



International Criminal Tribunal for Rwanda
Tribunal pénal International pour le Rwanda

ICTR-99-50-T

28-01-2008

(25212-25208)

OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Lee Gacunga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 28 January 2008

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

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**DECISION ON PROSPER MUGIRANEZA'S MOTION TO EXTEND DEADLINES
IN SCHEDULING ORDER OF 4 DECEMBER 2007 AND
ORDER FOR REDUCTION OF WITNESS LIST**

Rules 73, 54 and 73ter of the Rules of Procedure and Evidence

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justus Bwonwonga
Mr. Elvis Bazawule
Mr. George William Mugwanya
Mr. Shyam Lal Rajapaksa

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for Casimir Bizimungu
Mr. Ben Gumpert and Mr. Jonathan Kirk for Justin Mugenzi
Mr. Michel Croteau and Mr. Philippe Larochelle for Jérôme-Clément Bicamumpaka
Mr. Tom Moran for Prosper Mugiraneza

INTRODUCTION

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1. The trial in this case commenced in November 2003. To date, the Trial Chamber has heard the case for the Prosecution in its entirety,¹ as well as the defence cases for the Accused Justin Mugenzi and Casimir Bizimungu.² The defence case for Jérôme-Clément Bicamumpaka is ongoing, and the case for Prosper Mugiraneza is still to be heard. The last trial session in this case ended on 8 November 2007.

2. On 4 December 2007, the Trial Chamber issued a Scheduling Order for the preparation and conduct of the next trial session in this case, which, by virtue of that Order, is to commence on 28 January 2008 and to run, almost continuously, until the remaining evidence in the case has been heard.³ The Scheduling Order also laid down deadlines for the filing of certain documents by Prosper Mugiraneza, which were set, *inter alia*, upon the basis of submissions made by the Parties during a Status Conference which was held on 8 November 2007. According to the terms of the Order, the Mugiraneza Defence was to file:

- a) A Final List of Witnesses it intends to call, clearly delineating those witnesses intended to testify orally, and those witnesses intended to testify by means of written statement, pursuant to Rule 92bis of the Rules of Procedure and Evidence (the "Rules"),⁴ if any, no later than 22 January 2008;
- b) Any application it intends to submit for the admission of evidence pursuant to Rule 92bis of the Rules of Procedure and Evidence no later than 22 January 2008;
- c) Any application it intends to submit for the hearing of evidence in its case by means of video-link, no later than 7 January 2008; and
- d) Any other application pertaining to witness issues as soon as practicable.

3. By Motion filed on 7 January 2008,⁵ the Defence for Mugiraneza now seeks an extension of time to 8 February 2008 for the filing of its motion and written statements pursuant to Rule 92bis of the Rules (see 2b) above), and an extension of time to 31 January 2008 for filing its motions for the hearing of evidence by means of video-link (see 2c)

¹ Although the Prosecution has closed its case, the Chamber has ordered the recall of Prosecution Witness Fidèle Uwizye for further cross-examination by the Defence on specific subject matter, see *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Witness Fidèle Uwizye for Further Cross-examination (TC), 9 October 2006.

² The defence case for Casimir Bizimungu has been closed subject to the hearing of testimony of one remaining witness, and one application to add a witness to its Witness List which is pending before the Trial Chamber.

³ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Scheduling Order (TC), 4 December 2007 (the "Order"). The Scheduling Order was made pursuant to Rule 54 of the Rules of Evidence and Procedure.

⁴ Rule 92bis of the Rules bestows a discretionary power upon a Trial Chamber, *inter alia*, to admit the evidence of a witness, in whole or in part, by means of written testimony in lieu of testifying orally, subject to certain requirements being met. Notably, by virtue of sub-Rule (B), a written statement is only admissible under Rule 92bis if it attached a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's belief and that declaration is witnessed by, either, a person authorized to witness such a declaration in accordance with the law and procedure of a State; or a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and the person witnessing the declaration verifies certain matters in writing. These declarations are required to be attached to the written statement(s) presented to the Trial Chamber.

⁵ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Prosper Mugiraneza's Motion to Extend Deadlines in Scheduling Order of 4 December 2007" ("Defence Motion"), dated 6 January 2007, filed on 7 January 2007.



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above).⁶ As regards the Final List of Witnesses (see 2a) above), the Defence states that it will comply with the terms of the Chamber's original order.⁷

4. The Prosecution did not respond to the Motion, but the Registrar filed submissions in response, pursuant to Rule 33(B) of the Rules.⁸

DISCUSSION

Motions for video-link testimony

5. The Defence advises that it will bring motions for the hearing of evidence via video-link "from approximately three witnesses in Europe and one in the United States."⁹ Further, the Defence states that "[o]ther potential witnesses who have not finally agreed to testify may demand to testify by video-link for security reasons."¹⁰

6. The reason for the delay in filing the motions for video-link in relation to these witnesses' testimonies is that the Registrar did not provide Mugiraneza's investigator with the necessary documentation to procure visas for the countries in which those witnesses reside. This prevented the Defence from obtaining affidavits for video-link testimony. The Defence seeks an extension of time to 31 January 2008.

7. The Registrar responds that any delay in this matter is not attributable to any act or omission on the part of the Registry.¹¹ He states that the only request for documentation was a Defence request for the approval of a work programme, which was duly processed and approved days later.¹²

8. A further request was made of the Registry on 24 December 2007 in relation to the investigator's attempts to obtain a Belgian visa, only. The Registrar complied with the request, but complications arose in attempting to send original documentation to the investigator in Kigali.¹³ On 7 January 2008, the Registry sought the contact details of the Belgian embassy from the Defence investigator so that the documentation could be sent directly. The investigator did not respond, and the documents were eventually sent to Kigali, via ICTR beechcraft, on 14 January 2008.

⁶ Although the Defence proposes this new date for the filing of any motion for video-link testimony, it also wishes to retain "...the right to change those witnesses for good cause shown."

⁷ The Defence subsequently filed its Amended Witness List, see *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Confidential Amended Pre-Defense Summary of Anticipated Testimony of Prosper Mugiraneza," filed by the Defence on 24 January 2008. Note that the Defence was supposed to file its Amended Witness List on or before 22 January 2008 and therefore it was filed in breach of the deadline set by the Chamber's Scheduling Order.

⁸ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "The Registrar's Submissions in Response to 'Prosper Mugiraneza's Motion to Extend Deadlines in Scheduling Order of 4 December 2007'", dated 14 January 2008 ("Registrar's Submissions"). Rule 33(B) of the Rules provides that the "Registrar, in the execution of his functions, may make oral or written representations to Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions... with notice to the parties where necessary."

⁹ Defence Motion, para. 4.

¹⁰ *Ibid.*

¹¹ Registrar's Submissions, para. 9.

¹² Registrar's Submissions, para. 10. The Registrar states that the request for the approval of the work programme was submitted on 17 December 2007, and approved on 21 December 2007. The approval was communicated that same day.

¹³ Registrar's Submissions, paras. 10 & 11. The Registrar advises that the ICTR beechcraft was cancelled.



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9. The Chamber makes no adverse finding with respect to the Registry's actions, and considers that the Registry acted diligently in carrying out its functions in relation to this matter. The Chamber notes that the Mugiraneza Defence has been aware of the need to file motions for video-link testimony, from locations in Europe and North America, since at least October 2005.¹⁴ The Chamber further notes that CMS requires a minimum of four weeks to facilitate video-link testimony. The date set down by the Chamber was calculated so as to ensure ample time for the facilitation of any such testimony by the Court Management Section ("CMS") in consultation with the Defence.

10. The Chamber is, however, prepared to grant the Defence's application to extend the deadline for the filing of these motions to 31 January 2008, in the interests of justice. Any further failure to comply with this deadline will be dealt with accordingly by the Chamber. The Chamber urges the Defence to submit its applications for video-link testimony as soon as practicable and allowing CMS more than sufficient time to facilitate such testimony.

Rule 92bis Motion and accompanying written statements

11. The Defence submits that "[d]raft Rule 92bis statements for witnesses in Rwanda have been completed and will be forwarded to the Registrar for execution following final editing."¹⁵ Further, the Defence states that "[a]rrangements have been made for the execution of the documents" and that as soon as the documents are executed, they will be filed with the Trial Chamber.¹⁶

12. The Defence cites two reasons for its delay in filing its Rule 92bis motion and accompanying statements, including the reason provided for delay in filing its video-link testimony motions, which has already been discussed above.

13. The second reason cited by the Defence is that representatives of the Registry who are required to execute the witnesses declarations (as required by sub-Rule 92bis (B)) would not be available until approximately 15 January 2008.

14. The Registrar denies the Defence allegation that the Rule 92bis statements could not be executed in Rwanda before 15 January 2008. He advises that Defence Counsel submitted his initial application for execution of 92bis statements on 19 June 2007, which was subsequently approved, planned by CMS, and a date was set. A Presiding Officer was designated pursuant to Rule 92bis (B) of the Rules, to execute the statements. The Registrar submits that the mission was called off by the Defence because of the unavailability of witnesses and lack of the written statements required.

15. The Registrar further advises that, subsequent to the calling off of the mission scheduled in June 2007, the Defence communicated with CMS a second time in December 2007 regarding scheduling a 92bis mission for its witnesses. The Registrar states that the Defence investigator was advised that he would need to take or confirm statements from the available witnesses and provide the confirmed statements to CMS before the mission would be scheduled, and a Presiding Officer designated. The confirmed statements were never

¹⁴ See *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Prosper Mugiraneza's Pre-Defence Brief Pursuant to Rule 73ter," filed by the Defence on 3 October 2005, ("Pre-Defence Brief"), para. 47.

¹⁵ Defence Motion, para. 6.

¹⁶ *Ibid.*



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provided to CMS, and thus the 92bis mission was never scheduled. CMS is still awaiting this information from the Defence in order to process this request.

16. The Defence makes a number of allegations of delay in the Registry in authorising the retention of a surveyor as an expert. The Registry has also made a number of submissions in response to those allegations. Since the Defence makes no attempt to link those alleged delays with its inability to comply with the deadlines laid down in the Chamber's Scheduling Order, the Chamber declines to consider these submissions on the basis that they are irrelevant.

17. The Chamber makes no adverse finding with respect to the Registry's actions, and considers that the Registry has acted diligently in carrying out its functions also in relation to this matter. The Chamber notes that, according to the Registrar, CMS is still waiting to receive confirmed statements from the Mugiraneza Defence before the mission will be scheduled, and a Presiding Officer designated. This is further supported by the Defence submissions that "[d]raft Rule 92bis statements for witnesses in Rwanda have been completed and will be forwarded to the Registrar for execution following final editing."¹⁷ The Chamber notes that the Mugiraneza Defence has been aware of its need to file motions for the admission of written statements pursuant to Rule 92bis, and specifically for the need for those statements to be executed pursuant to sub-Rule (B), since at least October 2005.¹⁸ Furthermore, the Defence allowed six months to lapse between the time when it initially sought approval from the Registrar for the statements to be executed, and when it subsequently sought approval a second time, in circumstances where the Defence was fully aware that the commencement of its case was imminent.

18. In the interests of justice however, the Chamber is prepared to grant the Defence's application to extend the deadline for the filing of these motions to 8 February 2008.

Amended Defence Witness List

19. On 3 October 2005, the Defence for Prosper Mugiraneza filed its Pre-Defence Brief,¹⁹ pursuant to Rule 73 *ter* of the Rules, as well as its Proposed Witness List,²⁰ which consisted of 113 witnesses.²¹ In its Pre-Defence Brief, the Defence drew the Chamber's attention to the fact that several of its witnesses would give evidence pursuant to Rule 92bis of the Rules.²² It also said that any 92bis motion(s) would be filed well in advance of the time that the proposed testimony of those witnesses was presented, and that this would "save... the Trial Chamber substantial time."²³

20. With regard to the length of Prosper Mugiraneza's defence, the Defence stated in its Pre-Trial Brief that most witnesses would require less than five hours of direct examination²⁴

¹⁷ Defence Motion, para. 6.

¹⁸ See Pre-Defence Brief, para. 38.

¹⁹ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Prosper Mugiraneza's Pre-Defence Brief Pursuant to Rule 73 *ter*," filed by the Defence on 3 October 2005, ("Pre-Defence Brief").

²⁰ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Prosper Mugiraneza's Proposed Witness List," filed by the Defence on 3 October 2005, ("Proposed Witness List").

²¹ See Proposed Witness List.

²² Pre-Defence Brief, para. 38.

²³ *Ibid.*, para. 39.

²⁴ *Ibid.*, para. 55.



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and that the direct examination of its witnesses would take no more than 30 court days.²⁵ The Defence also stated that many witnesses would testify to similar facts.²⁶

21. During a Status Conference held by the Trial Chamber on 8 November 2008, the Defence stated that it would require a maximum of twelve weeks of sitting time for the totality of its case;²⁷ that the Final Witness List would consist of 20 to 30 witnesses whose testimony would be sought to be admitted in written form pursuant to Rule 92bis of the Rules, and 50 to 60 witnesses who would appear to testify in person;²⁸ and that a large number of Defence witnesses would require two hours or less of sitting time for their direct examination.²⁹

22. On 24 January 2008, the Defence filed its Amended Witness List, containing the names of 100.³⁰ The Amended Witness List provides time estimates for direct examination of each witness whom, it is proposed, will testify orally.³¹ The total amount of time required - for direct examination only - for the 71 witnesses whom it is proposed will testify orally, is 58.5 days,³² or more than 14 weeks of continuous sitting time. Therefore, approximately 28 or 29 weeks of continuous sitting time would be required for the testimony of 71 witnesses on the Defence's witness list to be heard.³³ This estimate does not include the testimony of a further 28 witnesses in relation to whose testimony a Rule 92bis application is still to be filed. The Defence's estimates are based on the Chamber granting its Rule 92bis application, and

²⁵ *Ibid.*, para. 55 (d).

²⁶ For example, in para. 55(a) and (b), the Defence states the following:

"(a)... witnesses MWA, MQA, MQB, MQQ, RDA, RDB, RDC, RDD, RDG, RDL, RDM and RDQ will testify generally that they were present in Kibungo Prefecture in period after 6 April 1994, that they witnessed killings and that Prosper Mugiraneza was not in the prefecture after 6 April 1994... (b) Other witnesses, including RDE, RDF, RDH, RDI, RDJ, RDK, RDQ, RDR, RDS, RDT, RDU, RDV, RDW, RDX, RDY, RDZ, RWA, RWB, RWC, RWD, RWE, RWF, RWG, RWH, KNA, KNB, will testify to the same facts as those in sub-paragraph (a) above plus additional facts..."

²⁷ See T. (E), 8 November 2008, pp. 42-50. In response to the Presiding Judge's question to Mr. Moran about the defence case taking 12 weeks, Mr. Moran responded: "At the maximum. With a little luck, it'll be a lot less."

²⁸ See T. (E), 8 November 2008, pp. 42-50:

MADAM PRESIDENT:

And what would be the number on the revised list?

MR. MORAN:

Including about 30 witnesses -- 20 to 30 witnesses we'll be looking for in 92 bis, we'll probably be calling 50 to 60 short, live witnesses; mainly short witnesses.

²⁹ See T. (E), 8 November 2008, pp. 42-50:

MR. MORAN:

A large number of our witnesses are going to be probably two hours on direct or less.

³⁰ These witnesses consist of 71 witnesses proposed to testify orally, and 28 witnesses proposed to testify by written statement pursuant to Rule 92bis.

³¹ The time estimates are provided either in terms of number of hours required for direct examination, or number of days. No time estimate for direct examination is provided in relation to the 28 witnesses proposed to testify by written statement pursuant to Rule 92bis.

³² The Chamber arrived at this calculation as follows:

(1) According to the time estimates, a total of 32.5 days and 144 hours of sitting time are required;

(2) The Chamber sits four full days (Monday-Thursday) per week, or a total of 24 hours per week (based on a sitting schedule of 9am to 1pm, with a 30 min. break; and 2:30pm to 5:30pm, with a 30 min. break, for a total of 6 hours per day).

(3) 144 hours would require 26 full days of sitting time.

(4) 32.5 days plus 26 is equal to 58.5 days.

(5) 58.5 days, divided by four days per week, is about 14.5 weeks.

³³ The Chamber considers that a conservative estimate of the time required for cross-examination of a witness is the same amount of time required for the examination-in-chief of that witness.

admitting the testimony of all 28 witnesses in its entirety, without requiring any of those witnesses to appear for cross-examination.³⁴

23. Rule 73ter (D) provides a Trial Chamber with the discretion to order the Defence to reduce the number of witnesses on its witness list, if it considers that an excessive number of witnesses are being called to prove the same facts. Furthermore, Rule 54 of the Rules provides a Trial Chamber with the discretion to issue any orders as may be necessary for the conduct of the trial.

24. According to the jurisprudence of this Tribunal, in deciding whether to make an order for the reduction of a witness list, a Chamber would take into account such matters as: the rights of all Accused persons to a fair and expeditious hearing, and to trial without undue delay (Article 20(4)(c) of the Statute); the need to balance such rights with the Accused's right to have adequate time and facilities for the preparation of his defence (Article 20(4)(b) of the Statute); and the court's obligation to avoid the waste of judicial resources, the interests of justice, and judicial economy.³⁵ Having regard to the principle of equality of arms, the Chamber may also take into consideration the number of witnesses called by the opposing party. A further relevant consideration might be the number of witnesses called by other Accused persons in the trial.

25. The Chamber considers the Defence's Amended Witness List to be excessive in the circumstances, and inconsistent with its own submissions on the management of its case to date. In particular, the Chamber notes the Defence's submissions that it would require 30 days for the direct testimony of its witnesses;³⁶ and that its case would take a maximum of 12 weeks.³⁷ Furthermore, the Chamber recalls that the Prosecution called a total of 57 witnesses to testify against four co-Accused over 178 days of evidence; the Defence for Mugenzi called a total of 19 witnesses over 48 days of evidence; the Defence for Bizimungu called a total of 23 witnesses over 72 days of evidence; and the Defence for Bicanumpaka has so far called 15 witnesses over 33 days of evidence.³⁸ The Chamber considers that ordering the Defence

³⁴ Rule 92bis (E) of the Rules envisages that, even after granting a Rule 92bis motion and admitting the evidence-in-chief of a witness in written form, the Chamber may still require the witness to appear for the purposes of cross-examination.

³⁵ See, for example, *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List (AC), 21 August 2007, paras. 20-26. In this case, the Appeals Chamber declined to interfere with the Trial Chamber's ruling that the Defence Witness List be reduced to a total of 30 witnesses; *Prosecutor v. Elie Ndayambaje et al.*, Case No. ICTR-98-42-T, Decision on Joseph Kanyabashi's Motions for Modification of his Witness List, the Defence Responses to the Scheduling Order of 13 December 2006 and Ndayambaje's Request for Extension of Time within which to Respond to the Scheduling Order of 13 December 2006, 21 March 2007, para. 30; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92bis of the Rules; and Order for Reduction of Prosecution Witness List, 11 December 2006, para. 28. In this case, the Chamber ordered the "drastic" reduction of the number of witnesses being called to testify on a particular count of the indictment; *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Oral Decision - Order on Reducing the Total Number of Defence Witnesses, 24 September 2007. In this case, the Chamber ordered the further reduction of the Defence witness list which at that time stood at 47 witnesses in total. The Chamber noted that the Prosecution had called 17 witnesses in total; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Order for Reduction of Prosecutor's Witness List (TC), 8 April 2003: In this case, the Trial Chamber ordered *proprio motu* the Prosecution to reduce its witness list from 235 to 100 witnesses.

³⁶ See footnote 19, above.

³⁷ See footnote 21, above.

³⁸ The Defence for Bicanumpaka is still ongoing, though nearing completion. The Defence is unlikely to call any more than a further 19 witnesses over no more than a further fifteen days of evidence.



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to substantially reduce its witness list is necessary to preserve the right of all Accused persons in this case to be tried without undue delay, and that doing so will not interfere with the individual rights of Prosper Mugiraneza. It is also in the interests of judicial economy.

26. Finally, the Chamber reminds the Defence that it should be ready to commence its case no later than 18 February 2008, as envisaged by the Chamber's Scheduling Order.

FOR THESE REASONS, the Chamber

GRANTS the Defence Motion; and hereby

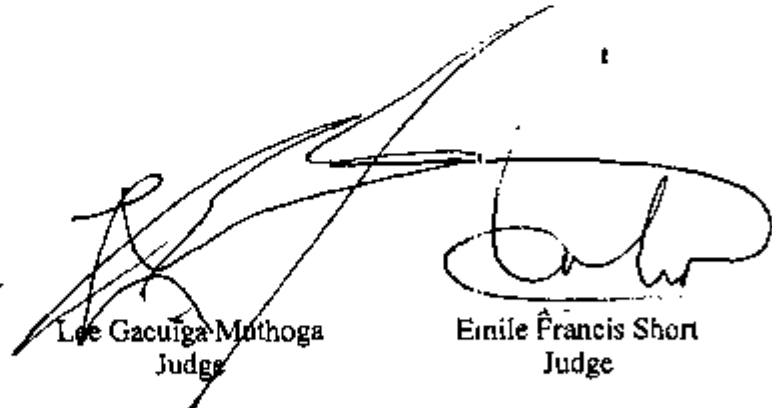
ORDERS the Defence for Prosper Mugiraneza to file:

- I. Any application it intends to submit for the admission of evidence in written form, pursuant to Rule 92bis of the Rules of Procedure and Evidence, no later than 8 February 2008; and
- II. Any application it intends to submit for the hearing of evidence in its case by means of video-link, no later than 31 January 2008; and
- III. A Revised Witness List, substantially reducing the number of witnesses on its Amended Witness List of 24 January 2008, particularly having regard to those who are being called to prove the same facts, no later than 11 February 2008.

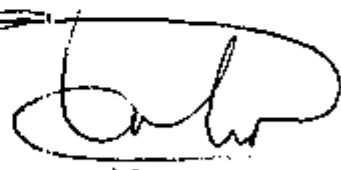
Arusha, 8 January 2008



Khadija Rachid Khan
Presiding Judge



Lee Gacunga Muthoga
Judge



Emile Francis Short
Judge

