

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **18 February 2013**

**TRIAL CHAMBER V**

**Before:** Judge Kuniko Ozaki, Presiding  
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 with Confidential Annexes A and B, and Confidential *Ex-parte*, Kenyatta  
and Muthaura Defence only, Annex C**

**Defence Application for Disclosure of Evidence Relating to Prosecution Witness 4**

**Sources:** Defence for Uhuru Muigai Kenyatta

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

**The Office of the Prosecutor**

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**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Silvana Arbia

**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta (“Defence”) applies to Trial Chamber V (“Chamber”) pursuant to Article 64(3)(c) of the Rome Statute (“Statute”) to compel disclosure and inspection by the Prosecution of the following material:
  - a. The contents of email addresses used by Prosecution Witness 4 (“OTP-4”) for certain periods relevant to the issues in the proceedings and a forensic inspection and analysis of the use of the accounts by an expert; and
  - b. The complete parts of a document that forms an exhibit disclosed by the Prosecution which details, *inter alia*, the travel and movements of OTP-4.<sup>1</sup>
2. The Defence requested, and the Prosecution agreed in correspondence to provide, the disclosure of evidence being the email communications for certain periods of OTP-4 for analysis by a jointly instructed expert. The Prosecution since reneged on this agreement and recently refused to provide the material to the Defence on the basis that “he is not a Prosecution witness”. The correspondence is annexed hereto in Confidential Annex A.
3. The Defence has classified Annexes A and B as “Confidential”, as they contain information concerning witnesses whose identity has not been publicly disclosed. Annex C has been classified as “Confidential *Ex-parte*, Kenyatta and Muthaura Defence” because it contains evidence capable of disclosing current Defence investigations and case theory.

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<sup>1</sup> KEN-OTP-0043-0083.

## II. PROCEDURAL HISTORY

### (i) Filings

3. On 8 March 2011, the Pre-Trial Chamber (“PTC”) issued summonses to appear before the International Criminal Court for Ambassador Francis Muthaura, Mr Uhuru Kenyatta and General Mohammed Ali.<sup>2</sup>
4. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties”.<sup>3</sup>
5. On 3 June 2011, the Prosecution requested that the PTC authorise redactions to evidence collected before 15 December 2010,<sup>4</sup> asking, *inter alia*, that the OTP-4 Statement be redacted in full.<sup>5</sup> On 8 July 2011, the Single Judge ordered<sup>6</sup> the Prosecution either to summarise or not disclose certain materials relating to OTP-4.<sup>7</sup>
6. On 15 August 2011, the Prosecution applied to the PTC to lift restrictions regarding the identity of OTP-4,<sup>8</sup> and also requested the continued non-disclosure to the Defence of, *inter alia*, the OTP-4 Statement.<sup>9</sup> On 18 August 2011, the Prosecution informed the PTC that OTP-4 had consented to the

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<sup>2</sup> ICC-01/09-02/11-1.

<sup>3</sup> ICC-01/09-02/11-64.

<sup>4</sup> ICC-01/09-02/11-101-Conf-Exp.

<sup>5</sup> ICC-01/09-02/11-101-Conf-Exp-AnxE2, p. 5.

<sup>6</sup> ICC-01/09-02/11-165-Conf-Exp; ICC-01/09-02/11-165-Conf-Red.

<sup>7</sup> ICC-01/09-02/11-165-Conf-Exp, p. 9.

<sup>8</sup> 15 August 2011 Application, para. 20.

<sup>9</sup> 15 August 2011 Application, para. 20, Annex A.

disclosure of his identity.<sup>10</sup> In the 18 August 2011 Decision, the Single Judge ruled that OTP-4's identity could be disclosed to the Defence<sup>11</sup> and ordered further non-disclosure of the OTP-4 Statement to the Defence.<sup>12</sup>

7. The Confirmation Hearing took place between 21 September and 5 October 2011. On 23 January 2012, PTC II issued the Confirmation Decision, confirming the charges against Ambassador Muthaura and Mr Kenyatta, and refusing to confirm the charges against General Ali.<sup>13</sup> On 9 March 2012, PTC II denied the Defence applications to appeal the Confirmation Decision.<sup>14</sup> On 12 March 2012, the Registry submitted the records of the legal proceedings to the Presidency.<sup>15</sup> On 29 March 2012, the Presidency constituted the Chamber and referred the case to trial.
8. On 21 June 2012, the Prosecution disclosed Potentially Exculpatory Evidence ("PEXO") – Package 8, a significant extent of which concerned OTP-4.<sup>16</sup>
9. On 1 August 2012, the Prosecution confirmed to the Defence the identities of witnesses OTP-11 and OTP-12.<sup>17</sup>
10. On 22 August 2012, the Prosecution disclosed PEXO – Package 10. This disclosure package contained only one item, an Article 67(2) exculpatory witness statement from Prosecution OTP-4.<sup>18</sup> On 19 October 2012, the

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<sup>10</sup> ICC-01/09-02/11-252-Conf-Exp, para. 2.

<sup>11</sup> 18 August 2011 Decision, p. 9.

<sup>12</sup> 18 August 2011 Decision, p. 9.

<sup>13</sup> ICC-01/09-02/11-382-Conf.

<sup>14</sup> ICC-01/09-02/11-406.

<sup>15</sup> ICC-01/09-02/11-407.

<sup>16</sup> ICC-01/09-02/11-443 and ICC-01/09-02/11-443-Conf-AnxA.

<sup>17</sup> ICC-01/09-02/11-461-Conf-Anx1.

<sup>18</sup> KEN-OTP-0067-0604.

Prosecution disclosed Incriminatory Evidence Package 18.<sup>19</sup> This disclosure package contained the OTP-4 Statement and other associated documentation.<sup>20</sup>

11. On 13 December 2012, and at the request of the Defence teams for Mr Kenyatta and Ambassador Muthaura, the Prosecution filed a request<sup>21</sup> for the reclassification of six documents relating to the 3 June 2011 Application,<sup>22</sup> 8 July 2008 Decision,<sup>23</sup> and 18 August Decision,<sup>24</sup> all of which related to Prosecution requests for the non-disclosure of the OTP-4 Statement to the Defence. On 14 December 2012, the Chamber issued its “Decision on the Prosecution's request for re-classification of six documents relating to the [OTP-4 Statement]”, ordering the Registry to reclassify the six documents that formed the subject matter of the 13 December 2012 Application, as confidential.<sup>25</sup> The Chamber also directed the Prosecution to file lesser-redacted versions the 3 June 2011 and 15 August 2011 Applications, including relevant annexes.<sup>26</sup> On 17 December 2012, the Registry reclassified the six documents, which comprised a Prosecution annex<sup>27</sup> and two decisions, with related annexes, issued by the Single Judge.<sup>28</sup> On 19 December 2012, the Prosecutor filed lesser-redacted versions of the 3 June 2011 and 15 August 2011 Applications, including relevant annexes.<sup>29</sup>

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<sup>19</sup> ICC-01/09-02/11-512 and ICC-01/09-02/11-512-Conf-Anx1.

<sup>20</sup> KEN-OTP-0043-0079, KEN-OTP-0043-0080 and KEN-OTP-0043-0081.

<sup>21</sup> ICC-01/09-02/11-570-Conf.

<sup>22</sup> The Prosecution requested that the Chamber reclassify as confidential an unredacted version of Annex E2 to ICC-01/09-02/11-101-Conf-Exp.

<sup>23</sup> The Prosecution requested that the Chamber reclassify as confidential a lesser-redacted version of ICC-01/09-02/11-165-Conf-Red, a redacted version of its corresponding Annex 1, and selected pages from Annex 2, with redactions.

<sup>24</sup> The Prosecution requested that the Chamber reclassify as confidential a lesser-redacted version of ICC-01/09-02/11-570, and selected pages from its corresponding Annex 2.

<sup>25</sup> ICC-01/09-02/11-572-Conf.

<sup>26</sup> ICC-01/09-02/11-572-Conf, p. 4.

<sup>27</sup> ICC-01/09-02/11-570-Conf, Annex E2.

<sup>28</sup> Lesser-redacted version of ICC-01/09-02/11-570-Conf-AnxA; redacted version of Annex 1 to ICC-01/09-02/11-570-Conf-AnxB; redacted version of Annex 2 to ICC-01/09-02/11-570-Conf-AnxC; lesser-redacted version of ICC-01/09-02/11-570-Conf-AnxD; redacted version of Annex 1 to ICC-01/09-02/11-570-Conf.

<sup>29</sup> ICC-01/09-02/11-101-Conf-Red2; ICC-01/09-02/11-101-Conf-Red-AnxE1; lesser-redacted version of ICC-01/09-02/11-241-Conf-Red; ICC-01/09-02/11-241-Conf-AnxA1-Red.

12. On 7 January 2013, the Prosecution submitted the “Final Updated Document Containing the Charges”.<sup>30</sup> On 9 January 2013, the Prosecution disclosed the “Prosecution’s Provision of Materials Pursuant to Decision ICC-01/09-02/11-451”.<sup>31</sup> The Annexes to this filing contained the list of witnesses to be relied upon at trial (“Witness List”);<sup>32</sup> summaries of the main facts on which each witness is expected to testify (“Summary of Areas of Testimony”);<sup>33</sup> and the Pre-Trial Brief.<sup>34</sup>

(ii) Correspondence

13. On 29 October 2012, the Defence wrote to the Prosecution requesting, *inter alia*, the appointment of a joint communications expert to analyse the mobile phone and email communications of OTP-4 and others (see Confidential Annex A).
14. On 20 December 2012, the Prosecution replied to the Defence in agreement with the need for a joint communications expert and that OTP-4 and others should be the subject of such expertise, including the period of January 2008 (see Confidential Annex A).
15. On 29 December 2012, the Defence acknowledged the agreement to the issue by the Prosecution and submitted the relevant phone and email addresses of the individuals (see Confidential Annex A).
16. On 1 January 2013, the Defence for Uhuru Kenyatta wrote to the Prosecution requesting complete disclosure of KEN-OTP-0043-0083 which had only partly

<sup>30</sup> ICC-01/09-02/11-591, ICC-01/09-02/11-591-Conf-AnxA.

<sup>31</sup> ICC-01/09-02/11-596/Conf.

<sup>32</sup> ICC-01/09-02/11-596-Conf-AnxA-Red.

<sup>33</sup> ICC-01/09-02/11-596-Conf-AnxB-Red.

<sup>34</sup> ICC-01/09-02/11-596-Conf-AnxD-Red-Corr.

been disclosed and which the Defence had grounds to believe contained material evidence relevant to the Defence (see Confidential Annex A).

17. On 7 February 2013 the Defence wrote a further letter to the Prosecution reminding it of the disclosure request of 1 January 2013 in respect of which no reply had been provided (see Confidential Annex A).
18. On 8 February 2013 the Prosecution wrote to the Defence and stated that the analysis of phone and email communications of OTP-4 was no longer necessary “since he is not a Prosecution witness” (see also letter dated 4 February, Confidential Annex A). The matter of the partly disclosed document KEN-OTP-0043-0083 was not referred to.
19. On 14 February 2013 the Prosecution wrote to the Defence and stated that KEN-OTP-0043-0083 had not been disclosed as a complete document because the rest of it was not in the possession of the Prosecution. The Prosecution did not consider requesting the rest of the form “since he is no longer a Prosecution witness” (see Confidential Annex A).

### III. GROUNDS

20. The grounds upon which the Defence seeks the evidence requested are as follows:
  - a. OTP-4 was the key witness upon whom the Decision on Confirmation of Charges was based.<sup>35</sup> The Defence has filed a motion to the Trial Chamber requesting reconsideration of the Confirmation of Charges Decision.<sup>36</sup> The

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<sup>35</sup> See ICC-01/09-02/11-382-Conf, paras 70-71, 310, 311, 325, 341, 342, 346-359, 375, 376.

<sup>36</sup> ICC-01/09-02/11-622.



basis for that challenge is that there has been a fraud committed upon the proceedings by the use of the evidence derived from OTP-4.<sup>37</sup> The Defence believes that the documents and materials requested contain further evidence capable of supporting the submissions of the Defence, which it is entitled to rely upon in its submissions under Article 64(4),<sup>38</sup> pursuant to Article 67(2).

- b. The Defence has reasonable grounds to believe that the materials emanating from OTP-4 that are being withheld by the Prosecution establish that he was not in the locality he claimed to be at the time of the material date of 3 January 2008, as relied upon by the PTC in its Decision to Confirm the Charges. The Defence has provided non-disclosable evidence obtained on this issue in Ex-parte Confidential Annex C.
- c. In the Pre-Trial Brief, the Prosecution relies upon evidence derived from OTP-4,<sup>39</sup> including information from his email account. At Annex B, the Defence has set out the email information disclosed by the Prosecution to the Defence in respect of the Prosecution's bribery allegation.<sup>40</sup> Though the Prosecution no longer intends to call OTP-4, it still seeks to rely on his evidence.<sup>41</sup> The Defence considers it disingenuous for the Prosecution to suggest that it does not need to disclose the evidence in its possession merely because it no longer intends to call OTP-4 to testify. By the Prosecution's own admission in the Pre-Trial Brief, OTP-4 remains central to their case. The Defence submits that the Prosecution is seeking to avoid proper evidence channels in order to admit OTP-4's evidence without

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<sup>37</sup> ICC-01/09-02/11-622, para. 2(c). For content, see paras 20-41.

<sup>38</sup> ICC-01/09-02/11-622.

<sup>39</sup> ICC-01/09-02/11-596.

<sup>40</sup> The Defence has compiled a table of the relevant email correspondence between Witness 4 and the other individuals in the alleged bribery investigation at Confidential Annex B.

<sup>41</sup> ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 86 and 94.

submitting him for cross-examination. The Defence submits that access to OTP-4's emails is therefore essential. The Defence is entitled to access such materials pursuant to Rule 77 of the Rules of Procedure and Evidence as they are material for Defence preparation. These documents and materials will significantly assist the Defence in the case it puts before the Chamber and are required to ensure the fairness of the proceedings under Article 64(2) of the Statute.

- d. The Defence has reasonable grounds to believe that prominent human rights campaigners in the Kenyan National Commission on Human Rights ("KNHCR"),<sup>42</sup> whose materials are relied upon by the Prosecution, have also had knowledge of the false allegations made by OTP-4 in these proceedings against Messrs Kenyatta and Muthaura, and have been aware of the fact that the witness was not where he claimed to be at the material time.<sup>43</sup> These issues go to the reliability of the materials used by the Prosecution in support of its case and are exculpatory within the scope of Article 67(2) of the Statute.
  
- e. Mr Kenyatta has been subject to the false allegations derived from OTP-4 that have been put in the public domain by the Court.<sup>44</sup> OTP-4 has been the most significant witness in the proceedings and has been relied upon by the PTC in the issuance of all the key Decisions in this case against Mr Kenyatta: "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya";<sup>45</sup> "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and

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<sup>42</sup> ICC-01/09-3-Anx4, paras 169 and 509.

<sup>43</sup> KEN-OTP-0009-0532.

<sup>44</sup> Relating to 3 January 2008, see ICC-01/09-02/11-382-Conf, paras 341-342, and 375-76.

<sup>45</sup> ICC-01/09-19, 31 March 2010, para. 124.

Mohammed Hussein Ali”;<sup>46</sup> and “Decision on the Confirmation of Charges Hearing”.<sup>47</sup> Pursuant to Articles 64(2), 67(1) and (2) of the Statute, and in the interests of transparency and fairness, the Defence submits that Mr Kenyatta is entitled to confront these allegations, which still remain part of the proceedings, and to advance issues supportive of his case to prevent a miscarriage of justice.

#### IV. SUBMISSIONS

21. The Chamber has a duty to ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the Accused and with due regard to the protection of victims and witnesses.<sup>48</sup> According to the Prosecution, OTP-4 is no longer a witness and he is not registered as a victim.
  
22. The Chamber is referred to the issues set out by the Defence in the correspondence at Confidential Annex A. In performances of its duties under Article 64(3) of the Statute and Rule 84 of the Rules of Procedure and Evidence, the Chamber is bound to ensure disclosure of documents or information not previously disclosed sufficiently in advance of the commencement of trial to enable adequate preparation for trial. In this regard, the Defence submits the following:
  - a. The email materials requested by the Defence are within the possession and control of the Prosecution and have been only partially disclosed to the Defence for a period chosen by the Prosecution.<sup>49</sup> The Prosecution have previously agreed to this disclosure. Under Rule 77, the Defence is entitled to inspect evidence that is material to the preparation of the defence case

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<sup>46</sup> ICC-01/09-02/11-1, paras 37-42.

<sup>47</sup> ICC-01/09-02/11-382-Conf.

<sup>48</sup> Article 64(2).

<sup>49</sup> See Annex A.

and the requested period of emails sought by the Defence falls within that category of evidence. Furthermore, the Defence requests the forensic examination of the email account for that period to ensure all usage is produced including deleted emails.

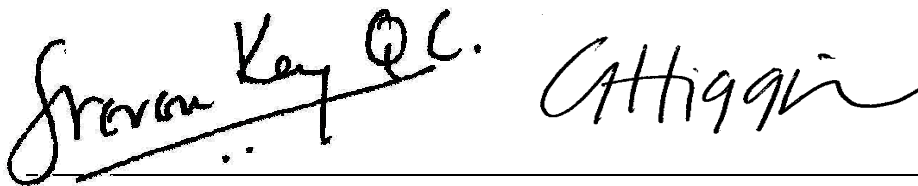
- b. The Prosecution produced an incomplete form KEN-OTP-0043-0083 that was within its custody. However, the rest of this document contains material information as it records the movements of the person completing the form. This information is relevant to the Defence and can be produced by the Prosecution in the same way they were able to produce the part disclosed.
23. The information that is being held by the Prosecution is exculpatory evidence within the scope of Article 67(2) of the Statute. The Defence believes that it shows or tends to show the innocence of the Accused and affects the credibility of Prosecution evidence. Non-disclosure of this information is capable of affecting the fairness of the proceedings. Continued delayed disclosure of this material interferes with the time needed by the Defence to prepare for trial and to undertake forensic examinations to detect any interference with or concealment of the email account.
24. The Prosecution is seeking to use evidence from the email accounts for its own purposes, and has reneged on its agreement to investigate jointly with the Defence, thereby denying the Defence the opportunity of a fair trial.

**V. RELIEF**

25. The Trial Chamber is respectfully requested to order the Prosecution pursuant to Rules 84 and 77 to:

- (1) Disclose to the Defence the full content of KEN-OTP-0043-0083; and
- (2) Disclose to the Defence the email accounts of OTP-4 and to permit forensic investigation of the same.

Respectfully Submitted,

The image shows two handwritten signatures in black ink. The first signature, on the left, is 'Steven Kay QC.' and the second, on the right, is 'Gilligan Higgins'. Both signatures are written in a cursive, flowing style. Below the signatures is a horizontal line.

Steven Kay QC and Gillian Higgins  
At London, England

Dated this 18<sup>th</sup> day of February 2013