

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Original Date: **19 October 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 third application for delayed disclosure of
information related to Witness 4, 19 October 2012, ICC-01/09-02/11-509-Conf**

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 third application for delayed disclosure of information related to Witness 4.

1. On 15 June 2012, the Office of the Prosecutor (“prosecution”) filed an application to delay disclosure of information 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 of 15 June 2012, 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 Monday 17 September 2012, since 15 September 2012 fell on Saturday, the prosecution filed a second application which provided an update on the status of its investigation under Article 70 of the Statute and requested continued non-disclosure of the Information for an additional 30 days.⁴

¹ Prosecution Application Pursuant to Rule 81(2), 15 June 2012, 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 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, 17 September 2012, ICC-01/09-02/11-486-Conf-Exp.

4. On 20 September 2012, the Chamber granted the application of 17 September 2012, authorising the prosecution to withhold the Information until 29 October 2012 and allowing a new request to be made to the Chamber by 15 October 2012 if the prosecution had a compelling justification for requesting a further extension of non-disclosure.⁵
5. On 15 October 2012, the prosecution filed the “Prosecution Application for continued non-disclosure of certain materials related to Witness 4” (“Application”).⁶ In the Application, the prosecution: (i) informs the Chamber that, on 10 October 2012, a cooperating State which had been requested to assist in this investigation indicated that [REDACTED] would be forwarded to the prosecution in the coming days,⁷ (ii) argues that the need to review these new materials constitutes a “compelling justification” for continued non-disclosure of the Information,⁸ (iii) submits that this temporary delay will not materially prejudice the defence and that the portion of Witness 4’s statement that is “most material to the preparation of the defence” was disclosed without redaction on 19 August 2012⁹ and (iv) requests authorisation to withhold the Information until 29 November 2012, along with authorisation to request an additional extension on or before 15 November 2012 if there is a compelling justification for such an extension.¹⁰
6. 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 investigation. However, the prosecution may not introduce such material

⁵ Decision on the prosecution's application for continued non-disclosure, 20 September 2012, ICC-01/09-02/11-489-Conf-Exp.

⁶ ICC-01/09-02/11-504-Conf-Exp.

⁷ ICC-01/09-02/11-504-Conf-Exp, para. 8.

⁸ ICC-01/09-02/11-504-Conf-Exp, paras 9-11.

⁹ ICC-01/09-02/11-504-Conf-Exp, para. 11.

¹⁰ ICC-01/09-02/11-504-Conf-Exp, para. 12.

into evidence at trial without adequate prior disclosure to the accused. On the basis of the prosecution's assertions that its Article 70 investigation is still ongoing and that the [REDACTED], the Chamber is satisfied that there is both an objectively justifiable risk that disclosure of the Information at this time may prejudice the prosecution's ongoing investigation and a compelling justification for allowing a further delay of disclosure.

7. The Chamber remains mindful of the fact that the Information is subject to disclosure under the Statute and the Rules.¹¹ The Chamber also notes that, in response to a specific defence request,¹² the prosecution has agreed to prioritise the disclosure of any Article 67(2) material concerning Witness 4 that remains undisclosed.¹³ The Chamber emphasises that disclosure must take place as soon as possible and in any event sufficiently in advance of trial to allow the defence to prepare its case, including preparation for any testimony of Witness 4. Two prior extensions relating to disclosure of the Information have already been given,¹⁴ and the Chamber expects this disclosure issue to be resolved in the near future. The prosecution's request for an extension is granted, but it must make every effort to disclose the material prior to or on 29 November 2012.

¹¹ ICC-01/09-02/11-489-Conf-Exp, para. 8. *See also* ICC-01/09-02/11-434-Conf-Exp, para. 6.

¹² Defence request for specific relief in respect of prosecution witnesses 4, 11 and 12, 11 July 2012, ICC-01/09-02/11-452.

¹³ Prosecution's response to defence request for specific relief in respect of prosecution witnesses 4, 11 and 12, ICC-01/09-02/11-461, para. 9.

¹⁴ ICC-01/09-02/11-464-Conf-Exp; ICC-01/09-02/11-489-Conf-Exp.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the prosecution's request for authorisation to continue to withhold from disclosure the information at issue until 29 November 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 November 2012, mindful of the expectation indicated in paragraph 7 above.

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