

**Cour
Pénale
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**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 23 April 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. UHURU MUIGAI KENYATTA***

Public

**Public Redacted Version of the Defence 'Submissions Regarding the Prosecution's
17 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-11'
(ICC-01/09-02-11-723-Conf, 23-04-2013)**

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 Uhuru Muigai Kenyatta hereby submits its written submissions regarding evidence newly disclosed by the Prosecution on 17 April 2013 that is directly relevant to the subject matter and relief sought in the evidential¹ and legal² submissions filed on 28 March 2013 (collectively, "28 March Submissions").
2. This application and its related annex are filed confidentially as they contain information relating to a protected witness. The Defence will file a public redacted version of this application in due course.

II. PROCEDURAL HISTORY

3. At 17 April 2013 at 17.00, the Prosecution disclosed six items of incriminatory evidence³ and an accompanying letter⁴ relating to the Prosecution's initial contact with OTP-11 in 2011. Of the six items disclosed, the documents relevant to the current application concern two transcripts of the Prosecution's screening interview with OTP-11 ("screening transcripts"), which took place on [REDACTED] 2011.⁵
4. On 18 April 2013, the Defence submitted its "Submissions Regarding the Prosecution's 11 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-4" ("OTP-4 Screening Transcript Submissions").⁶

¹ ICC-01/09-02/11-707-Conf-Corr.

² ICC-01/09-02/11-706.

³ KEN-OTP-0093-0280_R01; KEN-OTP-0097-0033_R01; KEN-OTP-0097-0127_R01; KEN-OTP-0097-0144_R01; KEN-OTP-0097-0160_R01; and KEN-OTP-0097-0184_R01.

⁴ See Annex A.

⁵ KEN-OTP-0097-0160_R01; and KEN-OTP-0097-0184_R01.

⁶ ICC-01/09-02/11-719-Conf.

5. On 18 April 2013, the Defence submitted its "Request for Permission to Provide Submissions on the Prosecution's 17 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-11" ("18 April Request").⁷
6. On 19 April 2013, via email, Trial Chamber V ("Chamber") granted the 18 April Request on "the understanding that the Defence will make submissions relevant to the subject matter and relief sought in its 28 March 2013 filings."⁸

III. APPLICABLE LAW

7. In support of the current application, the Defence refers the Chamber to paragraphs 5-8 of the OTP-4 Screening Transcript Submissions.

IV. SUBMISSIONS

The Failure of the Prosecution to Comply with its Obligations Under Article 67(2) of the Rome Statute

8. The failure of the Prosecution to disclose the screening notes to the Defence prior to the Confirmation Hearing provides further support for its submission that the case against Mr Kenyatta must be either terminated, stayed or referred back to the Pre-Trial Chamber for reconsideration as a result of deficiencies in the confirmation process.⁹ The Prosecution's failure to disclose this evidence as soon as practicable constitutes a violation of Article 67(2) of the Rome Statute, and once again calls into question the fairness of the proceedings. The Defence submits that the screening notes contain information that it was entitled to see prior to the Confirmation Hearing; that would have had a material impact on

⁷ 01/09-02/11-721-Conf.

⁸ Email from Rogier Bartels to the Defence sent at 17:27 on 19 April 2013.

⁹ ICC-01/09-02/11-706; and ICC-01/09-02/11-707-Conf-Corr.

the Defence's oral arguments and written submissions in respect of the Confirmation Hearing, and that ultimately would have affected the Pre-Trial Chamber's determination on the confirmation of charges against Mr Kenyatta.

9. In light of the Prosecution's assertion that, even absent the evidence of OTP-4, the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" ("Confirmation Decision")¹⁰ can be upheld on the evidence provided of, *inter alia*, OTP-11 in respect of an alleged meeting that took place on or about 30 December 2007 at State House, Nairobi,¹¹ the Defence submits that the non-disclosure of OTP-11's screening transcripts – which contain evidence capable of undermining the Prosecution case – is a further transgression of the Statute's disclosure provisions, which requires careful scrutiny by the Chamber. Where the Defence has been unfairly denied access to information which is capable of undermining the account of OTP-11, the fairness of the proceedings is necessarily called into question. In the Defence's submission, the Prosecution's failure to disclose the screening notes prior to the Confirmation Hearing provides further support for the relief requested in the 28 March Submissions.

10. It is wrong for the Prosecution to suggest, as it does in its 19 April Response, that its repeated failure to disclose key exculpatory evidence to the Defence as soon as practicable does not provide incontrovertible evidence that there is a systemic problem in the Office with respect to its ability to comply with its disclosure obligations under the Statute.¹² The Defence is concerned that the Prosecution considers it appropriate to 'justify' its failure to adhere to its obligations under the Statute by stating that "[t]he unfortunate reality is that no

¹⁰ ICC-01/09-02/11-717-Conf.

¹¹ For example, see the "Prosecution response to the Defence "Submissions Regarding the Prosecution's 11 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-4"" ("19 April Response"), ICC-01/09-02/11-722-Conf, para. 4.

¹² ICC-01/09-02/11-722-Conf, paras 7-12.

disclosure system is perfect...disclosable items are sometimes missed, despite the best intentions of all concerned.”¹³ In so submitting, the Prosecution exhibits a lackadaisical attitude with respect to its absolute duties under the Statute to disclose exculpatory evidence, and fails to recognise that the obligations imposed upon the Office are non-derogable. The Defence remains concerned that as long as the Prosecution withholds evidence with impunity, a fair trial will not be possible.

11. The present conduct of the Prosecution is precisely the reason why the disclosure rules have been devised, so as to prevent circumstances in which miscarriages of justice may occur as a result of prosecutorial failure to put exculpatory evidence before the Court. The exculpatory disclosure regime is also a system by which the Prosecution demonstrates that it has appropriately assessed the evidence and the accuracy of the case it is presenting to the Court. The screening transcripts of both OTP-4 and OTP-11 – which have formed the subject matter of the Defence’s two most recent filings – are central to the key issues in these proceedings. The screening transcripts are not peripheral evidence; they go directly to the alleged acts and conduct of the Accused, and form the basis of the charges. Further, the Prosecution’s submissions show that it has failed to take into account key evidence affecting the credibility of the witnesses it is relying upon. Instead, the Prosecution has attempted to derive benefit from advancing different evidence to support its case, whilst not providing the materials it was duty-bound to disclose which contradicted its case theory, and which could have been used by the Defence in the proceedings. In sum, the conduct of the Prosecution has caused the proceedings to be conducted upon clearly false premises. Further, it is clear that the non-disclosure of the screening notes of OTP-4 and OTP-11 is not an isolated event, but part of an accumulation of significant and substantial failures, as the

¹³ ICC-01/09-02/11-722-Conf, para. 11.

previous non-disclosure of key evidence regarding OTP-4 has shown in Defence filings related to this issue.¹⁴

12. Moreover, it is reflective of the Prosecution's unacceptable approach to disclosure in these proceedings that, in its 19 April Response, it unfairly characterises the Defence's submissions¹⁵ – which highlighted the potential impact on the proceedings of the Prosecution's failure to disclose the OTP-4 screening transcripts – as a delay tactic or an attempt by Mr Kenyatta to simply "avoid his trial."¹⁶ In fact, it is the behaviour of the Prosecution *vis-à-vis* its obligations under, *inter alia*, Article 67(2) that has necessitated further litigation i.e. the withholding, without the leave of the Court, of information which the Defence was entitled to see.¹⁷ The Prosecution's suggestion that by exercising his rights and bringing to the attention of the Chamber the Prosecution's unacceptable attitude in respect of key failures to disclose evidence capable of undermining its case, Mr Kenyatta is somehow attempting to delay the proceedings is grossly unfair and misrepresents the reality of the situation. This, in fact, provides further support for the argument that the Prosecution has overlooked exculpatory evidence and has set upon advancing a deeply flawed case. The judgment qualities of the Prosecution have been demonstrated by these failings to be fundamentally unsound in the decision to continue proceedings against Mr Kenyatta, whilst abandoning the case against the co-Accused Mr Muthaura.
13. Finally, the Defence submits that since the initial interview upon which screening transcripts are based took place on [REDACTED] 2011, it was entirely

¹⁴ See KEN-OTP-0043-0083, para. 33.

¹⁵ ICC-01/09-02/11-719-Conf.

¹⁶ ICC-01/09-02/11-722-Conf, para. 5.

¹⁷ In an email dated 22 April 2013, 11:58, Manoj Sachdeva of the Prosecution confirmed that "[w]ith respect to the telephone screening transcripts of OTP-4 and 11, the Prosecution did not seek leave of the Court to withhold their disclosure."

practicable for disclosure of these documents to have occurred prior to the Confirmation Hearing.

The Screening Transcripts Contain Information that the Prosecution Was Under an Obligation to Disclose to the Defence Prior to the Confirmation Hearing

14. The Defence submits that the screening transcripts should have been disclosed by the Prosecution pursuant to Article 67(2), in [REDACTED] 2011, as they contain information that is capable of undermining OTP-11's account and the Prosecution case in general. Further, the Prosecution's assertion that "the topics covered by [the screening transcripts] are generally reflected in the full interview transcripts disclosed previously", and that it "discloses these transcripts for the sake of completeness", is misleading and disingenuous.¹⁸ The information contained in the screening transcripts should have been made available prior to the Confirmation Hearing. Accordingly, any attempt by the Prosecution to state that the information is disclosed merely "for the sake of completeness" adds further credence to the Defence's argument that the Prosecution does not take its disclosure obligations under Article 67(2) seriously, or appreciate the significance of exculpatory evidence even in the context of the case it is advancing.¹⁹
15. The Defence submits that certain passages of the screening transcript are capable of supporting the argument that OTP-11 and OTP-12 fabricated their accounts, and that, following the Defence's refusal to cooperate with their extortion attempt, they colluded in order to devise a story falsely implicating Mr Kenyatta in the post-election violence.²⁰ For example, in the screening

¹⁸ See Annex A.

¹⁹ See Annex A.

²⁰ At the Confirmation Hearing and in subsequent filings, the Defence has maintained that OTP-11 and OTP-12 are extortionists whose evidence is inherently unreliable; see, for example, ICC-01/09-02/11-T-10-ENG, p. 15,

transcripts, OTP-11 states that there was a meeting at State House, Nairobi, at which [REDACTED].²¹ This account is, with reference to the phrase [REDACTED], identical to that provided by OTP-12.²² The Defence submits that such linguistic similarity is not coincidental, and is in fact clear evidence that OTP-11 and OTP-12 concocted their accounts together.²³ The Defence refers the Trial Chamber to the analysis provided in its 28 March submissions, which clearly shows that OTP-11 and OTP-12 refer to different dates in their Prosecution interviews.²⁴ At the very least, it shows that OTP-11 is not speaking about events witnessed by him personally. Therefore his evidence in respect of the 30 December allegation – which the Prosecution now submits is capable in isolation of supporting a determination that there are substantial grounds to believe that Mr Kenyatta committed the crimes charged²⁵ – is significantly weakened. This reasoning further strengthens the Defence submissions that the judgment of the Prosecution in this case is fundamentally unsound. Given the absence of OTP-4 as a trial witness and the consequently pivotal role of the evidence of OTP-11 and OTP-12 in respect of this allegation, the Defence submits that all evidence capable of undermining the 30 December allegation is of fundamental importance. The Prosecution's conduct in withholding the screening transcripts is therefore rendered all the more egregious.

16. In the screening transcripts, OTP-11 states that the issue of retaliatory violence was not discussed at an alleged meeting at [REDACTED], which took place before the elections in 2007,²⁶ and that the meeting was convened in order to

lines 11-25; p. 16-20; p.21, lines 1-8; and ICC-01/09-02/11-681-Conf, para. 24.

²¹ KEN-OTP-0097-0160 at 0179, lines 707-708.

²² KEN-OTP-0060-0112_R02 at 0115; KEN-OTP-0060-0299_R02 at 0334; KEN-OTP-0060-0405 at 0418; KEN-OTP-0060-0405_R03 at 0418; KEN-OTP-0061-0187_R02 at 0197; and KEN-OTP-0074-0590 at 0598.

²³ The Defence has recently provided further submissions regarding the possibility that OTP-11 and OTP-12 fabricated their evidence before speaking to the Prosecution; see ICC-01/09-02/11-681-Conf, para. 24.

²⁴ ICC-01/09-02/11-707-Conf-Corr, para. 28.

²⁵ See, for example, ICC-01/09-02/11-722-Conf, para. 4.

²⁶ KEN-OTP-0097-0160 at 0167, lines 257-258.

discuss [REDACTED].²⁷ Such an allegation does not support the alleged common plan, and, in fact, provides evidence that the Mungiki were seeking to support the government absent any encouragement from Mr Kenyatta. The credibility of this allegation is further weakened by OTP-11's admission that he was only able to conclude through his own "research", and not as a result of any direct evidence, that the meeting was convened to organise retaliatory violence.²⁸

17. It is clear from the screening transcripts that OTP-11 merely infers, without providing adequate justification, Mr Kenyatta's involvement in an alleged meeting at State House.²⁹ OTP-11 equates the involvement of "State House", as alleged by [REDACTED], with the involvement of "Kikuyu leaders", and the alleged involvement of Mr Kenyatta is predicated upon a vague, unsubstantiated connection between "Uhuru Kenyatta, the President himself, the GEMA community...international...the GEMA community."³⁰
18. In respect of the allegation that Mungiki members met at State House on 26 November 2007, OTP-11's account is significantly undermined by his admission in the screening transcripts that:
 - a. He was unable to tell the Prosecution "exactly what they talked in State House",³¹
 - b. He only "came to learn" about the meeting before it took place "when it was being discussed in the grassroots."³² Further, this account is directly

²⁷ KEN-OTP-0097-0160 at 0167, lines 259-260.

²⁸ KEN-OTP-0097-0160 at 0167, line 258.

²⁹ KEN-OTP-0097-0160 at 0168, lines 267-280.

³⁰ KEN-OTP-0097-0160 at 0168, lines 278-280.

³¹ KEN-OTP-0097-0160 at 0175, line 557.

³² KEN-OTP-0097-0160 at 0176, lines 584-585.

contradictory to his later evidence which states that he learnt of the 26 November meeting through [REDACTED] and [REDACTED];³³

- c. He only “came to understand” that [REDACTED] was “sent by Uhuru Kenyatta”, which he based on a vague assertion that “the PNU Secretariat...the person who was considered that maybe knows about Mungiki is Uhuru Kenyatta, having been with Mungiki for close to...more than, I would say more than 10 years.”³⁴

19. In respect of the pivotal Prosecution allegation that Mr Kenyatta met with Mungiki members at State House on or about 30 December 2007, OTP-11’s account contains the following information which fundamentally calls into question his credibility:

- a. Contrary to his full account provided to the Prosecution,³⁵ in the screening transcript, OTP-11 states that the meeting took place *after* the election;³⁶
- b. When asked by the Prosecution investigator “How do you know that he's the one responsible through his people? How are you connecting him to the Mungikis being supplied and to the violence that happened in January 08?”, OTP-11 is unable to respond with any degree of specificity.³⁷ OTP-11’s explanation merely alleges, without substance, a vague relationship between the Mungiki and Mr Kenyatta in which “he was the leader of these people in those kinds of things.”³⁸

³³ KEN-OTP-0052-1506 at 1513.

³⁴ KEN-OTP-0097-0160 at 0178, lines 654-656.

³⁵ KEN-OTP-0052-1506 at 1513-1514, lines 273-288. In the interests of clarity, the Defence notes that, later in the screening note, OTP-11 states that the meeting took place “just before...I think the elections were announced the following day. Or that day in the evening”, KEN-OTP-0097-0160 at 0181, lines 763-764.

³⁶ KEN-OTP-0097-0160 at 0180, line 736.

³⁷ KEN-OTP-0097-0160 at 0180, lines 749-750.

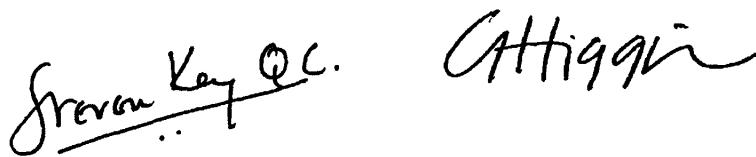
³⁸ KEN-OTP-0097-0160 at 0180, lines 751-759.

20. More generally, OTP-11's evidence is weakened by his admission within the screening transcripts that he "personally was not in any meeting that maybe money was given out or weapons were given out".³⁹

VI. RELIEF

21. For the reasons set out above, the Defence respectfully requests the Chamber to grant the relief requested in the 28 March Submissions, and:
- a. Terminate the proceedings; or
 - b. Stay the proceedings; or
 - c. Remit the case back to the Pre-Trial Chamber pursuant to Article 64(4) of the Statute for Reconsideration.

Respectfully submitted,



Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 23rd day of April 2013

At London, England

³⁹ KEN-OTP-0097-0184 at 0186, lines 54-55.