

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 31 October 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 adjourning the commencement of trial

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

Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives for Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber' or 'Trial Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Article 64(2) of the Rome Statute ('Statute'), Rule 132 of the Rules of Procedure and Evidence ('Rules') and Regulation 35(2) of the Regulations of the Court ('Regulations'), issues the following Decision adjourning the commencement of trial.

1. On 25 October 2013, the defence team for Mr Kenyatta ('Defence') filed the 'Defence Application to Vacate the 12 November 2013 Date for the Commencement of Trial' ('Application').¹ The Defence requests that the trial date of 12 November 2013² be postponed until at least 12 February 2014 because of, *inter alia*, '[t]he need for the Prosecution to investigate the facts and matters raised by the Defence Application for a Permanent Stay of Proceedings due to Abuse of Process'.³
2. On 30 October 2013, after an email was sent from the Chamber making this date the deadline to respond to the Application,⁴ the Office of the Prosecutor ('Prosecution') filed its response ('Response').⁵ On the ground raised by the Defence that is identified above, the Prosecution responds that '[w]hile these allegations – even if they are ultimately established on the facts – do not constitute grounds for a stay of proceedings, the Prosecution accepts that they merit further investigation'.⁶ The Prosecution further submits that additional time would allow it to present its evidence in a 'logical and coherent sequence', referencing a 23 October 2013 decision of the Chamber which, after granting the Prosecution's request to add an additional Mungiki insider witness, precluded the Prosecution from calling

¹ ICC-01/09-02/11-835-Red (confidential version notified same day).

² Decision on commencement date of trial, 20 June 2013, ICC-01/09-02/11-763-Red.

³ Application, ICC-01/09-02/11-835-Red, paras 2(i), 11-12 and 32, *referencing* Defence Application for a Permanent Stay of the Proceedings due to Abuse of Process, 10 October 2013, ICC-01/09-02/11-822-Red (confidential version notified same day).

⁴ Email communication from Legal Officer of the Chamber to the parties and participants on 25 October 2013 at 18:25.

⁵ Prosecution response to the Defence application to vacate the 12 November 2013 date for the commencement of trial, 30 October 2013, ICC-01/09-02/11-842-Red (confidential version notified same day).

⁶ Response, ICC-01/09-02/11-842-Red, para. 9.

Mungiki witnesses until at least the end of January 2014 so as to give the Defence an adequate opportunity to investigate the new proposed evidence.⁷ The Prosecution ultimately submits that it 'does not oppose the Defence Application, save in that the new date for the commencement of the trial should be fixed as Monday 3 February 2014 [...]'.⁸

3. On 31 October 2013, the Legal Representative for Victims ('LRV') filed a response to the Application.⁹ This response was filed after the 30 October 2013 deadline, and the Chamber does not accept that waiting until the Prosecution Response was filed in order to provide 'an informed response'¹⁰ constitutes a reason outside the LRV's control within the meaning of Regulation 35(2) of the Regulations.¹¹ Nevertheless, the Chamber notes the LRV's submissions that a postponement is likely to be met with 'deep disappointment and frustration by the victims of this case'.¹²
4. Pursuant to Rule 132(1) of the Rules, the Chamber may postpone the date of the trial at the request of the Prosecution or the Defence.¹³ Any such postponement shall be granted in accordance with the Chamber's obligation to ensure that a trial is both fair and expeditious.¹⁴
5. The Chamber notes that the parties are in agreement on postponing the trial date until February 2014 in order to give the Prosecution additional time to investigate

⁷ Response, ICC-01/09-02/11- 842-Red, paras 10-13, *referencing* Decision on Prosecution request to add P-548 and P-66 to its witness list, 23 October 2013, ICC-01/09-02/11-832.

⁸ Response, ICC-01/09-02/11- 842-Red, para. 14.

⁹ Victims' response to the public redacted version of the "defence application to vacate the 12 november 2013 date for the commencement of trial", 31 October 2013, ICC-01/09-02/11-845.

¹⁰ ICC-01/09-02/11-845, para. 7.

¹¹ Regulation 35(2) of the Regulations provides, in relevant part, that: '[a]fter the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control'.

¹² ICC-01/09-02/11-845, para. 12.

¹³ Rule 132(1) of the Rules provides that: '[p]romptly after it is constituted, the Trial Chamber shall hold a status conference in order to set the date of the trial. The Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may postpone the date of the trial. The Trial Chamber shall notify the trial date to all those participating in the proceedings. The Trial Chamber shall ensure that this date and any postponements are made public'.

¹⁴ Article 64(2) of the Statute.

recent factual allegations raised by the Defence. The Chamber accepts the parties' submissions that a postponement is warranted and vacates the trial date of 12 November 2013. This decision is without prejudice to the Chamber's views on the other reasons raised by the parties for adjourning the trial. However, noting the interest of justice, the fairness and expeditiousness of the proceedings and, in particular, the victims and witnesses, the Chamber deeply regrets that repeated adjournments of the trial have been necessary because one or both parties have required more time to prepare. The Chamber urges both parties to accelerate their preparation in order to ensure that no further postponements are required.

6. The parties disagree as to whether the trial should commence in the first or second full week of February 2014. The Chamber considers that neither party has specifically justified its chosen date in a convincing manner.¹⁵ However, noting the minimal difference between these two timeframes, the Chamber has selected a tentative trial commencement date that represents a compromise between the proposals of the parties.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

VACATES the trial commencement date of Tuesday, 12 November 2013 and

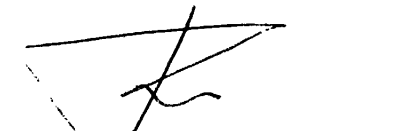
PROVISIONALLY SETS a trial commencement date of Wednesday, 5 February 2014.

¹⁵ The Defence presents no explanation for why 12 February 2014 has been specifically selected. The Prosecution's stated justification is based only on starting the next working day after the expiry of the time bar impacting the order of witnesses, as fixed in the Chamber's 23 October 2013 decision. Response, ICC-01/09-02/11-842-Red, para. 14, *referencing* ICC-01/09-02/11-832, para. 14.

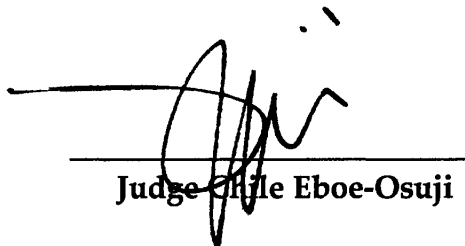
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Robert Fremr



Judge Chile Eboe-Osuji

Dated 31 October 2013

At The Hague, The Netherlands