

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Original Date: 9 January 2013

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 relief pursuant to Decision 451,
Rule 81(2) and Regulation 35, 9 January 2013, ICC-01/09-02/11-595-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

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 in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, having regard to Articles 64, 67(2), 68(1) and 68(5) of the Rome Statute (“Statute”), Rules 76, 77, 81 and 84 of the Rules of Procedure and Evidence (“Rules”), and Regulation 35(2) of the Regulations of the Court (“Regulations”), renders the following Decision on the prosecution’s application for relief pursuant to Decision 451, Rule 81(2) and Regulation 35.

I. Procedural Background and Submissions

1. On 9 July 2012, the Chamber directed the Office of the Prosecutor (“prosecution”) to disclose to the defence all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as to disclose all Article 67(2) material and provide all Rule 77 material to the defence for inspection by 9 January 2013.¹
2. On 8 January 2013, the prosecution filed its “Prosecution Application for relief pursuant to Decision 451, Rule 81(2) and Regulation 35” (“Application”).² The prosecution informs the Chamber that, on 4 January 2013, the prosecution disclosed 11 audio files with recordings of conversations between Witness 12 and [REDACTED].³ The prosecution asserts that the conversations reveal an attempt by [REDACTED], to bribe Witnesses 11 and 12 and persuade them not to testify.⁴ The prosecution alleges that these 11 audio files do not reveal that Witness 12’s [REDACTED].⁵ However, the prosecution alleges that there are an additional 37

¹ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-02/11-451, para. 15.

² ICC-01/09-02/11-592-Conf-Exp, with 37 confidential *ex parte* Annexes.

³ Application, ICC-01/09-02/11-592-Conf-Exp, para. 5.

⁴ Application, ICC-01/09-02/11-592-Conf-Exp, para. 5.

⁵ Application, ICC-01/09-02/11-592-Conf-Exp, para. 5.

audio files with recordings of conversations between Witness 12, [REDACTED] (“37 Audio Recordings”).⁶

3. The prosecution requests that the Chamber vary the 9 January 2013 disclosure deadline pursuant to Regulation 35 of the Regulations and authorise, pursuant to Rule 81(2) of the Rules, the prosecution to “temporarily postpone disclosure of any or all of the 37 audio files with recordings of conversations between Witness 12, [REDACTED] in order not to prejudice the Prosecution’s Article 70 investigation and until protective measures have been put place in respect of these persons”.⁷
4. The prosecution argues that non-disclosure of the 37 Audio Recordings is justified at this time because: (i) disclosure will reveal that the prosecution is actively engaged in a separate investigation under Article 70,⁸ (ii) the extra time will enable the prosecution to take formal statements from [REDACTED] and conclusively determine which of the 37 Audio Recordings are subject to disclosure,⁹ (iii) disclosure at this stage will put [REDACTED] at risk,¹⁰ (iv) disclosure would enable the Accused to provide [REDACTED] to take action to conceal his involvement and/or destroy evidence¹¹ and (v) no less restrictive measures are available, [REDACTED] stems from one of the Accused or his supporters and counsel for both Accused have taken the position that they must and will pass along to their clients any materials provided to them.¹² The prosecution submits that, though it “shares the Chamber’s desire to have all disclosure completed within the 9 January 2013 deadline [...] it is important to note, however, that the reasons for the proposed delay stem from unlawful

⁶ Application, ICC-01/09-02/11-592-Conf-Exp, paras 1, 6. *See also* ICC-01/09-02/11-592-Conf-Exp, annexes 1-37. The Chamber notes that Annex 1 is split into 2 parts, meaning that there are actually 38 recordings annexed to the Application.

⁷ Application, ICC-01/09-02/11-592-Conf-Exp, para. 15.

⁸ Application, ICC-01/09-02/11-592-Conf-Exp, para. 7.

⁹ Application, ICC-01/09-02/11-592-Conf-Exp, para. 7.

¹⁰ Application, ICC-01/09-02/11-592-Conf-Exp, para. 9.

¹¹ Application, ICC-01/09-02/11-592-Conf-Exp, para. 11.

¹² Application, ICC-01/09-02/11-592-Conf-Exp, para. 13.

attempts by the Defence or people claiming to act on its behalf to tamper with [the prosecution's] protected witnesses".¹³

II. Applicable Law, Analysis and Conclusions

5. Pursuant to Rule 81(2) of the 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. The Chamber notes that the prosecution has made previous applications asking to delay disclosure of materials in order to avoid prejudice to an investigation under Article 70 of the Statute, and the Chamber refers to its "Decision on the prosecution's application to authorise redactions to a statement of Witness 4 and to withhold documents from disclosure" for the criteria involved when evaluating such a request under Rule 81(2) of the Rules.¹⁴
6. Turning to its analysis of the Application, the Chamber notes that the prosecution does not adopt a definitive position as to whether the 37 Audio Recordings are subject to its disclosure obligations.¹⁵ However, the Chamber will proceed on the assumption that the 37 Audio Recordings fall within the prosecution's disclosure obligations.
7. The Chamber notes the prosecution's submissions that it is conducting [REDACTED] investigation relating to Witness 12 under Article 70 of the Statute, to which the prosecution has previously made reference.¹⁶ Though much of the 37 Audio

¹³ Application, ICC-01/09-02/11-592-Conf-Exp, para. 14.

¹⁴ 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, paras 5-7 (reclassified as confidential on 4 December 2012).

¹⁵ See Application, ICC-01/09-02/11-592-Conf-Exp, para. 7.

¹⁶ On 24 September 2012, the prosecution informed the Chamber that [REDACTED]. The prosecution notified the Chamber of its intention to continue to collect evidence on the [REDACTED]. Prosecution notification regarding intent to take investigative steps following apparent attempts to interfere with protected prosecution witnesses, 24 September 2012, ICC-01/09-02/11-492-Conf-Exp. The prosecution gave an update on the status of its investigation on 27

Recordings are in the Kikuyu language, the Chamber is satisfied on the basis of the English portions of the recordings that they are sufficiently related to the Article 70 investigation described by the prosecution. The Chamber considers that disclosing the information provided by Witness 12 [REDACTED] in the 37 Audio Recordings may prejudice this ongoing investigation. Although the prosecution makes reference to the need to put in protective measures for [REDACTED], implying that it sees part of its request as falling under Rule 81(4) of the Rules, the Chamber notes that the prosecution's request for relief is brought under Rule 81(2) of the Rules and that the prosecution does not need to show an objectively justifiable risk to the safety of the persons concerned in order for non-disclosure to be granted pursuant to Rule 81(2) of the Rules.

8. The Chamber also considers that this risk of prejudice is created from disclosing the 37 Audio Recordings specifically to the defence. The prosecution's investigation concerns alleged criminal conduct by the Accused and/or his supporters, and there is a risk that the investigated persons would seek to conceal their activities if the scope of the prosecution's investigation was revealed.
9. Moreover, it bears emphasis that the prosecution only seeks temporary postponement of disclosure for a limited number of materials. The prosecution has already disclosed the identity of Witness 12,¹⁷ and the existence of the essential subject matter behind the [REDACTED] investigation has also been revealed through the disclosure, on 4 January 2013, of audio recordings of alleged conversations between Witness 12 and [REDACTED]. The only materials with respect to which the prosecution seeks authorisation for non-disclosure at this point specifically relate to the alleged involvement of [REDACTED]. Given the limited nature of the relief

September 2012. Prosecution update pursuant to Decision ICC-01/09-02/11-493-Conf-Exp, 27 September 2012, ICC-01/09-02/11-494-Conf-Exp.

¹⁷ Annex 1: Prosecution's Response to the "Defence Request for Specific Relief in Respect of Prosecution Witnesses 4, 11 and 12", 2 August 2012, ICC-01/09-02/11-461-Conf-Anx1.

requested by the prosecution, the Chamber is satisfied that: (i) no less restrictive protective measures are feasible at this time and (ii) that temporary non-disclosure of the 37 Audio Recordings is not prejudicial to or inconsistent with the rights of the Accused and a fair and impartial trial.

10. For the reasons above, the Chamber finds that the 37 Audio Recordings fall within the scope of Rule 81(2) of the Rules. The Chamber considers that, in view of this finding, an extension of the disclosure deadline with respect to these materials is justified. Pursuant to Regulation 35(2) of the Regulations,¹⁸ the Chamber grants the prosecution's request to vary the 9 January 2013 disclosure deadline with respect to these materials. However, the Chamber emphasises that the 37 Audio Recordings which fall within the prosecution's disclosure obligations must be disclosed as soon as possible and, in any event, sufficiently in advance of trial in order for the defence to have an adequate opportunity to prepare its case. In particular, the prosecution is reminded that it must anticipate any protective measures which may be needed in order for these materials to be disclosed as soon as possible.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the prosecution's request for authorisation to withhold from disclosure the documents contained in Annexes 1 to 37 of the Application until 11 February 2013. If the prosecution has a compelling justification for requesting a further extension of non-

¹⁸ "The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard [...]".

disclosure, it should provide additional and detailed reasons in an application to the Chamber by 1 February 2013.

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