

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Original Date: **9 November 2012**

Date of public version: **3 February 2017**

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 redacted version of

Order regarding the Muthaura defence application for evidence of a witness to be taken in advance of trial, 9 November 2012, ICC-01/09-02/11-523-Conf-Exp

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

The Office of the Prosecutor

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

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 (“Court”) in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, pursuant to Articles 54(1), 56, 57(3)(b), 64(6), 68(1) of the Rome Statute (“Statute”); Rules 73, 81(1), 114 and 116 of the Rules of Procedure and Evidence (“Rules”); Regulation 23 *bis* of the Regulations of the Court (“Regulations”); and Regulations 17 and 21 of the Regulations of the Office of the Prosecutor renders this Order regarding the Muthaura defence application for evidence of a witness to be taken in advance of trial (“Order”).

I. Background

1. On 5 November 2012, the Muthaura defence (“defence”) filed an application requesting the Chamber to order that the evidence of a defence witness (“Witness”) be taken and preserved in accordance with the procedures set out in Article 56(2)(e) (“Application”).¹ The defence asserts that this measure is necessary to ensure the integrity of the proceedings and, in particular, to protect the rights of the defence. Specifically the defence submits that the Witness’s evidence may not be available at trial as he [REDACTED]² or that he [REDACTED].³
2. The Application was filed on a confidential *ex parte* basis, available only to the Muthaura and Kenyatta defence and the Victims and Witnesses Unit (“VWU”). The *ex parte* classification was justified on the grounds that the Application (including its annexes) concern “highly sensitive information about the evidence and personal (including security) information of witnesses that the Defence wish to present at

¹ Muthaura Defence (1) Application pursuant to Articles 56 and 57(3)(b) of the Statute of the Court and (2) Application for an extension of the page limit pursuant to Regulation 37(2) of the Regulations of the Court, 3 November 2012 (registered 5 November 2012), ICC-01/09-02/11-516-Conf-Exp and Conf-Exp-Annexes A – T.

²), ICC-01/09-02/11-516-Conf-Exp, para.16.

³), ICC-01/09-02/11-516-Conf-Exp, para. 18.

trial” and “reveal defence investigative strategies, confidential communication between the Defence and [REDACTED] and Defence internal work product.”⁴

3. The Application reveals that the defence referred its concerns about the Witness to the VWU on 26 August 2012 and requested the VWU to conduct its own independent assessment of the Witness’s complaints and eligibility for admission to the ICC Protection Programme (“ICCPP”).⁵ The Chamber has confirmed that the VWU conducted protection and psycho-social assessments of the Witness in October 2012 and that its final assessment and recommendations are forthcoming. Thereafter, the Registrar will make her decision on the Witness’s inclusion in the ICCPP.

II. Analysis

4. The Chamber considers that before it can determine the relief requested in the Application, it is essential for it to be informed of the VWU’s assessment and recommendations regarding the Witness and the Registrar’s decision on the Witness’s inclusion in the ICCPP.
5. Likewise, the Chamber considers that the Office of the Prosecutor (“prosecution”) should be informed of the Application and have an opportunity to make submissions thereon before the Chamber makes its final determination. In this regard, the Chamber is particularly mindful of the fact that the defence alleges that [REDACTED] facing the Witness.
6. The Chamber is conscious that much of the information contained in the Application and annexes is of a sensitive or confidential nature. It agrees with the defence that information revealing defence investigative strategies, its confidential

⁴ ICC-01/09-02/11-516-Conf-Exp, para. 5.

⁵ ICC-01/09-02/11-516-Conf-Exp, para. 5 and Annex Q.

communication with witnesses and third parties, and its internal work product should not be disclosed to the prosecution.

7. On the other hand, it does not accept the defence submission that disclosure to the prosecution of personal (including security) information of defence witnesses contained in the Application could “potentially jeopardize the security” of those witnesses. The Chamber recalls that the prosecution has legal and ethical obligations to protect the security of witnesses and respect the confidentiality of information. Article 54(1)(b) of the Statute provides that the Prosecutor shall “respect the interests and personal circumstances of victims and witnesses” in the course of investigations. Article 68(1) specifically requires the Prosecutor to take measures to “protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” Regulation 23 *bis*(1) of the Regulations stipulates that documents filed as confidential shall be treated according to that classification throughout the proceedings unless otherwise ordered by the Chamber. Regulations 17 and 21 of the Regulations of the Office of the Prosecutor require prosecution staff members to uphold the “highest standards of efficiency, competence and integrity” and to ensure the confidentiality of correspondence from the office. Taken as a whole, these provisions provide ample protection against disclosure by the prosecution of information contained in a confidential filing to third parties, including witnesses. The Chamber further notes that the defence itself accepts that disclosure to the prosecution would be required if the Application is granted. Finally, the Chamber notes that the Witness has himself [REDACTED].⁶ Under such circumstances, the Chamber does not see why providing a confidential redacted version of the Application to the prosecution at this stage would prejudice the security of this or other defence witnesses.

⁶ Annexes D, E, F, L to ICC-01/09-02/11-516-Conf-Exp.

FOR THE FOREGOING REASONS, THE CHAMBER:

DIRECTS the Registrar to inform the Chamber, by no later than Tuesday 13 November 2012, of her decision regarding the inclusion of the Witness into the ICCPP;

DIRECTS the Registrar to inform the Chamber, by no later than Tuesday 13 November 2012, of the VWU's assessment and recommendations regarding the Witness;

DIRECTS the defence to file, by no later than Tuesday 13 November 2012, a confidential redacted version of the Application which conforms to the Chamber's guidelines set out in paragraphs 6 and 7 above.

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



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 3 February 2017

At The Hague, The Netherlands

No. ICC-01/09-02/11

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