

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 19 November 2012

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

**Decision on the application for a ruling on the legality of the arrest of Mr
Dennis Ole Itumbi**

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for Francis Kirimi Muthaura
Mr Karim Khan, Mr Essa Faal,
Mr Kennedy Ogetto, Ms Shyamala
Alagendra

Legal Representatives of Victims

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins
Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others
Mr. Nicholas Kaufman

Trial Chamber V ("Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, after considering Articles 55(1)(d), 70 and 85(1) of the Rome Statute ("Statute"), renders the following decision on the application for a ruling on the legality of the arrest of Mr Dennis Ole Itumbi ("Mr Itumbi").

I. Background and Submissions

1. On 21 September 2012, Mr Itumbi filed a request in the Kenya situation record for a ruling by Pre-Trial Chamber II that he was unlawfully arrested.¹ Mr Itumbi submitted that he was illegally arrested by Kenyan authorities in the context of either "an investigation instigated on the initiative of the [Office of the Prosecutor ("prosecution")]" or "in connection with [the Court's] proceedings in general".² This request was made as a preliminary step towards requesting compensation under Article 85(1) of the Statute.³
2. On 25 September 2012, Pre-Trial Chamber II issued a decision whereby it ruled that it was not procedurally competent to deal with Mr Itumbi's request.⁴ Pre-Trial Chamber II reasoned that Trial Chamber V is now responsible for the conduct of subsequent proceedings relating to the two cases arising from the Kenya situation and that "[g]iven that the Application presented and the annex appended thereto raise an issue concerning the alleged intimidation of the Prosecutor's witnesses in the two cases already before the Trial Chamber, the Chamber considers that it is no more competent to address the Application *sub judice*".⁵

¹ Application for a ruling on the legality of the arrest of Mr Dennis Ole Itumbi, 21 September 2012, ICC-01/09-105.

² ICC-01/09-105, para. 35.

³ ICC-01/09-105, p. 3.

⁴ Decision on the "Application for a ruling on the legality of the arrest of Mr Dennis Ole Itumbi", 25 September 2012, ICC-01/09-106.

⁵ ICC-01/09-106, para. 8.

3. On 28 September 2012, Mr Itumbi filed the “Application for a ruling on the legality of the arrest of Mr Dennis Ole Itumbi” (“Application”)⁶ before this Chamber. Mr Itumbi seeks the same ultimate relief from this Chamber on the same grounds that were the basis of his submissions before Pre-Trial Chamber II.⁷ Mr Itumbi submits that:

- (i) for a ruling of unlawful arrest under Article 85 of the Statute, “ [...] [t]he only necessary requirement is that the unlawful arrest or detention be, in some way, causally linked to investigative proceedings being conducted at the International Criminal Court”;⁸
- (ii) there is no need to make a specific finding that the illegality of the arrest is attributable to the prosecution, as distinct from an “unauthorised folly” of the Kenyan authorities, because Article 85(1) of the Statute creates an enforceable and mandatory right to compensation for unlawful arrest without stipulating whether the identity of the offending party need be an organ of the Court itself or a national authority;⁹ and
- (iii) on 22 March 2012, Mr Itumbi was arrested by the Kenyan authorities in a manner which denied him due process under international law.¹⁰

4. On 22 October 2012, the prosecution filed a response to the Application on a confidential *ex parte*, prosecution and VWU only, basis.¹¹ On 29 October 2012, a

⁶ ICC-01/09-02/11-497, with two annexes.

⁷ ICC-01/09-02/11-497, para. 47.

⁸ ICC-01/09-02/11-497, para. 36.

⁹ ICC-01/09-02/11-497, paras 42-46.

¹⁰ ICC-01/09-02/11-497, paras 15, 37-41. *See also* ICC-01/09-02/11-497-AnxB.

¹¹ Response to Application for a ruling on the legality of the arrest of Mr. Dennis Ole Itumbi (ICC-01/09-02/11-497), 22 October 2012, ICC-01/09-02/11-511-Conf-Exp.

public redacted version of the prosecution's response was notified.¹² In this Decision, which is issued as a public document, reference is made only to the public redacted version of the prosecution's response.

5. The prosecution requests that the Application be rejected in its entirety¹³ and submits that:

- (i) the issue is not whether the alleged illegal arrest or detention by the Kenyan authorities was somehow "in connection with Court proceedings", but is rather whether Mr Itumbi's alleged arrest was attributable to or effectuated at the request of the Court or, more particularly, the prosecution;¹⁴
- (ii) the prosecution did not request and was not otherwise involved in Mr Itumbi's alleged arrest or detention;¹⁵ and
- (iii) as Mr Itumbi was not arrested or detained at the prosecution's request, but was rather arrested pursuant to Kenyan domestic law and by Kenyan authorities, he cannot validly make a compensation claim before the Court pursuant to Article 85(1) of the Statute.¹⁶

II. Analysis and Conclusions

6. The Chamber notes that Mr. Itumbi's arguments primarily focus on whether he was arrested "in connection with Court proceedings" and that it is unnecessary for an arrest to be "attributable" to the prosecution. The Chamber disagrees that an

¹² Public Redacted Version of Prosecution's 'Response to Application for a ruling on the legality of the arrest of Mr. Dennis Ole Itumbi (ICC-01/09-02/11-497)', dated 26 October 2012, ICC-01/09-02/11-511-Red. *See also* ICC-01/09-02/11-513-Conf-Exp.

¹³ ICC-01/09-02/11-511-Red, para. 31.

¹⁴ ICC-01/09-02/11-511-Red, paras 3(i), 16-19.

¹⁵ ICC-01/09-02/11-511-Red, paras 3(ii), 20-22.

¹⁶ ICC-01/09-02/11-511-Red, paras 3(iv), 23-27.

attribution requirement is unnecessary. In the Chamber's view, and contrary to Mr Itumbi's arguments, in order for the Chamber to make a finding of unlawful arrest pursuant to Article 85(1) of the Statute, a domestic arrest must breach a provision of the Court's statutory framework and be attributable in some way to the Court.¹⁷

7. Although Article 85(1) is broadly framed, referring to "[a]nyone who has been the victim of unlawful arrest or detention", its meaning and application must be interpreted in light of other relevant provisions of the Statute. In particular, the Chamber considers that Article 85(1) must in this case be read together with Article 55(1)(d) of the Statute, which protects persons from arbitrary arrest or detention "in respect of an investigation under this Statute".¹⁸ Furthermore, the Chamber considers that the right guaranteed under Article 55(1)(d) does not extend to every arrest or detention that related in any way to an investigation by the Court. Rather, in the view of the Chamber, in order for an arrest or detention to be "in respect of an investigation" within the meaning of Article 55(1)(d), it would need to be demonstrated, at minimum, that there is concerted action between the Court and national authorities.¹⁹
8. In this regard, the Chamber notes the Appeals Chamber's reasoning in 2006 that "[m]ere knowledge on the part of the Prosecutor of the investigations carried out by

¹⁷ Article 85(1) sets out that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". Rule 173 of the Rules makes clear that a prerequisite for the submission of a request for compensation is that a Chamber must first have decided on the unlawfulness of the arrest or detention under Article 85(1).

¹⁸ "In respect of an investigation under this Statute, a person: [...] (d) [s]hall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute."

¹⁹ Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute, 4 October 2006, ICC-01/04-01/06-512, p. 9 ("concerted action" between the Court and national authorities is required before a Chamber will evaluate whether someone's rights have been violated); Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)", 15 August 2012, ICC-02/11-01/11-212, para. 96.

[national] authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose”.²⁰

9. In the present case, the prosecution asserts that it did not request and was not otherwise involved in Mr Itumbi’s alleged arrest or detention. The Chamber is not persuaded that Mr Itumbi’s submissions cast doubt on the veracity of this assertion. In particular, the Chamber is not satisfied that Mr Itumbi’s alleged arrest on 22 March 2012 by the Kenyan authorities was “instigated” or otherwise requested by the prosecution or any other organ of the Court. Mr Itumbi does provide some evidence that he was being investigated by Kenyan authorities for matters connected with this Court’s proceedings,²¹ but, for the reasons above, in order to obtain a finding under Article 85(1) of the Statute it is insufficient to establish that a person’s arrest is merely “connected with Court proceedings” in the absence of concerted action.
10. Therefore, even assuming that Mr Itumbi has standing to make the Application and that the arrest took place as alleged, given that the Chamber is not satisfied that Mr Itumbi has been arrested in a manner attributable to the prosecution or any other organ of the Court, the relief requested in the Application must be rejected.

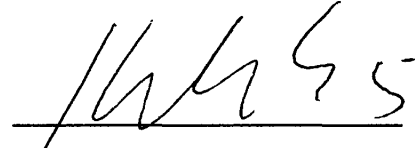
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the relief requested in the Application.

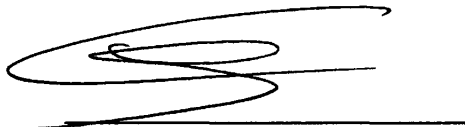
²⁰ Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 42.

²¹ ICC-01/09-02/11-497-AnxB, pp. 3-5. *See also* ICC-01/09-02/11-497-Conf-Exp-AnxA.

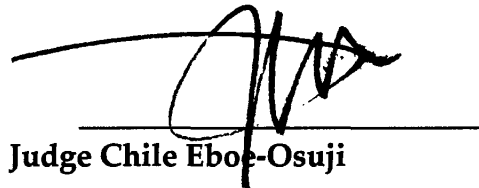
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 19 November 2012

At The Hague, The Netherlands