

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20
Date: 24 November 2021

TRIAL CHAMBER III (ARTICLE 70)

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. PAUL GICHERU***

Public

**Public Redacted Version of “Response to Prosecution’s request for introduction of prior recorded testimony of
Witnesses P-0731, P-0732, P-0733, P-0734, P-0735, P-0736 and P-0737
pursuant to Rule 68(2)(b),” 22 November 2021, ICC-01/09-01/20-231**

Source: Counsel for Paul Gicheru

Document to be notified in accordance with regulation 31 of the *Regulations of the Court*
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Mr. Paul Gicheru, through his Counsel (“the Defence”), hereby responds to the Office of the Prosecution’s (“OTP”) request for introduction of prior recorded testimony of Witnesses P-0731, P-0732, P-0733, P-0734, P-0735, P-0736 and P-0737 pursuant to Rule 68(2)(b).¹ The Request should be denied. P-0731’s and P-0732’s evidence is irrelevant. As for P-0733, P-0734, P-0735, P-0736 and P-0737, the probative value of their evidence is outweighed by the prejudice to Mr. Gicheru and the denial of his fair trial right of confrontation if their evidence is admitted under Rule 68(2)(b), militating in favor of these witnesses testifying orally. Fairness and respect of all of Mr. Gicheru’s statutorily guaranteed rights, including the right to mount a defence and challenge the evidence through confrontation should not be sacrificed at the altar of the OTP’s claims of supposed efficiency and timesaving in the proceedings. This Response is filed confidentially pursuant to Regulation 23bis(2) of the Regulations since it responds to a filing bearing the same classification level.

I. RESPONSE

P-0731

1. The OTP seeks to introduce under Rule 68(2)(b) six solemn declarations and four associated investigative reports authored by OTP Senior Investigator P-0731 to establish P-0397’s unavailability.² This request should be denied.
2. In response to the OTP’s application to introduce P-0397’s prior recorded testimony under Rule 68, the Defence acknowledges P-0397’s unavailability and Rule 68(2)(c)’s unambiguous allowance for the Trial Chamber to consider the prior recorded testimony of an unavailable witness upon a showing of sufficient indicia of reliability.³ P-0397’s unavailability not being in dispute, and considering the OTP’s “sole purpose” for introducing P-0731’s testimony “[REDACTED],”⁴ the OTP makes no compelling, rational, or justified reason to clog up the trial transcript with solemn declarations that serve no purpose.

P-0732

3. The OTP seeks to introduce under Rule 68(2)(b) one solemn declaration by P-0732, a former OTP investigator, to establish that [REDACTED] the recording of his initial

¹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-198](#), Prosecution’s request for introduction of prior recorded testimony of Witnesses P-731, P-732, P-0733, P-0734, P-735, P-0736 and P-0737 pursuant to rule 68(2)(b), 22 October 2021 (“OTP Request”).

² [OTP Request](#), para. 13.

³ *Prosecutor v. Gicheru*, Response to Prosecution application for the introduction of prior recorded testimony of Witness P-0397 pursuant to Rule 68(2)(c), and alternatively, 68(2)(d), filed on 22 November 2021.

⁴ [OTP Request](#), para. 12 (emphasis added).

explanation of P-0495's rights under Article 55(2) of the Rome Statute to have assistance of counsel during his suspect interview.⁵ This request should be denied.

4. The OTP erroneously claims that P-0732's solemn declaration – prepared one year after P-0495's suspect interview – is “relevant to the introduction of P-0495's prior testimony.”⁶ The OTP's previous attempt to admit P-0732's solemn declaration in *Ruto and Sang* by claiming that there was no violation of P-0495's Article 55(2) rights was notoriously denied.⁷ Finding P-0732's solemn declaration to be “insufficiently illuminating,”⁸ the *Ruto and Sang* Trial Chamber reasoned that: (a) there is no information specifying how P-0732 “came to the testimonial conclusion that his colleague did activate the recording device, or that it was done correctly;” and (b) “no suggestion offered as to why the recording device ‘had not recorded’ the initial conversation.”⁹ Rejecting the admission of P-0495's suspect interview, the *Ruto and Sang* Trial Chamber found that it was “unable to determine that the witness's right to counsel was fully availed to him, as required by Article 55(2) of the Statute.”¹⁰
5. This Trial Chamber – being presented with no additional evidence to that offered to the *Ruto and Sang* Trial Chamber – should find likewise, to wit: disregard P-0732's solemn declaration and deny the admission of P-0495's suspect interview. The transcript of the first recorded encounter with P-0495 shows with abundant clarity P-0495's concerns and inquiries about having legal representation to which he was entitled under Article 55(2), only to be repeatedly brushed aside in order to get him to talk. P-0732 was interviewing P-0495 as a suspect and beyond doubt knew that P-0495 had the statutorily guaranteed right to be assisted by competent counsel.¹¹ The *Ruto and Sang* Trial Chamber's finding that P-0732's representations were insufficiently illuminating to establish that P-0495 voluntarily waived his right to assistance of counsel not only establishes P-0732's solemn declaration as untrustworthy, but further calls into question P-0732's veracity and ability to forthrightly be candid even when solemnly declaring.

⁵ [OTP Request](#), para. 16.

⁶ [OTP Request](#), para. 16.

⁷ *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-1753](#), Reasons for the Decision on Admission of Certain Evidence Connected to Witness 495, rendered on 17 November 2014, 11 December 2014 (“*Ruto and Sang* Decision on P-0495's Suspect Interview”), paras. 29-31.

⁸ [KEN-OTP-0145-0569-R02](#), para. 8, [Ruto and Sang Decision on P-0495's Article 55\(2\) interview](#), paras. 29-30.

⁹ [Ruto and Sang Decision on P-0495's Article 55\(2\) interview](#), paras. 29-30.

¹⁰ *Prosecutor v. Ruto and Sang*, [ICC-01/09-01/11-1753](#), Reasons for the Decision on Admission of Certain Evidence Connected to Witness 495, rendered on 17 November 2014, 11 December 2014 (“*Ruto and Sang* Decision on P-0495's Suspect Interview”), para. 33.

¹¹ [KEN-OTP-0130-0462](#), at p. 463, lines 2-32.

P-0733

6. The OTP seeks to introduce under Rule 68(2)(b) a report on the review of forensic [REDACTED] from OTP Investigative Analyst P-0733 to “highlight[] the intersection” [REDACTED] and numbers attributed to certain individuals by the OTP.¹² This request should be denied.
7. The OTP erroneously claims that the introduction of P-0733 report on the examination of forensic [REDACTED] does not require cross-examination, and that prejudice to Mr. Gicheru is not likely to result because [REDACTED] can be independently verified.¹³ There is far more afoot to P-0733’s seemingly innocuous representations that: [REDACTED]¹⁴ Disingenuously, the OTP seeks the admission of P-0733’s report without confrontation so it could later argue its value as circumstantial evidence, despite any linkage, to duplicitously set up a noxious argument that: *where purportedly there is smoke years after the alleged and unproved events, there must have been fire.*
8. P-0733’s report is not suitable for admission through Rule 68(2)(b) because its probative value is nil in comparison to the prejudice against to Mr. Gicheru.¹⁵ There is no linkage showing that: [REDACTED]. The report is prejudicial to Mr. Gicheru since, by seeking to introduce this report without any confrontation by the Defence, the OTP effectively asks the Trial Chamber to speculate and assume that [REDACTED] during the period relevant to the charges.
9. To admit P-0733’s report under Rule 68(2)(b) would also deny the Trial Chamber the opportunity to assess P-0733 and if necessary question her in fulfilling the Trial Chamber’s truth-seeking function.¹⁶ Articles 64(6)(d) and 69(3) of the Statute and Rule 140(2)(c) are the vehicles by which the ICC Trial Chambers fulfill their mandatory obligation to determine the truth, and when read together, impose a responsibility on the Trial Chamber to ensure that all evidence that may be obtainable – irrespective of what is adduced by the parties – should be considered so the truth can emerge. Only if the parties have presented sufficient evidence for the Trial Chamber to determine the truth, then it need not exercise its discretionary authority under these provisions to order the production and submission of

¹² [OTP Request](#), para. 19.

¹³ [OTP Request](#), para. 21.

¹⁴ [KEN-OTP-0160-0699](#), pp. 701-02.

¹⁵ [Rules of Procedure and Evidence](#), Rule 68(1).

¹⁶ *Prosecutor v. Bemba*, [ICC-01/05-01/08-55](#), Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 3 August 2008, para. 11 (“the search for the truth is the principle goal of the Court as a whole”).

additional evidence.¹⁷ Without P-0733 appearing at trial and explaining what she did, how she did it, the results of her examination, and any follow up investigations, the Trial Chamber's ability to seek the material truth is circumscribed.

P-0734 and P-0735

10. The OTP seeks to admit under Rule 68(2)(b) a technical report from OTP Cyber Forensic Experts P-0734 and P-0735 on the extraction [REDACTED].¹⁸ This request should be denied.
11. While the Defence is not calling into question what was found [REDACTED] the extraction performed by P-0734 and P-0735 was not done correctly, there is a need to confront at least one of the expert witnesses. The report and data extracted, on their own, do not sufficiently provide all the necessary information to assist the Trial Chamber. Both witnesses are OTP employees. Their availability is not in question. And given by the OTP's estimation that it only needs 1.5 hours to examine either witness,¹⁹ any claims of efficiency and timesaving ring hollow.

P-0736

12. The OTP seeks to introduce under Rule 68(2)(b) an expert report from P-0736, a digital and device expert with the Netherlands Forensic Institute ("NFI") on the extraction [REDACTED].²⁰ This request should be denied.
13. P-0736's report is "largely duplicative of the similar report by P-0734 and P-0735."²¹ If either P-0734 or P-0735 testify and their co-authored report is admitted, it would be utterly unnecessary to introduce another expert report that by the OTP's admission is "largely duplicative."²² Admitting reports for cumulative effect has no added value – other than to give an injudicious and misguided appearance of extra weightiness.

P-0737

¹⁷ Rome Statute, Arts. 64(6)(d), 69(3).

¹⁸ [OTP Request](#), para. 22.

¹⁹ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-171-Conf](#), Prosecution's submissions on issues for the First Status Conference, 10 September 2021, p. 7.

²⁰ [OTP Request](#), para. 27.

²¹ [OTP Request](#), para. 29.

²² [OTP Request](#), para. 29.

14. The OTP seeks to introduce under Rule 68(2)(b) a forensic report from P-0737, a NFI expert [REDACTED].²³ This request should be denied.

15. P-0737's report is so incomprehensible to anyone without a degree in audio engineering that it is not suitable for admission under Rule 68(2)(b). P-0737 should be required to testify orally as to the [REDACTED] process that he conducted and its results. Given that the OTP estimates that it would only require 1.5 hours to examine each expert witness,²⁴ the efficiency of the proceedings would not be jeopardized by having one of these experts testify.

II. CONCLUSION

16. The OTP request should be denied. By advancing considerations of efficiency and timesaving the OTP attempts to have a trial *reductio ad absurdum* in which the probative value of these witnesses' evidence is outweighed by the prejudice to Mr. Gicheru and his fair trial right of confrontation.

WHEREFORE, the Trial Chamber should **DENY** the OTPs request for introduction of prior recorded testimony of Witnesses P-0731, P-0732, P-0733, P-0734, P-0735, P-0736 and P-0737 pursuant to Rule 68(2)(b).

Respectfully submitted, 24 November 2021,
In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru

²³ [OTP Request](#), paras. 31-34.

²⁴ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-171-Conf](#), Prosecution's submissions on issues for the First Status Conference, 10 September 2021, p. 7.