

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 15 September 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single 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

**Decision on the “Urgent Request to Replace One *Viva Voce* Witness due to
Unforeseen Circumstances”**

Decision 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 Francis Kirimi Muthaura
Karim Khan, Essa Faal, Kennedy
Ogetto and Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohamed Hussein Ali
Evans Monari, John Philpot and
Gershom Otachi Bw'omanwa

Legal Representatives of the Victims
Morris Azuma Anyah

Legal Representatives of the 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 & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”),¹ hereby renders this decision on the “Urgent Request to Replace One *Viva Voce* Witness due to Unforeseen Circumstances” (the “Defence’s Request”) submitted by the Defence of Mohammed Hussein Ali (“Mr. Ali”).²

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mr. Ali (collectively, the “Suspects”) to appear before it.³ Pursuant to this decision, the Suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011 during which, *inter alia*, the Chamber set the date for the commencement of the confirmation of charges hearing for 21 September 2011.⁴

2. On 20 July 2011, the Single Judge issued the “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, ordering the parties to indicate whether they intended to call live witnesses at the confirmation of charges hearing and, if so, to submit information detailing the subject-matter and the scope of the proposed testimony of each witness.⁵

3. On 5 August 2011, the Defence of Mr. Ali indicated its intention to call ten *viva voce* witnesses.⁶

4. On 10 August 2011, the Single Judge issued the “Order to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses” (the “10 August 2011 Order”),⁷ whereby she ordered the Defence teams to: (i) reduce the number of the witnesses

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

² ICC-01/09-02/11-327 and its confidential annexes.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-01.

⁴ ICC-01/09-02/11-T-1-ENG.

⁵ Pre-Trial Chamber II, ICC-01/09-02/11-181, p. 8.

⁶ ICC-01/09-02/11-219 and its confidential *ex parte* annex.

⁷ Pre-Trial Chamber II, ICC-01/09-02/11-226.

they intended to call to testify at the confirmation of charges hearing to a maximum of two witnesses for each suspect; and (ii) submit an amended list of *viva voce* witnesses, indicating their names and the scope and subject-matter of their proposed questioning.⁸

5. On 15 August 2011, the Defence of Mr. Ali submitted its amended list of *viva voce* witnesses in compliance with the 10 August 2011 Order.⁹

6. On 5 September 2011, the Defence of Mr. Ali disclosed its evidence which it intends to present at the confirmation hearing and its list of evidence, wherein it listed two *viva voce* witnesses including Witness KEN-D14-P-002.¹⁰

7. On 14 September 2011, the Defence of Mr. Ali requested the Pre-Trial Chamber to be allowed to withdraw Witness KEN-D14-P-002 from its list of *viva voce* witnesses appearing at the confirmation of charges hearing and replace the witness with a new witness identified by the Defence.¹¹ On 15 September 2011, the Defence of Mr. Ali submitted a Corrigendum to the Defence's Request.¹²

8. The Single Judge notes articles 61(6)(c), 67(1) and 69 of the Rome Statute (the "Statute") and rule 121(6) of the Rules of Procedure and Evidence (the "Rules").

9. The Single Judge notes that according to the Defence of Mr. Ali, on 13 September 2011, late afternoon, they were informed about the inability of Witness KEN-D14-P-002 to provide testimony at the confirmation hearing.¹³

10. The Single Judge observes that the prospective new *viva voce* witness has already provided the Defence with a written statement, which was disclosed to the

⁸ Pre-Trial Chamber II, "Order to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses", ICC-01/09-02/11-226, p. 13.

⁹ ICC-01/09-02/11-244-Conf-Anx.

¹⁰ ICC-01/09-02/11-293 and its confidential annexes.

¹¹ ICC-01/09-02/11-327 and its confidential annexes.

¹² ICC-01/09-02/11-327-Conf-AnxA-Corr.

¹³ ICC-01/09-02/11-327, para. 10.

Prosecutor on 5 September 2011.¹⁴ In view of this information, the Single Judge considers that the replacement of the witness proposed by the Defence team of Mr. Ali does not create any prejudice to the Prosecutor. Thus, the Defence's Request is to be granted.

11. Finally, the Single Judge considers that in order for the Chamber to exercise its powers under article 69(4) of the Statute and in order to enable the Prosecutor to adequately prepare for the upcoming confirmation of charges hearing, it is necessary to require the Defence of Mr. Ali to submit in a confidential filing information detailing the subject matter and the scope of the proposed testimony of each *viva voce* witness.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) grants** the Defence's Request;
- b) orders** the Defence of Mr. Ali to submit by no later than Friday, 16 September 2011, information detailing the subject-matter and the scope of the proposed testimony of each *viva voce* witness in accordance with paragraph 11 of the present decision.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 15 September 2011

At The Hague, The Netherlands

¹⁴ ICC-01/09-02/11-293 and its confidential annexes.