

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 August 2012

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

**Decision on the defence's request for specific relief in respect of three
witnesses of the prosecution**

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
Mr Karim Khan , Mr Essa Faal,
Mr Kennedy Ogetto, Ms Shyamala
Alagendra

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims
Mr Morris Anyah

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* renders pursuant to Article 64(2), 64(6)(e) and 64(6)(f), Article 67(2) and Article 68(1) of the Rome Statute (“Statute”) the following Decision on the defence’s request for specific relief in respect of three witnesses of the prosecution.

I. Background and Submissions

1. On 22 June 2012 the Registry filed the “Submission of the draft protocol on contacts with the witnesses on opposing parties and on communication of non-public information to the public in the course of the parties and participants’ investigations” to which it annexed the draft protocol (“draft protocol”).¹
2. On 9 July 2012 the Chamber issued the “Decision on the schedule leading up to trial” (“Schedule Decision”),² in which it set a number of deadlines for filings and communications in advance of the commencement of the trial.
3. On 11 July 2012 the defence team of Uhuru Muigai Kenyatta (“defence”) filed the “Defence Request for specific Relief in Respect of Prosecution Witnesses 4, 11 and 12” (“Request”),³ in which it asks the Chamber to (i) order the Office of the Prosecutor (“prosecution”) to confirm to the defence whether it intends to rely on prosecution witnesses 4, 11 and 12 at trial, (ii) order the prosecution to reveal the identities of witnesses 11 and 12, (iii) authorise the defence to use confidential identifying information for the sole purpose of the defence’s investigations with regard to witnesses 4, 11 and 12, and (iv) order the prosecution to disclose all evidence arising from investigations and all other material including direct or

¹ ICC-01/09-02/22-440 and annex: ICC-01/09-02/11-440-Anx1.

² ICC-01/09-02/11-451.

³ ICC-01/09-02/11-452, with public Annex.

indirect communication to date with regard to witnesses 4, 11 and 12 which tends to show the innocence of the accused or may affect the credibility of these prosecution witnesses. The defence submits that the information and material it seeks to obtain will enable it to adequately prepare its case, and in particular to investigate these witnesses in relation to their credibility.⁴ As regards request (ii), the defence argues that the right to a fair trial and Article 67(2) of the Statute compel the prosecution to divulge the identities of witnesses 11 and 12 in order for the defence to conduct this investigation concerning their credibility.⁵

4. On 2 August 2012 the prosecution filed its response to the request ("Response") together with one confidential annex which contains a communication to the defence from 1 August 2012.⁶ The prosecution submits that:

- (i) confirmation of whether it intends to call witnesses 4, 11 and 12 would amount to a reconsideration of the Chamber's Schedule Decision and should therefore be dismissed;⁷
- (ii) it has disclosed the identities of witnesses 11 and 12 to the defence on 1 August 2012;⁸
- (iii) it has no objection to the defence's use of confidential identifying information regarding witnesses 4, 11 and 12 as long as it is in compliance with the proposed protocol on witness contact;⁹ and
- (iv) it has agreed to prioritise the disclosure of Article 67(2)-related material that relates to the three witnesses.¹⁰

⁴ *Ibid.*, paragraph 12.

⁵ *Ibid.*, paragraph 14.

⁶ ICC-01/09-02/11-461.

⁷ *Ibid.*, paragraph 11.

⁸ *Ibid.*, paragraph 7.

⁹ *Ibid.*, paragraphs 15 to 16.

II. Analysis and Conclusions

5. With regard to the first request, the Chamber recalls that in its Schedule Decision it ordered the prosecution to file its list of witnesses to be relied on at trial by 9 January 2013.¹¹ The Chamber agrees with the prosecution that an order to the prosecution to confirm whether it intends to rely on these three witnesses at trial would be inconsistent with the Schedule Decision. Granting the defence request on this point would amount to varying the Schedule Decision. On the basis of the defence submissions, the Chamber is not convinced that it is necessary. Notably, the ability of the defence to conduct a thorough investigation in respect of the credibility of the witnesses is not affected by whether the prosecution intends to rely on these witnesses at trial. The first request is therefore dismissed.
6. With regard to the second request, the Chamber notes that the disclosure by the prosecution of the identities of witnesses 11 and 12 renders this request moot.
7. With regard to the third request, the Chamber is of the view that, taking into consideration that the prosecution does not object to the defence's use of confidential identifying information regarding witnesses 4, 11 and 12, the defence should be allowed to disclose that information for the purpose of investigations in respect of the three witnesses under the restrictions laid out in paragraphs 20 to 22 of the draft protocol. The Chamber notes that the final decision on the draft protocol has not yet been issued. The present decision is without prejudice to the decision on the protocol.
8. With regard to the fourth request, the Chamber considers that the defence essentially asks the Chamber to order that the prosecution fulfil its statutory obligations arising from Article 67(2) of the Statute. Taking into account the

¹⁰ *Ibid.*, paragraph 9.

¹¹ ICC-01/09-02/11-451, paragraph 18.

undertaking by the prosecution to prioritise the disclosure of Article 67(2) material related to the three witnesses, the Chamber considers that an additional order to the prosecution in this regard is unnecessary.

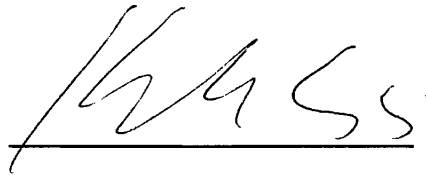
9. In addition to the above considerations regarding the second and fourth requests, the Chamber wishes to remind the parties that the disclosure process is to be carried out on an *inter partes* basis and that they should not seek the Chamber's intervention unless prior efforts to resolve a particular issue on an *inter parte* basis have clearly failed to produce satisfactory results.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

GRANTS the defence request permitting it to disclose confidential identifying information in visual and/or non-textual documents for the sole purpose of defence investigations in respect of witnesses 4, 11 and 12 under the restrictions set out in paragraphs 20 to 22 of the draft protocol; and

DISMISSES the remainder of the Request.

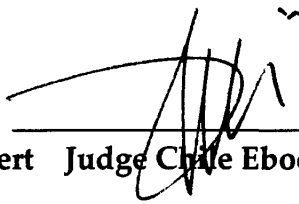
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chale Eboe-Osuji

Dated this 16 August 2012

At The Hague, The Netherlands