

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20
Date: 3 December 2021

TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

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

**Public
with confidential Annexes A-D**

Public redacted version of the “Addendum to the ‘Prosecution’s request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d)’ (ICC-01/09-01/20-196-Conf), dated 22 October 2021” (ICC-01/09-01/20-237-Conf) dated 2 December 2021

Source: Office of the Prosecutor

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

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**Unrepresented Applicants
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. As ordered¹ by Trial Chamber III,² the Office of the Prosecutor³ files this addendum to the Prosecution's request for the introduction of the prior recorded testimony of Witness P-0495 pursuant to rule 68(2)(d).⁴ The purpose of the addendum is to supplement the Request with additional information regarding subsequent events that are relevant to the issues before the Chamber.

II. CONFIDENTIALITY

2. This filing and its annexes are classified as "confidential" because they contain confidential information relating to Prosecution witnesses. The Prosecution will file a public redacted version as soon as possible, but in any event within five days.

III. SUBMISSIONS

(i) *Subsequent developments regarding P-0495*

3. After the filing of the Request, and after years of being unavailable to the Prosecution, P-0495 re-contacted the Prosecution on [REDACTED] 2021 via [REDACTED]. After alerting the Chamber,⁵ the Prosecution arranged to meet P-0495 at the earliest opportunity to establish his willingness to cooperate with the Court, including by testifying voluntarily at trial, and to obtain updated information concerning [REDACTED].
4. During an interview conducted under article 55(2) of the Statute,⁶ in the presence of duty counsel, the Prosecution established that the witness maintained that the evidence he provided in the *Ruto and Sang* case was the truth.⁷ However, before the interview could progress significantly further, P-0495 exercised his right to

¹ See Annex A, email dated 25 November 2021.

² "Chamber".

³ "OTP" or "Prosecution".

⁴ ICC-01/09-01/20-196-Conf, "Request".

⁵ Annex A, email dated 18 November 2021.

⁶ See Annexes B-D.

⁷ See Annex C, KEN-OTP-0160-1092 at 1102, ln. 339 to 1104, ln. 397.

remain silent on the advice of duty counsel.⁸ Despite P-0495 initially stating that he would be prepared to testify in the *Gicheru* case, his counsel subsequently revised this position and advised the Prosecution that the witness would be unlikely to testify willingly.⁹

(ii) *P-0495 remains unwilling to testify or to provide evidence of material facts*

5. Although the Prosecution has now re-established contact with P-0495, it is apparent from his recent interview that that he is unlikely to agree to testify, but that even if he did, he would not provide evidence on material facts—in particular his interactions with the Accused and his associates and his efforts to corruptly influence P-0613. By maintaining that his prior testimony in the *Ruto and Sang* case was truthful, P-0495 has re-committed himself to a narrative that is demonstrably – and at times transparently – false.
6. Although it is possible that his appearance before the Court could be secured by means of summons,¹⁰ even if he were to testify it is clear that he would again fail to give evidence with respect to material facts. Accordingly, no useful purpose would be served by summoning the witness simply to repeat his previous false testimony and be impeached once again.

(iii) *P-0495's unwillingness is still materially influenced by improper interference*

7. There has been no significant change in circumstances in this regard since P-0495 was summonsed to testify in the *Ruto and Sang* case and the Prosecution's submissions in the Request remain valid. Notwithstanding his agreement to meet with the Prosecution, the Prosecution submits that his unwillingness to provide a truthful account of his interactions with P-0613, and the reason therefore, is still materially influenced by the improper interference to which he was subjected.

⁸ See Annex D, KEN-OTP-0160-1106 at 1107.

⁹ *Ibid.*, at 1107, ln. 37 to 1108, ln. 40.

¹⁰ [REDACTED].

8. The fact that the witness [REDACTED] also places him in a legal quandary. [REDACTED]. Clearly his duty counsel was alive to this risk and advised him accordingly.

(iv) *Reasonable efforts have been made to secure P-0495's attendance and testimony*

9. Since filing the Request, the Prosecution has re-established contact with P-0495 and managed to interview him, but this has not changed his previous recalcitrance. It is now clearer than ever that he is not willing to testify, or to give evidence on material facts. As already discussed above, this obstacle cannot reasonably be overcome through resorting to a summons, since the witness has confirmed his prior evidence.


(v) *The remaining requirements of rule 68(2)(d) are still met*

10. The Prosecution's submissions in the Request on the remaining requirements of rule 68(2)(d) continue to apply, *mutatis mutandis*.
11. The documents have sufficient indicia of reliability and they are directly probative of the merits of this case.¹¹ No unfair prejudice *to the Accused* would be caused by their introduction, and certainly none that is not outweighed by the probative value of the evidence. Thus the interests of justice are best served by their introduction.

¹¹ As opposed to the *Ruto and Sang* case, where they were not probative of the merits of the PEV charges, but only to the corollary issue of the credibility of the witness.

IV. CONCLUSION

12. For the foregoing reasons, the Prosecution maintains its requests to allow the introduction of P-0495's prior testimony under rule 68(2)(d) and to consider it formally submitted in the record of the case.



James Stewart, Deputy Prosecutor

Dated this 3rd day of December 2021
At The Hague, The Netherlands