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No.: ICC-01/09-02/11
Date: 19 December 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA***

Public with confidential, *ex parte*, Annex A

**Notification of the removal of a witness from the Prosecution's witness list
and application for an adjournment of the provisional trial date**

Source: The Office of the Prosecutor

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

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Introduction

1. The Prosecution hereby withdraws P-0012 from its list of trial witnesses and requests an adjournment of the provisional trial date for three months.
2. P-0012 recently admitted that he provided false evidence regarding the event at the heart of the Prosecution's case against the Accused. The Prosecution no longer intends to call P-0012 as a witness. Separately, P-0011 has informed the Prosecution that he is no longer willing to testify at trial.
3. In light of these developments, the Prosecution considers that it has insufficient evidence to proceed to trial at this stage. The Prosecution therefore seeks an adjournment of the provisional trial date for three months, which will enable it to undertake additional investigative steps – including those not previously open to the Prosecution – to determine whether a case can be presented to the Chamber that establishes the Accused's guilt beyond reasonable doubt. There is potential for these investigative steps to produce evidence shedding light on key allegations in this case. The Prosecution believes they must be pursued in accordance with its Article 54(1) duties, to ensure that every effort has been made to hold to account those most responsible for the crimes committed during the 2007-2008 post-election violence ("PEV"), and to seek justice on behalf of the victims, who continue to wait for their day in court, almost six years after the crimes were committed.
4. The Prosecution proposes that the Chamber convene a status conference in the last week of January 2014 in which the Prosecution will update the Chamber on the progress of the investigative steps, and answer any questions the Chamber may have.

Confidentiality

5. The annex to this document is designated confidential, *ex parte* because it refers to ongoing and anticipated investigative steps, the disclosure of which may frustrate their purpose. A lesser redacted version of the annex will be made available to the Defence, detailing investigative steps of which the Defence is aware.

Facts

A. P-0012.

6. The Prosecution has interviewed P-0012 on five occasions. The first was a screening interview on 12 June 2011. The second and third were full-length interviews conducted between 16 and 23 June 2011 and 2 and 4 May 2012.
7. In P-0012's first three interviews, he stated that he attended a meeting at Nairobi State House on or about 30 December 2007, in which he described the Accused participating in the organisation and funding of violence that later unfolded against perceived ODM supporters.¹
8. In P-0012's fourth interview, undertaken on 16 and 17 May 2013 on the basis of telephone data submitted by the Defence that has since been proven to be fabricated and now appears to have been accepted as such by the Defence, P-0012 again described the purported 30 December 2007 meeting and the Accused's alleged actions at it.² During this fourth interview, P-0012 stated that the meeting took place around 6:30-7:00 pm,³ which was a departure from his earlier account that the meeting took place around 3:00-4:00 pm.⁴
9. P-0012's fifth and final interview was on 4 December 2013. During that interview, P-0012 admitted that he was not at the alleged 30 December 2007

¹ KEN-OTP-0061-0187, at 0196-97; KEN-OTP-0060-0112, at 0115-17; KEN-OTP-0060-0299, at 0313-14; KEN-OTP-0060-0426, at 0428; KEN-OTP-0074-0590, at 0597-98.

² KEN-OTP-0104-0383, at 0395-0400.

³ KEN-OTP-0104-0383, at 0399.

⁴ KEN-OTP-0060-0426, at 0429.

meeting and had previously lied to the Prosecution regarding this event.⁵

P-0012 asserted that he had learned about the alleged meeting from someone else.⁶

10. The transcripts of P-0012's fifth interview were completed on 18 December 2013 and are being disclosed to the Defence today, 19 December.

B. P-0011.

11. On 1 November 2013, P-0011 informed the Prosecution that he was no longer willing to appear as a witness in the *Kenyatta* case and asked to be removed from the list of witnesses.

12. Prosecution staff spoke with P-0011 on 12 November to discuss his wish to withdraw. P-0011 maintained that he was unwilling to continue as a witness.

13. Staff from the Prosecution and Victims and Witnesses Unit spoke with P-0011 on 17 December 2013. He volunteered that he may be willing to reconsider his position, but did not make a firm commitment.

Submissions

14. In light of P-0012's recantation, the Prosecution withdraws him from its witness list.

15. The loss of P-0012's purportedly eye-witness account has a substantial effect on the Prosecution's case. P-0012's account lay at the heart of the Prosecution's evidence, providing a critical link between the Accused and the crimes in Nakuru and Naivasha. Having considered the impact of P-0012's recantation on the case as a whole, the Prosecution does not

⁵ KEN-OTP-0123-0268, at 0271 ff.

⁶ KEN-OTP-0123-0268, at 0271 ff.

consider that it is currently in a position to present a case that satisfies the evidentiary standard applicable at trial, “beyond reasonable doubt”.⁷

16. P-0011’s withdrawal has also undermined the Prosecution’s case, removing evidence regarding the intermediaries who allegedly oversaw the attacks on the Accused’s behalf, as well as evidence regarding the logistical support provided to the attackers.
17. In the circumstances, the Prosecution requests an adjournment of the 5 February 2014 provisional trial date for three months.
18. The proposed adjournment would enable the Prosecution to conduct additional investigative steps, including those not previously open to the Prosecution, to determine whether a case can be presented to the Chamber that will establish the Accused’s guilt to Article 66(3)’s beyond reasonable doubt standard. The investigative steps are addressed in confidential, *ex parte* Annex A.
19. The proposed adjournment would enable the Chamber to adjudicate the Prosecution’s application for a finding of non-compliance against the Government of Kenya (“GoK”),⁸ which, if successful, may cause the GoK to produce the information the Prosecution has requested regarding the Accused’s finances. It is necessary to exhaust this line of inquiry – hitherto blocked by the GoK – to determine whether the existing witness testimony regarding the Accused’s alleged funding of the PEV can be corroborated by documentary evidence. It is also appropriate for the GoK’s failure fully to comply with its co-operation obligations to be adjudicated, so that the Assembly of States Parties can determine whether and what action to take with respect to those failures.

⁷ Article 66(3).

⁸ ICC-01/09-02/11-866-Red.

20. Further, the proposed adjournment would enable the Prosecution to determine conclusively whether P-0011 is willing to testify.
21. The proposed adjournment would not unduly infringe upon the Accused's Article 67(1)(c) right to be tried without undue delay. The right to an expeditious trial must be balanced against the Court's duty to do justice for the victims of the most serious crimes of international concern. In this case, the Accused has sought repeated adjournments, most recently on 25 October 2013.⁹ Against this backdrop, it cannot be asserted that the proposed adjournment would unduly infringe upon the Accused's right to an expeditious trial, which he has at least partially waived. Rather, an adjournment would protect the legitimate interests of the victims in ensuring that all possible avenues are pursued to bring the principal perpetrators of the PEV to justice. Furthering the interests of the victims is particularly appropriate given that the Accused is not in custody and would not be subject to any additional restrictions on his liberty if the adjournment were granted.
22. While this case has presented significant investigative challenges, the Prosecution remains committed to doing its utmost to secure justice for the victims of the PEV. No serious efforts have been made by the Kenyan authorities to investigate and prosecute high-level figures responsible for planning, instigating and funding the violence that tore through Kenya in December 2007 and January 2008. For victims, this Court offers the last hope for justice. The Prosecution's adjournment request seeks to ensure that this Court does everything in its power to ensure that the principal perpetrators of the PEV are held to account. The victims of the PEV deserve no less.

⁹ ICC-01/09-02/11-835-Conf.

23. The Defence will likely wish to make submissions on the matters raised in this application. To this end, the Prosecution suggests that it would be appropriate for the Chamber to convene a status conference so that the parties can state their positions and the Chamber can ask any questions it may have. It would be appropriate for the status conference to be held during the week beginning 27 January 2014 because by that time, the Prosecution will be in a position to update the Chamber regarding the progress of the investigative steps laid out in confidential, *ex parte* Annex A. That information will, in the Prosecution's view, assist the Chamber in ruling upon this application.

Conclusion

24. For the foregoing reasons, the Prosecution respectfully requests the Chamber to adjourn the 5 February 2014 provisional trial date for three months.

25. The Prosecution further suggests that it would be appropriate to convene a status conference in the week beginning 27 January 2014 to address the matters raised in the application.



Fatou Bensouda,
Prosecutor

Dated this 19th of December 2013
At The Hague, The Netherlands