

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 18 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

Decision on the withdrawal of charges against Mr Muthaura

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

The Office of the Prosecutor

Ms Fatou Bensouda
Ms Adesola Adeboyejo

Counsel for Francis Kirimi Muthaura

Mr Karim A. Khan, Mr Essa Faal, Mr
Kennedy Ogetto, Ms Shyamala
Alagenda

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**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*, pursuant to Articles 64(2) of the Rome Statute (“Statute”), Rule 134(1) of the Rules of Procedure and Evidence (“Rules”) and Regulations 23 *bis* and 42 of the Regulations of the Court (“Regulations”), issues the following Decision on the withdrawal of charges against Mr Muthaura (“Decision”).

I. Procedural history and submissions

1. On 23 January 2012, Pre-Trial Chamber II confirmed the charges against Mr Muthaura and Mr Kenyatta (“Confirmation Decision”).¹
2. On 29 March 2012, the Presidency referred the case against Mr Muthaura and Mr Kenyatta to the Chamber.²
3. On 5 and 7 February 2013, the defence for Mr Kenyatta (“Kenyatta Defence”) and the defence for Mr Muthaura (“Muthaura Defence”; together, “Defence”) respectively filed applications requesting the Chamber to refer the question of the validity of the Confirmation Decision, which they characterised as a preliminary issue, to the Pre-Trial Chamber for reconsideration, pursuant to Article 64(4) of the Statute (“Article 64(4) Applications”).³

¹ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red.

² Decision referring the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V, ICC-01/09-02/11-414.

³ 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; and 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.

4. Subsequently, the Defence and the Office of the Prosecutor (“Prosecution”) filed several additional filings pertaining to the Article 64(4) Applications.⁴
5. On 5 March 2013, the Chamber issued an order convening a status conference for 11 March 2013 in order to receive additional information and clarification on certain issues arising out of the aforementioned filings.⁵
6. On 11 March 2013, during the status conference, the Prosecution announced its decision to withdraw the charges against Mr Muthaura and its notification to that effect; having previously alerted the Chamber to that turn of events that morning in an informal communication.⁶ On the same day, the “Prosecution notification of

⁴ Addendum to ICC-01/09-02/11-628-Conf and ICC-01/09-02/11-628-Conf-AnxA, 20 February 2013 (ICC-01/09-02/11); 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 A1, 20 February 2013 (ICC-01/09-02/11-655); 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); 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); 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); Defence Reply to 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, 7 March 2013, ICC-01/09-02/11-678-Conf; Defence 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”, 8 March 2013, ICC-01/09-02/11-681-Conf; Defence Observations on Article 64(4) and 61(11) of the Rome Statute Pursuant to the “Order Scheduling a Status Conference”, 8 March 2013, ICC-01/09-02/11-682; Additional Prosecution observations on the Defence’s Article 64 applications, filed in accordance with order number ICC-01/09-02-11-67, 8 March 2013, ICC-01/09-02/11-683-Conf; Corrigendum of “Defence Submissions on Article 61(11) and Article 64(4) of the Rome Statute in Accordance with the Trial Chamber’s Order scheduling a status conference and agenda, dated 5 March 2013”, 8 March 2013, ICC-01/09-02/11-684-Corr.

⁵ Order scheduling a status conference and agenda, ICC-01/09-02/11-673.

⁶ ICC-01/09-02/11-T-23ENG ET, page 3, line 10 – 5, line 24.

withdrawal of the charges against Francis Kirimi Muthaura”⁷ (“Notification”) was filed.

7. In the Notification, the Prosecution submits that it is within the Prosecution’s discretion to withdraw the charges and that it is not necessary for the Chamber to grant the Prosecution leave to do so, because the trial has not yet commenced for the purposes of Article 61(9) of the Statute.⁸ Alternatively, the Prosecution submits that if the Chamber is of the view that leave should be granted, the fact that there is insufficient evidence to establish a conviction would warrant the granting of the leave.⁹
8. The Muthaura Defence and the Common Legal Representative for Victims both responded orally, during the status conference, to the Prosecution’s submission that it is within its discretion to withdraw the charges. The Muthaura Defence primarily argued that, following the withdrawal of charges, the case against Mr Muthaura should end as soon as possible.¹⁰ It submitted that the Prosecution has the discretion, at this stage of the proceedings, to withdraw the charges without leave of the Chamber as the trial has not yet commenced for the purposes of Article 61(9) of the Statute.¹¹ It referred to two cases at the Special Panel for Serious Crimes (East Timor), which it submits operates under the same procedural rules as applicable at the Court, where the Prosecutor withdrew the charges at a similar stage of proceedings without seeking leave of the judges.¹² As an alternative submission, the Muthaura

⁷ ICC-01/09-02/11-687.

⁸ ICC-01/09-02/11-687, para. 7.

⁹ ICC-01/09-02/11-687, para. 8.

¹⁰ ICC-01/09-02/11-T-23-ENG ET, page 10, line 10 – 18.

¹¹ ICC-01/09-02/11-T-23-ENG ET, page 12, line 7 – page 13, line 3.

¹² ICC-01/09-02/11-T-23-ENG ET, page 12, line 7 – page 13, line 3.

Defence argued that, in the event the Chamber considers leave is required, such leave should be expeditiously granted.¹³

9. The Common Legal Representative for Victims submitted that any withdrawal of charges requires approval by the Chamber.¹⁴ Additionally, he submitted that if the Chamber were to immediately dismiss the charges against Mr Muthaura it should be without prejudice to the right of the Prosecution to bring charges in the future, should circumstances change.¹⁵

II. Analysis and conclusions

10. Article 61(4) of the Statute provides that the Prosecution may “amend or withdraw” any charges before the confirmation hearing, upon reasonable notice to the suspect and, in the case of withdrawal, notification to the Pre-Trial of the reasons. Article 61(9) of the Statute provides that after the confirmation of the charges, but before the trial has commenced, the Prosecution may amend the charges with the permission of the Pre-Trial Chamber. It also clearly provides that, after the trial has commenced, the Prosecution may withdraw the charges with the permission of the Trial Chamber. The provision does not squarely address the situation which is now before the Chamber where charges are withdrawn after the confirmation decision but before commencement of the trial.¹⁶

¹³ ICC-01/09-02/11-T-23-ENG ET, page 22, line 18 – page 23, line 3.

¹⁴ ICC-01/09-02/11-T-23-ENG ET, page 21, line 17 – page 22, line 9.

¹⁵ ICC-01/09-02/11-T-23-ENG ET, page 25, line 25 – page 26, line 6.

¹⁶ On this point, the Chamber endorses the interpretation of Trial Chamber I in the *Lubanga* case that the reference to commencement of trial in Article 61(9) refers to the “true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses.” *Prosecutor v Thomas Lubanga Dyilo*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, para. 39 (citations omitted).

11. In the present case, the Prosecution has submitted that current evidence does not support the charges against Mr Muthaura and that it has no reasonable prospect of securing evidence that could sustain proof beyond reasonable doubt. Significantly, the Muthaura Defence does not contest the Prosecution's withdrawal. In these circumstances, the Chamber, acting pursuant to Article 64(2) of the Statute, considers that the withdrawal of the charges against Mr Muthaura may be granted.
12. The Chamber notes that by its decision of 8 March 2011, Pre-Trial Chamber II summoned Mr Muthaura to appear before the Court and it put certain conditions in place ("Decision on Summonses to Appear"),¹⁷ which have remained in effect throughout the proceedings. Upon termination of the case against Mr Muthaura, the conditions imposed on Mr Muthaura in the Decision on Summonses to Appear will cease to have effect. The Chamber reminds Mr Muthaura, however, that pursuant to Regulation 42 of the Regulations "protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect [...] after the proceedings have been concluded", and that the Court has jurisdiction over intentional acts of interference with witnesses.¹⁸ Similarly, pursuant to Regulation 23 *bis* of the Regulations, the classification of documents as "*ex parte*" or "confidential" remains in place until otherwise ordered by this Chamber.
13. The termination of the case against Mr Muthaura also renders moot all pending requests or applications by the Muthaura Defence before this

¹⁷ 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, pp 23-24.

¹⁸ Article 70 of the Statute.

Chamber or any other chamber of the Court. The Chamber has identified four such requests made by the Muthaura Defence alone.¹⁹

For the foregoing reasons, the Chamber, by majority, Judge Kuniko Ozaki partially dissenting, hereby:

GRANTS permission to the Prosecution to withdraw the charges against Mr Muthaura;

TERMINATES the proceedings against Mr Muthaura;

VACATES the Summons to Appear in respect of Mr Muthaura;

DECLARES moot all outstanding requests by the Muthaura Defence as specified in paragraph 13;

ORDERS the Registrar to notify the Republic of Kenya of the termination of proceedings against Mr Muthaura;

ORDERS, at this juncture, that all confidential filings by the Muthaura Defence and other confidential filings pertaining to Mr Muthaura alone, remain confidential; and

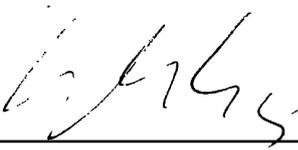
ORDERS all parties and participants, as well as the Registry, to remove "Francis Kirimi Muthaura" from the case name for all subsequent filings.

¹⁹ Defence Request to the Judges to consider to excuse themselves, 12 December 2012, ICC-01/09-02/11-565; Defence Request that the Prosecution Pre-Trial Brief Remain Confidential until the Commencement of Trial, 20 January 2013, ICC-01/09-02/11-605-Conf; Application for Sanctions, 1 February 2013, ICC-01/09-02/11-617-Conf-Exp; 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), 7 February 2013, ICC-01/09-02/11-628-Conf.

Judge Kuniko Ozaki appends a partially dissenting opinion.

Judge Chile Eboe-Osuji appends a concurring opinion.

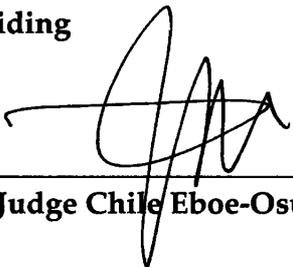
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 18 March 2013

At The Hague, The Netherlands