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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

Prosecution response to Defence submissions on the 11 April 2013 trial date

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The Office of the Prosecutor

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Introduction

1. The Prosecution hereby responds to the Kenyatta Defence's 21 February 2013 "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" ("Kenyatta Request"),¹ and the 22 February 2013 "Muthaura Defence's Additional Submissions on the Viability of the Commencement Date of Trial" ("Muthaura Submission").²

2. The Defence's requests to delay the start of trial are premised upon supposed failings in the Prosecution's disclosure process that, the Defence argues, "resulted in considerable pressure upon the Defence".³ The reality is, however, that the Prosecution has complied with the deadlines set by the Chamber and has taken all reasonable steps to ensure that the Defence received timely disclosure, notwithstanding the unprecedented level of witness tampering in this case and the associated witness security challenges, which have diverted considerable Prosecution resources. The Prosecution is ready for trial and wishes trial to proceed. At the same time, the Prosecution recognises that logistical constraints such as courtroom availability make a trial on 11 April 2013 unlikely. Therefore, the Prosecution does not object to a reasonable adjournment, to allow time for protective measures to be put in place for the witnesses whose identities remain to be disclosed ("Delayed Disclosure Witnesses") and to provide the Defence with adequate time to prepare.

Procedural history

3. At the 14 February 2013 status conference, the Kenyatta Defence requested the Trial Chamber to vacate the 11 April 2013 trial date that the Trial

¹ ICC-01/09-02/11-655-Corr.

² ICC-01/09-02/11-662.

³ ICC-01/09-02/11-655-Corr, para 11.

Chamber set in its 9 July 2012 “Decision on the schedule leading up to trial”.⁴ The Kenyatta Request seeks the same relief.

4. The Muthaura Defence asserted at the 14 February 2013 status conference that “[t]he April date is not viable”.⁵ The Muthaura Submission argues that a trial on “11 April 2013 is simply not viable” because the Defence has not received transcriptions/translations of certain audio files related to the autumn 2012 attempts to bribe Witnesses 11 and 12.⁶

Submissions

5. It is not necessary in this short response to correct every factual inaccuracy in the Defence submissions.⁷ Nor is it necessary to address in detail the Muthaura Defence’s argument regarding the transcriptions/translations of certain audio files. The files in question relate to the attempts in late 2012 to bribe Witnesses 11 and 12, which began just days after the Prosecution disclosed the witnesses’ identities to the Defence and were made by an associate of one of the Accused, apparently with his knowledge.⁸ The Prosecution cannot possibly be faulted for the time needed to transcribe/translate materials that were generated because of unlawful attempts to tamper with its witnesses.
6. The Prosecution will limit its observations to the two substantive arguments advanced by the Kenyatta Defence.

⁴ ICC-01/09-02/11-451, para 25; ICC-01/09-02/11-T-22-ENG ET, pages 22-31.

⁵ ICC-01/09-02/11-T-22-ENG ET, page 18.

⁶ ICC-01/09-02/11-662, page 17.

⁷ By way of example, the Kenyatta Defence asserts that the witness transcripts/statements of Witnesses 2, 11, 12, 217, 219 and 232 “remain significantly and substantially redacted”. ICC-01/09-02/11-655-Corr, para 33. This is incorrect. The Defence has been provided with transcripts/statements from these witnesses with virtually no redactions. Witness 219, for example, has 33 transcripts, totalling 427 pages. Aside from redactions to investigators’ names and interview locations, there are 12 individual redactions in the transcripts, which are confined to seven pages. Similarly, Witness 11’s 599 pages of transcript contain only 19 substantive redactions, which are confined to 12 pages.

⁸ ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 95-96.

7. *First*, the Kenyatta Defence objects that the Prosecution is offering more evidence at trial than at confirmation and that its case has “shifted”.⁹ In response, the Prosecution submits that it is self-evident that it would offer more evidence at trial than at the confirmation stage, when it needed only surpass the “substantial grounds” threshold and was entitled to rely upon “summary evidence”.¹⁰ Further, the Prosecution provided timely notice that it would increase its evidentiary presentation at trial, explaining at the initial status conference before this Chamber in June 2012 that it intended to call “between 25 to 35 witnesses”.¹¹ The Prosecution’s trial witness list, which contains 33 witnesses, falls within that range.¹² In these circumstances, the Defence cannot claim to be unfairly surprised by the addition of evidence.¹³
8. Similarly without merit is the suggestion that the Prosecution’s case has “mutated” or “shift[ed]” since confirmation.¹⁴ As explained in the Prosecution’s response to the Defence’s Article 64(4) applications, filed concurrently herewith, there has been no factual shift in the Prosecution’s case. The facts alleged in the Prosecution’s pre-trial brief fall within the four corners of the charges confirmed by the Pre-Trial Chamber and contained in the Updated Document Containing the Charges.
9. *Second*, the Kenyatta Defence argues that its ability to prepare is hindered because the identities of the Delayed Disclosure Witnesses remain redacted, pursuant to the Chamber’s rulings.¹⁵ The Prosecution is ready to disclose the identities of the witnesses concerned as soon as the Victims and Witnesses Unit (“VWU”) advises that adequate protective measures have been

⁹ ICC-01/09-02/11-655-Corr, paras 12-22.

¹⁰ Article 61(5) of the Statute.

¹¹ ICC-01/09-02/11-T-18-ENG CT, page 9.

¹² ICC-01/09-02/11-596-Conf-AnxA-Red.

¹³ See, e.g., ICC-01/09-02/11-T-22-ENG, page 16 (asserting that “two months before the trial, hey, presto, like a rabbit out of the hat, they come up with new allegations that simply have not been investigated”).

¹⁴ ICC-01/09-02/11-655-Corr, paras 11, 12, 20.

¹⁵ ICC-01/09-02/11-655-Corr, paras 23, 34.

implemented.¹⁶ The Prosecution acknowledges that the VWU requires time to implement the protective measures and that operational constraints and the pre-election security situation in Kenya make the process particularly challenging. The Prosecution also acknowledges that it is appropriate for the Defence to have a reasonable period of time, after the relevant identities have been disclosed and the corresponding redactions to the witness materials and the pre-trial brief have been lifted, to analyse the Prosecution's evidence before the witnesses testify.

10. Notwithstanding the Prosecution's objections to the particular arguments by the Defence, it does not object to a reasonable adjournment of the trial in light of the fact that events beyond the Court's control, in particular the Court's operational restraints, may make an April start date untenable.¹⁷

11. The Defence has requested the Chamber to "vacate the trial date of 11 April 2013",¹⁸ but has not proposed an alternate start date. The Prosecution suggests that if the 11 April 2013 trial date is to be vacated, it would be appropriate for the Chamber to fix a new schedule for the start of the trial. It is important for the Kenyan public, particularly the victims of the 2007-2008 post-election violence, to be assured that the trial will, in fact, commence in the coming months. A date certain would assist all parties and participants in their preparations and planning. The Prosecution suggests that a start date immediately after the Court's summer recess may be appropriate, although it is ready to start trial earlier, should the Chamber so order. The Prosecution understands from its discussions with the VWU that protective measures for the Delayed Disclosure Witnesses are likely to be finalised in the coming weeks, such that full disclosure can take place. An August 2013 start date would therefore provide the Defence with several months after

¹⁶ ICC-01/09-02/11-619-Conf-Red, para 16.

¹⁷ ICC-01/09-02/11-T-22-ENG ET, pages 34-35.

¹⁸ ICC-01/09-02/11-655-Corr, para 38.

receiving the Delayed Disclosure Witnesses' identities and unredacted materials to review those materials and conduct the associated preparations before trial begins.



Fatou Bensouda,
Prosecutor

Dated this 25th of February 2013
At The Hague, The Netherlands