

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **20 February 2013**

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***

**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 and Public Annex B**

Sources: 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

Fatou Bensouda
Adesola Adeboyejo

Counsel for Francis Kirimi Muthaura

Karim A. A. Khan QC, Essa M. Faal,
Kennedy Ogetto & Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC & Gillian Higgins

Legal Representatives of the Victims

Fergal Gaynor

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

Silvana Arbia

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta (“Defence”) hereby submits its written observations on the impact of the Prosecution’s investigations and disclosure on the ability of the Defence to prepare for trial, which is due to commence on 11 April 2013. These observations are provided pursuant to the invitation of Her Honour Judge Ozaki at the Status Conference on 14 February 2013.

II. PROCEDURAL HISTORY

2. On 12 June 2012, the Defence attended a Status Conference (“June 2012 Status Conference”).¹
3. On 9 January 2013, the Prosecution submitted its Pre-Trial Brief.²
4. On 14 February 2013, the Defence attended a further Status Conference (“February 2013 Status Conference”).³ During this Status Conference, the Chamber invited the Defence to file written submissions pertaining to the impact of the Prosecution’s investigations and disclosure on the ability of the Defence to prepare for trial.

III. CONFIDENTIAL ANNEX A

5. The Defence files Annex A confidentially as it contains information concerning the trial proceedings of a confidential nature.

¹ ICC-01/09-02/11-T-18-ENG ET WT.

² ICC-01/09-02/11-596-Conf-AnxD-Red-Corr.

³ ICC-01/09-02/11-T-22-ENG ET WT 14-02-2013.

IV. APPLICABLE LAW

6. Article 54(1) of the Statute imposes upon the Prosecution a duty to ensure that its investigations are proper, expeditious and effective. In interpreting “effective investigation”, the Defence draws the attention of the Chamber to the jurisprudence of the European Court of Human Rights, which has consistently held that the effectiveness of an investigation is contingent on its promptness and reasonable expedition.⁴
7. Article 67(1)(b) of the Statute articulates the Accused’s absolute right to have adequate time and facilities for the preparation of his defence.
8. The Court is under an obligation pursuant to Article 68(1) of the Statute to take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses. The measures taken by the Prosecution in this regard, however, shall not be prejudicial to, or inconsistent with, the rights of the Accused and a fair and impartial trial.
9. In *The Prosecutor v. Thomas Lubanga Dyilo*, the Appeals Chamber ruled that “the investigation should largely be completed at the stage of the confirmation of charges hearing”.⁵ The Appeals Chamber held that limited post-confirmation stage investigations could be tolerated due to the procedural safeguard guaranteed by Article 67.⁶ In *The Prosecutor v. Callixte Mbarushimana*, the Appeals Chamber held that most of the evidence should therefore be available at the Confirmation Hearing.⁷

⁴ Bazorkina v. Russia, Judgment of 27 July 2006, Application n°69481/01, para. 119; Tanrikidu v. Turkey, Judgment of 8 July 1999, Application n°23763/94, para. 109.

⁵ ICC-01/04-01/06- 568, para. 54.

⁶ ICC-01/04-01/06- 568, para. 55.

⁷ ICC-01/04-01/10-514, para. 44.

10. In his Dissenting Opinion to Pre-Trial Chamber II's "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute",⁸ and citing the Appeals Chamber's ruling in *Lubanga*,⁹ His Honour Judge Kaul expressed his concern that the Prosecution might seek to interpret too broadly the limited permission of post-confirmation investigations articulated therein.

V. SUBMISSIONS

11. The nature of the Prosecution's ongoing and protracted investigation and the manner in which the Prosecution has sought to disclose its evidence have required the Defence to expend considerable investigative resources in order to attempt to deal with an ever-shifting case in a limited period of time, which has resulted in considerable pressure upon the Defence in the preparation of its case.¹⁰ Pressure upon the Defence resources is compounded by the inclusion of new or radically altered post confirmation allegations and the sheer volume of Prosecution evidence disclosed in the weeks leading up to the commencement of trial.

(i) New or Radically Altered Allegations

12. The Prosecution's case as disclosed in its Pre-Trial Brief demonstrates that the evidentiary nature of the case has substantially mutated to the detriment of the Accused, since the Confirmation Hearing. In particular, the Prosecution has introduced a significant number of new allegations, which were not subjected

⁸ ICC-01/09-02/11-382-Conf, para. 52.

⁹ ICC-01/04-01/06- 568, para. 54.

¹⁰ See 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, para. 44, and Confidential Annex D thereto (detailing the new allegations made by the Prosecution at the trial stage).

to the rigours of the confirmation procedure. The Prosecution has also chosen to support radically altered confirmation allegations with newly-collected evidence in order to attempt to fill the evidential gaps left by Witness OTP-4. The Defence submits that in this regard, the conduct of the Prosecution has violated the Defence's absolute right under Article 67(1) of the Statute, and the Prosecution has failed to comply with the clear jurisprudence of the Appeals Chamber.¹¹

13. By way of example, at paragraph 29 of the Pre-Trial Brief, the Prosecution alleges that the Accused first dispatched an intermediary to persuade his Mungiki contacts to take part in the PEV, and that, on or about 30 December 2007, the intermediary assembled approximately a dozen senior Mungiki members at the Marble Arch Hotel in Nairobi.¹² This allegation was not confirmed by the Pre-Trial Chamber, nor mentioned in the Confirmation Decision. The only piece of Prosecution evidence pre-Confirmation Hearing in respect of this event consisted of a vague allegation from the KNCHR report, which did not mention the intermediary, and clearly upon closer inspection refers to another allegation. The Defence submits therefore that this is a totally new allegation that the Defence was not made aware of prior to January 2013.

14. Furthermore, the allegation is vague and fails to specify a particular date. This lack of specificity has obvious implications leading to the need for the Defence to broaden its investigations in respect of the time period covered by this allegation. In support of its allegation, the Prosecution refers to the following sources:

¹¹ ICC-01/04-01/06- 568, paras 54-55.

¹² ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para. 29.

- a. P-0217 – First interviewed by the Prosecution in 2012. The Defence was not aware of this individual’s testimony until 9 January 2013. The Defence has therefore had an extremely limited period to review, analyse and investigate the allegations made by this key witness.
 - b. P-0429 [REDACTED] - First interviewed by the Prosecution in 2012. The Defence was not aware of this individual’s testimony until 30 November 2012. The Defence has been unable to conduct investigations into this witness’ credibility as his identity is redacted.
 - c. At footnotes 127, 128, 129, 130 and 131 the Prosecution refers to either redacted documentary material or witnesses evidence (it is unclear which as the footnote simply states “[REDACTED]”). The Defence has been unable to conduct any analysis whatsoever in respect of the evidence referred to in these redacted references.
15. The Defence also draws the attention of the Chamber to allegations previously known to the Defence that have been radically altered by the Prosecution in the Pre-Trial Brief. As an illustration of the extent to which the approach of the Prosecution has negatively impacted on the Accused’s rights under Article 67(1), the Defence refers to the allegation concerning a meeting at the Nairobi Members’ Club in January 2008.
16. At paragraph 31 of the Pre-Trial Brief, the Prosecution alleges that in early January 2008, the Accused met at the Nairobi Club, with several senior Mungiki members to persuade them to mobilise the Mungiki for the retaliatory attacks.¹³ When this allegation was confirmed by the Pre-Trial Chamber, the Prosecution’s supposed “eye witness”, OTP-4, provided key evidence supporting an allegation that Mr Kenyatta Ambassador Muthaura and others

¹³ ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para. 31.

met with Mungiki members at a supposed meeting at the Nairobi Members' Club on 3 January 2008 and directed them to commit the crimes charged.

17. The allegation now contained in the Pre-Trial Brief is vague. It fails to specify a particular date. The unspecified nature of the time period in the allegation makes effective Defence investigation extremely difficult. In support of its allegation in the Pre-Trial Brief, the Prosecution no longer refers to OTP-4. The allegation as it now stands in the Pre-Trial Brief is supported almost entirely by new evidence:
 - a. At footnotes 140, 141, 142, 143, 144, 145 and 146, the Prosecution refers to either redacted documentary material or witnesses evidence (it is unclear which as the footnote simply states "[REDACTED]"). The Defence has been unable to conduct any analysis whatsoever in respect of the evidence referred to in these redacted references. Crucially, these references contain previously undisclosed information in respect of the alleged words and actions of both accused.
 - b. P-0012 – First interviewed by the Prosecution in June 2011. The Defence was not aware of this particular aspect of this individual's testimony until 19 October 2012. In any event, the vast majority of the references to this allegation do not refer to this witness.
 - c. P-0219 – [REDACTED] Interviewed in 2012. Redaction by the Prosecution precludes effective investigation into the witness' allegations or credibility.
 - d. P-0494 – [REDACTED] Interviewed in 2012. Redaction by the Prosecution precludes effective investigation into the witness' allegations or credibility.

18. The Defence submits that the unbridled nature of ongoing Prosecution investigations and the introduction of wholly new evidence, which was available with the exercise of reasonable diligence at the confirmation stage, but which was not collected or presented by the Prosecution, emasculates the confirmation of charges process and denudes confirmation decisions of the required legal certainty.

19. The Defence submits that all of the witnesses the Prosecution proposes to call at trial were available for interview prior to the Confirmation Hearing. The Prosecution has argued that “prospective witnesses may...not cooperate until they are confident, based on the fact that the charges are confirmed, that the prosecution is serious and likely to proceed”.¹⁴ The Defence submits however that the confirmation stage cannot be used as an enticement to testify, and this argument cannot constitute a justification for the Prosecution’s failure to adhere to its duty under Article 54(1)(a) of the Statute to ensure that its investigations are proper, expeditious and effective.¹⁵

20. As illustrated in paragraphs 12 to 19 above, a wholly disproportionate, and fundamentally unfair proportion of the Prosecution’s ever-shifting case has been disclosed to the Defence at an inappropriately late stage. Whether the new allegations are characterised as ‘fact and circumstance underlying the charges’ or ‘supporting fact’, the Defence has not been afforded adequate time to prepare for trial.

¹⁴ ICC-01/09-02/11-633, para. 11.

¹⁵ The European Court of Human Rights holds that the effectiveness of an investigation is contingent on its promptness and reasonable expedition.

(ii) New Witnesses

21. The Defence refers the Chamber to Annex A. This table prepared by the Defence provides an overview of the witnesses relied upon by the Prosecution at the confirmation stage and those it now relies upon at trial.
22. The change in the substantive evidence underlying the Prosecution's case is evidenced clearly by the fact that the Prosecution no longer intends to call seven of the 12 witnesses it relied upon at the confirmation stage. The Prosecution now seeks to call 26 witnesses that it interviewed for the first time after the confirmation stage.¹⁶ The total expected time for the examination-in-chief of the 31 Prosecution witnesses amounts to 262 hours. The expected time for the examination-in-chief of the five remaining witnesses *first* interviewed prior to the Confirmation Hearing is 42 hours. The testimony from those interviewed for the first time after the Confirmation Hearing is thus expected to account for 84 *per cent* of the Prosecution's case, into which the Defence must now concentrate its resources.

(iii) Witness Identities Not Disclosed

23. The identities of ten witnesses upon whom the Prosecution intends to rely at trial remain unknown to the Defence.¹⁷ These witnesses were all interviewed by the Prosecution for the first time in 2012.¹⁸ Judging by the time allotted by the Prosecution to conduct the examination-in-chief of these ten witnesses, it is evident that they constitute the most significant body of evidence. Their

¹⁶ ICC-01/09-02/11-596-Conf-AnxA.

¹⁷ OTP-118, OTP-334, OTP-428, OTP-429, OTP-430, OTP-493, OTP-494, OTP-505, OTP-506, and OTP-510.

¹⁸ See Annex A.

combined testimony is expected to last 106 hours, over 40 *per cent* of the Prosecution testimony in total.¹⁹

(iv) Volume of disclosure

24. At the June 2012 Status Conference, the Prosecution indicated that following finalisation of a protocol on redactions,²⁰ and contingent on the Chamber's authorisation of any applications for redactions, it would be in a position to disclose witness materials totaling approximately 680 items.²¹ These items were said to be related to seven witnesses and comprised of approximately 2,290 pages.²² However, the Prosecution did not indicate how many of the items or pages related to incriminatory or PEXO materials, stating only that they were comprised of: 76 interview transcripts from the interviews of five witnesses (approximately 1,400 pages); and 355 other witness-related documents (approximately 644 pages).²³ The Prosecution added that 250 of the approximately 680 documents were Rule 77 materials related to witness expenses (approximately 276 pages).²⁴

25. Further, at the June 2012 Status Conference the Prosecution stated that following the confirmation hearing, it had conducted interviews with six witnesses that were still being transcribed, and that the approximate total of pages from these interviews would stand at 1,650.²⁵

¹⁹ Calculated as 106/262, which equals 40.46%.

²⁰ The "Decision on the protocol establishing a redaction regime" was notified on 27 September 2012, ICC-01/09-02/11-495.

²¹ ICC-01/09-02/11-T-18-ENG ET WT, p.4, lines 11-15.

²² ICC-01/09-02/11-T-18-ENG ET WT, p.4, lines 19-20.

²³ ICC-01/09-02/11-T-18-ENG ET WT, p.4, lines 20-22.

²⁴ ICC-01/09-02/11-T-18-ENG ET WT, p.4, lines 23-25.

²⁵ ICC-01/09-02/11-T-18-ENG ET WT, p.5, lines 6-8.

26. The Prosecution also indicated that it had 560 further items, not related to witnesses, in its possession that it was in the process of reviewing, and that the majority of these materials were open source materials comprised of approximately 2,200 pages and 26 audio video files.²⁶
27. Taking into consideration the explanation provided by the Prosecution to the Court at the June 2012 Status Conference, the Defence calculates that the Prosecution's estimated total for the likely disclosure page count for trial stood at approximately 6,140 plus 26 audio files. At Annex B the Defence has disclosed a table outlining the page counts relating to all documents disclosed by the Prosecution in these proceedings. Annex B clearly shows that the actual number of documents disclosed by the Prosecution following the June 2012 Status Conference is 2,056 which is comprised of 22,069 pages, 5,232 pages of which was received by the Defence after 10 January 2013. Further, during the same period, the Prosecution disclosed 186 audio files, with a total duration of 50.44.27 hours.
28. The Defence submits that the discrepancy between the Prosecution's estimate at the June 2012 Status Conference and the actual figures disclosed at Annex B shows clearly the Prosecution's inappropriate approach to the investigation of its case, and its ultimate failure to act in a manner that respects the rights of the Defence, in particular the right to adequate time to prepare for trial. The manner and extent of Prosecution disclosure no longer resembles, in amount or content, the representations made by the Prosecution to the Court and the Defence in June 2012. Accordingly, the Defence submits that in order for it to be able to prepare adequately for trial, the Chamber must vacate the current trial date.

²⁶ ICC-01/09-02/11-T-18-ENG ET WT, p. 5, lines 12-18

(v) Redactions

29. The Prosecution has provided the Defence with evidence in varying states of redaction, as referred to by the Defence in the February 2013 Status Conference.²⁷ The extent of the remaining redactions renders any meaningful analysis of the key allegations impossible. Redactions in respect of witness identification have also rendered it impossible to assess the credibility of the witnesses. Such assessment is an essential component of trial preparation particularly where the nature of a significant number of witnesses relied upon includes members, or former members, of the Mungiki.
30. The scale of the redactions necessitates a complete review by the Defence with each new disclosure, which may constitute several hundred pages on each occasion.
31. By way of example, the Prosecution has served 80 distinct transcripts of interviews with OTP-11 and OTP-12. These total 1,433 pages of dense, sometimes circuitous, interview. Every page requires intense scrutiny and analysis. The latest disclosure of lesser-redacted transcripts of the same evidence was on 11 February 2013.²⁸
32. The evidence of OTP-4 has been disclosed five times. Despite informing the Defence that it does not intend to call OTP-4 to testify,²⁹ the Prosecution has disclosed lesser-redacted versions of his evidence on 5 November 2012, 29

²⁷ ICC-01/09-02/11-T-22-ENG ET WT 14-02-2013, pp. 28-29.

²⁸ See Annex A.

²⁹ ICC-01/09-02/11-596-Conf-AnxA-Red; ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para. 94.

November 2012, 9 January 2013, and 11 February 2013, all of which necessitate careful review.³⁰

33. The transcripts of the interviews of the following witnesses remain significantly and substantially redacted: OTP-2, OTP-11, OTP-12, OTP-118, OTP-217, OTP-219, OTP-232, OTP-334, OTP-428, OTP-429, OTP-430, OTP-493, OTP-494, OTP-505, OTP-506, and OTP-510.
34. Additionally, the evidence of OTP-494 and OTP-510, which was disclosed to the Defence on 21 December 2012, and the evidence of OTP-505 and OTP-506, disclosed to the Defence on 11 January 2013, has been provided in draft form only.³¹

(vi) Redaction of the Sources of the Pre-Trial Brief

35. As the Defence indicated in the February 2013 Status Conference,³² the utility of the Pre-Trial Brief has been significantly reduced by the extent to which sources remain redacted. Of the 589 footnotes, 181 are entirely or partially redacted. This amounts to over 30 *per cent* of the footnotes in the Pre-Trial Brief.³³ Crucially, the effect of these redactions is that the Defence is unable to penetrate the reliability or credibility of the source, or the veracity of the allegation. The Defence is unable to properly to investigate the case, or prepare for the cross-examination of the witnesses.

³⁰ See Annex A.

³¹ See Annex A.

³² ICC-01/09-02/11-T-22-ENG ET WT 14-02-2013, pp. 27-28, lines 24-5.

³³ Calculated as 181/589, which equals 30.73%.

(vii) The Prosecution's Conduct Regarding Requests for Delayed Disclosure and Continued Redactions

36. Further recent requests for non-disclosure and continued redactions have been notified to the Defence on the disclosure deadline date.³⁴ The Defence submits that the Prosecution has either had, or ought to have had, the information underlying these last minute requests for a significant period of time, and insufficient reasoning has been provided to justify the timing of these motions. The Defence submits that such conduct constitutes evidence of the Prosecution's use of delay tactics as a litigation strategy to limit the Defence's ability to prepare adequately for trial.

(viii) The Prosecution has not Exercised Due Diligence in the Service of its Disclosure

37. The Defence's receipt of disclosure has been hindered by technical difficulties and logistical problems caused by the Prosecution's service of disclosure. For example, between 14 and 18 February 2013, the Prosecution disclosed and reissued four sets of materials to the Defence. The materials relate to the expert reports of Herve Maupeu and Lars Bromley, which the Prosecution had been ordered to disclose by 14 February 2013.³⁵ As a result of the substandard quality of the documents and the incorrect metadata disclosed by the Prosecution at 17.30 on 14 February 2013, it has been necessary for members of the Defence team to liaise with the Prosecution in order to obtain fully legible documents. The Prosecution has now reissued all 17 items contained in incriminatory evidence packages 36 and 37.

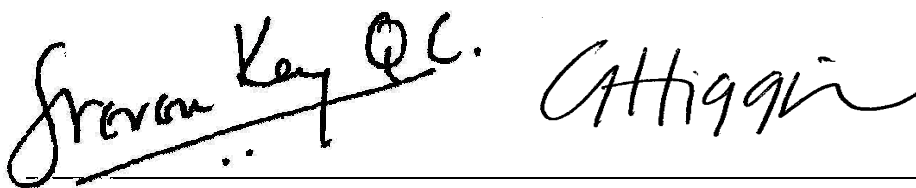
³⁴ ICC-01/09-02/11-636-Conf-Red; ICC-01/09-02/11-638-Conf-Red.

³⁵ ICC-01/09-02/11-451, para 22.

VI. RELIEF

38. For the aforementioned reasons, the Trial Chamber is respectfully requested to vacate the trial date of 11 April 2013.

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 'G Higgins'.

Steven Kay QC and Gillian Higgins
At London, England

Dated this 20th day of February 2013