

**Cour
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**International
Criminal
Court**

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No.: **ICC-01/09-02/11**
Date: **05 February 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

**Defence Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute
to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber
for Reconsideration**

Source: Defence for Uhuru Muigai Kenyatta

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

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I. INTRODUCTION

1. The Defence for Mr Uhuru Kenyatta (“Defence”) requests Trial Chamber V (“Chamber”) to refer the Decision on the Confirmation of Charges¹ (“Confirmation Decision”) back to Pre-Trial Chamber II (“PTC”) pursuant to Article 64(4) of the Rome Statute for reconsideration in order to avoid a serious miscarriage of justice in the present case.
2. Referral by the Chamber to the PTC of this preliminary issue is necessary in order to ensure the fair and effective functioning of the proceedings and maintain the integrity of the Court for the following reasons:
 - a. Essential facts underpinning the Confirmation Decision by the PTC are no longer relied upon by the Prosecution as evidence in support of the charges, as they are now known to have been falsely alleged by a witness relied upon for those proceedings. The Prosecution’s disclosure of its case in the “Prosecution’s provision of materials pursuant to Decision ICC-01/09-02/11-451”² contradict the findings upon which the Confirmation Decision was based.
 - b. The Confirmation Decision and the hearing on the confirmation of charges (“Confirmation Hearing”) have been rendered unfair by reason of the Prosecution’s failure³ to draw the attention of the PTC to crucial evidence undermining its case,⁴ the failure of the Single Judge to properly satisfy herself as to the true nature of the OTP-4 statement and her consequent authorisation of non-disclosure to the Defence of the same or a summary thereof.⁵
 - c. In the circumstances, the Confirmation Decision was decided by the PTC based upon fraudulent evidence.

¹ ICC-01/09-02/11-382-Conf.

² ICC-01/09-02/11-596-Conf Anx A,B,C,D.

³ In particular, the Defence refers the Chamber to the Prosecution’s 15 August 2011 application and associated annexes requesting, *inter alia*, the continued non-disclosure to the Defence of evidence concerning a statement made by OTP-4 (KEN-OTP-0043-0083 (“OTP-4 Statement”)), ICC-01/09-02/11-241-Conf-Exp (“15 August 2011 Application”).

⁴ OTP-4 Statement, para. 33.

⁵ ICC-01/09-02/11-254-Conf-Exp (“18 August 2011 Decision”), p.9.

II. PROCEDURAL HISTORY

3. On 8 March 2011, the PTC issued summonses to appear before the International Criminal Court (“ICC”) for Ambassador Francis Muthaura, Mr Uhuru Kenyatta and General Mohammed Ali.⁶
4. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties”.⁷
5. On 3 June 2011, the Prosecution requested that the PTC authorise redactions to evidence collected before 15 December 2010,⁸ asking, *inter alia*, that the OTP-4 Statement be redacted in full.⁹ On 8 July 2011, the Single Judge ordered¹⁰ the Prosecution either to summarise or not disclose certain materials relating to OTP-4.¹¹
6. On 15 August 2011, the Prosecution applied to the PTC to lift restrictions regarding the identity of OTP-4¹², and also requested the continued non-disclosure to the Defence of, *inter alia*, the OTP-4 Statement.¹³ On 18 August 2011, the Prosecution informed the PTC that OTP-4 had consented to the disclosure of his identity.¹⁴ In the 18 August 2011 Decision, the Single Judge ruled that OTP-4's identity could be disclosed to the Defence¹⁵ and ordered further non-disclosure of the OTP-4 Statement to the Defence.¹⁶
7. The Confirmation Hearing took place between 21 September and 5 October 2011. On 23 January 2012, Pre-Trial Chamber II issued the Confirmation Decision, confirming the charges against Ambassador Muthaura and Mr Kenyatta, and refused to confirm the

⁶ ICC-01/09-02/11-1.

⁷ ICC-01/09-02/11-64 (“Disclosure Calendar Decision”).

⁸ ICC-01/09-02/11-101-Conf-Exp (“3 June 2011 Application”).

⁹ ICC-01/09-02/11-101-Conf-Exp-AnxE2, p.5.

¹⁰ ICC-01/09-02/11-165-Conf-Exp; ICC-01/09-02/11-165-Conf-Red (“8 July 2008 Decision”).

¹¹ ICC-01/09-02/11-165-Conf-Exp, page 39.

¹² 15 August 2011 Application, para. 20.

¹³ 15 August 2011 Application, para. 20, Annex A.

¹⁴ ICC-01/09-02/11-252-Conf-Exp, para. 2.

¹⁵ 18 August 2011 Decision, p.9.

¹⁶ 18 August 2011 Decision, p.9

charges against General Ali.¹⁷ On 9 March 2012, Pre-Trial Chamber II denied the Defence applications to appeal the Confirmation Decision.¹⁸ On 12 March 2012, the Registry submitted the records of the legal proceedings to the Presidency.¹⁹ On 29 March 2012, the Presidency constituted the Chamber and referred the case to trial.

8. On 21 June 2012, the Prosecution disclosed Potentially Exculpatory Evidence (“PEXO”) – Package 8, a significant extent of which concerned Prosecution OTP-4.²⁰
9. On 1 August 2012, the Prosecution confirmed to the Defence the identities of Prosecution Witnesses 11 and 12.²¹
10. On 22 August 2012, the Prosecution disclosed PEXO – Package 10. This disclosure package contained only one item, an Article 67(2) exculpatory witness statement from Prosecution OTP-4.²² On 19 October 2012, the Prosecution disclosed Incriminatory Evidence Package 18.²³ This disclosure package contained the OTP-4 Statement and other associated documentation.²⁴
11. On 13 December 2012, and at the request of the defence teams for Mr Kenyatta and Ambassador Muthaura, the Prosecution filed a request²⁵ for the reclassification of six documents relating to the 3 June 2011 Application,²⁶ 8 July 2008 Decision,²⁷ and 18 August Decision,²⁸ all of which related to Prosecution requests for the non-disclosure of the OTP-4 Statement to the Defence. On 14 December 2012, the Chamber issued its “Decision on the prosecution's request for re-classification of six documents relating to the [OTP-4 Statement]”, ordering the Registry to reclassify the six documents that

¹⁷ ICC-01/09-02/11-382-Conf.

¹⁸ ICC-01/09-02/11-406.

¹⁹ ICC-01/09-02/11-407.

²⁰ ICC-01/09-02/11-443 and ICC-01/09-02/11-443-Conf-AnxA.

²¹ ICC-01/09-02/11-461-Conf-Anx1.

²² KEN-OTP-0067-0604.

²³ ICC-01/09-02/11-512 and ICC-01/09-02/11-512-Conf-Anx1.

²⁴ KEN-OTP-0043-0079, KEN-OTP-0043-0080 and KEN-OTP-0043-0081.

²⁵ ICC-01/09-02/11-570-Conf (“13 December 2012 Application”).

²⁶ The Prosecution requested that the Chamber reclassify as confidential an unredacted version of Annex E2 to the 3 June 2011 Application.

²⁷ The Prosecution requested that the Chamber reclassify as confidential a lesser-redacted version of the 8 July 2011 Decision, a redacted version of its corresponding Annex 1, and selected pages from Annex 2, with redactions.

²⁸ The Prosecution requested that the Chamber reclassify as confidential a lesser-redacted version of the 18 August 2011 Decision, and selected pages from its corresponding Annex 2.

formed the subject matter of the 13 December 2012 Application, as confidential.²⁹ The Chamber also directed the Prosecution to file lesser-redacted versions the 3 June 2011 and 15 August 2011 Applications, including relevant annexes.³⁰ On 17 December 2012, the Registry reclassified the six documents, which comprised a Prosecution annex³¹ and two decisions, with related annexes, issued by the Single Judge.³² On 19 December 2012, the Prosecutor filed lesser-redacted versions of the 3 June 2011 and 15 August 2011 Applications, including relevant annexes.³³

12. On 7 January 2013, the Prosecution submitted the “Final Updated Document Containing the Charges” (“Updated DCC”).³⁴ On 9 January 2013, the Prosecution disclosed the “Prosecution’s Provision of Materials Pursuant to Decision ICC-01/09-02/11-451”.³⁵ The Annexes to this filing contained the list of witnesses to be relied upon at trial (“Witness List”);³⁶ summaries of the main facts on which each witness is expected to testify (“Summary of Areas of Testimony”);³⁷ and the pre-trial brief (“Pre-Trial Brief”).³⁸

III. LEGAL SUBMISSIONS

13. The Defence contends that on the basis of the submissions herein, the Trial Chamber is duty bound to exercise its powers under Article 64(4) to refer the preliminary issue of the Confirmation Decision back to the PTC for reconsideration in order to ensure the

²⁹ ICC-01/09-02/11-572-Conf (“14 December 2012 Decision”).

³⁰ 14 December 2012 Decision, p. 4.

³¹ 3 June 2011 Application, Annex E2, ICC-01/09-02/11-570-Conf (3 June Application, Annex E2”).

³² Lesser-redacted version of the 8 July 2011 Decision, ICC-01/09-02/11-570-Conf-AnxA (“Lesser-Redacted 8 July 2011 Decision”); redacted version of Annex 1 to the 8 July 2011 Decision, ICC-01/09-02/11-570-Conf-AnxB (“8 July 2011 Decision, Redacted Annex 1”); redacted version of Annex 2 to the 8 July 2011 Decision, ICC-01/09-02/11-570-Conf-AnxC (“8 July 2011 Decision, Redacted Annex 2”); Lesser-redacted version of the 18 August 2011 Decision, ICC-01/09-02/11-570-Conf-AnxD (“Lesser-Redacted 18 August 2011 Decision”); redacted version of Annex 1 to the 18 August 2011 Decision, ICC-01/09-02/11-570-Conf-AnxE (“18 August 2011 Decision, Redacted Annex 1”).

³³ Lesser-redacted version of the 3 June 2011 Application, ICC-01/09-02/11-101-Conf-Red2 (“Lesser-Redacted 3 June 2011 Application”); Annex E1 to the 3 June 2011 Application (“3 June 2011 Application, Redacted Annex E1”); Lesser-redacted version of the 15 August 2011 Application, ICC-01/09-02/11-241-Conf-Red (“Lesser-Redacted 15 August 2011 Application”); redacted version of Annex A1 to the 15 August 2011 Application, ICC-01/09-02/11-241-Conf-AnxA1-Red (“15 August 2011 Application, Redacted Annex A1”).

³⁴ ICC-01/09-02/11-591, ICC-01/09-02/11-591-Conf-AnxA.

³⁵ ICC-01/09-02/11-596/Conf.

³⁶ ICC-01/09-02/11-596-Conf-AnxA-Red.

³⁷ ICC-01/09-02/11-596-Conf-AnxB-Red.

³⁸ ICC-01/09-02/11-596-Conf-AnxD-Red-Corr.

“effective and fair functioning” of the proceedings and to avoid a serious miscarriage of justice.

14. The Defence relies upon Articles 21(1)(b), 21(2), 61(11), 64(2), 64(4), 64(6)(a) and 64(6)(f) of the Rome Statute and Rule 134(1) of the Rules of Procedure and Evidence.
15. The Chamber has an explicit power to perform all the functions of the Pre-Trial Chamber,³⁹ and must ensure that a trial is fair and expeditious.⁴⁰ Article 64(4) permits, “if necessary for...[the] effective and fair functioning” of the proceedings, the Chamber to “refer preliminary issues to the Pre-Trial Chamber.” Article 21(1)(b) requires the Chamber, in the absence of a specific article or rule, to apply “applicable treaties and the principles and rules of international law...”. Article 21(2) allows the Chamber to “apply principles and rules of law as interpreted in its previous decisions”.
16. Article 64(6)(f) and Rule 134(1) of the Rules of Procedure and Evidence grants the Chamber the power to “[r]ule on any other relevant matters” or “any issue concerning the conduct of the proceedings”.
17. Judicial reconsideration of decisions is required when newly discovered evidence casts serious doubt on a prior determination as in the present case. Following referral of the preliminary issue to the PTC, the inherent power of a court to reconsider its own decisions is well-established at the international criminal courts and tribunals. The ICTY Appeals Chamber has confirmed the inherent nature of this discretionary power to reconsider a previous decision in circumstances where “there has been a clear error of reasoning or if particular circumstances exist that justify reconsideration in order to prevent an injustice.”⁴¹ In the request for reconsideration, the requesting party must demonstrate a “clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.”⁴²

³⁹ Articles 61(11) and 64(6)(a), Rome Statute.

⁴⁰ Article 64(2), Rome Statute.

⁴¹ ICTY, *Prosecutor v. Perisic*, Decision on Defence Motion for Reconsideration of the Trial Chamber’s Decision of 4 May 2010 Concerning Adjudicated Facts, IT-04-81-T, 15 October 2010, para. 15.

⁴² ICTY, *Prosecutor v. Karadzic*, Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, IT-95-5/18-T, 10 December 2010, para. 8 and ICTY, *Prosecutor v. Karadzic*, Decision on Accused’s Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, IT-95-5/18-T, 14 June 2010, para. 12.

18. The standard employed by the ICTR is not dissimilar and allows for reconsideration when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made the original decision; or (3) there is reason to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.⁴³
19. At the ICC, Trial Chamber III has determined that judicial reconsideration is possible with “new information about which the Chamber had no knowledge at the time of its original decision.”⁴⁴ Moreover, Trial Chamber I has ruled that such oversight is needed to “maintain public confidence in the judicial system.”⁴⁵ A chamber’s power to review in the interests of justice is also evident from Article 84(1)(b) of the Rome Statute, which allows for revision of conviction or sentence when it is “discovered that decisive evidence, taken into account at the trial and upon which the conviction depends, was false, forged or falsified.”

IV. SUBMISSIONS ON THE MERITS

The Confirmation Decision is Substantially Different to the Case Disclosed and Relied Upon by the Prosecution in the Pre-Trial Brief and Related Materials

20. Article 74(2) of the Rome Statute states that a “charge” is composed of the facts and circumstances underlying an alleged crime as well as the legal characterisation. In the Confirmation Decision, the PTC held that “the charges confirmed fix and delimit, to a certain extent, the scope of the case for the purposes of the subsequent trial”.⁴⁶ Regulation 55 of the Regulations of the Court vests the Chamber with the authority to

⁴³ ICTR, *Prosecutor v. Augustin Ndirabatware*, Decision on Defence Motion for Second Reconsideration of Witness Protective Measures, ICTR-99-54-T, 15 July 2010, para. 18 (citing Decision of 7 July 2010, para. 17, citing Impugned Decision, para. 22; ICTR, *Prosecutor v. Édouard Karemera et al.*, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera’s Motion for Inspection: Michel Bagaragaza (TC), ICTR-98-44-T, 29 September 2008, para. 4; ICTR, *Bagosora et al.*, Decision of 15 June 2004, para. 9).

⁴⁴ ICC-01/05-01/08-T-42-Red-ENG WT, Transcript of 2 December 2010, page 4, lines 3-4.

⁴⁵ *Prosecutor v. Lubanga*, Decision on the Defence Request to reconsider the “Order on Numbering of Evidence” of 12 May 2010, ICC-01/04-01/06-2705, para. 18 (noting that Trial Chamber I decided that judicial reconsideration or irregular decisions is an implicit power of a Chamber of the Court).

⁴⁶ ICC-01/09-02/11-382-Conf, para. 56.

modify the legal characterisation of facts “without exceeding the facts and circumstances described in the *charges* and any amendments to the charges”.⁴⁷

21. The PTC held that the facts underlying the charges must not be exceeded by the Trial Chamber, drawing a distinction between underlying facts and subsidiary facts of evidence that demonstrate or support the facts described in the charges.⁴⁸ For this reason, the charges confirmed in this case pursuant to Article 61(7)(a) required the PTC to be satisfied by the evidence so that the factual subject matter of the charges was settled for the purpose of the trial.⁴⁹

i. Nairobi State House Meeting – 26 November 2007; Yaya Centre Meeting – 17 November 2007

22. The PTC found as a fact underlying the charges that Mr Kenyatta, Ambassador Muthaura, President Mwai Kibaki and others met with Mungiki representatives at Nairobi State House on 26 November 2007 (“26 November meeting”).⁵⁰ The PTC found that OTP-4 was present at this meeting as a Mungiki representative⁵¹ and alleged guest of Mr Kenyatta.⁵² His evidence was relied upon to establish the presence of Mr Kenyatta and his links to the Mungiki, whom he was alleged to have told to fully support the President.⁵³ This evidence was also relied upon to establish links at this time to Maina Njenga, the alleged leader of the Mungiki, and the creation of a relationship to enable the Mungiki to support the PNU in the forthcoming elections.⁵⁴

23. At the time of the Confirmation Hearing, the PTC was in possession of statements by OTP-4 that alleged he was an eye-witness to the 26 November meeting. Mr Kenyatta’s alleged presence at this meeting was found by the PTC to have been established by this evidence.⁵⁵ OTP-4’s evidence was challenged by both Defence teams.⁵⁶ After the

⁴⁷ ICC-01/09-02/11-382-Conf, para. 57.

⁴⁸ ICC-01/09-02/11-382-Conf, para. 59.

⁴⁹ ICC-01/09-02/11-382-Conf, para. 60.

⁵⁰ ICC-01/09-02/11-382-Conf, para. 310.

⁵¹ ICC-01/09-02/11-382-Conf, para. 311.

⁵² ICC-01/09-02/11-382-Conf, para. 325.

⁵³ ICC-01/09-02/11-382-Conf, para. 311.

⁵⁴ ICC-01/09-02/11-382-Conf, para. 311.

⁵⁵ KEN-OTP-0043-0002, paras 149-81.

⁵⁶ ICC-01/09-02/11-382-Conf, paras 316-331; *see also* ICC-01/09-02/11-372, paras 32(a)-32(l) and ICC-01/09-02/11-374-Conf, paras 24-26 and 52-54.

Confirmation Hearing, on 25 May 2012, OTP-4 resiled from his evidence and admitted he had lied and was not present at the meeting as alleged.⁵⁷

24. OTP-4 has also admitted lying about another meeting at which he alleged he was present with Mr Kenyatta and Mungiki personnel on 17 November 2007 (“17 November meeting”).⁵⁸ He claimed the source for his knowledge was a witness interviewed by the Defence for Ambassador Muthaura (“Muthaura Defence”), D12-37, whose statement was submitted as evidence in the Confirmation proceedings.⁵⁹ In fact, D12-37 stated to both the Muthaura Defence and the Prosecution that: (a) neither Mr Kenyatta nor OTP-4 were present at the 26 November meeting;⁶⁰ (b) the 17 November meeting never took place;⁶¹ and (c) he has never met Mr Kenyatta in person.⁶² The fact that D12-37 had stated that OTP-4 was not present was held against him in the assessment of his evidence by the PTC.⁶³ Furthermore, in his testimony to the PTC, Mr Kenyatta gave evidence that he was not present at this meeting,⁶⁴ and the Defence submitted cogent evidence of his alibi in support,⁶⁵ all of which was wrongfully and unfairly rejected by the PTC.⁶⁶
25. None of the documents recently submitted by the Prosecutor setting out its case – the Pre-Trial Brief, Summary of Areas of Testimony and the Updated DCC – assert that Mr Kenyatta was present at the 26 November meeting. In the circumstances, a key fact underlying the confirmed charges has been established to be based upon a lie. The Defence evidence, which went to the truth of the matter, was in the circumstances wrongfully rejected by the PTC.

⁵⁷ KEN-OTP-0067-0604, paras 10-13.

⁵⁸ *Ibid* at paras 7-9.

⁵⁹ *Ibid* at paras 11-12.

⁶⁰ KEN-D12-0001-0412, para. 38; when D12-37 was asked in his 24 April 2012 Prosecution interview to identify the “untrue” parts of his statement to the Muthaura Defence, he did not select paragraph 38, which states “I was asked if Uhuru Kenyatta was present at the Statehouse on 26 November 2007 during the youth meeting. He was not present there. If Uhuru Kenyatta was present there or any place where I was present I would certainly have noticed and remember that”, KEN-OTP-0074-0053_R01 at 0065.

⁶¹ KEN-D12-0001-0412, para. 45; KEN-OTP-0074-0053_R01 at 0066, line 443-444.

⁶² KEN-D12-0001-0412, para. 45; KEN-OTP-0074-0053_R01 at 0066, line 454-456.

⁶³ ICC-01/09-02/11-382-Conf, para. 324.

⁶⁴ ICC-01/09-02/11-T-11-CONF-ENG ET at page 22, line 6 to page 24, line 23.

⁶⁵ KEN-D13-0005-0408 at 0430 to 0431; KEN-D13-0001-0358; KEN-D13-0001-0356; KEN-D13-0001-0357; KEN-D13-0005-0779 at 0800 to 0806; KEN-D13-0005-0179; KEN-D13-0005-0195; KEN-D13-0005-0197; KEN-D13-0005-0475; KEN-D13-0005-0524; KEN-D12-0010-0072 at 0075 to 0076, paras 19 – 20; KEN-D12-0001-0412 at 0417 to 0419; KEN-D12-0001-0276 at para 51.

⁶⁶ ICC-01/09-02/11-382-Conf, paras 315-32.

ii. Nairobi Club – 3 January 2008

26. The PTC found as a fact underlying the charges that Mr Kenyatta, Ambassador Muthaura and others met with Mungiki members at a supposed meeting at the Nairobi Members' Club on 3 January 2008 ("3 January meeting") and directed them to commit the crimes charged.⁶⁷ The facts relied upon to establish the charges are derived from the testimony of OTP-4.⁶⁸ The fact this meeting took place was challenged by the Defence⁶⁹ using extensive evidence to contradict the account of OTP-4.⁷⁰ The Defence evidence was rejected by the PTC. This was a key planning meeting relied upon by the Prosecution to establish the criminal plan.⁷¹
27. The Pre-Trial Brief no longer contains the allegation that the 3 January meeting took place as described in the facts underlying the charges, and refers only to meetings in "early January".⁷² The Witness List of the Prosecution no longer contains OTP-4, who was the only direct source of this evidence.⁷³ The Summary of Areas of Testimony contains no reference to the 3 January meeting.
28. A statement made by OTP-4 has been disclosed to the Defence after the Confirmation Decision in which the witness admitted that he was not present at the 3 January 2008 meeting. This statement was received by the Prosecution on 27 September 2010⁷⁴ and signed by Counsel for the Prosecution who took part in the confirmation proceedings. It was not disclosed to the Defence for Confirmation Hearing. The Prosecution only disclosed the OTP-4 Statement to the Defence on 19 October 2012,⁷⁵ despite the fact

⁶⁷ ICC-01/09-02/11-382-Conf, paras. 341 and 375-76.

⁶⁸ ICC-01/09-02/11-382-Conf, para. 342.

⁶⁹ ICC-01/09-02/11-382-Conf, paras 346-359.

⁷⁰ ICC-01/09-02/11-382-Conf, paras. 70-71 (citing ICC-01/09-02/11-T-10-ENG at page 47, line 12 to page 48, line 22; ICC-01/09-02/11-T-11-CONF-ENG at page 37, line 21 to page 38, line 14; ICC-01/09-02/11-T-15-CONF-ENG at page 63, line 4 to page 64, line 8; KEN-D13-0005-0755 at 0760 to 0761; KEN-D13-0005-0408 at 0411; KEN-D12-0003-0114; KEN-D12-0008-0039; KEN-D12-0012-0001; KEN-D12-0001-0412 at 0419, paras 42-44 and KEN-D12-0010-0072 at 0076, para 22).

⁷¹ ICC-01/09-02/11-382-Conf, para. 375

⁷² ICC-01/09-02/11-596-Conf-AnxD-Red, paras 31 and 115.

⁷³ The support in the Pre-Trial Brief for evidence of a meeting in early January from OTP-12, OTP-219 and OTP-494 none of whom were present at the alleged meeting to which they refer. These statements do not support the charges with direct evidence.

⁷⁴ See chain of custody metadata for KEN-OTP-0043-0083.

⁷⁵ KEN-OTP-0043-0083 at 0096, para. 33.

that it contradicted a key fact underlying the charges and was directly relevant to the credibility and reliability of the witness.⁷⁶

29. In oral argument at the Confirmation Hearing and subsequent written submissions, the Prosecution never referred to this important contradiction, and, contrary to the submissions of the Defence, emphasised the consistency of OTP-4:

Regarding Witness 0004, Kenyatta alleged a number of so called inconsistencies in his previous statements. Regarding his first statement, Prosecution Witness 0004 explained that he wanted to be discreet about his presence at the State House with the Mungiki on 26 November 2007 because he wanted to keep his Mungiki membership hidden. In any case, rather than indicating any inconsistencies, the limited purpose of the evidence he gave shows the security concerns of the Witness whilst he provided the statement.

*As regards the statement given to CIPEV, though different in some respects from the first statement, it is fundamentally consistent with the evidence provided by the Witness in the previous statement. **Crucially, the third and fourth statements of the Witness do not show any material inconsistency that may warrant the rejection of Witness 0004's evidence implicating Kenyatta in the common plan. Rather, the evidence of the Witness highlighted the specific and essential contribution of Kenyatta to the effective implementation of the common plan. Furthermore, the core of the evidence of the Witness has remained consistent and corroborated by other sources.***

30. In the circumstances, the Defence submits that the Prosecution misled the PTC as to the content and importance of the OTP-4 further statement in order to strengthen its case and prevent the Defence from having access to significant exculpatory evidence necessary for the proceedings.⁷⁷ In the Confirmation Decision, the PTC did not consider paragraph 33 of the OTP-4 Statement, and relied instead on the minutiae of the witness' alleged 'eye-witness' account of the 3 January meeting:

"...both Defence teams challenge the credibility of Witness OTP-4 by mentioning a number of inconsistencies between the information provided to the Prosecutor and that previously given to CIPEV. In particular, as highlighted by the Defence of Mr. Muthaura and of Mr. Kenyatta, the Chamber notes that, whilst in his statement to CIPEV the witness asserted that the meeting with Mungiki members on 3 January 2008 took place at the "Nairobi Safari Club" at around 11 a.m., in his statement to the Prosecutor

⁷⁶ OTP-4 clearly states in the OTP-4 Statement, which is a sworn affidavit, that he did not attend the alleged meeting at Nairobi Members' Club on 3 January 2008.

⁷⁷ The Defence refers the Chamber to its submissions at Section IV.(B)(i) on this issue.

*he states that the meeting was held at the “Nairobi Members’ Club” at breakfast time and commenced around 9 a.m. The Chamber notes that with respect to the name of the location of the meeting, the witness explains the inconsistency and confirms that the meeting took place at “Nairobi Members’ Club”, also describing its precise location in Nairobi as well as its interiors. Furthermore, the Chamber observes the number of details on the timing of the meeting given by Witness OTP-4 in the statement provided to the Prosecutor, e.g. precise information on what the witness did before arriving at the meeting and the fact that the witness had “breakfast” in the meeting room immediately before the meeting commenced. Conversely, the only reference to the time of the meeting in the witness’ statement to CIPEV is the planned time of the commencement of the meeting that the witness was given the day before. **In light of the above, the Chamber does not find that there exists an inconsistency which would cast doubt on the witness’ statement with respect to the meeting under consideration.**”⁷⁸*

31. Accordingly, the Confirmation Decision is based on an inherently flawed analysis of the evidence, and is fundamentally unfair to the Defence. Had the PTC been aware of the true nature of OTP-4’s evidence at the time of its deliberations, the Defence submits that the PTC would not have confirmed the present case for trial.

The Prosecution Misled the PTC by Failing to Draw Crucial Evidence Undermining its Case to its Attention

32. The OTP-4 Statement contains key contradictions in respect of the witness’ account the 3 January meeting at which it is alleged that Mr Kenyatta, Ambassador Muthaura and others met with Mungiki members and directed them to commit the crimes charged. Specifically, and contrary to the account provided by OTP-4 to the Prosecution,⁷⁹ he asserts that he was not in fact present at the 3 January meeting.⁸⁰ In the 15 August 2011 Application, the Prosecution did not draw the attention of the PTC to the fact that the OTP-4 Statement contained evidence directly relevant to the 3 January meeting.⁸¹ In the same application, the Prosecution stated that non-disclosure to the Defence of the entire OTP-4 Statement was justified for the following reasons:

- a. “to protect the safety of the witness”;

⁷⁸ ICC-01/09-02/11-382-Conf paras. 346

⁷⁹ KEN-OTP-0043-0002_R01, paras 188-208; KEN-OTP-0051-1045_R01, paras 36, 50-54; KEN-OTP-0067-0604_R01, paras 14-15.

⁸⁰ OTP-4 Statement, para. 33.

⁸¹ The Prosecution describes the OTP-4 Statement as follows: “Request for non-disclosure of document – “Affidavit...containing information about his personal history, the Mungiki, the 2007 election, government involvement in the planning of the post-election violence, death threats...and the Waki Commission”, 15 August 2011 Application, Redacted Annex A1, p.3.

- b. “[because] revealing the existence of [the OTP-4 Statement] could lead to the identification of the witness’ current place of residence, thereby putting him at risk”;
 - c. “[because] [t]he disclosure of this document, or even of its mere existence, could inevitably lead to the identification of the witness’ place of residence”; and
 - d. “[because]...in view of its specific subject matter, an anonymous summary of the material is likely to be either misleading or meaningless.”⁸²
33. With respect to evidence collected prior to 15 December 2010,⁸³ the Single Judge stated that she expected that the “Prosecutor [had] carefully reviewed the evidence in his possession...both incriminating and exculpatory.”⁸⁴ The Defence submits, however, that the Prosecution misled the PTC in the 15 August 2011 Application and its associated annexes, and failed to carry out its duty to provide “properly justified” reasons underlining its application for the authorisation of the continued non-disclosure of the OTP-4 Statement to the Defence.⁸⁵ In essence, the Prosecution failed to satisfy its “burden of providing necessary information for the Chamber to conduct the analysis required”.⁸⁶
34. The Defence submits that the Prosecution’s failure to mention in the 15 August 2011 Application that the OTP-4 Statement spoke directly to the 3 January meeting, and contained potentially exculpatory information relating thereto, misled the PTC as to the true nature of the evidence and its fundamental importance to the Defence.
35. The Prosecution also misled the PTC in its suggestion that the non-disclosure to the Defence of the OTP-4 Statement was justified because “disclosure of [it], or even of its mere existence, could inevitably lead to the identification of the witness’ place of residence”, and that “in view of its specific subject matter, an anonymous summary of the material is likely to be either misleading or meaningless”.⁸⁷ The Defence submits that in addition to the Prosecution’s failure to explain the potentially exculpatory nature

⁸² 15 August 2011 Application, Redacted Annex A1, p.3.

⁸³ The chain of custody metadata states that the Prosecutor came into possession of the OTP-4 Statement on 27 September 2010.

⁸⁴ Disclosure Calendar Decision, para. 17.

⁸⁵ Disclosure Calendar Decision, para. 16.

⁸⁶ Lesser-Redacted 8 July 2011 Decision, para. 35.

⁸⁷ 15 August 2011 Application, Redacted Annex A1, p.3.

of the evidence contained within the OTP-4 Statement, the Prosecution also misrepresented the extent to which an alternative measure short of withholding the entire document was available and feasible in the circumstances. Furthermore, it was misleading to suggest that disclosure of the “mere existence” of the OTP-4 Statement could lead to the identification of the witness’ place of residence, as the Prosecution was capable of redacting all information within the document that identifies it as the particular type of document it is, leaving unredacted only the passages that do not potentially compromise the security situation of OTP-4 or his family. The Prosecution’s suggestion that the Defence would not benefit from an anonymous summary is equally misleading, as the crucial contradiction at paragraph 33 of the OTP-4 Statement contains no information capable of disclosing to the Defence the witness’ place of residence.

36. Given the expectation of the Single Judge that the Prosecution would have carefully reviewed all incriminating and exculpatory evidence prior to the application for summons, and the Prosecution’s duty to investigate incriminating and exonerating circumstances equally⁸⁸ and to disclose fully,⁸⁹ subject to protective measures, “all evidence which tends to show the innocence of the suspects, or [that] mitigate[s] their alleged guilt, or [that] may affect the credibility of the Prosecutor's evidence”,⁹⁰ the Defence submits that any failure on behalf of the Prosecution to indicate properly the importance of the OTP-4 Statement to the PTC must be seen as an act of bad faith. The Defence submits that the Prosecution’s failure constitutes an abuse of the protective measures regime, and was used as a litigation strategy to increase artificially the strength of its case.

The Single Judge Failed to Satisfy Herself as to the True Nature and Evidential Value of OTP-4’s Statement

37. Notwithstanding the Prosecution’s misrepresentation to the PTC of the true significance of the OTP-4 Statement, the Defence submits that the Single Judge, when assessing the 15 August 2011 Application, failed to adhere to the established practice of the Court in

⁸⁸ Article 54(1)(a), Rome Statute.

⁸⁹ ICC-01/09-02/11-48, para. 7; CC-01/09-02/11-77, para. 25..

⁹⁰ Disclosure Regime Decision, para. 7.

respect of applications for redactions pursuant to Rule 81(4) of the Rules of Procedure and Evidence.⁹¹ The Defence submits that by authorising the non-disclosure of the OTP-4 Statement in the 18 August 2011 Decision, and by failing to order the Prosecution to apply appropriate redactions or disclose a suitable summary, the Single Judge restricted the rights of the Defence unfairly and unnecessarily.

38. First, the Defence submits that the Single Judge failed to consider whether an alternative measure short of withholding the entire document was “available and feasible in the circumstances.”⁹² Given that the justification relied upon by the Single Judge for non-disclosure of the OTP-4 Statement rested solely on the ground that disclosure could lead to the identification of the witness’ place of residence, the Defence submits that the Single Judge acted disproportionately by withholding the entire document from the Defence. The Defence submits that a more proportionate measure, which was both available and feasible in the circumstances, would have been to redact only those aspects of the OTP-4 Statement capable of revealing the witness’ place of residence. Crucially, the key contradictory passage at paragraph 33 regarding the 3 January meeting **contains no information capable of disclosing OTP-4’s place of residence**, and could have been disclosed to the Defence prior to the Confirmation Hearing without compromising the security situation of OTP-4 or his family. The authorisation of non-disclosure by the Single Judge therefore unfairly deprived the Defence of evidence essential for the preparation of its case prior to the Confirmation Hearing.
39. Secondly, the Defence submits that the Single Judge failed to assess carefully the relevance of the OTP-4 Statement to the Defence. It is not clear from the 18 August 2011 Decision⁹³ or the related annex – which, aside from one paragraph,⁹⁴ repeats

⁹¹ *The Prosecutor v Germain Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-475 (“Katanga Appeals Judgment”), para. 67-73.

⁹² Katanga Appeals Judgment, para.72.

⁹³ At paragraph 23 of the 18 August Decision, the Single Judge states that “[w]ith respect to [*inter alia*, the OTP-4 Statement] the Prosecutor proposes their full redaction. The Single Judge observes that the Prosecutor actually proposes the continuation of non-disclosure as ordered in the First Decision on Redactions. Having assessed the content of the documents in light of the current security situation of witness 14 and his family, the Single Judge agrees with the Prosecutor that the non-disclosure of the said documents remains justified. The individual analysis of each document is included in the annex to this decision.”

verbatim the justifications provided by the Prosecution in the 15 August 2011 Application and annexes⁹⁵ – that the Single Judge had satisfied herself as to the importance of this document to the Defence. The Single Judge is under an obligation to balance fairly the interests of persons potentially placed at risk and the suspect, and is under a duty to take particular care where “information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor”.⁹⁶ The lack of any justification with respect to the status of the OTP-4 Statement as a document that is central to the credibility of the Prosecution’s case is a clear sign that the Single Judge failed to take particular care when considering the relevance of this evidence to the Defence.

40. Further, had the Single Judge recognised the OTP-4 Statement as information that went to the heart of the Prosecution’s case, and to which appropriate redactions could be applied to permit the Defence access to the key information in paragraph 33 without compromising the witness’ security, she would have been bound to conclude that non-disclosure of the entire document would result in the Confirmation Hearing, “viewed as whole, to be unfair to the suspect”.⁹⁷ The Defence therefore submits that the Single Judge, by authorising non-disclosure of the full OTP-4 Statement failed to balance fairly the interests at stake, and as a result the subsequent proceedings failed to comply “with the requirements of adversarial proceedings and equality of arms.”⁹⁸
41. For the reasons set out above, the Defence requests the Chamber to refer the preliminary issue of the validity of the Confirmation Decision back to the PTC for reconsideration. Furthermore, the Defence requests the Chamber to reprimand the Prosecution for acting in bad faith, and take into account the Prosecution’s conduct in the determination of any future request for redactions in the proceedings.

V. RELIEF

⁹⁴ “The information presented by the Prosecutor falls under category A. Based on rule 81(4) of the Rules, the Single Judge grants the request for non-disclosure of the document referred to in column 3, considering that the information can put the witness at risk”, 18 August 2011 Decision, Redacted Annex 1, pp.2-3.

⁹⁵ 15 August 2011 Application, Redacted Annex A1, p.3.

⁹⁶ Katanga Appeals Judgment, para. 72.

⁹⁷ Katanga Appeals Judgment, para. 72.

⁹⁸ Katanga Appeals Judgment, para. 73.

42. For the reasons set out above, the Defence respectfully requests the Chamber to:
- a. Refer the preliminary issue of the validity of the Confirmation Decision back to the PTC for reconsideration pursuant to Article 64(4).
 - b. Vacate the day set for trial.

Respectfully submitted,



Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta

Dated this 5th day of February 2013
At London, England