

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Original Date: **20 September 2012**

Date of public version: **3 February 2017**

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 for continued non-disclosure, 20
September 2012, ICC-01/09-02/11-489-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	Counsel for Francis Kirimi Muthaura Counsel for Uhuru Muigai Kenyatta
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	<i>Amicus Curiae</i>

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 in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* renders the following Decision on the prosecution’s application for continued non-disclosure.

1. On 15 June 2012 the Office of the Prosecutor (“prosecution”) filed an application to delay disclosure of information in documents related to the [REDACTED] pending an ongoing investigation under Article 70 of the Rome Statute (“Statute”).¹ The information in question comprises certain parts of the Third Statement of Witness 4, its annexes and a set of emails (“Information”).²
2. On 16 August 2012 the Chamber granted the application, authorising the prosecution to withhold the Information until 28 September 2012 and allowing the prosecution to make a new request to the Chamber by 15 September 2012 in the event that the Article 70 investigation was not sufficiently advanced by that date and the prosecution considered continued non-disclosure to be necessary for a longer period of time.³
3. On 17 September 2012 the prosecution filed its “Application pursuant to Rule 81(2) of the Rules of Procedure and Evidence and Regulation 35 of the Regulations of the Court for extension of time to disclose material to the Defence” (“Application”).⁴
4. In its Application the prosecution submits that its Article 70 investigation is still ongoing, and suggests that there is an objectively justifiable risk that the investigation would be compromised if the Information is disclosed before certain “ongoing

¹ Prosecution Application Pursuant to Rule 81(2), ICC-01/09-02/11-434-Conf-Exp, with annexes.

² See annexes to ICC-01/09-02/11-434-Conf-Exp.

³ Decision on the prosecution’s application to authorise redactions to a statement of Witness 4 and to withhold documents from disclosure, 16 August 2012, notified on 17 August 2012, ICC-01/09-02/11-464-Conf-Exp, paras 9 – 11 and page 8.

⁴ ICC-01/09-02/11-486-Conf-Exp.

investigative steps” are completed.⁵ It submits that these ongoing investigative steps include an [REDACTED].⁶ The prosecution also states that it is “evaluating the evidence that it has collected to date and considering what further investigative or prosecutorial steps it could take”.⁷

5. On this basis, the prosecution requests continued non-disclosure of the Information for an additional 30 days unless it seeks, before 15 October 2012, and is granted, a further extension of non-disclosure.⁸
6. The prosecution submits that the defence will not be materially prejudiced by the additional delay.⁹ It argues that the utility of the information for the defence is likely to be confined to preparation for Witness 4’s testimony at trial, and that the defence has already been provided with a non-redacted portion of Witness 4’s Third Statement.¹⁰
7. Pursuant to Rule 81(2) of the Rules of Procedure and Evidence (“Rules”), the Chamber may authorise the non-disclosure to the defence of material that is subject to disclosure under the Statute and the Rules, if disclosure will prejudice further or ongoing investigations. However, the prosecution may not introduce such material into evidence at trial without adequate prior disclosure to the accused. On the basis of the prosecution’s statement that its Article 70 investigation is still ongoing, particularly in light of the submissions concerning an [REDACTED], the Chamber is satisfied that there is an objectively justifiable risk that disclosure to the accused of the Information may prejudice the prosecution’s ongoing investigation by revealing [REDACTED].

⁵ ICC-01/09-02/11-486-Conf-Exp, paras 6 – 8.

⁶ ICC-01/09-02/11-486-Conf-Exp, paras 6 – 7.

⁷ ICC-01/09-02/11-486-Conf-Exp, para. 7.

⁸ ICC-01/09-02/11-486-Conf-Exp, para. 8.

⁹ ICC-01/09-02/11-486-Conf-Exp, para. 9.

¹⁰ ICC-01/09-02/11-486-Conf-Exp, para. 9.

8. However, given that the Information is subject to disclosure under the Statute and the Rules,¹¹ in order to protect the rights of the accused disclosure must take place as soon as possible and in any event sufficiently in advance of trial to allow the defence to prepare for any testimony of Witness 4. Given the potential for delay if the Information is not disclosed to the defence in a timely manner, the prosecution should make every effort to disclose the material prior to 29 October 2012. If the prosecution has a compelling justification for requesting continued non-disclosure of this information, it should provide additional and detailed reasons in an application to the Chamber by 15 October 2012.

FOR THE FOREGOING REASON, THE CHAMBER HEREBY

GRANTS the prosecution's request for authorisation to continue to withhold from disclosure the information at issue until 29 October 2012. If the prosecution has a compelling justification for requesting a further extension of non-disclosure, it should provide additional and detailed reasons in an application to the Chamber by 15 October 2012.

¹¹ See ICC-01/09-02/11-434-Conf-Exp, para. 6.

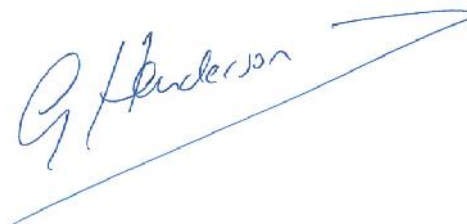
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated this 3 February 2017

At The Hague, The Netherlands