chamber II which outlined the factors to be considered as follows:

First, it will consider whether there is a timely and sufficiently motivated application to extend the time limit in accordance with regulation 35(2) of the Regulations. If this is the case, the Chamber will in principle allow the late submission, unless it would cause undue prejudice to the Defence. If this is not the case, the Chamber will in principle reject the late addition of new items of evidence, unless the new material must be disclosed to the Defence in accordance with article 67(2) of the Statute or falls under rule 77 of the Rules. If the new material is incriminating, the Chamber may still consider late addition, using its powers under article 64(6)(d) and 69(3) of the Statute, but only if it can be shown 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

³ See Trial Chamber II, Transcript of 16 May 2011, ICC-01/04-01/07-T-260-Red-ENG WT 16-05-2011, page 4, lines 9-19 (defence notifying the Chambers and Prosecutor 14 days in advance of the witness's testimony that the defence would be withdrawing 4 witnesses), see also Trial Chamber II, Transcript of 14 June 2011, ICC-01/04-01/07-T-281-Red-ENG WT 14-06-2011, pages 47-56 (defence withdrawing a witness on short notice with no opposition from the Prosecutor); Trial Chamber I, Transcript of 30 March 2011, ICC-01/04-01/06-T-340-ENG CT2 WT 30-02-2011, page 1 (defence withdrawing 7 witnesses)

previously unknown fact which has a significant bearing upon the case, and (ii) the late addition 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(l)(b) of the Statute.⁴

9. In the above passage, Trial Chamber II exercised its powers under Article 69(3); which the Defence argues are exercisable by this Chamber to effect its powers under Article 64(3)(a).
10. The inability of Witness KEN-D14-P-002 to provide testimony was not known to the Defence or the witness until late yesterday afternoon. The Defence feels that the replacement of Witness KEN-D14-P-002 is warranted and does not prejudice the Prosecutor for the following reasons:
 - a. The New Witness has given a written statement to the Defence. This statement was disclosed to the Prosecutor on 05 September 2011 in the Defence's Rule 78 disclosure package. The specific ERN number designated for this statement and accompanying details about the New Witness are attached in Confidential Annex A.
 - b. The New Witness would not be called to testify until the afternoon sessions of 04 October 2011. For the purposes of the Hearing, the Defence submits that this is ample time to prepare for a cross-examination limited to one hour.⁵
11. The Defence feels that the New Witness will provide equally valuable testimony vital to the defence of General Ali. While it is not argued that the information intended to be revealed by the New Witness is of greater

⁴ Trial Chamber II, Decision on Prosecution requests ICC-01/04-01/07-1726-Conf-Exp and ICC-01/04-01/07-1738-Conf-Exp made pursuant to regulation 35 of the Regulations.

⁵ See generally Trial Chamber II, Transcript of 12 July 2011, ICC-01/04-01/07-T-290-Red-ENG WT 12-07-2011, pages 62-67 (adding a witness on the condition that the witness testify later in the trial to allow the Prosecutor to prepare for the examination of the new witness).

importance than Witness KEN-D14-P-002, the Defence highlights that the New Witness was listed in our original list of the 10 proposed *viva voce* witnesses given to the Chamber.

12. Finally, the Defence would like to notify the Chamber that the Defence's VWU contact in Nairobi has also been apprised of this situation and that necessary steps are currently being taken that will enable the required documentation and ICC procedures to be completed on time if the Chamber allows the New Witness to testify in The Hague.

Relief Sought

13. The Defence respectfully requests that:

- a. it be allowed to withdraw Witness KEN-D14-P-002 from its list of *viva voce* witnesses appearing before the Chamber at the Hearing and
- b. it be allowed to replace Witness KEN-D14-P-002 with the New Witness.

14. An amended LoE containing the Defence's *viva voce* witness list, including information on the New Witness, is appended to this request as Confidential Annex A. The Defence requests that this annex be classified as confidential because it contains sensitive information concerning our *viva voce* witness and the evidence that the Defence intends put forth at the Hearing. Additionally, the Defence has appended Confidential Annex B to explain Witness KEN-D14-P-002's situation.

Respectfully Submitted,

Two handwritten signatures in black ink. The first signature on the left is 'Evans Monari' and the second signature on the right is 'Gershom Otachi'.

Evans Monari and Gershom Otachi
On behalf of Mohammed Hussein Ali

Dated this, 14th of September 2011

At Nairobi, Kenya