

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 22 September 2011

PRE-TRIAL CHAMBER II

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

SITUATION IN KENYA

THE PROSECUTOR

v.

**FRANCIS KIRIMI MUTHAURA
UHURU MUIGAI KENYATTA &
MOHAMMED HUSSEIN ALI**

**Public Document
Urgent**

**Defence Response to Prosecution Request to Exclude Witness Statement KEN-
D12-0001-0276**

Source: Counsel for Ambassador Francis Kirimi Muthaura

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

Counsel for the Defence

Counsel for Francis Kirimi Muthaura

Karim A. A. Khan QC, Essa M. Faal,
Kennedy Ogetto & Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali

Evans Monari, John Philpot and
Gershom Otachi 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

Silvana Arbia

Counsel Support Section

Deputy Registrar

Didier Priera

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. BACKGROUND

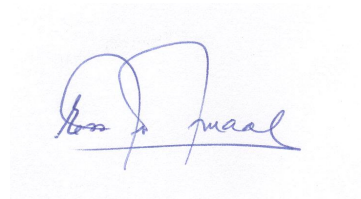
1. On 21 August 2011, the submitted a filing informing the Chamber page 9 of **D12-0001-0276** filed by the Muthaura Defence Team is missing from the document.
2. The Prosecution requested that the Chamber exclude the document from the list of evidence.

II. DEFENCE SUBMISSIONS

3. The Defence relies on the oral submissions it made during the hearing.
4. The Defence notes that the issue complained about by the Prosecution is a simple clerical error which can easily be remedied by resubmission of the full statement or provision of the missing page.
5. The Defence submits that the missing page does not and ought not to affect the admissibility of the rest of the document which had been duly filed. It's admission does not occasion the Prosecution any prejudice. If there is any prejudice at all, it is to the Defence.
6. The Prosecution request is unreasonable and disproportionate when viewed in light of the complaint. The exclusion of the entire evidence which is relevant and probative to the issues that fall for determination in this confirmation hearing is an extraordinary remedy that a court should exercise with great caution
7. The Chamber has a discretion in the interest of justice to allow the defence to correct this clerical error.

REQUEST

8. In view of the forgoing, the Defence request that the Prosecution application with regards to the document complained about be rejected, and:
- (a) It be allowed to re-file the entire statement; or in the alternative
 - (b) To admit the statement complained about in the manner in which it was filed.



Essa M. Faal

Co- Counsel for Ambassador Francis K. Muthaura

Dated this 22nd Day of September 2011

At The Hague, Netherlands