

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date of original: 16 August 2012

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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 redacted version of

Decision on the prosecution's application to authorise redactions to a statement of Witness 4 and to withhold documents from disclosure, 16 August 2012, ICC-01/09-02/11-464-Conf

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

The Office of the Prosecutor

Ms Fatou Bensouda

Legal Representatives of Victims

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

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* renders the following Decision on the prosecution’s application to authorise redactions to a statement of Witness 4 and to withhold documents from disclosure.

I. Procedural History

1. On 15 June 2012, the Office of the Prosecutor (“prosecution”) filed the “Prosecution Application Pursuant to Rule 81(2)” (“Application”),¹ in which it seeks a ruling of the Chamber authorising (i) the temporary non-disclosure of certain information contained in a May 2012 statement given by Witness 4 to the prosecution (“Third Statement”), its annexes and a set of emails, all of which relate to [REDACTED], pending an ongoing investigation under Article 70 of the Rome Statute (“Statute”); and (ii) redactions to the Third Statement to the identities of investigators, interview locations, the witness’s place of residence, and the identities of his family members, consistent with redactions previously authorized by the Pre-Trial Chamber.
2. On 11 July 2012, the defence team of Mr. Kenyatta filed the “Defence Request for Specific Relief in Respect of Prosecution Witnesses 4, 11 and 12” (“Defence Request for Disclosure”),² in which the defence requests the Chamber, *inter alia*, to order the prosecution to disclose all evidence arising from its investigations and all other material including direct or indirect communications to date in respect of Witness 4.³

¹ ICC-01/09-02/11-434-Conf-Exp, with Annexes. The application was made in writing, pursuant to the Chamber’s instructions given at the status conference of 12 June 2012 (ICC-01/09-02/11-T-19-CONF-EXP-ENG, page 18).

² ICC-01/09-02/11-452.

³ ICC-01/09-02/11-452, paragraph 41.

3. On 2 August 2012, the prosecution filed its response to that request, in which it submits, *inter alia*, that it has agreed to prioritise the disclosure of Article 67(2) material that relates to Witness 4.⁴
4. The Chamber recalls that on 12 June 2012, at a status conference, it directed the parties and the Registry to liaise and submit, by 3 July 2012, a draft proposal for the procedure for disclosing material with redactions.⁵ The present decision is without prejudice to the system of disclosure with redactions which may be adopted on the basis of the parties' proposal.

II Analysis

5. Article 67(2) requires the prosecution to disclose to the defence "as soon as practicable" any material within its possession which may affect the reliability of prosecution evidence. The prosecution must also make available to the defence documents which are intended for use as evidence at trial⁶ or are material to the preparation of the defence, in accordance with Rule 77. In addition, if the prosecution intends to rely on the evidence of Witness 4 at trial, it is under the obligation to disclose statements of that witness to the defence, in accordance with Rule 76 of the Rules of Procedure and Evidence ("Rules").
6. These disclosure obligations are, however, subject to the protection and privacy of victims and witnesses and the protection of confidential information. The Chamber notes Rules 81(2) and (4) of the Rules, pursuant to which the Chamber may rule that material or information should not be disclosed to the defence, where disclosure

⁴ Prosecution's Response to the "Defence Request for Specific Relief in Respect of Prosecution Witnesses 4, 11 and 12", ICC-01/09-02/11-461, paragraph 9.

⁵ ICC-01/09-02/11-T-18-ENG, page 29.

⁶ Should the prosecution rely on these documents in future proceedings under Article 70 of the Statute, these Rules also apply to such proceedings, in accordance with Rule 163(1).

may prejudice further or ongoing investigations, or to protect the safety of witnesses and victims and members of their families.

7. The Chamber will turn first to the prosecution's request for authorisation to redact from the Third Statement the identities of investigators, interview locations, the witness's place of residence and the identities of the witness's family members. The Chamber recalls that the requirements that have to be met in order to authorise the non-disclosure of information are the following: (i) the existence of an "objectively justifiable risk"⁷ to the safety of the person concerned or which may prejudice further or ongoing investigations;⁸ (ii) the risk must arise from disclosing the particular information to the accused;⁹ (iii) the infeasibility or insufficiency of less restrictive protective measures;¹⁰ (iv) an assessment as to whether the redactions sought are "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial";¹¹ and (v) the obligation to periodically review the decision authorising the redactions should circumstances change.¹²

8. With regard to the information related to investigators, interview locations and the residence and family members of Witness 4, the Chamber is satisfied that the disclosure of this information to the accused may create an objectively justifiable risk to the safety of the persons concerned and may, in the case of interview

⁷ 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", 13 May 2008, ICC-01/04-01/07-475, paragraph 71.

⁸ *Ibid.*, paragraph 97.

⁹ *Ibid.*, paragraph 71(b).

¹⁰ Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, paragraph 37; Judgement on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, paragraph 33.

¹¹ Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, paragraph 34.

¹² 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", 13 May 2008, ICC-01/04-01/07-475, paragraph 73(c).

locations and the identities of prosecution investigators, prejudice further or ongoing investigations. The Chamber is also satisfied that no less restrictive measures are available at this stage. The information sought to be redacted does not render the document unusable or illegible, and given the nature of this information which the prosecution seeks to redact (*i.e.* the identifying information of third parties whose relevance to the live issues in the case has not been established) the proposed redactions do not violate the right of the accused to a fair trial. The Chamber notes that the proposed redactions are consistent with those authorised by Pre-Trial Chamber II with respect to another statement of the same witness and regarding the same type of information.¹³

9. The prosecution also seeks the Chamber's authorisation to apply redactions to information regarding [REDACTED]. It is submitted that disclosure of this information to the defence at this stage would create an objectively justifiable risk that the accused and/or individuals working on their behalf would destroy or tamper with evidence and/or witnesses related to the Article 70 investigation, and that disclosure could allow those involved in the [REDACTED] to conceal their involvement and/or destroy evidence.¹⁴
10. The Chamber notes that the prosecution has acknowledged that the materials at issue "are subject to disclosure under the Statute and the Rules".¹⁵ However, on the basis of the prosecution's submissions, Chamber is satisfied that there is an objectively justifiable risk that disclosure to the accused of the relevant parts of the Third Statement, along with the annex and the emails, may prejudice the prosecution's ongoing investigation by revealing the details of the [REDACTED]. In the circumstances, the Chamber is also satisfied that no less restrictive measures are

¹³ Annex to the Fifth Decision on the Prosecutor's Requests for Redactions, ICC-01/09-02/11-254-Conf-Exp-Anx, pages 69 to 80.

¹⁴ Application, paragraph 11.

¹⁵ Application, paragraph 6.

available at this stage. The Chamber considers that a delay in disclosure of this information does not prejudice the right of the accused to a fair trial. The Chamber additionally considers that the Application is consistent with a decision issued by Pre-Trial Chamber II with respect to another statement of the same witness regarding [REDACTED].¹⁶

11. The prosecution seeks authorisation for non-disclosure until such time when disclosure would not cause material prejudice to its ongoing Article 70 investigation.¹⁷ As discussed above, the prosecution does not dispute that the information at issue is subject to disclosure under the Statute and the Rules. Therefore the Chamber finds that in order to protect the rights of the accused to a fair trial it is important to ensure the disclosure of the currently withheld information as soon as possible and in any event sufficiently in advance of the testimony of Witness 4, should he be called to testify at trial. In order to ensure that disclosure is not unduly delayed, the prosecution should, if necessary justify any continued non-disclosure of the information at issue on an ongoing basis.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

GRANTS the prosecution requests (1) for the redactions indicated in Annex 1 to the Application and (2) for authorisation to withhold from disclosure the documents contained in Annexes 2 and 3 to the Application, until 28 September 2012. In the event that the prosecution's Article 70 investigation is not sufficiently advanced by that date and the prosecution considers that continued non-disclosure is necessary for a longer period of time, it is to make a request to the Chamber no later than 15 September 2012.

¹⁶ Annex to the Fifth Decision on the Prosecutor's Requests for Redactions, ICC-01/09-02/11-254-Conf-Exp-Anx, pages 78 to 79.

¹⁷ Application, paragraph 16.

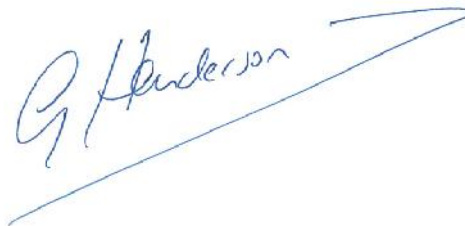
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated this 3 February 2017

At The Hague, The Netherlands