

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 31 January 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

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

Public, with confidential, *ex parte*, Annexes A, B, C and D

**Public Redacted Version of the 22 January 2013 "Prosecution's Request to Amend the
Final Updated Document Containing the Charges Pursuant to Article 61(9) of the
Statute"**

Source: Office of the Prosecutor

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

Court to:

The Office of the Prosecutor

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Other

1. Pursuant to Article 61(9) of the Rome Statute (“the Statute”) and Rule 128 of the Rules of Procedure and Evidence (“the Rules”), the Prosecution proffers evidence obtained since the confirmation hearing and, based on that evidence, seeks the Pre-Trial Chamber’s permission to re-insert a factual allegation, that the Pre-Trial Chamber previously denied as lacking adequate factual support. The factual allegation is that “victims were also killed by gunshot” in Naivasha. It was originally previously cited in the Count of Murder as a Crime against Humanity (Count 1). As this Chamber declined to find sufficient proof that victims were killed by gunshot in Naivasha, the Trial Chamber has determined that it cannot be included in the charges to be levied against the Accused at trial. The Prosecution accordingly makes this request in order that it can include the allegation in the Document Containing the Charges (“DCC”), to provide notice to the Defence and to enable it to lead this evidence at trial.
2. On 23 January 2012, Pre-Trial Chamber II issued its “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”,¹ whereby it confirmed, *inter alia*, the charge of murder constituting a crime against humanity.
3. The Chamber found that the evidence established “substantial grounds to believe that the Mungiki attackers killed civilians as part of the attack on the perceived ODM supporters [...] on 27 and 28 January 2008 in or around Naivasha”.² It did not, however, “find sufficient evidence to substantiate the Prosecutor’s allegation that weapons and uniforms were used in Naivasha”.³

¹ ICC-01/09-02/11-382-Red.

² *Ibid.*, para. 233.

³ *Ibid.*, para 174.

4. In its “Decision on the content of the updated document containing the charges”,⁴ Trial Chamber V directed the Prosecution to modify the Updated Document Containing the Charges and Modified Charges Section⁵ to withdraw, in particular, the factual allegation in Count 1 that “6 victims were killed by gunshots” in or around Naivasha.⁶ The order directing that this allegation be withdrawn was based on the Pre-Trial Chamber’s finding that the allegation had been insufficiently established.
5. On 7 January 2013, the Prosecution submitted the Final Updated Document Containing the Charges (“the Final Updated DCC”),⁷ as modified in accordance with the Chamber’s Decision. It no longer contains the specific allegation that guns were used to commit murders in Naivasha.
6. Since the Confirmation Hearing, the Prosecution obtained evidence from several witnesses – P-0493, P-0494, P-0506 and P-0510 – that the Network supplied and used guns in murders of perceived ODM supporters in Naivasha. The relevant evidence is annexed to this application in confidential Annexes A through D.
7. In his interview, Witness P-0506 states that he was given automatic weapons together with ammunition and was instructed to attack Luos in Naivasha.⁸ He admitted that he personally shot and killed two men in [REDACTED].⁹ P-0506 also saw persons within his group kill 15 to 20 men using their automatic weapons.¹⁰ Witness P-0493 stated that a group of 30 or 35 Mungiki members came to Naivasha with the aim of attacking Luos, armed with three sacks containing automatic

⁴ ICC-01/09-02/11-584.

⁵ ICC-01/09-02/11-584-Anx.

⁶ ICC-01/09-02/11-584, paragraph 75.

⁷ ICC-01/09-02/11-591; ICC-01/09-02/11-591-Conf-AnxA.

⁸ P-0506, KEN-OTP-0091-0574, at 0594-0595, KEN-OTP-0091-0778, at 0788-0790.

⁹ P-0506, KEN-OTP-0091-0717, at 0726-0731 and 0746.

¹⁰ P-0506, KEN-OTP-0091-0717, at 0746.

weapons.¹¹ [REDACTED] P-0510 saw six other men shot and killed¹² and described another incident where Mungiki attackers fired automatic weapons and killed three Luo men, who were handcuffed at the time.¹³

8. Accordingly, pursuant to Article 61(9) of the Statute and Rule 128 of the Rules, the Prosecution hereby requests the Pre-Trial Chamber's permission to amend DCC to include the allegation that victims were killed by gunshots in Naivasha in the Count of Murder as a Crime against Humanity (Count 1).
9. Article 61(9) of the Statute provides that "[a]fter the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges". It further specifies that "[i]f the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held". This implies that when the proposed amendment does not involve any such additional charge or more serious charge, a hearing is not required.
10. In the Prosecution's submission the proposed amendment of the Final Updated DCC does not involve the addition of charges or the substitution of more serious charges.¹⁴ To the contrary, the proposed amendment is merely the re-insertion of one specific underlying factual allegation in relation to one crime site (Naivasha) for the existing and already-confirmed charge of murder. Neither the legal characterisation of the facts -- that they committed murder constituting a crime against humanity -- nor the

¹¹ P-0493, KEN-OTP-0088-0033, at 0047-0048; P-0510, KEN-OTP-0088-0033, at 0048-0049 and 0054-0055.

¹² P-0510, KEN-OTP-0088-0070, at 0078-0083; KEN-OTP-0088-0084, at 0085-0086.

¹³ P-0493, KEN-OTP-0090-0443, at 0458-0459.

¹⁴ See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges", 20 July 2010, ICC-01/05-01/08-836, para. 215, The Trial Chamber found that the Pre-Trial Chamber in the case had rejected a specific factual allegation of the Prosecution, but added: "Whether it is permissible for the prosecution to introduce additional evidence to support the existing factual allegations will be resolved on a case-by-case basis, as necessary."

Prosecution's main factual allegation – that Mungiki and Pro-PNU youth attacked and killed perceived ODM supporters in and around Naivasha between 27 and 29 January 2008 – would thus be affected by this modification. For these reasons, a hearing in the sense envisaged in Article 61(9) is not required.

11. If leave is granted, the Prosecution proposes to add the following sentence to paragraph 71 and Count 1 – Naivasha of the Final Updated DCC: "*victims were also killed by gunshots*". Thus, paragraph 71 will read (with the proposed addition underlined and in italics) as follows:

71. As of 31 January 2008, at least 50 people were killed during the PEV in Naivasha, including at least 39 civilians perceived to be ODM supporters, some of whom were women and children. Twenty-three victims, including 13 children, were burnt to death, and 16 were killed by crude weapons, mostly machetes, but also local clubs called *rungus*, pieces of metal and spiked clubs. *Victims were also killed by gunshot.* Another 53 people were injured during the attacks, including 37 injured by sharp pointed objects. Four cases of forcible circumcision were reported. One woman in particular was gang raped by five men. It is suggested that many other cases of rape went unreported due to the trauma caused by such crimes and societal stigma.

12. Count One will read (with the proposed addition underlined and in italics) as follows:

From on or about 27 January to 28 January 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed, jointly with each other and through members of the Mungiki group and other pro-PNU youth, the crime against humanity of the murder of civilians perceived to be supporters of the Orange Democratic Movement political party in or around Naivasha town

(Naivasha District, Rift Valley Province), Republic of Kenya. The Mungiki and pro-PNU youth targeted and killed perceived ODM supporters by conducting door to door searches, burning several perceived ODM supporters to death and chasing others down before hacking them to death with machetes and clubs. From on or about 27 January to 28 January 2008 at least 50 people had been killed during the PEV in Naivasha, a majority of whom were perceived ODM supporters. Twenty-three victims, including 13 children, were burnt to death and 16 by crude weapons. Victims were also killed by gunshots. FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed the murder of civilians in or around Naivasha as indirect co-perpetrators, in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute.



Fatou Bensouda,
Prosecutor

Dated this 31st day of January 2013
At The Hague, The Netherlands