

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 10 September 2014

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF KENYA

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

PUBLIC REDACTED VERSION

**Defence Response to 'Prosecution notice regarding the provisional trial date'
(ICC-01/09-02/11-944) and Request to Terminate the Case against Mr Kenyatta**

Source: Defence for Uhuru Muigai Kenyatta

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

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I. INTRODUCTION

1. Pursuant to the 28 August 2014 Order of Trial Chamber V(B) ('Chamber'),¹ the Defence for Uhuru Muigai Kenyatta ('Defence') hereby submits its response to the 'Prosecution notice regarding the provisional trial date' ('Prosecution's Submissions').²
2. This response is filed confidentially as it contains material related to protected witnesses. A public redacted version is filed concurrently.

II. PROCEDURAL HISTORY

3. The Prosecution was formally granted permission to open an investigation into Kenya's 2007-2008 post-election violence on 31 March 2010.³
4. Mr Kenyatta has been subject to a summons since 8 March 2011.⁴
5. The Pre-Trial Chamber, by majority, confirmed the charges against Mr Kenyatta on 23 January 2012.⁵ The evidence underlying those charges is now known to be false as conceded by the Prosecution in its decision to abandon Witness 4,⁶ and in its 'Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date' ('December 2013 Adjournment Request').⁷ The abandonment of Witness 4 led to the Prosecution seeking to withdraw the charges against Ambassador Muthaura, and the termination of the proceedings against him by the Chamber.⁸

¹ ICC-01/09-02/11-939.

² ICC-01/09-02/11-944.

³ ICC-01/09-19.

⁴ ICC-01/09-02/11-01.

⁵ ICC-01/09-02/11-382.

⁶ *See also* ICC-01/09-02/11-878, para. 4, fns 6-8.

⁷ ICC-01/09-02/11-875.

⁸ ICC-01/09-02/11-696.

6. Since confirmation, the Prosecution has sought to strengthen its case through further investigations, which have included putting false evidence relied on by the Pre-Trial Chamber to those witnesses it interviewed subsequently.⁹
7. As a consequence of the Prosecution's disproportionate post-confirmation investigations and delayed disclosure regime, the trial has been repeatedly delayed to afford the Defence time to prepare in accordance with Article 67 of the Statute.¹⁰ None of these adjournments has been the fault of the Defence.
8. On 1 November 2013, Witness 11, who was relied upon by the Pre-Trial Chamber in the Confirmation of Charges Decision,¹¹ informed the Prosecution that he was no longer willing to appear as a witness.¹² His letter to the Prosecution is contained in Annex A. In this letter, Witness 11 stated, *inter alia*:

[REDACTED].¹³

In a letter to the Judges of the Court dated 28 July 2014, contained in Annex B, Witness 11 confirmed that he was not willing to appear as a witness, disputed Mr Kenyatta's involvement in the alleged crimes, and criticised the Prosecution for failing to investigate the matter:

[REDACTED].¹⁴

In his conclusion, Witness 11 stated that Mr Kenyatta was the wrong suspect:

[REDACTED].¹⁵

⁹ See the Defence's previous submissions on this point at ICC-01/09-02/11-903, para. 5, fn 7, citing KEN-OTP-0074-0903 annexed thereto.

¹⁰ ICC-01/09-02/11-451, ICC-01/09-02/11-677, ICC-01/09-02/11-763, ICC-01/09-02/11-847, and ICC-01/09-02/11-886.

¹¹ ICC-01/09-02/11-382.

¹² ICC-01/09-02/11-875, paras 11 and 12.

¹³ KEN-OTP-0116-0503 at 0503.

¹⁴ KEN-OTP-0138-0513 at 0156.

¹⁵ KEN-OTP-0138-0513 at 0518.

Witness 11 emailed copies of this letter to members of the Defence and major Kenyan media outlets on 20 August 2013.¹⁶ The Prosecution prevented the publication of his letter.

9. On 4 December 2013, Witness 12, who was relied upon by the Pre-Trial Chamber in the Confirmation of Charges Decision, during an interview conducted by the Prosecution lawyers, admitted that the statements they had relied upon were false. Witness 12's lie concerned his presence at an alleged meeting on 30 December 2007 at State House at which he stated that Mr Kenyatta had handed out money to fund post-election violence.¹⁷ This meeting had been the foundation of the Prosecution's entire case.
10. On 20 December 2013, the Prosecution filed the December 2013 Adjournment Request, in which it stated that it had insufficient evidence to proceed to trial, and sought a three-month adjournment to allow it to undertake additional investigative steps and for the Chamber to adjudicate the Prosecution's application for a finding of non-compliance against the Government of Kenya.¹⁸
11. On 31 January 2014, the Prosecution filed 'Prosecution opposition to the Defence request for the termination of the Kenyatta case' ('January 2014 Adjournment Request'),¹⁹ in which it abandoned its previous request, conceding that its proposed investigations had 'not yielded evidence upon which the Prosecution intends to rely,'²⁰ and requested an

¹⁶ The Defence reported Witness 11's conduct to the Prosecution on 27 August 2014.

¹⁷ KEN-OTP-0123-0247 at 0265, line 651.

¹⁸ ICC-01/09-02/11-875, paras 17-19.

¹⁹ ICC-01/09-02/11-892.

²⁰ ICC-01/09-02/11-892, para. 9.

indefinite adjournment pending the determination of its application for a finding of non-compliance against the Government of Kenya.²¹

12. On 5 February 2014, the date previously fixed for trial, the Prosecution conceded during the Status Conference that it did not consider that any information requested has 'any reasonable prospect of leading to evidence which could in combination with the existing evidence persuade a court beyond doubt of Mr Kenyatta's guilt.'²² The Prosecution admitted that 'absent the financial records [...] the remaining stones unturned are better characterised as pebbles, and the realistic prospect that turning them will yield real potentially conclusive evidence is minimal.'²³
13. On 31 March 2014, in its 'Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for adjournment of the provisional trial date' ('March 2014 Adjournment Decision'),²⁴ the Chamber permitted 'a limited adjournment' of the trial date to 7 October 2014.²⁵ This adjournment was 'of fixed duration and for the specific purpose of providing an opportunity for compliance by the Kenyan Government with the outstanding cooperation request.'²⁶ The Chamber, noting that 'some of the difficulties described were foreseeable and do not justify the delay in investigations,' granted 'a strictly limited opportunity to pursue outstanding investigations at this stage.'²⁷ The Chamber found that 'an adjournment of limited duration, and for a clearly defined purpose which the Chamber considers

²¹ ICC-01/09-02/11-892, para. 29.

²² ICC-01/09-02/11-T-27-ENG, p. 3, lines 10-13.

²³ ICC-01/09-02/11-T-27-ENG, p. 12, lines 15-18.

²⁴ ICC-01/09-02/11-908.

²⁵ ICC-01/09-02/11-908, para. 2.

²⁶ ICC-01/09-02/11-908, para. 2.

²⁷ ICC-01/09-02/11-908, para. 95.

necessary in the interests of justice, would not be inconsistent with the rights of the accused.’²⁸

14. On 18 June 2014, in a letter contained in Annex C, the Accused, through the Defence, consented to the full disclosure of his financial records pertaining to the relevant post-election violence three-month period of December 2007 to February 2008. None of these records provided any evidence in support of the Prosecution case. The Defence advised the Chamber of this fact at the Status Conference held on 9 July 2014.²⁹
15. On 28 August 2014, the Chamber, noting ‘the importance of timely and efficient preparations,’ ordered the Prosecution to file a notice confirming whether it anticipates being in a position to start trial on the scheduled commencement date of 7 October 2014.³⁰
16. On 5 September 2014, the Prosecution duly filed the ‘Prosecution notice regarding the provisional trial date’ (‘September 2014 Adjournment Request’),³¹ in which it submitted that ‘the appropriate course of action is to further adjourn the case until such time as the GoK executes the Revised Request in full as required by the Chamber and in accordance with the Rome Statute.’³²

III. APPLICABLE LAW

17. Article 67 of the Statute guarantees Mr Kenyatta’s fundamental fair trial rights, including a final determination of the charges against him without undue delay.

²⁸ ICC-01/09-02/11-908, para. 97.

²⁹ ICC-01/09-02/11-T-30-ENG ET WT 09-07-2014, p. 22, lines 14-16, and p. 39, lines 4-6.

³⁰ ICC-01/09-02/11-939, para. 2 and disposition.

³¹ ICC-01/09-02/11-944.

³² ICC-01/09-02/11-944, para. 6.

IV. SUBMISSIONS

(i) Prosecution's Responsibility for the Failed Investigation

18. Mr Kenyatta's fundamental fair trial rights have been subordinated in the process of the Prosecution seeking to divert blame to the Government of Kenya for the failure of its case. By proclaiming insufficiency of evidence 'at the door of the court', yet seeking to prolong the proceedings indefinitely, the Prosecution has placed the Accused in a position not countenanced by the Statute, nor by any true conception of justice, namely that of an individual in respect of whom there is insufficient evidence to prosecute but who must nevertheless endure the stigma of criminal charges and subjection to a prolonged criminal process.
19. The Prosecution seeks to have the proceedings, against a man in respect of whom it has no credible case, adjourned *sine die*, even though the cause of the charges is known to be false. This is despite repeated Defence warnings to the Prosecution, the Pre-Trial Chamber and the Trial Chamber as to the falsity of the evidence that has been revealed, as well as other false aspects of the case. All of these warnings were unheeded. This attitude persists. The Accused's bank records, disclosed to satisfy the Prosecution's request to turn 'pebbles',³³ also defeated the last remaining and wholly speculative contention of the Prosecutor.
20. The Prosecution's misguided preconceptions regarding those responsible for the 2007-2008 post-election violence have tainted the manner and extent of its investigations from the outset, as demonstrated by (i) the evidence presented by the Prosecution at the confirmation of charges hearing which had not been robustly scrutinised before being

³³ See para. 12, *supra*.

relied upon;³⁴ and (ii) the contamination of the evidence collated thereafter by the Prosecution's reliance on the Pre-Trial Chamber's Decision on the Confirmation of Charges in its questioning of other witnesses.³⁵ These fundamental failures by the Prosecution to investigate in accordance with the requirements of the Statute, prevented the Prosecution from being aware of the severe evidential limitations of its own case at the earliest opportunity and from seeking assistance from the various relevant institutions several years previously.³⁶

21. In a manner unprecedented in pre-trial proceedings before the Court, the Defence informed the Prosecution, the Pre-Trial Chamber and the Trial Chamber clearly and repeatedly of its grave concerns in relation to the lack of veracity and the unreliability of Witnesses 4, 11 and 12.³⁷ Warnings were provided to the Prosecution before the commencement of the confirmation proceedings. More recently, notice has again been given of the lack of support for the Prosecution case in the disclosed December 2007 to February 2008 financial records of Mr Kenyatta. These records in fact undermine the Prosecution's case, showing that Mr Kenyatta was not involved in the post-election violence. The Defence submits that it is unfair that representations as to the quality of the evidence in this case have been consistently ignored and the case permitted to continue.
22. Notwithstanding the substantial additional time afforded to the Prosecution to conduct post-confirmation investigations, the Prosecution has failed to present any case against the Accused. The Prosecution's

³⁴ See, for example, with respect to Witness 4, ICC-01/09-02/11-878-Conf, para. 4, fn 8; with respect to Witness 11 and 12, see, for example, ICC-01/09-02/11-878-Conf, para. 20, fn 48 and ICC-01/09-02/11-878-Conf-AnxC, pp. 1-3.

³⁵ See, for example, KEN-OTP-0074-0903 at 0917, 0919. Previous Defence submissions regarding this are at ICC-01/09-02/11-903, para. 5.

³⁶ See, in particular, Article 54(1)(a).

³⁷ Particulars of the warnings provided by the Defence to the Prosecution were previously set out by the Defence at ICC-01/09-02/11-878-Conf-AnxB.

evidence has also been challenged on the basis that its major witnesses and a key intermediary had conspired to pervert the course of justice by providing false evidence and interfering with Defence witnesses.³⁸ This conduct included the capture of Defence witness statements by the intermediary.³⁹ It must also be noted this conduct was to be the subject of Article 70 investigations by the Office of the Prosecutor,⁴⁰ in respect of which not one of the Defence witnesses who were the subject of the alleged interference has ever been interviewed by the Office of the Prosecutor, an indication that this conduct has been wilfully ignored. The Defence submits, therefore, that it has serious concerns that the Office of the Prosecutor selectively investigates interferences with the course of justice and has not been prepared to reveal misconduct within its own case that threatens to expose its witnesses and intermediaries as having committed offences against the administration of justice.

23. To the extent that the Prosecution has failed to conduct its investigation and handle its witnesses appropriately in accordance with Article 54 of the Statute, the Prosecution is complicit and responsible for the presentation of a false case which is no longer capable of being bolstered or emboldened by evidence of bank records, telephone records, company records or any other category of information sought from the Government of Kenya.
24. Furthermore, the Defence submits that it is disingenuous of the Prosecution to claim that it has encountered insurmountable investigative difficulties in Kenya. The Prosecution has collected evidence, interviewed witnesses in Kenya, been involved in domestic court proceedings to secure the release of material from

³⁸ ICC-01/09-02/11-822.

³⁹ ICC-01/09-02/11-822, para. 44.

⁴⁰ ICC-01/09-02/11-848, paras 3 and 77.

telecommunications companies and been present at meetings with company officials.⁴¹ Senior members of the Prosecution have had discussions with key personnel in Kenya in order to secure evidence in this case. Appropriate avenues for evidence collection have been available since the outset, yet, despite the passage of five years, the Prosecution has failed to put in place an effective mechanism to collect the material it now demands from the Government of Kenya. Basic investigative steps by the Prosecution could have been taken at any time in these proceedings, preferably before the commencement of confirmation proceedings, including the making of appointments with individuals in positions of authority within various departments and corporations to gather information. The scope of the materials that the Prosecution has pursued from the outset demonstrates the wholly speculative nature of its endeavours that are being permitted to continue in violation of the Accused's fair trial rights.

25. After five years of fruitless investigations, the Prosecution must not be permitted to engage in a disingenuous referral of responsibility for the collection of broad categories of evidence to the Government of Kenya, having presented a false case against Mr Kenyatta. The Prosecution has been allowed to dictate the conduct of these proceedings to an unacceptable degree.
26. During this period, Mr Kenyatta has, in order to advance these proceedings: cooperated with the Court; voluntarily testified before the Pre-Trial Chamber; provided information of his bank records; and

⁴¹ On 10 July 2013, the Prosecution and Defence instructed a joint expert to liaise with telecommunications companies Safaricom and Airtel in Nairobi, meeting representatives from both telecommunications companies, both severally and together, and overseeing the extraction of the data by the expert in Nairobi. The Prosecution also expressed its formal support for confidential domestic litigation initiated by the Defence, which successfully applied for the expert to be permitted to extract telephone numbers and call data records for both parties; ICC-01/09-02/11-793-Conf, paras 7-11.

entered into a joint process with the Prosecution for the extraction of highly relevant telephone data. All of this demonstrated his innocence. The submission by Prosecution that the Accused, as President, should take responsibility for alleged failures by the Government of Kenya to comply with its international obligations is flawed and without merit. The practical and legal difficulties for the Government of Kenya in executing the Prosecution requests are matters for which the Accused is not responsible. All these matters are founded upon issues of Kenyan law. The Prosecution's refusal to comply with Kenyan legal procedure has frustrated this process. Any involvement by the Accused which resulted in exculpatory evidence would be criticised by the Prosecution and the Victims' Representative, unfairly, as interference in the process.

27. In this matter, the Prosecution has stated that it will seek referral of the Government of Kenya to the Assembly of States Parties for a finding of non-compliance.⁴² The Defence submits that in the event of a referral of this matter, the Assembly of States Parties would be no less than astonished by the conduct of the Prosecution in this case, the shoddiness of its investigations, its insistence on presenting a case based upon false and fabricated evidence and its untenable position of seeking an adjournment *sine die* after conceding it has insufficient evidence to prosecute Mr Kenyatta. Any such referral would not be limited to a narrow assessment of the Government of Kenya's conduct *in abstracto*.

(ii) Violation of the Rights of the Accused

28. In granting the Prosecution's January 2014 Adjournment Request, the Chamber permitted 'a strictly limited opportunity to pursue outstanding investigations at this stage.'⁴³ The Defence observes that in granting the

⁴² ICC-01/09-02/11-940-Conf-AnxD.

⁴³ ICC-01/09-02/11-908, para. 95.

Prosecution an adjournment of eight months, the Chamber has already provided a generous opportunity for the Prosecution to pursue lines of investigation that have been open since the commencement of the proceedings against the Accused. The Chamber did not countenance an open-ended adjournment reliant on the conclusion of such lines of investigation.

29. The Defence submits that the granting of the Prosecution's request for an adjournment *sine die* at this stage in the proceedings would violate the fair trial rights of Mr Kenyatta to be either tried without undue delay or to have the current case against him terminated on the basis of a highly significant concession of insufficient Prosecution evidence.⁴⁴
30. At this stage in the proceedings, the Defence submits that the Prosecution's inadequately reasoned application for an adjournment should be rejected by the Chamber on the basis of: (i) its obligation to uphold Mr Kenyatta's fair trial rights pursuant to Article 67 of the Statute; (ii) the amount of time afforded to the Prosecution to date to conduct its investigations since the commencement of these proceedings; (iii) substantial evidence of the dilatory manner in which the Prosecution has collected and assessed its evidence from before the confirmation proceedings;⁴⁵ (iv) the inadequacy of the efforts made from the outset by the Prosecution to secure evidence from the Government of Kenya;⁴⁶ (v) voluntary disclosure made by the Defence; and (vi) the

⁴⁴ The most recent September 2014 admission that the Prosecution's evidence is insufficient to prove Mr Kenyatta's guilt was a restatement of its position as at 19 December 2013, ICC-01/09-02/11-944, para. 2.

⁴⁵ See, for example, ICC-01/09-02/11-728, paras 94, 112, 118. With respect to Witness 11 and 12, see, for example, ICC-01/09-02/11-878-Conf, para. 20, fn 48 and ICC-01/09-02/11-878-Conf-AnxC, pp. 1-3.

⁴⁶ ICC-01/09-02/11-908, para. 5; ICC-01/09-02/11-937, para. 33.

reasonableness of the Government of Kenya's submissions concerning its limited ability to fulfil the requests made for disclosure.⁴⁷

31. Given these unique circumstances any granting of the Prosecution's application to adjourn *sine die* would violate the right of the Accused to a final determination on these charges without undue delay.

(iii) Unfairness to the Accused caused by the Conduct of the Victims' Representative

32. The continuation of the current proceedings without evidential basis has also resulted in unfairness to the Accused emanating from the conduct of the Victims' Representative.
33. The Victims' Representative's unfair and potentially harmful public comments and accusations are unacceptable and do not properly represent the best interests of the victims.⁴⁸ He has commented on matters to which he is not party, repeatedly making grave and unfounded accusations against Mr Kenyatta, which in fact demonstrate his fundamental lack of understanding of the evidence in the case.⁴⁹ The Prosecution has stated repeatedly that there is insufficient evidence against Mr Kenyatta to proceed to trial, and the key evidence relied upon by the Pre-Trial Chamber in confirming the charges is now known to be false. Further, as noted by the Chamber, no evidence has been provided to substantiate the extremely serious allegation that Mr Kenyatta is in any way responsible for alleged interference with the collection of evidence or alleged non-compliance on the part of the

⁴⁷ ICC-01/09-02/11-934-Conf-Red.

⁴⁸ See, for example: ICC-01/09-02/11-T-27-ENG ET WT 05-02-2014, p. 19, lines 12-24; ICC-01/09-02/11-T-30-ENG ET WT 09-07-2014, p. 32, lines 19-25 to p. 33, lines 1-5; "Don't end Uhuru's ICC case – victims", *The Star*, 20 August 2014, available at: <http://www.the-star.co.ke/news/article-185549/dont-end-uhurus-icc-case-victims>; Letter to the UN Security Council, dated 3 November 2013, para. 22.

⁴⁹ See, for example: ICC-01/09-02/11-T-27-ENG ET WT 05-02-2014, p. 19, lines 17-20.

Government of Kenya.⁵⁰ On the contrary, Mr Kenyatta has cooperated with the Court, given evidence at the confirmation proceedings, provided voluntary disclosure and appeared at the seat of the Court on every occasion he has been required to do so.

34. Mr Kenyatta is presumed innocent. As an officer of the Court, the Victims' Representative is under an obligation to respect this presumption. The Victims' Representative is recklessly and illegitimately raising the expectations of those he represents, whose 'central interest in the search for truth can only be satisfied if: (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue.'⁵¹ It is not helpful for the victims, the Court, or the proper administration of justice, for the Victims' Representative to continue to be permitted to make unsupported allegations.
35. The Victims' Representative has also argued that the Accused has 'knowingly waived his right to an expeditious trial.'⁵² The Defence submits that the Victims' Representative should be reminded that each of the adjournments to the commencement of this trial have been precipitated or necessitated by the conduct of the Prosecution.⁵³ As stated by the Chamber, 'the Defence has a right to see appropriate procedural remedies [...] necessitated by untimely disclosure on the part of the Prosecution.'⁵⁴

⁵⁰ ICC-01/09-02/11-908, para. 86.

⁵¹ The Prosecutor v. Katanga and Ngudjolo Chui, '*Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case*,' ICC-01/04-01/07-474, para. 36.

⁵² ICC-01/09-02/11-T-30-ENG ET WT 09-07-2014, p. 45, lines 17-24.

⁵³ ICC-01/09-02/11-677; ICC-01/09-02/11-763; ICC-01/09-02/11-847; ICC-01/09-02/11-875; and ICC-01/09-02/11-892.

⁵⁴ ICC-01/09-02/11-908, para. 85.

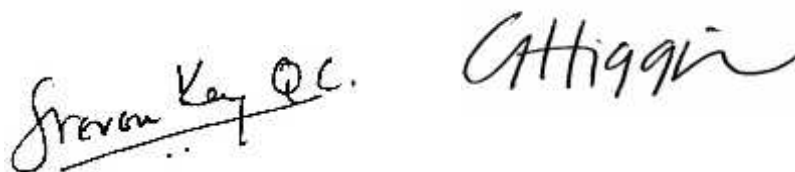
Conclusion

36. In view of the foregoing, the Defence submits that the Chamber is now in a position to make a final decision on the charges. In this regard, the Defence refers the Chamber to its previous submissions on this issue.⁵⁵

V. RELIEF

37. For the reasons set out herein, the Defence respectfully requests the Chamber to deny the Prosecution's request for a further adjournment, terminate the proceedings, and issue a final determination of the charges against Mr Kenyatta.

Respectfully submitted,



.....
Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 10th day of September 2014

At London, England

⁵⁵ ICC-01/09-02/11-903.