

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

Second decision on the first and second Prosecution applications for delayed disclosure of witness identities, 5 February 2013, ICC-01/09-02/11-619-Conf-Exp

Trial Chamber V (“Chamber”) of the International Criminal Court (“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, and Rules 76, 77, 81 and 84 of the Rules of Procedure and Evidence issues this Second decision on the first and second Prosecution applications for delayed disclosure of witness identities.

I. BACKGROUND

1. On 5 November 2012, the Office of the Prosecutor (“Prosecution”) filed an application for the delayed disclosure of the identities of five witnesses beyond the final disclosure deadline of 9 January 2013 (“First Application”).¹
2. The defence teams for Mr Muthaura and for Mr Kenyatta (jointly “Defence”) responded to the application on 7 December 2012, opposing the request in its entirety.²
3. On 7 December 2012, the Prosecution filed an application for the delayed disclosure of the identities of an additional seven witnesses (“Second Application”).³
4. On 21 December 2012, the Chamber issued its decision on the First Application (“First Decision”) authorising the Prosecution to withhold the identities of five witnesses beyond 9 January 2013 and ordering the VWU to file a report on the

¹ Prosecution application for delayed disclosure of witness identities, ICC-01/09-02/11-519-Conf-Exp. A public redacted version was filed on 7 November 2012, ICC-01/09-02/11-519-Red.

² Defence Response to the Public Redacted Version of the 5 November 2012 “Prosecution Application for delayed disclosure of witness identities” (ICC-01/09-02/11-519-Conf-Exp), ICC-01/09-02/11-561.

³ Second Prosecution application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witness 334, 7 December 2012, ICC-01/09-02/11-562-Conf-Exp. On 10 December 2012, the Prosecution’s public redacted version of the Second Delayed Disclosure Application, without annexes, was notified. A confidential redacted version of the Second Delayed Disclosure Application was subsequently filed by the Prosecution on the same day. Confidential Redacted Version of the 7 December 2012 ‘Second Prosecution application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witness 334’, 10 December 2012, ICC-01/09-02/11-562-Conf-Red.

security situation and protection status of four witnesses no later than 28 January 2013 in order for the Chamber to make a final determination on any continued non-disclosure of their identities.⁴

5. On 2 January 2013, the Defence filed the “Defence Response to the ‘Confidential Redacted Version of the 7 December 2012 ‘Second Prosecution application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witness 334’”,⁵ opposing the Second Application.
6. On 8 January 2013, the Chamber issued the “Decision on second Prosecution application for delayed disclosure of witness identities” (“Second Decision”).⁶ In the Second Decision, the Chamber authorised the Prosecution to temporarily withhold from disclosure to the Defence the identities of seven witnesses beyond 9 January 2013⁷ and ordered the VWU to file a report on the security situation and protection status of the witnesses no later than 28 January 2013 in order for the Chamber to make a final determination on any continued non-disclosure of their identities.⁸

⁴ Decision on prosecution application for delayed disclosure of witness identities, ICC-01/09-02/11-580-Conf-Exp. A confidential redacted version, ICC-01/09-02/11-580-Conf-Red, was filed on the same day. Consequently, on 21 December 2012, the Prosecution submitted the First provision of additional information relating to the Prosecution’s second application for delayed disclosure of witness identities (ICC-01/09-02/11-562), together with confidential, *ex parte* annexes, containing transcripts of interviews of Witnesses 493, 494 and 510. ICC-01/09-02/11-582, with Confidential, *ex parte* Annexes A, B and C. On 28 December 2012, the Prosecution filed the “Corrigendum of Annex D to Second Prosecution application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witness 334”, with an annex. ICC-01/09-02/11-562-Conf-Exp-AnxD-Corr, with Annex A.

⁵ ICC-01/09-02/11-586-Conf, with Annexes A (ICC-01/09-02/11-586-Conf-Exp-AnxA) and B (ICC-01/09-02/11-586-Conf-Exp-AnxB).

⁶ ICC-01/09-02/11-593-Conf-Exp. The confidential redacted version, ICC-01/09-02/11-593-Conf-Red, was filed on 9 January 2013.

⁷ ICC-01/09-02/11-593-Conf-Exp, page 24.

⁸ ICC-01/09-02/11-593-Conf-Exp, page 25. Consequently, On 11 January 2013, as indicated in paragraph 7 of the Second Delayed Disclosure Application, the Prosecution submitted the Second provision of additional information relating to the Prosecution’s second application for delayed disclosure of witness identities (ICC-01/09-02/11-562) together with confidential *ex parte* annexes, containing the draft interview transcripts for Witnesses 505 and 506. ICC-01/09-02/11-599-Conf with confidential *ex parte* annexes A and B. On 25 January 2013, the Third provision of additional information relating to the Prosecution’s second application for delayed disclosure of witness identities (ICC-01/09-02/11-562) was submitted together with confidential *ex parte* annexes containing the final interview transcripts

7. On 28 January 2013, pursuant to the First and Second Decisions, the VWU filed two confidential *ex parte*, Registry and Prosecution only, reports on the security situation and protection status of the witnesses.⁹

II. ANALYSIS

Witness P-219

8. The VWU informs the Chamber that on [REDACTED].¹⁰ The witness was [REDACTED].¹¹ The VWU submits that “the risk to this witness has been mitigated and can be managed [REDACTED]”.¹²
9. The Chamber recalls that in the First Decision it found that there was an objectively justifiable risk to the safety of Witness P-219 should his identity be disclosed to the Defence on 9 January 2013 and authorised temporary non-disclosure of his identity until such time as the VWU had made a determination concerning necessary protective measures.¹³ In view of the VWU’s submissions, the Chamber is satisfied that there is no need for continuing non-disclosure. It therefore orders that the identity of the witness be disclosed to the Defence as soon as possible, and in any event no later than 11 February 2013, [REDACTED]¹⁴.

Witness P-232

for Witness 494 and 510. ICC-01/09-02/11-609-Conf with confidential *ex parte* and confidential redacted annexes A and B. On 31 January 2013 the prosecution submitted the Fourth provision of additional information to the Prosecution’s second application for delayed disclosure of witness identities (ICC-01/09-02/11-562), containing the final interview transcripts for witnesses 505 and 506, ICC-01/09-02/11-616 with confidential *ex parte* annexes A and B.
⁹ Victims and Witnesses Unit’s Report Following the “Decision on prosecution application for delayed disclosure of witness identities” (ICC-01/09-02/11-580-Conf-Exp), ICC-01/09-02/11-611-Conf-Exp; Victims and Witnesses Unit’s Report Following the “Decision on second Prosecution application for delayed disclosure of witness identities” (ICC-01/09-02/11-593-Conf-Exp), ICC-01/09-02/11-613-Conf-Exp.

¹⁰ ICC-01/09-02/11-611-Conf-Exp, para. 1.

¹¹ ICC-01/09-02/11-611-Conf-Exp, para. 1.

¹² ICC-01/09-02/11-611-Conf-Exp, para. 1.

¹³ ICC-01/09-02/11-580-Conf-Red, paras 35 – 37.

¹⁴ [REDACTED]

10. The VWU submits that on [REDACTED]. The VWU submits that the witness's security concerns have been mitigated "to a manageable level".¹⁵
11. The Chamber recalls that in the Second Decision it found that there was an objectively justifiable risk to the safety of Witness P-232 should his identity be disclosed to the Defence on 9 January 2013 and authorised temporary non-disclosure of his identity until such time as the VWU had fully implemented adequate protective measures.¹⁶ In view of the VWU's submissions, the Chamber is satisfied that there is no need for continuing non-disclosure. It therefore orders that the identity of the witness be disclosed to the Defence as soon as possible, and in any event no later than 11 February 2013.

Witness P-334

12. The VWU submits that the Prosecution referred Witness P-334 to the VWU on 22 January 2013.¹⁷ Having met with the witness and assessed his security situation, the VWU recommends delayed disclosure [REDACTED].¹⁸ The VWU submits that the witness and his family have not been threatened and that [REDACTED]. However, the VWU is of the view that the [REDACTED], put the witness at risk.¹⁹
13. In view of these considerations, the Chamber is satisfied that the objectively justifiable risk to this witness's security persists and continues to justify a delay in the disclosure of his identity to the Defence. The Chamber considers that it is necessary to protect the safety of this witness, which may be at risk on account of his involvement with the Prosecution.

¹⁵ ICC-01/09-02/11-613-Conf-Exp, para. 1.

¹⁶ ICC-01/09-02/11-593-Conf-Red, para. 51.

¹⁷ ICC-01/09-02/11-613-Conf-Exp, para. 2.

¹⁸ ICC-01/09-02/11-613-Conf-Exp, para. 3.

¹⁹ ICC-01/09-02/11-613-Conf-Exp, para. 3.

14. Having regard to the measures the Chamber identified in the Second Decision in order to mitigate any prejudice to the accused arising from the temporary non-disclosure,²⁰ the Chamber is satisfied that the delayed disclosure strikes an appropriate balance between the need to ensure full disclosure to the Defence as early as possible and the need to ensure the safety of the witness. The Chamber is, however, not persuaded that the security concerns are such as to justify a delay until 45 days before the testimony of the witness, especially in view of [REDACTED]. The Chamber therefore authorises a delay in the disclosure of the witness's identity [REDACTED], but disclosure must take place no later than 30 days before the commencement of the trial, which is the final date anticipated in the Chamber's scheduling order for disclosure of non-ICCP witnesses with protection concerns.²¹

Witnesses P-428, P-429, P-430, P-493, P-494, P-505, P-506 and P-510

15. The VWU informs the Chamber that [REDACTED] each of witnesses P-428, P-429, P-430, P-493, P-494, P-505, P-506 and P-510 [REDACTED].²² Thereafter, the VWU will make a recommendation to the Registrar concerning the most appropriate solution for these witnesses' protection.²³ In view of the fact that the VWU is in the process of completing its evaluation of the security situation of these eight witnesses, the Chamber authorises the Prosecution to continue to withhold disclosure of the identities of P-428, P-429, P-430, P-493, P-494, P-505, P-506 and P-

²⁰ ICC-01/09-02/11-593-Conf-Exp, para. 53.

²¹ ICC-01/09-02/11-451, para. 24.

²² ICC-01/09-02/11-611-Conf-Exp, paras 2 – 4; ICC-01/09-02/11-613-Conf-Exp, paras 4 – 8.

²³ ICC-01/09-02/11-611-Conf-Exp, paras 2 – 4; ICC-01/09-02/11-613-Conf-Exp, paras 4 – 8.

510 in order to give the VWU sufficient time to finalise its security assessment and to put in place any required measures.²⁴

16. The VWU is directed to inform the Prosecution and the Chamber on a rolling basis once the security assessments are completed for each witness, indicating the outcome of the assessment and what protective measures have been implemented. The witnesses' identities should be disclosed to the defence as soon as the VWU has informed the Prosecution that any necessary protective measures have been implemented.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

DIRECTS the Prosecution to disclose the identity of Witnesses P-219 and P-232 to the Defence as soon as possible, and in any event no later than 11 February 2013;

AUTHORISES the Prosecution to temporarily withhold from disclosure to the Defence the identity of Witness P-334 until [REDACTED] and in any event no later than 30 days before the commencement of trial;

AUTHORISES the Prosecution to temporarily withhold from disclosure to the Defence the identity of Witnesses P-428, P-429, P-430, P-493, P-494, P-505, P-506 and P-510 until such time as the VWU assessment is complete and protection measures have been implemented;

²⁴ The Chamber notes that the present order is without prejudice to any future ruling on the Muthaura Defence "Application for Sanctions pursuant to Article 70 of the Statute against an OTP staff Member and request for steps to be taken to ensure the protection of defence witnesses", 1 February 2013, ICC-01/09-02/11-617-Conf-Exp (public redacted version filed on 4 February 2013, ICC-01/09-02/11-617-Red).

ORDERS the VWU to inform the Prosecution and the Chamber on a rolling basis once the security assessments are completed for each witness, indicating the outcome of the assessment and what protective measures have been implemented;

DIRECTS the Prosecution to disclose the witnesses' identities to the Defence as soon as the VWU has informed the Prosecution that any necessary protective measures have been implemented; and

AUTHORISES the Prosecution to continue to temporarily maintain the redactions to the witness statements and transcripts of the witnesses with respect to whom the Chamber has authorised the continuing non-disclosure of identities.

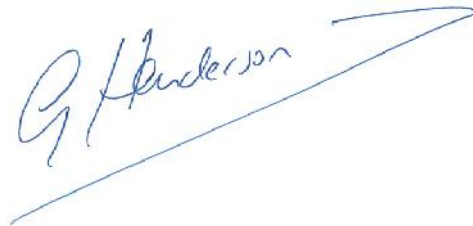
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 3 February 2017

At The Hague, The Netherlands

No. ICC-01/09-02/11

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3 February 2017