

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 7 March 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR *v.* FRANCIS KIRIMI MUTHAURA
AND
UHURU MUIGAI KENYATTA**

Public

Order concerning the start date of trial

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for Francis Kirimi Muthaura
Mr Karim Khan, Mr Essa Faal,
Mr Kennedy Ogetto, Ms Shyamala
Alagendra

Legal Representatives of Victims
Mr Fergal Gaynor
Unrepresented Victims

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins
Legal Representatives of Applicants
Unrepresented Applicants for
Participation/Reparation

The Office of Public Counsel for
Victims
Ms Paolina Massidda

The Office of Public Counsel for the
Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber V (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, having regard to Articles 64 and 67 of the Rome Statute (“Statute”) and Rule 132 of the Rules of Procedure and Evidence (“Rules”) issues this Order concerning the start date of trial.

1. On 5 February 2013 the defence for Mr Kenyatta (“Kenyatta Defence”) made an application requesting the Chamber to “refer the preliminary issue of the validity of the Confirmation Decision” back to the Pre-Trial Chamber for reconsideration pursuant to Article 64(4) and to vacate the date set for the start of trial (“Kenyatta Application”).¹
2. On 7 February 2013 the defence for Mr Muthaura (“Muthaura Defence”) made an application requesting the Chamber to “refer [three] preliminary issues back” to the Pre-Trial Chamber, namely (i) whether non-disclosure by the Office of the Prosecutor (“Prosecution”) of potentially exonerating evidence which was in its possession at the time of the confirmation hearing vitiates the validity of the Decision on the Confirmation of Charges; (ii) whether the case should proceed to trial when the core planning meeting alleged at the pre-trial stage appears to have been dropped and the only witness presented to prove that meeting is no longer relied on; and (iii) whether new facts alleged in the Prosecution’s pre-trial brief (“PTB”) require a new confirmation of charges hearing (“Muthaura Application”).² Alternatively, the Muthaura Defence requests that the Prosecution be ordered to remove a number of “new allegations” from the PTB.³ Annexed to the Muthaura

¹ Defence Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration, ICC-01/09-02/11-622, para. 42.

² Defence Application pursuant to Article 64(4) for an order to refer back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary issue of the Validity of the Decision on the Confirmation of Charges or for an order striking out new facts alleged in the Prosecution’s Pre-Trial Brief and Request for an extension of the page limit pursuant to Regulation 37(2), ICC-01/09-02/11-628-Conf, paras 3 and 46.

³ ICC-01/09-02/11-628-Conf, paras 3 and 46.

Application were a list of potentially exculpatory material disclosed to both defence teams after the confirmation hearing despite apparently being in the possession of the Prosecution prior to the hearing;⁴ copies of *inter partes* communications,⁵ and a table identifying the allegations in the PTB which the Muthaura Defence requests be struck out and concerning which it requests the Prosecution to be prohibited from leading any evidence.⁶

3. The Chamber held a status conference on 14 February 2013⁷ during which, *inter alia*, the impact of delayed Prosecution disclosure on the trial start date was addressed upon the request of the Kenyatta and Muthaura defence teams.⁸ Both defence teams submitted that as a result of delayed Prosecution disclosure and the changing nature of the Prosecution's case following the Decision on the Confirmation of Charges, the 11 April 2013 start date for trial was no longer viable.⁹
4. On 20 February 2013 the Muthaura Defence filed an addendum to the Muthaura Application, arguing that given the right of the accused to have adequate time to prepare his defence and to know the case against him, it would be unfair for the trial to start before September 2013.¹⁰ Annexed to the addendum were an updated version of ICC-01/09-02/11-628-Conf-AnxA and two other annexes containing charts of the Article 67(2) and Rule 77 items in the Prosecution's possession prior to the confirmation of charges hearing which were not disclosed until the trial stage.¹¹

⁴ ICC-01/09-02/11-628-Conf-AnxA.

⁵ ICC-01/09-02/11-628-Conf-AnxB and ICC-01/09-02/11-628-Conf-AnxC.

⁶ ICC-01/09-02/11-628-Conf-AnxD and ICC-01/09-02/11-628-Conf, para. 46.

⁷ Transcript of hearing on 14 February 2013, ICC-01/09-02/11-T-22-ENG.

⁸ [Muthaura] Defence Observations on issues related to the commencement of trial, filed pursuant to the Trial Chamber's order ICC-01/09-02/11-615, 6 February 2013, ICC-01/09-02/11-624-Conf; Response on behalf of Uhuru Kenyatta to the "Order for observations on issues related to the commencement of trial," 6 February 2013, ICC-01/09-02/11-627-Conf.

⁹ ICC-01/09-02/11-T-22-ENG, page 11, line 9 to page 31, line 5.

¹⁰ Addendum to ICC-01/09-02/11-628-Conf and ICC-01/09-02/11-628-Conf-AnxA, ICC-01/09-02/11-656-Conf.

¹¹ ICC-01/09-02/11-656-Conf-AnxA1, ICC-01/09-02/11-656-Conf-AnxE and ICC-01/09-02/11-656-Conf-AnxF.

5. On 20 February 2013 the Kenyatta Defence filed submissions on the nature of the Prosecution's investigation and late disclosure on its ability to prepare for trial and requesting that the Chamber vacate the 11 April 2013 trial start date.¹²
6. On 22 February 2013 the Muthaura Defence filed additional submissions on the viability of the trial start date.¹³
7. On 25 February 2013 the Prosecution filed its response to the defence submissions on the 11 April 2013 trial date.¹⁴ The Prosecution submits that it is ready for trial and wishes trial to proceed, but recognises that logistical constraints make a trial on 11 April 2013 unlikely, and therefore "does not object to a reasonable adjournment, to allow time for protective measures to be put in place for the witnesses whose identities remain to be disclosed [] and to provide the Defence with adequate time to prepare".¹⁵ The Prosecution suggests that on this basis a start date immediately after the Court's summer recess would be appropriate.¹⁶
8. Also on 25 February 2013 the Prosecution filed a consolidated response to the Kenyatta Application and Muthaura Application ("Prosecution Response").¹⁷ The Prosecution requested the Chamber to dismiss the Kenyatta Application, but submitted that "[t]he situation with respect to Mr Muthaura is different. [...] Mr Muthaura presents the extremely rare case where it is appropriate to contemplate

¹² Corrigendum to Observations on the Conduct, Extent and Impact of the Prosecution's Investigation and Disclosure on the Defence's Ability to Prepare for Trial with Confidential Annex A, Public Annex B and Public Annex 1A, ICC-01/09-02/11-655-Corr, with public annexes A1 and B and confidential annex A.

¹³ Muthaura Defence's Additional Submissions on the Viability of the Commencement Date of Trial, ICC-01/09-02/11-662, with two confidential annexes. A corrigendum was filed on 25 February 2013, ICC-01/09-02/11-662-Corr.

¹⁴ ICC-01/09-02/11-663.

¹⁵ ICC-01/09-02/11-663, para. 2.

¹⁶ ICC-01/09-02/11-663, para. 11.

¹⁷ Consolidated Prosecution response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber, ICC-01/09-02/11-664-Conf-Exp. Confidential and public redacted versions were filed the same day, ICC-01/09-02/11-664-Conf-Red and ICC-01/09-02/11-664-Red2.

sending the case back to the Pre-Trial Chamber for reconsideration on the basis of the withheld Affidavit [...]”.¹⁸

9. On 1 March 2013 the Muthaura Defence and the Kenyatta Defence each sought leave to reply to the Prosecution Response.¹⁹ On the same day, the Prosecution submitted a response opposing the request by the Muthaura Defence.²⁰ The Chamber notified the parties on 1 March 2013 of its decision to grant the Defence requests for leave to reply.²¹

10. Both defence teams have asked the Chamber to vacate the trial start date and the Prosecution does not oppose an adjournment. Considering that on their face the defence applications requesting referral back to the Pre-Trial Chamber raise very serious issues that must be resolved before the trial can proceed and which may not be resolved before 11 April 2013, and considering also the defence submissions relating to the impact of delayed disclosure, which the Chamber must resolve, the Chamber hereby vacates the trial commencement date of 11 April 2013 pending the resolution of these matters. Without prejudice to the Chamber’s determination of the issues raised by the defence applications and related filings, and in order to ensure sufficient time for their resolution, the Chamber provisionally sets the new date for the commencement of trial as 9 July 2013.

¹⁸ ICC-01/09-02/11-664-Red2, para. 44.

¹⁹ Muthaura Defence Application for Leave to Reply to the “Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber”, ICC-01/09-02/11-668, and Defence Request for Leave to Reply to the “Confidential redacted version of the 25 February 2013 Consolidated Prosecution Response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber”, ICC-01/09-02/11-669.

²⁰ Prosecution response to the “Muthaura Defence Application for Leave to Reply to the ‘Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber’” (ICC-01/09-02/11-670).

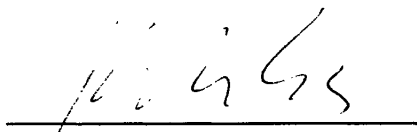
²¹ Email communication from Trial Chamber V Communications to the parties at 18:39 on 1 March 2013.

FOR THE FOREGOING REASONS, THE CHAMBER:

VACATES the trial commencement date of 11 April 2013;

PROVISIONALLY SETS the new date for start of trial as 9 July 2013.

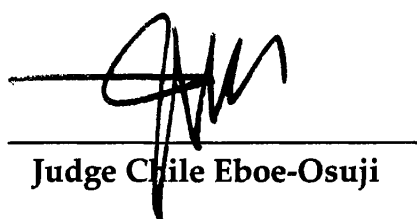
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 7 March 2013

At The Hague, The Netherlands