

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 June 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

Public

**Decision on Defence application for disclosure of evidence relating to
Prosecution witness 4**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Ms Adesola Adeboyejo

Counsel for the Defence

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

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

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 54(1)(a), 64(3)(c) and 67 of the Rome Statute (“Statute”), Rules 77 and 84 of the Rules of Procedure and Evidence (“Rules”), issues this Decision on Defence application for disclosure of evidence relating to Prosecution witness 4.

Background and submissions

1. On 18 February 2013, the defence team for Mr Kenyatta (“Defence”) filed the “Defence Application for Disclosure of Evidence Relating to Prosecution Witness 4” (“Application”).¹ The Defence requests the Chamber to order the Office of the Prosecutor (“Prosecution”) to disclose to the Defence the full content of Witness 4’s asylum application and the email accounts of Witness 4 for certain periods relevant to the issues in the proceedings; and permit expert forensic investigation of the disclosed email accounts.²
2. In its Application, the Defence submits that from 29 October 2012 to 14 February 2013, correspondence took place between the Defence and the Prosecution regarding the joint appointment of a communications expert to analyse the mobile phone and email communications of Witness 4, among others, and regarding requests from the Defence for the Prosecution to disclose the complete asylum application of Witness 4.³ The Defence states that on 8 February 2013 the Prosecution wrote to the Defence stating that analysis of phone and email communications of Witness 4 was not necessary since he was no longer a Prosecution witness.⁴ The Defence also submits that on 14 February 2013 the Prosecution stated that the asylum application had not

¹ ICC-01/09-02/11-648, with confidential Annexes A and B, and confidential *ex parte*, Kenyatta and Muthaura Defence only, Annex C.

² Application, ICC-01/09-02/11-648, paras 1 and 25.

³ Application, ICC-01/09-02/11-648, paras 13-19; ICC-01/09-02/11-648-Conf-AnxA.

⁴ Application, ICC-01/09-02/11-648, para. 18; ICC-01/09-02/11-648-Conf-AnxA, pages 22 – 24.

been disclosed as a complete document because the rest of it was not in the possession of the Prosecution and that the Prosecution did not consider requesting the rest of the form as Witness 4, to whom the document relates, was no longer a Prosecution witness.⁵

3. The Defence advances five grounds for seeking the requested materials:

- (a) That Witness 4 is a key witness upon whom the Decision on the Confirmation of Charges was based, and that the requested materials contain evidence to support the Defence's submissions under Article 64(4) of the Statute in its motion requesting the reconsideration of that decision;⁶
- (b) That the Defence has reasonable grounds to believe that the requested materials establish that Witness 4 was not in the locality that he claimed to be on 3 January 2008, as relied upon by the Pre-Trial Chamber,⁷ and that the complete asylum application would contain a record of the movements of Witness 4;⁸
- (c) That although the Prosecution no longer intends to call Witness 4, it still seeks to rely on his evidence.⁹ The Defence contends that it is 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 Witness 4 to testify, and that the Prosecution is seeking to avoid proper evidence channels in order to admit Witness 4's evidence without submitting him for cross-examination;¹⁰
- (d) That the Defence has reasonable grounds to believe that prominent human rights campaigners, whose materials are relied on by the Prosecution, had

⁵ Application, ICC-01/09-02/11-648, para. 19; ICC-01/09-02/11-648-Conf-AnxA, page 25.

⁶ Application, ICC-01/09-02/11-648, para. 20(a).

⁷ Application, ICC-01/09-02/11-648, para. 20(b).

⁸ Application, ICC-01/09-02/11-648, para. 22(b).

⁹ Application, ICC-01/09-02/11-648, para. 20(c).

¹⁰ Application, ICC-01/09-02/11-648, para. 20(c).

knowledge of the false allegations made by Witness 4 in these proceedings and of the fact that the witness was not where he claimed to be at the material time.¹¹

The Defence argues that this goes to the reliability of the materials used by the Prosecution and is exculpatory under Article 67(2) of the Statute;¹² and

- (e) That Mr Kenyatta has been subject to the false allegations of Witness 4 which are now in the public domain and were relied upon by the Pre-Trial Chamber, and that Mr Kenyatta is entitled under Articles 64(2), 67(1) and (2) of the Statute to confront these allegations which still remain part of the proceedings.¹³

Moreover, the Defence argues that the Chamber has a duty to ensure disclosure of such information sufficiently in advance of the commencement of trial to allow the Defence time to prepare.¹⁴

4. On 12 March 2013, the Prosecution submitted its response to the Application ("Response"),¹⁵ requesting the Chamber to deny the Application.¹⁶ With regard to the request for the email accounts of Witness 4, the Prosecution states that it does not have this material within its possession or control and, as such, the Defence assertion that the requested materials are 'being withheld' is incorrect.¹⁷ The Prosecution claims that all emails collected during the interview with Witness 4 in May 2012 were disclosed to the Defence on 29 November 2012.¹⁸ The Prosecution submits that no other emails were collected and that the witness did not provide the Prosecution with the passwords to the email accounts.¹⁹ With regard to the request for disclosure of the

¹¹ Application, ICC-01/09-02/11-648, para. 20(d).

¹² Application, ICC-01/09-02/11-648, para. 20(d).

¹³ Application, ICC-01/09-02/11-648, para. 20(e).

¹⁴ Application, ICC-01/09-02/11-648, para. 22.

¹⁵ Prosecution response to the "Defence Application for Disclosure of Evidence Relating to Prosecution Witness 4", ICC-01/09-02/11-690.

¹⁶ Response, ICC-01/09-02/11-690, paras 1 and 7.

¹⁷ Response, ICC-01/09-02/11-690, paras 1 and 3.

¹⁸ Response, ICC-01/09-02/11-690, para. 3.

¹⁹ Response, ICC-01/09-02/11-690, para. 4.

remaining parts of Witness 4's asylum application, the Prosecution submits that they are not, and have never been, in the Prosecution's possession and, as such, the Prosecution cannot disclose them.²⁰

Analysis and conclusion

Whether the requested material is "in the possession or control" of the Prosecution

5. The Chamber notes that the Prosecution states that it does not have the email accounts of Witness 4 in its possession or control, apart from those it already disclosed to the Defence.²¹ The Chamber further takes note of the *inter-partes* communications between the Defence and the Prosecution regarding this matter,²² in which the parties discussed ways of "recovering email records"²³ and "the collection of data".²⁴ According to these exchanges²⁵ and the Prosecution's submissions, Witness 4 did not relinquish or share with the Prosecution the ability to access his email accounts.²⁶ The Chamber thus accepts the Prosecution's assertion that it does not have the materials sought by the Defence in its possession or control.
6. The Defence's assertion that the requested email material is in the possession or control of the Prosecution appears to be also based on the Prosecution's prior agreement to investigate, jointly with the Defence, the content of the email accounts of Witness 4.²⁷ However, after having made this agreement and before commencing any investigations, the Prosecution stated that it did not intend to call Witness 4 as a trial witness.²⁸

²⁰ Response, ICC-01/09-02/11-690, para. 5.

²¹ Response, ICC-01/09-02/11-690, para. 3.

²² ICC-01/09-02/11-648-Conf-AnxA.

²³ ICC-01/09-02/11-648-Conf-AnxA, page 14.

²⁴ ICC-01/09-02/11-648-Conf-AnxA, page 10.

²⁵ ICC-01/09-02/11-648-Conf-AnxA, page 16.

²⁶ Response, ICC-01/09-02/11-690, para. 4.

²⁷ Application, ICC-01/09-02/11-648, paras 2, 22(a) and 24.

²⁸ ICC-01/09-02/11-648-Conf-AnxA, page 17.

7. The Chamber is of the view that a third party's email accounts, the content of which has not been obtained by the Prosecution and to which access has not been shared by the third party, cannot be regarded to be "in the possession or control" of the Prosecution,²⁹ as required by Article 67(2) of the Statute and Rule 77 of the Rules. The Chamber is also not persuaded that the email materials sought by the Defence are within the control of the Prosecution merely because it previously agreed to take steps to gain access to the witness's email accounts. The Chamber therefore finds that this part of the Defence's request does not meet one of the requirements of Article 67(2) of the Statute and Rule 77 of the Rules.

8. As regards the Defence's request for disclosure of parts of Witness 4's asylum application that it claims are missing from the copy already disclosed by the Prosecution, the Prosecution asserts that it disclosed all parts of the asylum application which were in its possession and that the parts the Defence is seeking have never been in the Prosecution's possession.³⁰ The Defence in fact acknowledges that the missing parts of the document may currently not be in the Prosecution's possession. It submits that these documents "can be produced by the Prosecution in the same way they were able to produce the part disclosed".³¹ The Defence's request is thus for the Prosecution to *obtain* the missing parts of the asylum application and disclose them to the Defence. The Chamber notes the Prosecution's prior communication in response to that request, whereby the Prosecution informed the

²⁹ See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on Defence Requests for Disclosure of Materials, 17 November 2006, ICC-01/04-01/06-718, pages 4-5, whereby the Single Judge of Pre-Trial Chamber I held that notes taken by journalists, non-governmental organisations and MONUC during interviews with witnesses included in the Prosecution's list of evidence were not "in the possession or control of the Prosecutor". See also ICTY, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Trial Chamber II, Decision on Popović's Motion for Disclosure pursuant to Rule 66(b) and Request to File an Addendum to Professor Stojković's Expert Report, 6 October 2008, para. 11 ("material held by a third party independent from the Prosecution, cannot be said to be within the 'custody or control' of the Prosecution on any reading. The fact that the Prosecution has a good relationship with the third party is not relevant unless it can be established that the Prosecution has some ability to direct and control the relevant person or organization").

³⁰ Response, ICC-01/09-02/11-690, para. 5.

³¹ Application, ICC-01/09-02/11-648, para. 22(b).

Defence that Witness 4 was no longer a Prosecution witness and that it did not consider it necessary to request the provision of the remaining parts of the asylum application.³²

9. In the light of the information provided by the Defence and the Prosecution, and having regard to its above considerations,³³ the Chamber is not satisfied that the missing parts of Witness 4's asylum application are "in the possession or control" of the Prosecution. The Chamber therefore finds that this part of the Defence's request does not meet one of the requirements of Article 67(2) of the Statute and Rule 77 of the Rules.

Whether the Prosecution should obtain the materials sought by the Defence

10. Although the Defence claims that the materials it seeks are in the possession or control of the Prosecution, within the meaning of Article 67(2) of the Statute and Rule 77 of the Rules, the Application also seeks the Prosecution's cooperation in obtaining the materials. In particular, the Defence submits that the missing parts of the asylum application "can be produced by the Prosecution in the same way they were able to produce the part disclosed".³⁴ The Defence also refers to the Prosecution's "agreement to investigate jointly with the Defence", on which the Prosecution "has reneged".³⁵ The Chamber notes that in its communications the Prosecution agreed to take such investigative steps, together with the Defence, in order to obtain and analyse the email communications of Witness 4.³⁶ The Chamber is of the view that in the light of this agreement and the Prosecution's duty under Article 54(1)(a) of the

³² ICC-01/09-02/11-648-Conf-AnxA, page 25.

³³ See *supra*, para. 7.

³⁴ Application, ICC-01/09-02/11-648, para. 22(b).

³⁵ Application, ICC-01/09-02/11-648, para. 24.

³⁶ ICC-01/09-02/11-648-Conf-AnxA, pages 8-9.

Statute to investigate incriminating and exonerating circumstances equally, the Defence may reasonably expect the Prosecution to make an effort to facilitate the Defence's investigation of those communications. As regards the missing parts of the asylum application, the Chamber is of the view that since the Prosecution already obtained parts of that application, it could easily seek the witness's consent to disclose other parts. The Chamber also takes note of the Prosecution's previous intention to call the witness to testify and its contacts with him, which may facilitate the effort.

11. In order to determine whether the Prosecution should make efforts to obtain the materials sought by the Defence, the Chamber also needs to examine the Defence's submissions regarding its intended use of those materials and, in particular, whether they may be material to the preparation of the defence. The main issue which the Defence seeks to explore on the basis of the requested material is Witness 4's whereabouts on 3 January 2008.³⁷ However, considering that the Prosecution no longer intends to call Witness 4 to testify at trial and that his account of the events of 3 January 2008 is not relied upon, the Chamber is not convinced that the requested relief should be ordered for the purpose of assessment of the reliability of that account. In so far as the Defence seeks to investigate the reliability of the materials used by the Prosecution in support of its case and originating from human rights campaigners, who, in the submission of the Defence, had "knowledge of the false allegations" made by Witness 4 against Mr Kenyatta and of Witness 4's whereabouts at the material time,³⁸ the Defence has not indicated which materials are relied on by the Prosecution and failed to show how the reliability of these materials is affected by the human rights campaigners' knowledge of Witness 4's statements and whereabouts.

³⁷ Application, ICC-01/09-02/11-648, paras 20(b), 20(d) and 22(b).

³⁸ Application, ICC-01/09-02/11-648, para. 20(d).

12. Another ground on which the Defence seeks the production of additional evidence is the alleged relevance of such evidence to the Defence application under Article 64(4) of the Statute.³⁹ However, in view of the Chamber's ruling on that application,⁴⁰ there is no need to produce evidence regarding Witness 4 for that purpose.
13. In so far as the Defence seeks to obtain material necessary for it to confront the allegations regarding Mr Kenyatta which were made in decisions of the Pre-Trial Chamber based on Witness 4's evidence,⁴¹ the Chamber notes that in view of the Prosecution's decision not to call Witness 4 to testify at trial, the reliability of his evidence is no longer of relevance to those allegations.
14. As regards the Defence's request for access to Witness 4's email communications related to the allegations of bribery made by the Prosecution in its pre-trial brief,⁴² the Chamber notes the Prosecution's assertion that it already disclosed such email communications to the Defence.⁴³ However, the Defence also seeks the forensic examination of Witness 4's email account for the relevant period "to ensure all usage is produced including deleted emails".⁴⁴ The Chamber notes that despite having decided not to call Witness 4 to testify, the Prosecution intends to rely on his statement in order to prove its allegations of bribery.⁴⁵ The Chamber therefore agrees with the Defence that the witness's email communications from the period relevant to the bribery allegations are material to the preparation of the defence and that it is reasonable for the Defence to expect that there may have been more such communications than the ones disclosed by the Prosecution. The Chamber recalls that

³⁹ Application, ICC-01/09-02/11-648, para. 20(a), referring to Defence Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration, 5 February 2013, ICC-01/09-02/11-622.

⁴⁰ Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728.

⁴¹ Application, ICC-01/09-02/11-648, para. 20(e).

⁴² Application, ICC-01/09-02/11-648, para. 20(c).

⁴³ Response, ICC-01/09-02/11-690, para. 3.

⁴⁴ Application, ICC-01/09-02/11-648, para. 22(a).

⁴⁵ Confidential redacted version of Annex B to Prosecution Submission of the Second Updated Document Containing the Charges and the Updated Pre-Trial Brief, 7 May 2013, ICC-01/09-02/11-732-Conf-AnxB-Red, footnote 437.

the Prosecution only disclosed those which it obtained during its interview with the witness.⁴⁶

15. The Chamber further notes that to the extent the Prosecution intends to rely on a prior statement of Witness 4 for the purpose of proving its allegations against the accused, the Defence has a legitimate interest in collecting evidence regarding the credibility of that witness. Although for reasons set out above the Chamber is not persuaded that the Prosecution can be required to facilitate the Defence's investigation of the reliability of the witness's account of the events of 3 January 2008, the Chamber is of the view that material relevant to the witness's credibility may assist the Defence in its assessment of those statements on which the Prosecution continues to rely.
16. For these reasons, the Chamber is of the view that the Prosecution should provide assistance to the Defence in its investigation of the Prosecution's allegations based on the evidence of Witness 4. In particular, as part of its duty under Article 54(1)(a) of the Statute, the Prosecution should make an effort to obtain access to the witness's email communications and the missing parts of his asylum application.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

DIRECTS the Prosecution to contact Witness 4 and request him to:

- (i) share access to his email communications from the period relevant to the part of his statement on which the Prosecution continues to rely, as well as to communications from other periods to the extent they are material to the preparation of the defence, as set out in paragraph 15 above;

⁴⁶ See *supra*, para. 4.

- (ii) provide the Prosecution with the missing parts of his asylum application, in so far as relevant to the issues identified in paragraph 15 above;

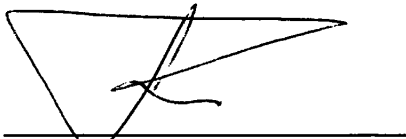
DIRECTS the Prosecution to review the material it obtains from the witness, if any, and disclose it or part of it to the Defence, no later than 9 July 2013, as far as the Prosecution believes that such material or part of it is subject to disclosure under Article 67(2) of the Statute and/or Rule 77 of the Rules; and

REJECTS the Application in all other respects.

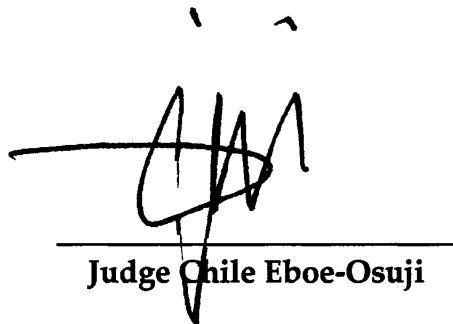
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Chile Eboe-Osuji

Dated 11 June 2013

At The Hague, The Netherlands