

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 24 September 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

Public

Decision on the Defence's oral request for an adjournment

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Adesola Adeboyejo

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Caroline Walter

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Others

Trial Chamber V(B) ('Chamber')¹ of the International Criminal Court ('Court'), in the case of *The Prosecutor v Uhuru Muigai Kenyatta*, having regard to Articles 64 and 67 of the Rome Statute (the 'Statute'), issues the following Decision on the Defence's oral request for an adjournment.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 30 August 2013, the Chamber issued a scheduling order and agenda for a status conference to be held on 6 September 2013.² The parties and participants were instructed to notify the Chamber, by 3 September 2013, of any other issues they may wish to raise at the status conference.³
2. On 3 September 2013, the defence team for Mr Kenyatta (the 'Defence') sent an email⁴⁵ listing, *inter alia*, the following issue as one the Defence 'wishe[d] to raise' at the status conference as part of agenda item D (Other matters):⁶

[...]

B. Adjournment of Trial Date as a Result of the Following Matters

2. Mobile Telephone Evidence:

- a. Further mobile telephone data to be collected by Defence and OTP joint expert from telephone companies in relation to significant OTP witnesses.
- b. Further analysis of current and yet to be collected data by Defence and OTP joint expert.
- c. Provision of reports from the Defence and OTP joint expert analysing evidence obtained from extraction of mobile telephone data.
- d. Relevance of reports to be considered by parties.

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber V in its composition as until 21 May 2013 and to Trial Chamber V(B) as composed by the Presidency's Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and The Prosecutor v. Uhuru Muigai Kenyatta*, 21 May 2013, ICC-01/09-01/11-745.

² Scheduling Order and Agenda for Status Conference, ICC-01/09-02/11-799.

³ ICC-01/09-02/11-799, para. 3.

⁴ E-mail sent by the Defence to the Chamber on 3 September 2013 at 16:26.

⁵ E-mail sent by the Chamber to the Defence on 3 September 2013 at 18:11.

⁶ E-mail sent by the Defence to the Chamber, Prosecution and Legal Representative on 3 September 2013 at 20:20. The Defence's email was initially sent to the Chamber only on 3 September 2013 at 16:26. It was re-sent to the Prosecution and Legal Representative upon the direction of the Chamber, issued by e mail on 3 September 2013 at 18:11.

e. Identification of further mobile telephone numbers and mobile telephones used by significant OTP witnesses at material times.

f. Further collection of mobile telephone data arising as a result of the initial extraction.

[...]

6. Further time required to complete investigations into significant Prosecution witnesses.⁷

3. On 6 September 2013, the status conference took place. During this hearing, the Defence submitted that 'an important and fundamental development' in relation to 'key evidence' had taken place during the six weeks preceding the status conference.⁸ It described the development as 'the joint seeking of telephone data in relation to witnesses [...] who have made allegations in relation to this case asserting they were at significant events with certain specified individuals'.⁹ It submitted that the investigation into telephone data is ongoing.¹⁰ The Defence averred that this investigation will produce evidence 'of such fundamental importance' that it needs to be properly considered by the parties.¹¹ Therefore, it argued, the trial should not commence 'just [...] because a timetable has been set'¹² and that maintaining the current date for the commencement of the trial would prevent the 'proper development of this evidence' and, as such, would be contrary to the interests of justice.¹³
4. In response to a question from the Presiding Judge as to whether the Defence was seeking the commencement of trial to be vacated until a specific date, the Defence

⁷ E-mail sent by the Defence to the Chamber and the Prosecution on 3 September 2013 at 20:20. In addition, the Defence requested that three other issues would be discussed in closed session.

⁸ Transcript of hearing, 6 September 2013, ICC-01/09-02/11-T-26-ENG ET WT, page 26, lines 6 – 7 and 24.

⁹ ICC-01/09-02/11-T-26-ENG ET WT, page 2, lines 7 – 11.

¹⁰ ICC-01/09-02/11-T-26-ENG ET WT, page 27, line 11.

¹¹ ICC-01/09-02/11-T-26-ENG ET WT, page 27, line 18 – 22.

¹² ICC-01/09-02/11-T-26-ENG ET WT, page 27, line 21.

¹³ ICC-01/09-02/11-T-26-ENG ET WT, page 28, lines 8 – 10.

submitted that its view on the proper start date remained the same as it had previously submitted, namely January 2014.¹⁴

5. The Prosecution responded orally, opposing the Defence's request. It submitted that the Chamber's decision of 20 June 2013 (the 'Adjournment Decision'),¹⁵ in which the Chamber vacated the trial commencement date of 9 July 2013 and granted the Defence extra preparation time by setting the date for commencement of trial at 12 November 2013, took into account the Defence's submissions made at the time on the issue of mobile telephone evidence. The Prosecution pointed specifically to paragraph 34 of the Adjournment Decision, in which the Chamber considered that the Defence's investigations into such evidence did not justify an extension of the preparation time beyond three months.¹⁶
6. The Prosecution submitted that the Defence's request for adjournment is an attempt to reintroduce the Defence's previous application to postpone the commencement of trial until January 2014. According to the Prosecution there is no basis for requesting such reconsideration, as no new submissions had been presented to the Chamber compared to those previously made.¹⁷
7. The Prosecution acknowledged that a large amount of data had been extracted as a result of the telecommunications investigations, but submitted that this circumstance is not uncommon for investigations in a case such as the present one.¹⁸ It averred that the more than two months that remain before the commencement of

¹⁴ ICC-01/09-02/11-T-26-ENG ET WT, page 27, lines 13 – 20. See also Defence Observations on Estimated Time Required to Prepare for Trial with Confidential Annex A, Public Annex B, Confidential ex parte Annexes C and C.1 and Confidential Annexes C.2 to G, ICC-01/09-02/11-735-Conf. A public redacted version was filed on 14 May 2013, para. 32.

¹⁵ Decision on commencement date of trial, ICC-01/09-02/11-763-Conf.

¹⁶ ICC-01/09-02/11-T-26-ENG ET WT, page 30, lines 10 – 22.

¹⁷ ICC-01/09-02/11-T-26-ENG ET WT, page 30, lines 21 – 22 and page 31, lines 5 – 9.

¹⁸ ICC-01/09-02/11-T-26-ENG ET WT, page 30, line 25 – page 31, line 2.

the trial leave 'more than adequate time for all of the data that has been collected to be analysed and for it to be used during the course of the trial'.¹⁹

8. The Legal Representative of Victims opposed the request.²⁰ He submitted that the victims do not want any further delays for the commencement of trial and that they suspect that the request is merely an attempt by the Defence to prevent the start of the trial.²¹

II. ANALYSIS AND CONCLUSIONS

9. The Chamber recalls that on 26 April 2013, it issued its 'Decision on defence application pursuant to Article 64(4) and related requests',²² in which it determined, *inter alia*, that the Defence would be provided with further time, beyond the initial trial commencement date of 9 July 2013, to conduct its investigations and prepare for trial. In that decision, the Chamber invited the Defence to submit observations as to the estimated time it needed to adequately prepare for trial. The Defence filed these observations on 13 May 2013, requesting the Chamber to postpone the commencement of trial until January 2014.²³ The Chamber notes that the Defence, at that time, submitted that allegations by key Prosecution witnesses in respect of their alleged presence at certain events could be undermined by mobile phone evidence and that it further contended that the production of this evidence was time-consuming.²⁴ In the Adjournment Decision, the Chamber considered the Defence's proposed period of adjournment and held, *inter alia*, that

¹⁹ ICC-01/09-02/11-T-26-ENG ET WT, page 31, lines 18 – 20.

²⁰ The Legal Representative was represented at the hearing by the Office of Public Counsel for Victims in accordance with the Chamber's Decision on Victims' Participation, 3 October 2012, ICC-01/09-02/11-498.

²¹ ICC-01/09-02/11-T-26-ENG ET WT, page 32, lines 16 – 21.

²² ICC-01/09-02/11-728.

²³ ICC-01/09-02/11-735.

²⁴ ICC-01/09-02/11-735, paras 24-25.

having considered the Defence's arguments in support of its request to adjourn the commencement until January 2014, the Chamber is not persuaded that the Defence requires such an extensive additional amount of time (nearly nine months after the original commencement date of 11 April 2013) in order to carry out investigations and otherwise adequately prepare for trial.

In particular the Chamber does not accept that the Defence's on-going investigations into mobile telephone evidence and Prosecution intermediaries justifies an extension of time beyond the three months initially contemplated by the Chamber. Such investigations are part of the Defence's ordinary preparations and, apart from the matter of delayed disclosure of the relevant individuals' identities, have not been frustrated by conduct on the part of the Prosecution.²⁵

10. The Chamber thus took the Defence's submissions on the mobile phone evidence into account when setting the commencement date of trial for 12 November 2013. The Defence has not presented the Chamber with additional or new arguments why this date should be vacated and why an adjournment until January 2014 should be granted.²⁶ Indeed, the Defence appears to be of the view that the Chamber should not base the sought decision to adjourn the commencement date of trial on legal or substantive submissions but rather on the Defence's – as of yet – unsubstantiated conclusions about the phone evidence only.²⁷ The Defence submitted that it is 'aware of significant conclusions that are going in one direction only [and] that completely support the Defence contentions', and that it knows that the mobile phone evidence 'alters the whole nature of these proceedings', because it has 'spent considerable time looking at it'.²⁸ The Chamber cannot determine

²⁵ ICC-01/09-02/11-763-Conf, 33-34.

²⁶ In this regard, the Chamber notes that the issues listed as proposed agenda items in the Defence's email of 3 September 2013, do not constitute submissions in support of the request for adjournment as they were not elaborated upon at the hearing.

²⁷ See, e.g., ICC-01/09-02/11-T-26-ENG ET WT, page 27, lines 5-10; and page 28, lines 21 – 24.

²⁸ ICC-01/09-02/11-T-26-ENG ET WT, page 27, lines 14 – 16.

whether the request for an adjournment should be granted on the basis of such propositions alone.

11. The only substantive submission by the Defence, made in reply to the Legal Representative of Victims' response, was that 'a particular software and technology has had to be developed to enable the material and data to be produced and considered'.²⁹ However, this circumstance alone cannot justify an adjournment.
12. Furthermore, the Chamber does not accept the Defence suggestion that the current commencement date of trial should be vacated because the Prosecution needs to consider whether the case should commence at all.³⁰ This is merely the Defence's view on the strength of the Prosecution's case and does not provide a basis for an adjournment.
13. Ultimately it is the view of the Chamber that the Defence's request for an adjournment until January 2014 is in fact no more than a request for reconsideration of the Adjournment Decision. This is abundantly clear from lead counsel's submissions that when the Chamber set the trial commencement date for 12 November 2013, it 'did not accept my guidance on the matter but chose another date'³¹ and that 'I had the date that I'd submitted to the Court altered by the Court – for whatever reason the Court altered it – but my original application was based upon my being able to foresee how long it would take to deal with this data'.³²
14. As considered by the Chamber in the Adjournment Decision, the Defence investigations into the phone evidence are part of ordinary defence preparations for trial and do not necessitate an adjournment until January 2014. Since the Defence has not shown good cause why the Chamber's previous decision should be altered, the Chamber therefore rejects the Defence's request.

²⁹ ICC-01/09-02/11-T-26-ENG ET WT, page 33, lines 17 – 20.

³⁰ See ICC-01/09-02/11-T-26-ENG ET WT, page 28, lines 3 – 5.

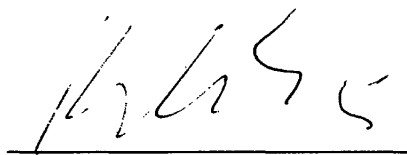
³¹ ICC-01/09-02/11-T-26-ENG ET WT, page 27, line 23 – page 28, line 2.

³² ICC-01/09-02/11-T-26-ENG ET WT, page 29, lines 2 – 4.

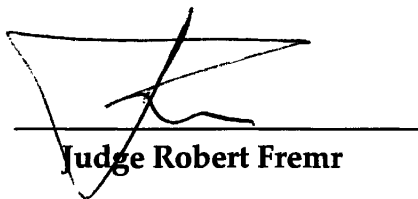
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence's request for an adjournment.

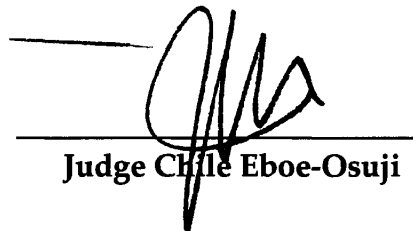
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Robert Fremr



Judge Chie Eboe-Osuji

Dated 24 September 2013

At The Hague, The Netherlands