

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 28 May 2012

TRIAL CHAMBER V

Before:

**Judge Kuniko Ozaki, Presiding
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

**Defence for Uhuru Muigai Kenyatta Submissions on Status Conference Agenda
In Response to Trial Chamber Order dated 14 May 2012 (ICC-01/09-02/11-422)**

Source: Defence for Uhuru Muigai Kenyatta

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirmi Muthaura
Karim A. A. Khan QC, Essa Faal,
Kennedy Ogetto & Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Legal Representatives of the Victims

Mr. Morris Anyah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 23 January 2012, Pre-Trial Chamber II issued its decision (“Confirmation Decision”) confirming for trial those charges set out therein against Ambassador Muthaura and Mr. Uhuru Muigai Kenyatta.¹
2. On 29 March 2012, the full record of proceedings before Pre-Trial Chamber II was transmitted to Trial Chamber V, including the Confirmation Decision.² Judge Kuniko Ozaki was appointed as the Presiding Judge for the trial proceedings on 26 April 2012.³
3. On 14 May 2012, the Trial Chamber issued “Order Scheduling a Status Conference”, including an agenda and instructed the parties to make written submissions on the issues arising by 28 May 2012.⁴

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.

² *The Prosecutor v. Francis Kirihi Muthaura and Uhuru Muigai Kenyatta*, “Decision Referring the Case of *The Prosecutor v. Francis Kirihi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V”, 29 March 2012, ICC-01/09-02/11-414.

³ ICC-01/09-02/11-420.

⁴ ICC-01/09-02/11-422.

II. Submissions on behalf of Uhuru Muigai Kenyatta

A. Date of Trial

4. The Defence has not at this stage received notification of all the evidence to be used by the Prosecution in the proceedings, nor the identities of the witnesses it intends to rely upon. Significant and large scale redactions exist within statements and transcripts of interviews which were relied upon by the Prosecution in the confirmation of charges proceedings that prevent the Defence from comprehensively analysing aspects of the evidence. The Defence needs to be able to investigate these redacted passages as there is a clear challenge to the reliability and integrity of certain witnesses relied upon by the Prosecution. In such circumstances, the Defence is unable to carry out proper pre-trial investigations and unable to provide an estimate of the date of readiness for trial. At confirmation, the Prosecution served its most significant evidence at a very late stage in the proceedings, 30 days before the commencement of the hearing, giving the Defence only 15 days to respond. The Prosecution's conduct resulted in unfairness to the Defence in the confirmation proceedings, which the Defence seeks to avoid in the future conduct of this case.

B. Languages in the Proceedings

5. At this stage, the Defence does not know the identities of all witnesses to be called. It is anticipated that the languages of English, Kiswahili and Kikuyu will be used during the proceedings.

C. Anticipated Length of Time for Presentation of Evidence

6. At this stage, by reason of the matters raised in paragraph 4 above, the Defence is unable to predict the length of time needed for the presentation of its case. Substantial investigations will take place as the proceedings are to be fully contested.

D. Rule 76 Disclosure

7. The Defence submits that Rule 76 disclosure of the names of witnesses must take place as soon as possible in order to allow the Defence adequate time to prepare for trial. A regime that allows the Prosecution to delay and brings pressure upon the Court to fulfill a date that has been predetermined is not in the interests of justice. Any decision made by the Prosecution to add additional witnesses should not be permitted at a late stage, as such conduct may prevent the Defence from adequate preparations. The Defence is concerned that the history of the pre-trial proceedings will be repeated to its disadvantage.

E. Article 67(2) and Rule 77 Materials

8. The Defence is concerned to ensure the early provision of all exculpatory materials under Article 67(2) and the materials from its investigations into the accounts of Prosecution witnesses 4, 11 and 12.
9. The Defence requests early provision of a list of materials available for inspection under Rule 77.

F. Issues concerning Confidentiality under Article 54(3)(e)

10. This is a matter for the Prosecution.

G. Witness Protection Issues

11. This is a matter for the Prosecution. However, the issue of the identity of witnesses and redactions is an important matter for the Defence. This procedure must not be employed so as to prevent unfairly the Defence from being able to challenge the Prosecution case. The experience of the Defence at the pre-trial stage was that the procedure used prevented the Defence from having adequate time to investigate and challenge key witnesses, whose reliability and credibility was evidently an issue.⁵

H. Defences under Rules 79 and 80

12. The Defence has already submitted evidence of alibi under Rule 79(1)(a). Further evidence relied upon will be supplied in accordance with the Rules.
13. The Defence does not anticipate any issue arising under Rule 80.

I. Expert Witnesses

14. The Defence anticipates the calling of expert witnesses as part of its case. The Defence is unaware of any expert witnesses to be relied upon by the Prosecution.

⁵ Witnesses 4, 11 and 12.

J. Agreement as to Evidence Pursuant to Rule 69

15. The Defence suggests that the Prosecution produce an initial schedule of matters of common knowledge for consideration. It is submitted that further matters will arise during the proceedings.

K. Time Limit for Submissions of Applications for Victim Participation

16. The Defence requests that the time limit for the submission of applications for victim participation be set significantly in advance of the commencement of trial in order to accord the Defence sufficient time to review and investigate each application.

L. E-court Protocol

17. In order to comply with its obligations under the E-Court Protocol (the “Protocol”), and in accordance with Rule 20(1)(e) of the Rules of Procedure and Evidence, the Defence requests that it be provided with adequate facilities in order to prepare its evidence.⁶ In terms of the Defence’s duty to import and export evidence in accordance with the Protocol, the Defence requests that it is provided with an office equipped with the necessary software and hardware, including the following:

- i. PC connected to the ICC network with access to Defence network drive and ‘images’ folder;
- ii. Ringtail Import/Export Manager software;
- iii. Simple Stamp software;

⁶ Under Rule 20(1)(e), the Registry shall “[p]rovide the defence with such facilities as may be necessary for the direct performance of the duty of the defence.”

- iv. Video and audio conversion software to convert files to Windows Media Video and Windows Media Audio format;
 - v. Adobe Acrobat Professional software; and
 - vi. Any other unforeseen software or hardware necessary to adhere properly to the Protocol.
18. Under paragraph 15 of the Protocol, potential evidence must be provided, *inter alia*, in Optical Character Recognition (“OCR”) format.⁷ During its preparation for the Confirmation Hearing, the Defence experienced technical difficulties with the Simple Stamp software provided by the Court for the conversion, stamping and OCR of evidence.⁸ The Defence seeks confirmation that the Simple Stamp software is fully functional and will now stamp, convert and carry out OCR on all further evidence.

M. Objections or Observations arising from Pending Proceedings

19. This is no longer an issue.

N. Legal Re-characterisation of Facts under Regulation 55

20. The Defence does not have any observations to make on this issue but reserves the right to respond to submissions of the Prosecutor or the Legal Representative, as necessary.

⁷ ICC-01/09-02/11-48-Anx1, para 15.

⁸ The Defence experienced problems with the Simple Stamp software’s creation of OCR text files. The programme would only scan the first page of a document, which meant that team members had to separately scan each document to create an OCR text file.

O. Site Visit

21. The Defence submits that a visit to key sites before the proceedings commence will assist the Trial Chamber to decide upon important issues in the case.

P. Protocol for Protected Witnesses

22. The Defence has no representations, save that it is concerned to ensure that any regime does not prevent it from reasonable, proper and responsible investigations.

Q. Further Matters

(i) Amended DCC, Summary and Analysis Chart

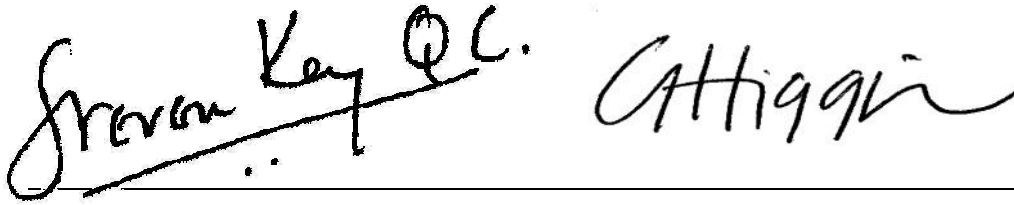
23. The Defence requests the Prosecution to submit an amended Document Containing Charges, Summary of Presentation of Evidence and In-depth Analysis Chart. This matter arises because of the Pre-Trial Chamber's decision on the confirmation of charges that rejected the case against the co-accused General Ali, which has altered fundamentally the nature of the allegations in the trial. The Defence for Uhuru Kenyatta is entitled to be informed of the evidence to be relied upon in the trial proceedings as presently confirmed.

(ii) Trial Venue

24. The Defence requests the trial to be held in Kenya for reasons of judicial economy and to ensure that the judicial process takes place within the

territory affected. The Rome Statute provides that the Court may sit elsewhere, whenever it considers it desirable to do so.⁹

Respectfully submitted,

The image shows two handwritten signatures in black ink. The first signature, on the left, is 'Steven Kay QC.' and is written over a horizontal line. The second signature, on the right, is 'Gilligan' (likely Gillian Higgins) and is written above a horizontal line.

Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 28 May 2012

London, England

⁹ Article 3(3).