

Prosecution Hopes of Kenyatta Trial "Less and Less Promising"

Author: J.J.
Wangui

ICC case against Kenyan president on verge of collapse as prosecutors ask judges to force national authorities to hand over evidence.

Lawyers seeking to prosecute Kenya's president Uhuru Kenyatta at the International Criminal Court (ICC) have asked judges to delay the start of his trial until the government hands over financial records that could bolster their case.

Part of the case brought by the Office of the Prosecutor (OTP) case involves the allegation that Kenyatta bankrolled the violence which hit large parts of Kenya six years ago. The OTP admits, however, that even this new information may not be enough to bring him to trial.

Prosecutor Fatou Bensouda announced in December that she did not have enough evidence to try Kenyatta after she was forced to drop two key witnesses from the case. (See **ICC Case against Kenyan President Unravels.**)

Bensouda has repeatedly accused the Kenyan authorities of obstructing her office's investigations, and she has asked judges to force them to hand over evidence.

"The request which is now before the chamber is that the trial should continue to be adjourned without a date being fixed for the opening of the trial until such time as the government of Kenya complies," prosecuting lawyer Benjamin Gumpert told judges during a court meeting on February 5. "Principally, our submission is that the government of Kenya has obstructed this investigation by its non-compliance for assistance."

Kenyatta is charged with five counts of crimes against humanity for allegedly orchestrating widespread bloodshed following a disputed presidential election in 2007.

Kenyatta's Party of National Unity (PNU), with a large support base among the Kikuyu ethnic community, claimed victory over the opposition Orange Democratic Movement (ODM), which was mainly supported by Kalenjin.

The unrest claimed 1,100 lives and forced some 650,000 people from their homes.

Prosecutors allege that Kenyatta personally funded attacks in the towns of Nakuru and Naivasha by providing "colossal" sums of money to the "Mungiki", an outlawed gang whose members allegedly committed atrocities in both places.

As well as noting the government's failure to provide Kenyatta's financial records, Bensouda has previously notified judges of a number of other obstacles put in her way by officials in Kenya.

In a January 31 filing, she said her office had been blocked from interviewing Kenyan police officers who they believed had information about the bloodshed. When she requested records like the minutes of National Security Advisory Committee meetings, she says she was only given redacted, or edited, versions.

Other documents had not been handed over at all, Bensouda told judges, although she disclosed that she did have evidence against other senior PNU members and prominent Kikuyu politicians and businessmen.

"The prosecution is currently assessing the strength of its evidence against these individuals," she wrote to judges.

Kenyatta's trial was meant to start on February 5, but judges postponed the case after the OTP requested a three-month delay. Prosecutors now say that might not be long enough to secure the evidence they need.

In response to a request from presiding Judge Kuniko Ozaki for greater clarity on the matter, Gumpert said it had been hard to place a time limit on the lines of inquiry that remain open to the prosecution.

"The three-month period was no more than the best rough estimate which we could then come up with, hoping as we did then that the investigative steps outlined to the court might bear fruit," Gumpert said.

In the January 31 filing, prosecutors informed judges that during the week of January 20, the OTP discovered that it was not going to be able to get further information it was seeking, including phone records and government documents.

Gumpert admitted that the prosecution's hopes of being able to gather enough evidence to bring the case to trial were fading fast. He said the remaining leads looked "less and less promising".

"We have made a decision that [in the absence of] the financial records of which we have spoken, the remaining stones unturned are better characterised as pebbles," he told judges.

Gumpert said that the last realistic avenue open to the prosecution would be for the Kenyan authorities to be forced to hand over Kenyatta's financial records.

"I don't rule out the possibility that full disclosure of Mr Kenyatta's financial records - if indeed our case theory is correct - might be sufficient for the case to be brought," Gumpert said.

But he added, "That really is just the wildest speculation."

A lawyer representing some 600 victims of the violence accused both the Kenyan authorities and the defendant himself of obstructing the case.

"As president, Mr Kenyatta has unleashed a diplomatic campaign of startling hostility, directly trying to reduce support for this court in an effort to help him escape trial," Fergal Gaynor told judges.

He said large sections of state institutions had been used to defend those standing trial while ignoring the rights of the hundreds of thousands of victims of the post-election violence.

"Instead of acting to secure justice for the victims, the accused instead took steps to frustrate their search for the truth," Gaynor added.

Responding to these arguments, Kenyatta's lawyers said the case against their client had collapsed and asked judges to terminate proceedings.

Steven Kay, Kenyatta's leading lawyer, said the prosecution was now engaged in a "face-saving" exercise.

Kay informed judges that he had repeatedly told the court that the prosecution's witnesses were lying. This had now been shown to be the case, he said, and the charges against his client did not stand up.

"We have come to a stage where the case presented reveals that it is not a case, it is a case with allegations based upon falsity. And the prosecution knows that," Kay said.

He rejected the allegation that Kenyatta had paid people to carry out the attacks. He said his client could not have withdrawn such large sums of money without setting off alarm-bells.

"It absolutely makes no sense at all that 20 million pounds [sterling] cash [30 million US dollars or four billion Kenyan shillings] was taken out of the Kenyan banking system in a heartbeat and provided to people," said Kay. "We have no evidence, if this did happen, from the financial sources readily available to the prosecution as to what would happen to the money markets in Kenya."

Kay further accused Gaynor of stirring up victims' emotions by offering them unjustified hope.

"Mr Gaynor created a false narrative that has been a hope that he believes that someone who was responsible should be punished. That narrative however, with all its passion from him, was based upon false evidence," he said.

A further court meeting between all parties will be held on February 13 at which arguments will be heard on the OTP's application for a finding of non-compliance against the Kenyan government.

JJ Wangui is an IWPR reporter in Nairobi.

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