

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 1 March 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***

Public

Defence Request for Leave to Reply to the “Confidential redacted version of the 25 February 2013 Consolidated Prosecution Response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber”

Source: Defence for Uhuru Muigai Kenyatta

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta (“Defence”) seeks the leave of the Trial Chamber (“Chamber”), pursuant to Regulation 24(5), to reply to the “Confidential redacted version of the 25 February 2013 Consolidated Prosecution Response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber” (“Response”).¹

II. PROCEDURAL HISTORY

1. On 8 March 2011, the Pre-Trial Chamber (“PTC”) issued summonses to appear before the International Criminal Court for Ambassador Francis Muthaura, Mr Kenyatta and General Mohammed Ali.²
2. The hearing on the confirmation of charges (“Confirmation Hearing”) took place between 21 September and 5 October 2011. On 23 January 2012, the PTC issued the “Decision on the Confirmation of Charges” (“Confirmation Decision”), confirming the charges against Amb. Muthaura and Mr Kenyatta, and refusing to confirm the charges against General Ali.³
3. On 5 February 2013, the Defence submitted its “Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration” (“Article 64(4) Application”).⁴

¹ ICC-01/09-02/11-664-Conf-Red.

² ICC-01/09-02/11-1.

³ ICC-01/09-02/11-382-Conf.

⁴ ICC-01/09-02/11-622.

4. On 7 February 2013, the Defence for Amb. Muthaura (“Muthaura Defence”) submitted its “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)” (“Muthaura Article 64(4) Application”).⁵
5. On 20 February 2013, the Muthaura Defence submitted an addendum to its Article 64(4) Application.⁶
6. On 25 February 2013, the Prosecution submitted its Response.

III. ISSUES NECESSITATING DEFENCE REPLY

7. The Defence seeks leave to reply to the following issues arising from the Response:
 - (i) The Prosecution’s submission that the Article 64(4) Application “has the potential to seriously affect the orderly conduct of all future and pending cases before the court”⁷;
 - (ii) The Prosecution’s submission that the Article 64(4) Application seeks reconsideration of the Confirmation Decision “simply because the evidence has evolved since the confirmation of charges hearing”;⁸

⁵ ICC-01/09-02/11-628-Conf.

⁶ ICC-01/09-02/11-656-Conf.

⁷ ICC-01/09-02/11-664-Conf-Red, para. 2.

⁸ ICC-01/09-02/11-664-Conf-Red, Submissions I, p. 6.

- (iii) The inconsistent position taken by the Prosecution in respect of the effect of the withheld exculpatory evidence in the case of Amb. Muthaura as compared to that of Mr Kenyatta, and the Prosecution's submission that the remaining evidence cited in the Confirmation Decision provided "substantial grounds to believe" that Mr Kenyatta committed the crimes charged;⁹ and
- (iv) That the Prosecution's failure to disclose an exculpatory statement by Witness 4 does not require Mr Kenyatta's case to be referred back to the Pre-Trial Chamber for reconsideration.¹⁰

IV. GROUNDS

- (i) The Prosecution's submission that the Article 64(4) Application "has the potential to seriously affect the orderly conduct of all future and pending cases before the court"
8. The Prosecution's policy argument that the Article 64(4) Application "has the potential to seriously affect the orderly conduct of all future and pending cases before the court" falls outside the legal scope of a response to the Article 64(4) Application.¹¹ This argument raises the issue that notwithstanding the unique and exceptional circumstances, namely the retraction of key evidence by a witness after the confirmation of charges and the failure to disclose key exculpatory evidence, the application should be denied on the basis of policy considerations.

⁹ ICC-01/09-02/11-664-Conf-Red, paras 8, 9, 23, 24, 44, 45.

¹⁰ ICC-01/09-02/11-664-Conf-Red, paras 40, 41.

¹¹ ICC-01/09-02/11-664-Conf-Red, para. 2

9. The Defence seeks leave to respond to the argument that wider policy considerations should determine this issue against Mr Kenyatta, notwithstanding the fact that the Prosecution has conceded the validity of the procedure in relation to Amb. Muthaura.¹²
 - (ii) The Prosecution's submission that the Article 64(4) Application seeks reconsideration of the Confirmation Decision "simply because the evidence has evolved since the confirmation of charges hearing"
10. The Prosecution's argument that the issue before the Chamber is "simply because the evidence has evolved since the confirmation of charges hearing" is misleading, because the evidence reveals that:¹³
 - a. The case advanced by the Prosecution was false;
 - b. The arguments advanced were based on false evidence;
 - c. The Pre-Trial Chamber was thereby caused to come to erroneous conclusions, including rejecting wholly credible Defence evidence; and
 - d. The Prosecution advanced arguments as to the consistency of its case, when in possession of contradictory evidence.
11. The Defence seeks leave to respond to the evolution of evidence argument, as it contends that what occurred was not merely development, but rather the result of a systemic failure of case investigation and verification of evidence that any justice system should expect of its officers, and which is capable of leading to a miscarriage of justice.

¹² ICC-01/09-02/11-664-Conf-Red, para. 45.

¹³ ICC-01/09-02/11-664-Conf-Red, Submissions I, p. 6.

(iii) The inconsistent position taken by the Prosecution over the effect of the withheld exculpatory evidence in the case of Amb. Muthaura as compared to that of Mr Kenyatta, and the Prosecution's submission that the remaining evidence cited in the Confirmation Decision provided "substantial grounds to believe" that Mr Kenyatta committed the crimes charged

12. The Defence submits that the Prosecution's inconsistent position as regards the need for a reconsideration of the confirmation of charges only in respect of Amb. Muthaura constitutes a new factual and legal argument to which the Defence must be permitted to reply.¹⁴
13. The Defence submits that it must be permitted to provide submissions on the fundamental nature of Witness 4's evidence in the context of the Confirmation Decision as a whole, without which the PTC would not have established that there were substantial grounds to believe that Mr Kenyatta committed the crimes charged.
14. In the Response, the Prosecution advanced an interpretation of its case previously unexpressed at the Confirmation Hearing, namely that absent the evidence of Witness 4, there still existed sufficient evidence to establish substantial grounds to believe that Mr Kenyatta committed the crimes charged.¹⁵ Further, the Defence submits that it should be permitted to respond to the Prosecution's misleading analysis with respect to the "totality of the evidence relied upon by the Pre-Trial Chamber",¹⁶ and the importance placed by the PTC on the evidence of Witnesses 11 and 12 in the Confirmation

¹⁴ ICC-01/09-02/11-664-Conf-Red, paras 9, 44, 45.

¹⁵ ICC-01/09-02/11-664-Conf-Red, paras 8, 23, 24.

¹⁶ ICC-01/09-02/11-664-Conf-Red, para 23.

Decision.¹⁷

15. Given the Prosecution's allegations that both Accused were members of a common plan, the Defence should be granted leave to reply to the Response in order to demonstrate that without the evidence of Witness 4, the case theory advanced by the Prosecution at the Confirmation Hearing, and adopted in part by the PTC in the Confirmation Decision, against *both* Amb. Muthaura and Mr Kenyatta is untenable, and relies on evidence that is incapable of satisfying the substantial grounds threshold.
16. The Defence requests an opportunity to provide submissions on the fundamentally flawed nature of the Confirmation Decision and the requirement of a rehearing in respect of *both* Accused.

(iv) The Prosecution's failure to disclose an exculpatory statement by Witness 4 does not require Mr Kenyatta's case to be referred back to the Pre-Trial Chamber for reconsideration

17. In the Response, the Prosecution provides new reasons for its failure to disclose Witness 4's exculpatory statement. The reasons provided by the Prosecution do not address the fact that a member of their legal team – who participated in the first interviews with Witness 4, was present throughout the Confirmation Hearing, and who addressed the PTC on the merits of the case – had reviewed the exculpatory evidence and failed to bring the matter to the attention of the PTC and the Defence even during the proceedings.¹⁸ The Prosecution have given an account of the review of the contentious evidence that fails to deal

¹⁷ ICC-01/09-02/11-664-Conf-Red, paras 23, 24

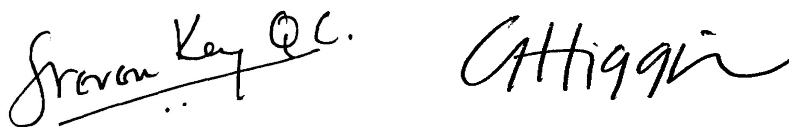
¹⁸ ICC-01/09-02/11-664-Conf-Red, paras 7, 37, 38, 41.

with the important facts surrounding this issue and the Defence seek leave to address the Chamber upon the merits advanced.

V. RELIEF

18. For the reasons set out above, the Defence respectfully requests leave to reply to the Response.

Respectfully submitted,

The block contains two handwritten signatures in black ink. The signature on the left is 'Steven Kay QC.' with a horizontal line drawn under the name. The signature on the right is 'G Higgins' in a cursive script.

.....

Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 1st day of March 2013

At London, England