

**Cour
Pénale
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**International
Criminal
Court**

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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
11 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-4'
(ICC-01/09-02-11-719-Conf, 18-04-2013)**

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 11 April 2013 that is directly relevant to the subject matter and relief sought in the evidential¹ and legal² submissions filed on 28 March 2013.
2. This application is filed confidentially as it contains information relating to a protected witness. A public redacted version will be filed in due course.

II. PROCEDURAL HISTORY

3. On 11 April 2013, the Prosecution disclosed four items and an accompanying letter³ relating to the Prosecution's initial contact with OTP-4 in 2010.⁴ The four items were:
 - a. A file note of the Prosecution's [REDACTED] 2010 preliminary telephone screening of OTP-4;⁵
 - b. An audio recording of the Prosecution's [REDACTED] 2010 screening of OTP-4;⁶
 - c. A transcription of the Prosecution's [REDACTED] 2010 telephone screening of OTP-4;⁷ and
 - d. A file note of the Prosecution's [REDACTED] 2010 screening of OTP-4.⁸

¹ ICC-01/09-02/11-707-Conf.

² ICC-01/09-02/11-706.

³ See Annex A.

⁴ The documents were disclosed to the Defence in a meeting commencing at 17.30 on Thursday 11 April 2013. However, due to a fault in the Ringtail system and the non-availability of IT assistance after 18:00, the Defence was not able to access the documents until 12 April 2013.

⁵ KEN-OTP-0096-0285; see Annex B.

⁶ KEN-OTP-0028-0152; see Annex C.

⁷ KEN-OTP-0097-0003; see Annex D.

⁸ KEN-OTP-0096-0279; see Annex E.

4. On 15 April 2013, via email, the Chamber invited the Defence to provide written submissions on the four items listed at paragraph three.

III. APPLICABLE LAW

5. Article 54(1)(a) imposes upon the Prosecution the obligation to investigate incriminating and exonerating circumstances equally and to consider all facts and evidence in order to assess whether there is criminal responsibility under the Statute. Under Article 54(1)(c), the Prosecution must fully respect the rights of the Accused.
6. Under Article 67(2), the Prosecution must, as soon as practicable, disclose to the Defence evidence in its control which may affect the credibility of Prosecution evidence.
7. Article 64(2) imposes upon the Chamber an obligation to ensure that the proceedings are fair and expeditious and conducted with full respect for the rights of the Accused. Under Article 64(6)(f), the Chamber may rule on any relevant matter.
8. Pursuant to Rule 134 of the Rules of Procedure and Evidence and the appellate jurisprudence of *Lubanga*, the Chamber is vested with the power to stay proceedings where it is impossible to hold a fair trial.⁹ A conditional stay of proceedings is appropriate in circumstances where a fair trial cannot be held at the time that the stay is imposed, but where unfairness to the Accused might be

⁹ *Prosecutor v. Thomas Lubanga Dyilo*, 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, ICC-01/04-01/06-772, see para. 39.

remedied such that a fair trial does become possible.¹⁰ A permanent stay, or the termination, of proceedings is necessary in circumstances where no fair trial can be held.¹¹

IV. NEWLY DISCLOSED INCONSISTENCIES IN OTP-4'S EVIDENCE

9. The four items set out in paragraph 3 above were in the possession of the Prosecution since 2010 and prior to the Confirmation Hearing. None of these items were disclosed to the Defence as exculpatory material for that proceeding, as required by the Statute.¹² The evidence contained within the four items, reveals further fundamental contradictions to the various accounts OTP-4 has provided both before and after 2010 in relation to material facts relied upon by the Prosecution to establish its case and further significantly affects his credibility.¹³ The evidence provided in KEN-OTP-0097-0003 directly contradicts that provided by OTP-4 in his statements to the [REDACTED];¹⁴ the Commission of Inquiry into the Post Election Violence ("CIPEV")¹⁵ and the ICC.¹⁶ These statements were relied upon by the Pre-Trial Chamber in its 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'.¹⁷ The Prosecution's failure to disclose this evidence as soon as practicable, constitutes a violation of Article 67(2). This violation is exacerbated by the passage of almost three years since it came into the Prosecution's possession.¹⁸

¹⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the Accused, together with certain other issues raised at the Status Conference on 10 June 2008', ICC-01/04-01/06-1486, para. 4.

¹¹ ICC-01/04-01/06-772, para. 37.

¹² Article 67(2); and see Annexes B-E.

¹³ Document KEN-OTP-0096-0285 is dated [REDACTED] 2010 and documents KEN-OTP-0028-0152_R01; KEN-OTP-0096-0279_R01; and KEN-OTP-0097-0003_R01 are dated [REDACTED] 2010.

¹⁴ KEN-OTP-0009-0532.

¹⁵ KEN-OTP-0097-0003.

¹⁶ KEN-OTP-0043-0002.

¹⁷ ICC-09/01-02/11-382-Conf ("Confirmation Decision").

¹⁸ The telephone interview took place on [REDACTED] 2010.

10. In Annex A, Ms Adeboyejo concedes that the four items 'may constitute Rule 77 material with respect to the Defence's Article 64 Application' and that 'some information Witness 4 provided during the [REDACTED] 2010 screening (KEN-OTP-0096-0378) appears to be inconsistent with the account he provided in his first ICC statement (KEN-OTP-0043-0002)'. In fact, the inconsistencies within the documents disclosed, when compared with OTP-4's other accounts, are wide-ranging and impact centrally upon the credibility and reliability of his evidence. The Defence notes Ms Adeboyejo's concession that the documents 'should have been disclosed' and her 'regret that this was not done'.¹⁹ The Prosecution has, however, provided no explanation for its failure to disclose this crucial exculpatory evidence.

11. The investigator's [REDACTED] 2010 screening notes also explain that OTP-4's account of these alleged meetings were from notes which were allegedly "prepared five days after each meeting".²⁰ Accordingly, the evidence provided by OTP-4 in the telephone screenings appears to be considered and is not merely the result of an impromptu conversation. To date, these notes have not been disclosed to the Defence.

12. In his telephone interview with three Prosecution investigators on [REDACTED] 2010,²¹ OTP-4 indicated that:
 - a. A meeting took place at the Yaya Centre, which he did not attend,²² and that this meeting took place *after* the State House meeting;²³

¹⁹ See Annex A.

²⁰ KEN-OTP-0096-0285, para. 12; see Annex B.

²¹ KEN-OTP-0097-0003; see Annex D.

²² KEN-OTP-0097-0003. OTP-4 eventually clarifies, after reviewing his notes, that he was not present at an alleged meeting at the Yaya Centre. See lines 74-75, 154-157, 165-167, 171, 234-238. OTP-4 also, illogically, indicates that it was at this Yaya Centre meeting that the State House meeting was planned: see lines 213-215.

- b. He attended a meeting that took place at State House on 26 December 2007,²⁴ and states that this was the *first* meeting;²⁵
- c. He attended a meeting at Nairobi Safari Club, and states that the same meeting occurred in both February²⁶ and January 2008; and²⁷
- d. A meeting occurred at Blue Springs Hotel on the same day as the alleged meeting at Nairobi Safari Club,²⁸ which took place in both February²⁹ and January 2008.³⁰

All these variations go to the credibility of this witness whose evidence was challenged by the Defence at the Confirmation Hearing as being untruthful.

Yaya Centre Meeting

- 13. In his statement to CIPEV, OTP-4 stated that he attended a meeting at the Yaya Centre at [REDACTED].³¹ In his statement to the Court, OTP-4 stated that the alleged Yaya Centre meeting took place at [REDACTED].³²
- 14. In his telephone interview, OTP-4 clearly states, whilst listing the sequence of events, that the meeting at the Yaya Centre was the second meeting,³³ and that it occurred after the alleged meeting at State House,³⁴ after the election³⁵ and in order for members of the Kikuyu community to organise how to defend themselves.³⁶ In the recently-disclosed transcript, therefore, OTP-4 clearly

²³ KEN-OTP-0097-0003, lines 159-160.

²⁴ KEN-OTP-0097-0003, at lines 100-101, 119-134, 143-145, 165-169.

²⁵ At KEN-OTP-0097-0003, lines 159-160, it is clear that OTP-4 suggests that the alleged Yaya Centre meeting was convened "after the State House meeting, after now...the State House was the first one."

²⁶ KEN-OTP-0097-0003, line 172.

²⁷ KEN-OTP-0097-0003, lines 172-173, 481-577, 580-640.

²⁸ KEN-OTP-0097-0003, lines 173-175, 577, 579, 637-638, 645-647.

²⁹ KEN-OTP-0097-0003, line 172.

³⁰ KEN-OTP-0097-0003, lines 172-173, 481-577, 580-640.

³¹ KEN-OTP-0005-0484 at 0490. OTP-4 also alleged that the other attendees were: [REDACTED].

³² KEN-OTP-0043-0002 at 0030. OTP alleges that he was present, along with [REDACTED].

³³ KEN-OTP-0097-0003, line 166.

³⁴ KEN-OTP-0097-0003, lines 159-160.

³⁵ KEN-OTP-0097-0003, line 154.

³⁶ KEN-OTP-0097-0003, lines 156-157.

exhibits a fundamental lack of reliability as to the purpose of the alleged meeting and the sequence of events. Further, OTP-4 repeatedly states that he was not present at this meeting,³⁷ and lists different participants.³⁸ Crucially, the Defence was unfairly prevented from relying upon the Prosecution transcript containing these critical inconsistencies at the Confirmation Hearing.

15. These contradictory statements regarding OTP-4's presence at, and the purpose and timing of, an alleged Yaya Centre meeting go to the credibility of OTP-4, and as such constitute evidence which the Prosecution was under an obligation pursuant to Article 67(2) to disclose to the Defence as soon as practicable.

State House Meeting

16. In OTP-4's statements to both CIPEV³⁹ and the Prosecution,⁴⁰ he states that he attended a meeting on 26 November 2007 at State House.
17. In his telephone interview, OTP-4 states that the alleged meeting took place on 26 December 2007.⁴¹ Even when prompted by Interviewer 1 that the meeting took place on 26 November 2007, OTP-4 emphasises, 'The State House meeting took... that one I remember because I attended, it took place in 26 December.'⁴²
18. These contradictory statements regarding the date of the alleged State House meeting go to the credibility of OTP-4, and as such constitute evidence which the Prosecution was under an obligation to disclose under Article 67(2). The Pre-Trial Chamber had relied upon OTP-4 as an eyewitness to this event for the Confirmation Decision, without having the complete evidence placed before it

³⁷ KEN-OTP-0097-0003, lines 75, 146-149, 171, 213, 238.

³⁸ OTP-4 states that [REDACTED]; see KEN-OTP-0097-0003, lines 235-236, 243-244.

³⁹ KEN-OTP-0005-0484 at 0490.

⁴⁰ KEN-OTP-0043-0002 at 0032.

⁴¹ KEN-OTP-0097-0003, lines 100-101, 119-134, 143-145, 165-169.

⁴² KEN-OTP-0097-0003, lines 98-101.

by the party asserting the fact. The Prosecution's partial presentation of evidence caused the Pre-Trial Chamber's Decision to be based upon an incorrect assessment of the evidence to the prejudice of the Accused.

Nairobi Safari Club Meeting

19. In his CIPEV statement, OTP-4 states that he attended a meeting at the Nairobi Safari Club at 11am on 3 January 2008.⁴³ In his statement to the Court, OTP-4 states that he attended a meeting at a different location, namely, the Nairobi Members' Club at 9am on 3 January 2008.⁴⁴
20. In his telephone interview, OTP-4 first states that this meeting took place at the Nairobi Safari Club in February 2008,⁴⁵ despite later alleging that it occurred on 3 January 2008.⁴⁶
21. These contradictory statements regarding the timing and precise venue of the alleged meeting go to the credibility of OTP-4, and as such constitute evidence which the Prosecution was under an obligation to disclose under Article 67(2). These inconsistencies support the Defence submissions that the alleged meeting as described by OTP-4 is a fiction. The Defence submits that disclosure of this evidence prior to confirmation would have significantly changed the Pre-Trial Chamber's assessment of the evidence of OTP-4.

Blue Springs Hotel Meeting

22. In his CIPEV statement, OTP-4 states that 'it was agreed there was to be a larger meeting later at Blue Spring' on 3 January 2008.⁴⁷ As he also claimed that the Nairobi Safari Club meeting lasted one hour, this alleged Blue Springs meeting

⁴³ KEN-OTP-0005-0484 at 0493.

⁴⁴ KEN-OTP-0043-0002 at 0038.

⁴⁵ KEN-OTP-0097-0003, line 172.

⁴⁶ KEN-OTP-0097-0003, line 486.

⁴⁷ KEN-OTP-0005-0484 at 0494.

would have taken place in the afternoon.⁴⁸ In his statement to the Court, OTP-4 intimates that a meeting taking place at Blue Springs Hotel overlapped with the alleged meeting at Nairobi Members' Club.⁴⁹

23. In his telephone interview, OTP-4 first states that the Blue Springs meeting took place "the same day"⁵⁰ as the alleged meeting in the Nairobi Safari Club, which, in same paragraph, he states occurred in February 2008,⁵¹ despite later alleging that it occurred on 3 January 2008.⁵²
24. These contradictory statements regarding the timing of the alleged Blue Springs Hotel meeting go to the credibility of OTP-4, and as such constitute evidence which the Prosecution was under an obligation to disclose under Article 67(2).

Investigators' Memorandum

25. In the internal Prosecution memorandum regarding the telephone interview, the author notes that OTP-4 'made several contradictions regarding the chronology of the events and meetings'.⁵³ The author goes on to note 'several inconsistencies between [OTP-4's] CIPEV statement and his declarations during the screening interview'.⁵⁴ The Prosecution was therefore 'on notice' regarding the fundamental inconsistencies in OTP-4's account from the outset, and cannot claim credibly to have been unaware of either of these inconsistencies, their critical importance, or the general need to treat OTP-4 with particular caution.

⁴⁸ KEN-OTP-0005-0484 at 0494.

⁴⁹ KEN-OTP-0043-0002 at 0039-0040.

⁵⁰ KEN-OTP-0097-0003, line 173.

⁵¹ KEN-OTP-0097-0003, line 172.

⁵² KEN-OTP-0097-0003, line 486.

⁵³ KEN-OTP-0096-0279 at 0283.

⁵⁴ KEN-OTP-0096-0279 at 0283.

V. SUBMISSIONS REGARDING THE TERMINATION OF PROCEEDINGS

26. The Defence refers the Chamber to its previous extensive arguments regarding the Prosecution's failure to comply with its duties under Articles 54(1)(a) and 67(2) of the Statute in these proceedings.⁵⁵ The Prosecution's failure to disclose further important evidence exhibits incontrovertible proof of a clear and systematic problem within the Office of the Prosecution, whether intentional or as a result of negligence, which continues to have far-reaching and negative effects on the fairness of the proceedings and the credibility of the Court as an institution. The Prosecution's failure to comply with its absolute disclosure obligation has violated the Accused's fundamental fair trial rights. The non-disclosure of evidence in the possession of the Prosecution at the time of the Confirmation Hearing impacts directly on the reliability and correctness of the findings made by the Pre-Trial Chamber at this critical stage of the proceedings.
27. The recent disclosure of these documents provides yet further evidence that the conduct of the investigation, and the way in which information has been managed and disclosed (or otherwise) to the Defence, has rendered the product of the investigation manifestly unreliable. The Defence submits that any proceedings, eventual trial, or decisions based upon the Prosecution's investigation are thus necessarily unsound. The Defence remains concerned as to the extent to which the disclosure obligations of the Prosecution have been fulfilled with respect to other aspects of the case and with respect to those witnesses relied upon by the Prosecution for trial.

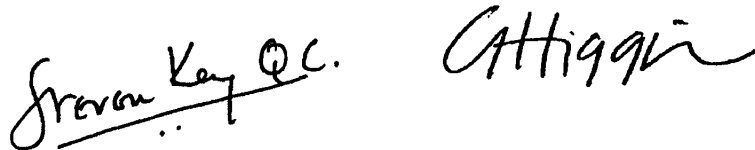
⁵⁵ See, for example, paragraphs 28 to 36 of the 'Defence Reply to the "Confidential redacted version of the 25 February 2013 Consolidated Prosecution Response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber"'.

28. The Defence submits that the fairness of the fabric of this trial has clearly been shattered before it has even commenced, and that, in the circumstances, no fair trial can be held.⁵⁶

VI. RELIEF

29. For the reasons set out above, the Defence respectfully requests that the Chamber:
- a. Determine that a fair trial has been rendered impossible; and, accordingly,
 - b. Terminate the proceedings against Mr Kenyatta.

Respectfully submitted,



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

Dated this 23rd day of April 2013

At London, England

⁵⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Georgios M. Pikis to 'Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'', ICC-01/04-01/06-1486, para. 44.