

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 4 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

**Muthaura Defence Notification with respect to the 8 March 2013 Deadline for the
Second Joint Prosecution-Defence Submission on Agreed Facts**

Sources: Counsel for Ambassador Francis Kirimi Muthaura

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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Ms. Adesola Adeboyejo

Counsel for Francis Kirimi Muthaura

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Legal Representatives of the Victims

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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

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Defence for Ambassador Francis Muthaura ("Defence") hereby respectfully notifies the Trial Chamber ("Chamber") that the 8 March 2013 deadline set by the Chamber in the "Decision on the schedule leading up to trial" ("Trial Schedule Decision")¹ for a "second joint submission on agreed facts (including agreements as to evidence)"² cannot reasonably be complied with due to the dilatory actions of the Prosecution.

2. At paragraph 24 of the Trial Schedule Decision, the Chamber instructed:

The prosecution and the defence teams for both accused are to liaise with a view to reaching agreement on facts as well as the authenticity of evidence. Any party which is unable to agree to a proposed stipulation shall reflect the reasons and indicate the factual basis for this disagreement in an annex to the joint filing. The second joint submission on agreed facts (including agreements as to evidence) is to be filed by 8 March 2013.

3. On Thursday, 28 February 2013 at 12:54pm, the Prosecution Trial Attorney with carriage for the case transmitted to the Defence by email an "updated proposal for agreements as to evidence pursuant to Rule 69" ("Updated Rule 69 Proposal"), explaining that the proposal "contains new facts from the updated DCC and Charges section, and the pre-trial brief" and requests a response from the Defence by today, Monday 4 March 2013, "in order to meet the 8 March 2013 deadline". The Updated Rule 69 Proposal contains 112 proposed facts and 95 footnotes containing numerous references to items of evidence in support of each proposed fact.³

4. It is entirely unreasonable for the Prosecution to expect the Defence to conduct a proper review of each agreed fact, and each item of evidence cited in support, as is necessary for such a critical matter, and then to consult with and take

¹ 9 July 2012, ICC-01/09-02/11-451.

² *Ibid.*, para. 24.

³ For example, footnote 90, cited in support of proposed fact number 107, references 34 individual items of evidence.

instructions from the client, only after which the drafting of detailed submissions on the factual basis for any fact not accepted by the Defence can take place, within what amounts to 2 working days.

5. The *inter partes* process cannot operate to the detriment of the Defence and fundamental rights of Ambassador Muthaura. Regulation 34(b) of the Regulations of the Court sets out the reasonable standard time-frame, as determined by the Judges of the Court, for a party to respond to the filing of another party. The Defence submits that the Updated Rule 69 Proposal is analogous to a substantive filing, and that the Prosecution ought to have borne this timeframe in mind when transmitting the Updated Rule 69 Proposal to the Defence for purposes of detailed review and comments thereon.
6. Of course, the Prosecution was on clear notice of the reasonable timeframe required by the Defence for the purposes of collaboration between the parties on the issue of Rule 69 agreements, based on the circumstances surrounding the parties consultations on the first submission of an agreement on facts pursuant to Rule 69, which necessitated an urgent joint filing requesting an extension of the relevant deadline.⁴
7. The Prosecution's Pre-Trial Brief was filed on 9 January 2013.⁵ It is unacceptable for the Prosecution to have waited 7 weeks to provide the Defence with the detailed Updated Rule 69 Proposal it transmitted on 28 February 2013, and then to expect the Defence to respond in two working days. The Defence respectfully submits that even the 8 March 2013 deadline set by the Chamber leaves insufficient time, at this stage, to properly conduct the necessary work, as outlined in paragraph 4 above, with respect to the Updated Rule 69 Proposal.

⁴ Joint Prosecution/ Defence Application Pursuant to Regulation 35 of the Regulations of the Court, 2 September 2012, ICC-01/09-02/11-473, paras. 5-8 (detailing, *inter alia*, Defence communications to the Prosecution as to the insufficient time provided by the Prosecution for the Defence to undertake the tasks necessary to review, respond to and liaise with the OTP on the proposed agreement on facts pursuant to Rule 69).

⁵ Confidential redacted version filed on 10 January 2013 (ICC-01/09-02/11-596-Conf-AnxD-Red).

8. The Defence accordingly hereby respectfully informs the Trial Chamber of the situation that it has been placed with respect to the Chamber's 8 March 2013 deadline, through no fault of its own, and further invites the Office of the Prosecutor to take the action it deems necessary as a minister of justice to provide the Defence with adequate time to review, respond to and liaise with the Prosecution on the Updated Rule 69 Proposal, and thereafter jointly submit the results of this process to the Chamber in the manner required by the Trial Schedule Decision.

Respectfully Submitted,



Karim A. A. Khan QC
Lead Counsel for Francis K. Muthaura

Dated this 4th Day of March 2013
At The Hague, the Netherlands