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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

Public redacted version of the Prosecution's request to add two witnesses to its witness list

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 requests the Chamber's authorisation to add Witness 548 – a Mungiki insider – and Witness 66 – a sexual and gender based violence witness – to its witness list pursuant to Regulation 35 of the Regulations of the Court and Articles 64(6)(d) and 69(3) of the Rome Statute. The Prosecution came into contact with Witness 548 after the expiry of the time limit to disclose its witness list, and the collection of his statement took place shortly afterwards. Even though the Prosecution had previous contact with Witness 66, the Prosecution approached that witness again recently as a replacement witness, following the withdrawal of Witness 426 from its witness list.

2. The Prosecution submits that there is good cause to include these witnesses to the witness list at this stage. The evidence of both witnesses is relevant to the Prosecution's case; the Defence will have ample time to prepare for their cross-examination since they will be called later in the Prosecution case; and the anticipated evidence, in part, corroborates that of witnesses already on the list and concerns matters already known by the Defence. In sum, their addition to the witness list will not prejudice the Accused and will assist the Chamber in determining the truth in this case.

Confidentiality

3. This application is designated "confidential, *ex parte*, Prosecution and VWU only" because it contains security-related information about potential Prosecution witnesses that, if disclosed to the parties or the public, may

place the potential witnesses and/or their family members at risk. Redacted versions will be filed concurrently.¹

4. The Prosecution has applied selective redactions to the witness statements in confidential Annexes B and D, which reflect these concerns. The Prosecution requests that the identities of Witnesses 548 and 66 are disclosed to the Defence only if the Prosecution's application is ultimately successful.²

Procedural history

5. On 9 July 2012, the Chamber issued its "Decision on the schedule leading up to trial", which set the trial date for 11 April 2013 and ordered the Prosecution to disclose "all incriminatory material . . . to be relied on trial", "provide its witness list" and "file its list of evidence to be relied on at trial" by 9 January 2013.³
6. On 9 January 2013, the Prosecution completed its disclosure of the incriminatory evidence to be relied upon at trial in its possession (except for certain information permitted to be withheld by the Chamber),⁴ and filed its list of evidence⁵ and list of witnesses to be relied on at trial.⁶
7. From [REDACTED], the Prosecution interviewed Witness 548, obtaining a statement pursuant to Article 55(2) and Rule 112.⁷
8. On 20 June 2013, the Chamber set a new date for the commencement of trial for 12 November 2013.⁸

¹ See ICC-01/09-02/11-794, para. 11.

² See, e.g., [REDACTED].

³ ICC-01/09-02/11-451, paras 18-19, 25.

⁴ See ICC-01/09-02/11-637.

⁵ [REDACTED].

⁶ [REDACTED].

⁷ Witness 548's draft transcribed statement is attached as confidential, *ex parte*, Prosecution and VWU only Annex A and confidential Annex B. The final version of the statement is expected to be completed in early October.

9. On 16 July 2013, the Prosecution withdrew three witnesses from its witness list, including Witness 426, who informed the Prosecution that [REDACTED] he was no longer willing to testify.⁹ The Prosecution also gave notice that it may file an application pursuant to Regulation 35 in the future if suitable replacements for these witnesses were forthcoming.¹⁰ Immediately thereafter, the Prosecution started taking steps to identify a replacement witness for Witness 426.
10. From [REDACTED], the Prosecution interviewed Witness 66, obtaining a Rule 111 statement.¹¹

Submissions

11. The Prosecution seeks leave pursuant to Regulation 35(2) to vary the 9 January 2013 time limit in order to add Witnesses 548 and 66 to the Prosecution's witness list. The Prosecution submits that for "exceptional circumstances" outside its control it was unable to file this application within the time limit set by the Chamber.¹² Additionally, the Prosecution requests the Chamber to order the production of this evidence pursuant to Articles 64(6)(d) and 69(3). The witnesses provide relevant and probative evidence that will assist the Chamber in its determination of the truth, and the Defence will not suffer prejudice.¹³

⁸ ICC-01/09-02/11-763-Red, p. 16 (disposition).

⁹ [REDACTED].

¹⁰ ICC-01/09-02/11-773-Red, para. 11; *see also* ICC-01/09-02/11-596, paras 9-10 ("The Prosecution hereby gives notice to the Chamber that it may seek leave to amend the list of witnesses and/or the list of evidence pursuant to the requirements of Regulation 35").

¹¹ Witness 66's statement is attached as confidential, *ex parte*, Prosecution and VWU only Annex C and confidential Annex D.

¹² *Prosecutor v. Lubanga*, 'Decision on the request for an extension of time filed by the Legal Representatives of Victims V02', 7 February 2013, ICC-01/04-01/06-2975 (A 4 A 5 A 6), para. 4.

¹³ *Prosecutor v. Ruto & Sang*, 'Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses', 3 September 2013, ICC-01/09-01/11-899-Red, para. 17 ("In determining whether to authorise the addition of new witnesses at this stage, the Chamber needs to consider, in particular, the impact on the right of the accused to have adequate time and facilities for the preparation of the defence, as set out in Article 67(1)(b) of the Statute"); *see also Prosecutor v. Gbagbo*, 'Decision on the Prosecution's request pursuant to Regulation 35 for variation of time limit to submit a request for

I. Reasons for the late addition of the witnesses.

a) *Witness 548*

12. The Prosecution was unable to include Witness 548 in its witness list application of 9 January 2013 due to “exceptional circumstances . . . namely for reasons outside [its] control”.¹⁴
13. The Prosecution did not interview Witness 548 until [REDACTED]. Although the Prosecution initially contacted Witness 548 on [REDACTED], [REDACTED] before the deadline, it could not complete the interview at that time and accordingly was not fully apprised of the content of his anticipated testimony. It could not assess the probative value and credibility of his potential evidence before the interview took place.
14. The Prosecution was not able to contact this witness before 9 January 2013 because of the witness’ acute security concerns, which not only impeded initial physical access to, and availability of, the witness, but has forced the Prosecution to delay its request for the addition of Witness 548 to the witness list.
15. This security concern revolves around [REDACTED] and a political associate of the Accused. According to Witness 548, [REDACTED]. These circumstances formed the basis for the witness’s security concerns, and for his initial reluctance to speak to the Prosecution.
16. The Prosecution was only able to determine that Witness 548 was willing to testify [REDACTED]. As a result of this change in circumstances, the

redactions and for the extension of time for disclosure’, 20 April 2012, ICC-02/11-01/11-97, para. 18; *Prosecutor v. Gaddafi and Al-Senussi*, ‘Decision on the Defence for Abdullah Al-Senussi’s ‘Urgent Application pursuant to Regulation 35’’, 23 January 2013, ICC-01/11-01/11-257, para. 12.

¹⁴ ICC-01/04-01/06-2975 (A 4 A 5 A 6), para. 4.

Prosecution re-assessed the value this witness would bring to the case, balanced against his security situation.

b) Witness 66

17. The Prosecution did not interview Witness 66 until it became clear that Witness 426 was unwilling to testify. Witness 426 was an important witness for the Prosecution. He was the [REDACTED] during the post-election violence ("PEV"). He was to testify, primarily, about [REDACTED] about the female victims of sexual violence in Nakuru and Naivasha during the PEV.¹⁵ He was also to testify on the widespread nature of sexual violence during the PEV and the specific forms and patterns of such violence, including rape, perpetrated against women, which goes to the core of the Prosecution's allegations against Mr Kenyatta.¹⁶ Upon the withdrawal of Witness 426, the Prosecution immediately searched for a replacement, re-establishing contact with Witness 66 and interviewing the witness on [REDACTED]. Witness 66 was [REDACTED] during the PEV, the testimony of whom will substantially replace that of Witness 426.

18. The Prosecution recognises that the two interviews were conducted after the expiry of the 9 January 2013 time limit, but notes that it is mandated to continue its investigation in order to establish the truth under Article 54(1)(a). As the Appeals Chamber in the *Lubanga* case explained, "[t]he duty to establish the truth is not limited to the time before the confirmation hearing", permitting the Prosecution to "continue its investigations beyond the confirmation hearing, if this is necessary in order to establish the truth".¹⁷ In certain circumstances, "to rule out further investigation after the

¹⁵ See [REDACTED].

¹⁶ See ICC-01/09-02/11-732-AnxA-Red, pp. 31-35 ("Count 2"; "Count 3"; "Count 4"; "Count 5").

¹⁷ *Prosecutor v. Lubanga*, 'Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence'', 13 October 2006,

confirmation hearing may deprive the Court of significant and relevant evidence”.¹⁸ This Chamber has also found that it may be appropriate to conduct investigations after confirmation when “certain evidence that was available prior to confirmation, unexpectedly and through no fault of the Prosecution, becomes unavailable for use at trial (e.g. a witness dies or otherwise becomes unavailable)”, or if the Prosecution “could not have taken a particular investigative step prior to confirmation without unduly endangering the security of particular individuals”.¹⁹

II. The witnesses provide probative and relevant evidence that will assist the Chamber in its determination of the truth.

19. The overarching objective of a trial is a fair proceeding through which the truth is established. While submitting that this application can properly be made and considered under Regulation 35(2), the Prosecution additionally requests the Chamber to order the production of this evidence under Articles 64(6)(d) and (f) and 69(3). These powers permit the Chamber to manage the trial, with due regard for the rights and obligations of the parties, and to request all evidence it considers necessary of the determination of the truth.

20. Trial Chamber II in the *Katanga & Ngudjolo* case allowed the introduction of new witnesses to its witness list²⁰ if the Prosecution demonstrated that “the

ICC-01/04-01/06-568, para. 52; *see also* the Concurring Separate Opinion of Judge Eboe-Osuji to the decision on the defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728-Anx3-Corr2-Red, paras 86-100.

¹⁸ ICC-01/04-01/06-568, para. 54.

¹⁹ ICC-01/09-02/11-728, para. 120.

²⁰ *See, e.g., Prosecutor v. Katanga & Ngudjolo*, ‘Decision on the Defence Request to Vary Time Limit for Disclosure of 132 items of documentary evidence’, 5 July 2011, ICC-01/04-01/07-3059, para. 21; *Prosecutor v. Katanga & Ngudjolo*, ‘Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)’, 9 October 2009, ICC-01/04-01/07-1515-Corr, para. 37; *Prosecutor v. Katanga & Ngudjolo*, ‘Decision on Prosecution requests ICC-01/04-01/07-1386 and ICC-01/04-01/07-1407 made pursuant to regulation 35 of the Regulations’, 23 October 2009, ICC-01/04-01/07-1552, para. 14; *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-314-ENG CT2 WT, p. 5, lines 17-25.

new evidence is either more compelling than evidence already disclosed to the Defence, or that it brings to light previously unknown facts which have a significant bearing upon the case”, and that “the late addition is not prejudicial to the fairness of the proceedings, especially in terms of providing the opponent with adequate time to respond to the new material”.²¹

a. Witness 548

21. Witness 548’s evidence goes to the heart of the issues in dispute – such as the individual criminal responsibility of the Accused – and will assist the Chamber in ascertaining the truth concerning the charges against Mr Kenyatta. The evidence brings to light previously unknown information and therefore will have a significant bearing on the case.

22. Witness 548, [REDACTED], is a Mungiki insider who was a [REDACTED] during the PEV. Witness 548 provides new and relevant evidence with respect to:

- Personal attendance at preparatory meetings at, *inter alia*, [REDACTED] to prepare for the 24 January 2008 Nakuru attack;
- The provision by [REDACTED] of police uniforms and clothing, [REDACTED], weapons and ammunition to Witness 548;
- The provision of weapons to Witness 548 by [REDACTED];
- [REDACTED];
- [REDACTED];
- The specific targeting, [REDACTED], of senior and influential ODM members during the Nakuru attack;
- [REDACTED];
- [REDACTED];

²¹ ICC-01/04-01/07-3059, para. 21.

- [REDACTED], weapons and police uniforms; and
- Additional specifics of the rape, forcible circumcision and murder committed all over Nakuru town during the attack.

23. In addition to this unique evidence, Witness 548 also provides valuable corroborating evidence. The *Lubanga* and *Ngudjolo* trial judgments have noted the importance of corroboration.²² These areas relate to:

- The history, structure, leadership and organisational characteristics of the Mungiki;
- The Mungiki's decision to support the PNU coalition in the 2007 elections, and the reasons for that decision, including the PNU's promise to stop the extra-judicial killings of Mungiki members;
- The role of, and operatives involved with, Operation Kibaki Again;
- [REDACTED] facilitative role in striking a deal between the Mungiki and the PNU to organise the PEV;
- Maina Njenga's approval of the deal with the PNU, promising Mungiki's involvement in the attacks in the Rift Valley during the PEV, and the payments he purportedly received from Mr Kenyatta and others in exchange;
- Preparatory meetings between Mungiki leaders and senior PNU officials in January 2008, including at the [REDACTED];
- The coordination of the attacks in and around Nakuru, including the recruitment and oathing of attackers, the organisation of attackers into units and the issuance of orders;

²² *Prosecutor v. Lubanga*, 'Judgment pursuant to Article 74 of the Statute', 14 March 2012, ICC-01/04-01/06-2842, paras 730 ("the Chamber has accepted his testimony . . . , particularly when corroborated by other credible evidence"), 839 ("the Chamber is unable to conclude on the basis of his evidence alone . . . and has only drawn conclusions from his evidence when it was corroborated by the testimony of other witnesses."); *Prosecutor v. Ngudjolo*, 'Judgment pursuant to Article 74 of the Statute', 18 December 2012, ICC-01/04-02/12-3-tENG, para. 248 ("As a result, the Chamber considers that this witness should be considered credible, although his testimony can only be taken into account if it is corroborated.").

- The provision of weapons, finance and materiel to the Mungiki by intermediaries linked to the Accused, including and particularly, [REDACTED];
- Description of the crimes carried out during the Nakuru attack, including murder, arson, forcible circumcision and rape, as well as the use of guns and grenades; and
- Mr Kenyatta's role as a "patron" of the Mungiki and his role in the provision of weapons and money to the Mungiki during the PEV.

24. Finally, Witness 548 provides direct and relevant evidence with respect to the Prosecution's allegations of witness bribery and intimidation:

- [REDACTED];
- [REDACTED].

b. Witness 66

25. Witness 66's evidence similarly goes to the heart of the issues in dispute – particularly the commission of rape and sexual violence during the PEV – and will assist the Chamber in ascertaining the truth concerning the charges against Mr Kenyatta. This evidence helps to replace the evidence of Witness 426.

26. Witness 66, [REDACTED], a position the witness held during the PEV. The witness will testify about:

- [REDACTED];
- [REDACTED];
- The causes of underreporting of rape and sexual violence in Kenya and stigma that attaches to victims of sexual violence;
- The effect that sexual violence had on PEV victims and the lack of psycho-social support for victims and their ongoing trauma;

- The widespread nature of sexual violence during the PEV and the specific forms and patterns of such violence, including rape, perpetrated against women;
- The presence of displaced persons in IDP camps in the aftermath of the PEV; and
- [REDACTED] several organisations to collect evidence of sexual violence to support litigation against the perpetrators of such violence, including evidence of sexual violence during the PEV.

27. The evidence of Witness 66 is important in order to prove incidences of rape and other types of sexual violence, and will assist the Chamber in its determination of the widespread and systematic nature of the crimes, the foreseeability of these crimes in the ordinary course of events and the effect of the crimes on the victims.

III. The addition will not cause undue prejudice to the Accused.

28. The Chamber in the *Ruto & Sang* case has confirmed that “the addition of persons to the Prosecution’s witness list . . . is justified” even one week before the commencement of trial, when it “does not cause undue prejudice to the Defence”.²³

29. The Prosecution submits that the prejudice, if any, suffered by the Accused, as a result of Witness 548’s inclusion on the list of witnesses is minimal and would not cause the present proceedings to be unfair because the Defence will have sufficient time to analyse the evidence and conduct any necessary investigations before he is called to testify.²⁴ His evidence is intrinsically connected to the core allegations of the Prosecution case, known to the

²³ ICC-01/09-01/11-899-Red, para. 20.

²⁴ See ICC-02/11-01/11-97, para. 18; see also *Prosecutor v. Katanga & Ngudjolo*, ‘Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence’, 23 October 2009, ICC-01/04-01/07-1553, para. 24.

Defence since the early stage of the proceedings, including in great detail in the pre-trial brief.²⁵ The new evidence not previously adduced by other witnesses provides additional details on matters that are already known by the Defence.

30. The addition of Witness 66 to the witness list will also not result in any prejudice to the Defence. Rather than introducing new facts and evidence, the Prosecution is merely substantially replacing the source of information already provided to the Defence by Witness 426. The Defence has long been on notice of the [REDACTED]; the only change amounts to the [REDACTED] and [REDACTED]. The Prosecution recognises that the Defence will wish to conduct investigations into the credibility of Witness 66, but submits that “such investigations do not necessarily need to take place prior to the commencement of trial”.²⁶ In light of the substantially overlapping nature of the two witness’ anticipated testimonies, the Prosecution does not believe it would “require a considerable amount of additional investigations on the part of the Defence”.²⁷

31. Any potential detrimental impact on the Defence has been further mitigated by not scheduling Witnesses 548 and 66 to testify among the Prosecution’s first ten witnesses. They will likely be scheduled even further down the list.

32. The Prosecution acknowledges that this application is being made approximately two months before the commencement of trial, inside the three month period the Chamber has generally afforded to the Defence for preparation after the date of full disclosure.²⁸ However, the Chamber in the *Ruto & Sang* case has held that “three months cannot be considered the standard time that should be automatically granted to enable investigations

²⁵ [REDACTED].

²⁶ ICC-01/09-01/11-899-Red, para. 19.

²⁷ ICC-01/09-01/11-899-Red, para. 19.

²⁸ ICC-01/09-02/11-728, para. 127; ICC-01/09-02/11-451, paras 18, 19, 25.

with respect to . . . additional witnesses”.²⁹ This rings true, particularly because the Prosecution was unable – as discussed above – to file this application sooner due to circumstances beyond its control. In light of the Prosecution’s commitment to not call both these witnesses in the first three months of its case, likely to be at least six months to one year hence, the disclosure of these witnesses’ evidence at this time is reasonable and proportionate and occasions no undue prejudice to the Accused.

Conclusion

33. For the foregoing reasons, the Prosecution respectfully seeks the Chamber’s authorisation pursuant to Regulation 35(2) and Articles 64(6)(d) and 69(3) to add Witnesses 548 and 66 to its witness list, add their evidence to its list of evidence and disclose material received from them to the Defence.



Fatou Bensouda,
Prosecutor

Dated this 13th day of September 2013
At The Hague, The Netherlands

²⁹ ICC-01/09-01/11-899-Red, para. 18.