



Original: **English**

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

Date: **18 June 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 Response on behalf of Uhuru Kenyatta to the “Defence Application for
(1) An Order prohibiting the Prosecution from contacting potential Defence
witnesses without following the procedural safeguards stipulated in other cases
before the ICC and (2) An Order to the Prosecution to disclose information on all
contacts between the Prosecution and potential Defence witnesses” (ICC-01/09-
02/11-433-Corr)**

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
Ms. Fatou Bensouda, 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 Pereira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta (the “Kenyatta Defence”) responds to the Defence for Francis Kirimi Muthaura’s (the “Muthaura Defence”) “Application for (1) An Order prohibiting the Prosecution from contacting potential Defence witnesses without following the procedural safeguards stipulated in other cases before the ICC and (2) An Order to the Prosecution to disclose information on all contacts between the Prosecution and potential Defence witnesses” (the “motion”), with confidential and ex-parte Annex A and confidential Annexes B and C.¹

2. The motion filed arises from the revelation during Trial Chamber V’s (the “Chamber”) first Status Conference on 12 June 2012² that the Prosecution had been in contact with at least one of the Muthaura Defence’s witnesses, without following the accepted protocol of the International Criminal Court (the “ICC”) in relation to contacting witnesses of another party or participant in the proceedings.³ As a result, the Chamber ordered the parties and the legal representative of the victims to consult with the Registry in order to produce a workable protocol regulating contacts with the witnesses of opposing parties and the communication of non-public information to the public.⁴

3. The Kenyatta Defence has followed Pre-Trial Chamber II’s Decisions of 4 April 2011⁵ and 12 May 2011,⁶ in relation to their investigations and understood that the jurisprudence of the ICC relating to contact with witnesses applied to all parties, including the Prosecution.

¹ ICC-01/09-02/11-433-Corr.

² ICC-01/09-02/11-T-18-ENG.

³ ICC-01/04-01/06-1372, paras 11, 14.

⁴ ICC-01/09-02/11-T-18-ENG, p. 59, lines 14-20.

⁵ ICC-01/09-02/11-38.

⁶ ICC-01/09-02/11-89.

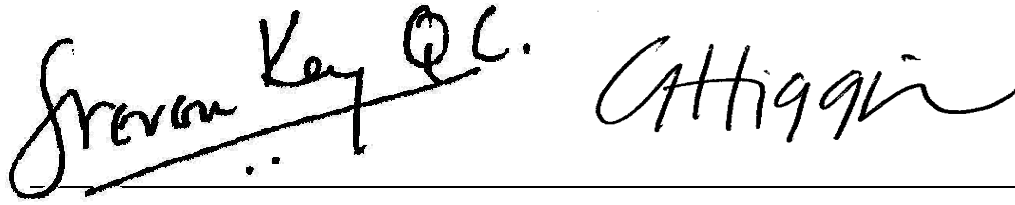
II. SUBMISSIONS

4. The Kenyatta Defence adopts the submissions set out in the Muthaura Defence's motion at paragraphs 3-36, in so far as it deals with the general issue of restraining the Prosecution from contacting the witnesses of a party or a participant in the proceedings until the Chamber has established an appropriate protocol.

III. RELIEF

5. The Defence hereby respectfully requests the Chamber to immediately:
 - (i) Issue an order prohibiting the Prosecution from contacting through direct or indirect means 'potential Defence witnesses', as that phrase is defined at paragraph 32 of the motion;
 - (ii) Order the Prosecution to disclose to the Defence a log of all direct and indirect (such as through third parties) contacts and attempted contacts between the Prosecution and potential Defence witnesses, as well as all items that record, summarise or otherwise reference the contents of any and all communications the Prosecution or persons affiliated with the Prosecution (such as intermediaries) may have had with potential Defence witnesses.

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'.

Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 18 June 2012

London, England