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

Public redacted version of the 5 February 2013 Prosecution response to the Muthaura Defence's "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" (ICC-01/09-02/11-617-Conf-Exp)

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Prosecution hereby responds to the Muthaura Defence's "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 ("Application").¹

2. The Application has no merit. It is wrong on the facts and wrong on the law. It contains repeated accusations of "reprehensible" prosecutorial behaviour, alleges that the Prosecution displayed a "flagrant disregard for the orders of this Court" and a "stubborn[] refus[al]" to take precautions to protect Defence witnesses, and describes the Prosecution's activities as "actionable misconduct". Stripped of this highly charged rhetoric, the Application relies ultimately on selectively edited portions of two witness interviews from which relevant exchanges that contradict its scenario have been omitted. Once this misleading picture is corrected, it is clear that the Prosecution did not act improperly, did not violate court orders, and did not jeopardize Defence witnesses. The Application should be dismissed.

Confidentiality

3. To respond to the Application, the Prosecution must reference information from the interviews of Witnesses [REDACTED] and [REDACTED] that, to date, is redacted from documents disclosed to the Defence. These redactions were approved by the Chamber and are necessary to protect the identity of Witness [REDACTED], for whom delayed disclosure has been granted and for whom the Victims and Witnesses Unit has advised that [REDACTED]. To account for this, the Prosecution is filing three versions of this response. The first, designated "confidential, *ex parte*", contains the full references to the relevant transcripts. The second is filed confidentially, and redacts

¹ ICC-01/09-02/11-617-Conf-Exp.

information that has not yet been disclosed to the Defence. The third is filed publicly.

Submissions

4. The Application is premised upon the untrue allegations that Prosecution staff revealed the identity of Defence witnesses during interviews with two of its witnesses, Witnesses [REDACTED] and [REDACTED]. It accuses the Prosecution of disclosing that [REDACTED] and [REDACTED] had been Defence witnesses at the confirmation stage and thereby jeopardizing their safety and security.²
5. The accusations are false. Witnesses [REDACTED] and [REDACTED] knew prior to their interviews, and informed the Prosecution interview team during the interviews themselves, that [REDACTED] and [REDACTED] were Defence witnesses. [REDACTED]. Thus, the Prosecution did not provide either of the two interviewees any new or confidential information, nor did it jeopardize in any conceivable respect the safety and well-being of either Defence witness.
6. Similarly untrue are the allegations by the Defence that the Prosecution's response to expressed concerns by the Defence gave "short shrift to the Defence complaint".³ When the Defence first suggested to the Prosecution that the Prosecution may have revealed confidential information during the course of its interviews, the Prosecution promptly responded that the Defence's assertions were incorrect and that redacted portions of the relevant transcript "make clear that the interview team did not reveal that [REDACTED] or [REDACTED] were Defence witnesses".⁴ The Prosecution

² ICC-01/09-02/11-617-Conf-Exp, paras 6-11.

³ ICC-01/09-02/11-617-Conf-Exp-AnxA, para 8.

⁴ ICC-01/09-02/11-617-Conf-Exp-AnxA, page 3 (11 December 2012 email from Adesola Adeboyejo to Shyamala Alagendra).

reiterated the same a day later in response to further Defence inquiries.⁵ Far from being “dismissive and high-handed”,⁶ the Prosecution’s communications accurately and appropriately informed the Defence that it was misreading and misinterpreting the transcripts.

A. Witness [REDACTED]

7. [REDACTED]. Witness [REDACTED]’s interview transcript demonstrates that he knew prior to his Prosecution interview that [REDACTED] was a Defence witness, having received this information from [REDACTED].
8. The issue arose during questioning regarding alleged payments to Mungiki members who agreed to provide false exonerating evidence to the Defence. The questioning is contained in document [REDACTED], an unredacted version of which is attached as confidential, *ex parte* Annex A. Witness [REDACTED] explained that [REDACTED] to him and other Mungiki members. In particular, at pages [REDACTED] through [REDACTED], Witness [REDACTED] stated that [REDACTED]. The following excerpt illustrates the point. The passages highlighted in grey are those redacted from the version available to the Defence. The words in bold contain the Prosecution’s emphasis.

[REDACTED].⁷

9. The Prosecution’s questioning of Witness [REDACTED] did not disclose [REDACTED]’s status or reveal any new information regarding him, and did not put him in any conceivable jeopardy. Witness [REDACTED] had already learned [REDACTED] that [REDACTED] was a Defence witness, that he had given the Defence a written statement, and that [REDACTED] his written statement contained false evidence. Moreover, Witness

⁵ ICC-01/09-02/11-617-Conf-Exp-AnxA, page 3 (12 December 2012 email from Adesola Adeboyejo to Shyamala Alagendra).

⁶ ICC-01/09-02/11-617-Conf-Exp, para 12.

⁷ [REDACTED].

[REDACTED] volunteered this information to the Prosecution. The Prosecution's questions merely determined what Witness [REDACTED] knew and how he knew it. Particularly given that the Muthaura Defence has chosen to make [REDACTED] the cornerstone of its case theory, the Prosecution's questioning regarding the veracity of his evidence was a proper exercise of its Article 54 investigatory powers,⁸ which complied with its Article 68(1) obligations and the Chamber's protocol concerning the handling of confidential information ("Protocol").⁹

10. [REDACTED]. The Defence's allegations regarding the Prosecution's alleged disclosure of [REDACTED]'s status as a Defence witness are also wrong. Witness [REDACTED] knew prior to his Prosecution interview that [REDACTED] had provided evidence to the Defence, having also received this information from [REDACTED] as well as other Mungiki sources. The relevant excerpts are as follows:

[REDACTED]¹⁰

[REDACTED]¹¹

[REDACTED]¹²

[REDACTED]¹³

⁸ The importance of investigating the veracity of [REDACTED]'s account is underscored by the evidence that he provided false statements at the confirmation stage due to monetary inducements and/or threats made to him. *See, e.g.*, [REDACTED].

⁹ ICC-01/09-02/11-469-Anx, paras 19-20.

¹⁰ [REDACTED].

¹¹ [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

11. As with [REDACTED], the Prosecution's questioning regarding [REDACTED] did not reveal any new or confidential information; it merely sought to determine what Witness [REDACTED] knew and how he knew it.
12. There is no merit to the Defence's arguments to the contrary, including its suggestion that the Prosecution "indirectly confirm[ed]" [REDACTED]'s witness status by using the word "statement" in a question and thereby endangered that person.¹⁴ As the transcript makes clear, the Prosecution did no such thing: Witness [REDACTED] already knew about [REDACTED]'s provision of evidence to the Defence, having received this information from [REDACTED] and having repeatedly already referred to him as a Defence witness.¹⁵
13. In sum, the Defence's factual presentation with respect to Witness [REDACTED]'s interview is wrong, which renders its associated accusations of prosecutorial misconduct (and its demand, *inter alia*, for an investigation of the Prosecution for obstruction of justice) unfounded.

B. Witness [REDACTED]

14. The Defence's assertions regarding Witness [REDACTED]'s interview are similarly unfounded, relying as they do on selectively edited portions of the transcript that omit critical information and present an incorrect and misleading picture for the Chamber.
15. The Application accuses the Prosecution again of "inform[ing] the witness, in clear and unequivocal terms, that [REDACTED] was a Defence Witness".¹⁶ It quotes two segments of questioning during Witness [REDACTED]'s interview, from lines 665-673 and 682-683. It omits,

¹⁴ ICC-01/09-02/11-617-Conf-Exp, para 6.

¹⁵ [REDACTED]. The Prosecution notes that [REDACTED] has himself disclosed the fact of his Defence interview to Mungiki members. *See, e.g.*, [REDACTED].

¹⁶ ICC-01/09-02/11-617-Conf-Exp, para 10.

however, nine critical lines in between, lines 674-681, and the continued relevant discussions that follow, up to line 702.¹⁷

16. These omissions, the Prosecution suggests, were not inadvertent. They contain information that would persuade the Chamber to deny the Application, including the “clear and unequivocal” statement by Witness [REDACTED] that he had known [REDACTED] was a Defence witness prior to this Prosecution interview. Had the full excerpts been included in the Application, they would themselves have rebutted the accusations levelled by the Defence.

17. The full excerpt, included in confidential, *ex parte*, Annex B, is as follows:

[REDACTED]¹⁸

18. The Prosecution notes that this line of questioning was triggered by information given during the Witness [REDACTED],¹⁹ and earlier in his interview,²⁰ concerning [REDACTED]’s recent efforts to solicit Witness [REDACTED] to provide evidence for the Defence in exchange for security assurances.

19. It comes as no surprise that Witness [REDACTED] knew [REDACTED] to be a Defence witness. The two had been closely associated during the period covered by the charges, with [REDACTED] taking Witness [REDACTED] to [REDACTED] and intervening on Mr Muthaura’s behalf to [REDACTED].²¹ And Witness [REDACTED] also knew that Mr Muthaura and [REDACTED] remained closely associated, as the excerpts contained in footnote 20 illustrate. Then, in early 2012 (before the interview at issue here),

¹⁷ ICC-01/09-02/11-617-Conf-Exp, paras 10-11.

¹⁸ [REDACTED].

¹⁹ The relevant excerpts of the written record of Witness [REDACTED]’s are attached as confidential, *ex parte* Annex C.

²⁰ *See, e.g.*, [REDACTED].

²¹ [REDACTED].

[REDACTED] attempted to persuade Witness [REDACTED] and other Mungiki members to join him as Defence witnesses,²² telling him at that time that he ([REDACTED]) was “already a witness in the defence of Uhuru and Muthaura”.²³

20. To the extent that the questioning “revealed” that [REDACTED] was himself a Defence witness, it was information that Witness [REDACTED] had already learned from [REDACTED] himself. As with Witness [REDACTED], the Prosecution’s questioning simply sought to determine what Witness [REDACTED] knew and how he knew it.

21. Finally, even if it reasonably could be argued that the Prosecution disclosed information to Witness [REDACTED] that he did not already know – and it cannot – the Defence’s accusations that the Prosecution deliberately disregarded judicial orders by violating the Protocol are untrue. The Protocol came into force five months after Witness [REDACTED]’s interview. The Prosecution cannot be said to have violated a set of rules that were not yet in place.²⁴ Absent the Protocol, the provisions of Articles 54 and 68(1) of the Statute guided the Prosecution’s investigations and were, as discussed above, scrupulously complied with.

Conclusion

22. The Prosecution assures the Chamber in no uncertain terms that it takes seriously the Defence’s expressed concerns regarding [REDACTED]’s safety, regardless of the source of the alleged threats.²⁵ Considerations of witness security are paramount in this Court’s work. To this end, and in

²² [REDACTED]

²³ [REDACTED]

²⁴ Similarly without merit is the Defence’s reliance on protocols adopted in other cases. *See* ICC-01/09-02/11-617-Conf-Exp, para 17. The Chamber has previously dismissed the Defence’s arguments regarding the applicability of protocols adopted by different Chambers, in different case, involving different issues. *See* ICC-01/09-02/11-439, para 9 (concluding that other Chamber’s rulings regarding witness contact “are of little relevance to the issue in the present case”).

²⁵ [REDACTED]

light of the particular security challenges in this case, the Prosecution has at all times made the well-being of witnesses a top priority and has taken every possible step to ensure that no one is put at risk on account of the Court's work.

23. The Prosecution also acknowledges that it is appropriate to bring witness security concerns to the Chamber's attention when its intervention is warranted. It is not appropriate, however, to waste the Court's time with accusatory applications that the filing party knows to be baseless. The factual record shows that the Prosecution acted properly during its investigations, and the Defence's assertions to the contrary lack any basis in fact and are inaccurate to the point of being misleading.

24. For the reasons set forth above, the Application should be dismissed.



Fatou Bensouda,
Prosecutor

Dated this 8th of February 2013
At The Hague, The Netherlands