



REPUBLIC OF KENYA

REQUESTS FOR MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Guidance for Authorities Outside of Kenya

**Issued by the Office of the Attorney General and
Department of Justice,**

Sheria House, Harambee Avenue,

P.O. BO 40112, 00100, Nairobi, Kenya.

Tel No. +254-2-2214069/ 2227461—9/ 2251355/ 0700072929/ 0732529995

Email: ag@ag.go.ke/centralauthority.mla@ag.go.ke

Website: www.statelaw.go.ke

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Table of Contents:

Introduction	3
International and Bi-lateral Agreements	3
Part A: Incoming Letters of Request	4
Content of Letter of Request	4
Transmission of a Request	6
Postponement	7
Refusal of Request	7
Part B: Specific types of Assistance	8
Service of Documents	8
Provision or Production of Records	9
Examination of Witnesses	9
Attendance of Witnesses	10
Voluntary Attendance of Persons in Custody	11
Search and Seizure of Property in Kenya	11
Lending of Exhibits	12
Requests for Evidence via Video Link	13
Identification, Tracing, Asset Recovery, Freezing, Confiscation, Seizure of the Proceeds and Instruments of Crime	13
Grounds for Refusal of Requests for Asset Tracing and Recovery	15
Interception of Communication	15
Grounds for Request for Interception	15
Interception of Items during the Course of Carriage by a Public Postal Service	16
Preservation of Communication Data	16
Covert Electronic Surveillance	17
Confidentiality	17
Collateral Use	18
Urgent Requests	18

INTRODUCTION

The Office of the Attorney General is the Central Authority for Mutual legal assistance in Kenya. Its functions are to receive, accede and ensure the execution of Mutual Legal Assistance (MLA) requests.

Mutual legal assistance is used by law enforcement:

- During investigation, prosecutions, judicial proceedings, consultations and service of overseas processes;
- It also used in conducting investigative interviews in criminal investigations;
- Freezing and confiscating property acquired from proceeds of crime;
- Obtaining evidence to be used in civil asset recovery investigations and proceedings.

This document is intended to provide essential basic information on Kenya's mutual legal assistance programme.

These guidelines seek to give a clear understanding of the provision and improve the efficiency of processing of mutual legal assistance requests to Kenya.

These guidelines are based on the **Mutual Legal Assistance Act No 36 of 2011** and are superseded by the Act.

INTERNATIONAL AND BI-LATERAL AGREEMENTS

Legislative Framework for Mutual legal assistance

Kenya is a signatory to several Bilateral and Multilateral Mutual legal assistance (MLA) treaties and agreements that provide for international co-operation in criminal matters. Kenya can provide mutual legal assistance

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based on the principles of reciprocity and mutual cooperation. Kenya is a member of the Commonwealth, Harare Scheme and London Scheme relating to Mutual legal assistance in criminal Matters within the Commonwealth.

The domestic law for mutual legal assistance is the Mutual Legal Assistance Act, Act No. 36 of 2011 of the Laws of Kenya.

Kenya can provide MLA to any country or territory in the world whether or not there is such an agreement. Kenya would, however, expect reciprocity from countries to which we give assistance. Where an agreement imposes specific conditions or procedures, Kenya expects these to be adhered to.

PART A: INCOMING LETTERS OF REQUEST

Is it necessary?

Before submitting a Letter of Request, first consider whether the material can be obtained voluntarily without assistance from Kenyan authorities, or whether it can be obtained via law enforcement cooperation. It is often helpful if overseas authorities obtain intelligence before making a mutual legal assistance request as it will make it less likely that the request will be returned due to lack of information.

Content of Letters of Request:

1. The Letter of Request and all other supporting documents must be in English language;
2. The Letter of Request should be on an official letterhead of the requesting authority bearing the signature of the authorizing officer of the requesting authority, official stamp of the same and must be dated;

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3. The legal basis of the request must be stated with reference to relevant legislation in the requesting State; applicable extracts of the relevant law must be attached to the request;
4. The Letter of Request must specify the nature of the criminal matter, the assistance required and details of any particular procedure to be followed in compliance with the request;
5. The request must indicate the purpose for which the evidence, information or any other material is sought;
6. The request must indicate any time limits within which compliance is required and state reasons;
7. It should indicate whether criminal proceedings have been instituted and where they have been instituted it should contain the following information:
 - a. The court exercising jurisdiction in the proceedings;
 - b. The identity of the accused person;
 - c. The offence for which he stands accused and a summary of facts;
 - d. The stage reached in the proceedings;
 - e. Any date fixed for further stages in the proceedings.
8. Where criminal proceedings have not been instituted, the request must state the offence that the Competent Authority has reasonable grounds to suspect has been, will be or is being committed with a summary of known facts;
9. The request should contain an assurance of reciprocity;
10. The request should contain any relevant documents or exhibits. Please note that certain copies of documents should be certified or authenticated as true copies of the original by a notary or judicial officer. These documents will include court orders, warrants and anything that would reasonably be relied upon in court proceedings in order to give effect to your request.

Where a requesting state wishes to use evidence obtained from Kenya for a different purpose to that stated in the original MLA request or to share that evidence with a third country, a formal request to do so must be made in writing to the Central Authority and must include the following:

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- i. Case name/reference number to enable identification of the original request;
- ii. What evidence is to be used /shared;
- iii. How this evidence will be used/shared;
- iv. Why this evidence is required in other proceedings.

Transmission of a Request

Kenya does not require requests to come via diplomatic channels. Kenya Central Authority will accept service directly to the address given above both by post, courier or email. Requesting states will need to comply with their own domestic laws relating to the transmission of requests.

The address of the Central Authority is:

Office of the Attorney General and Department of Justice

Sheria House, Harambee Avenue,

P.O. BOX 40112, 00100, Nairobi, Kenya.

Tel No. +254-2-2214069/ 2227461—9/ 2251355/ 0700072929/ 0732529995

Email: ag@ag.go.ke/centralauthority.mla@ag.go.ke

Website: www.statelaw.go.ke

What will happen when the Central Authority receives your Letter of Request?

The requesting state shall receive an acknowledgment of receipt within five working days upon receipt by the Central Authority.

If the Central Authority is satisfied that all requirements have been met, the Letter of Request will be transmitted to the relevant Competent Authority. The

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requesting state will be advised when this has occurred. If the Letter of Request does not comply with the law, the requesting state shall be informed.

Upon receipt by a Competent Authority, the requesting state may be contacted directly if further information is deemed necessary.

Postponement

The Competent Authority may postpone the execution of a request if its immediate execution would interfere with an on-going investigation or prosecution.

Failure to comply with the law may delay the acceptance and execution of a request.

Refusal of Request

A request may be refused on the following grounds:

- I. The request relates to an act or omission that is not an offence under Kenyan law;
- II. The person to whom the Letter of Request refers could not be prosecuted for the offence had it occurred in Kenya due to lapse of time or any other reason;
- III. The subject of the request has been acquitted, pardoned or has already been punished for the relevant offence in the requesting state;
- IV. The request relates to an offence of a political character;
- V. There are substantial grounds for believing the purpose of the request is to prosecute, punish or otherwise cause prejudice to a person on account of the person's race, sex, religion, nationality or political opinions;
- VI. The request would prejudice the sovereignty, security or other national interest of Kenya;

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- VII. The provision of the legal assistance could prejudice an investigation or criminal proceedings in relation to a criminal matter in Kenya;
- VIII. The provision of legal assistance would likely prejudice the safety of any person whether in or outside Kenya.

PART B: SPECIFIC TYPES OF ASSISTANCE

This section deals with the forms of assistance that Kenya can provide and the specific information that must be included in the request.

Service of Documents

There is nothing to stop a Requesting State serving documents directly and Kenya strongly encourages direct transmission of procedural documents. However, a request may be necessary if the address of the intended recipient is unknown or uncertain; or where the law of the requesting state requires proof of service or where it has not been possible to effect service through post or there are reasons to believe that service by post will be ineffective or inappropriate.

Where a request to serve documents is made, the request should include all relevant documents to be served and if a particular method of service is required, this should be explicitly stated. Whatever mode of service is proposed must not be contrary to Kenyan law. Failure to so do will mean that service will be effected according to Kenyan law. All dates of hearings or other deadlines should be stated clearly within the request together with the address of the court where the proceedings are to take place. The Central Authority will advise the requesting state whether the document has been delivered or whether or not it was possible to serve the document.

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Provision or Production of Records

A request for the provision or production of documents, records or other materials must demonstrate how that material is related to a criminal matter in the requesting state. Certain documents that are not publicly available such as bank records, other financial records, communication records and tax information can only be obtained and/or produced pursuant to a court order. This will usually be done on notice to ensure the respondent has the opportunity to be represented. If such a hearing might prejudice any confidentiality requirement in the requesting state, this must be explicitly referred to in the request in order for an *ex parte* application to be considered. The relevant Competent Authority will advise on any further information required in order to apply for an *ex parte* hearing.

Examination of Witnesses

The request must contain the following:

1. Name, address, date of birth or official designations of the witness to be examined. It helps to make reference to information in identification documents e.g. national identification documents, passports;
2. Basis of the examination i.e. the nexus between the witness and the criminal matter alleged;
3. Questions to be put across and/or the subject matter to be examined;
4. Desired method of examination (oral or in writing);
5. Desired method of administration e.g. under oath or upon solemn affirmation;
6. Confirmation that the witness is not a privileged /exempted witness under the laws of the requesting state;
7. Details of any special requirements as to the manner of taking evidence relevant to its admissibility in the requesting state;
8. Any language requirements of the person in question, if any;

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9. Any other relevant information, including details of special needs for persons with disabilities.

The requesting state may seek permission for an accused person or his legal representative to attend and ask questions of the witness. This will be considered in accordance with Kenyan law.

Costs for the attendance of the person to the interview shall be borne by the requesting state as will the cost of any interpreter if required. The Central Authority shall advise the requesting state of any such costs before they are incurred.

Attendance of Witnesses

The Central Authority will make appropriate arrangements to facilitate the personal appearance of a willing witness in criminal proceedings in a requesting state.

1. The request must be received by the central authority **at least 30 days prior** to the date of appearance.
2. In case of an urgent request, the Competent Authority can accept a request in less than 30 days.
3. The content of the request must contain: -
The name, physical address and/or other identifying details of the witness to facilitate location of that witness;
4. The subject matter and the purpose of the appearance;
5. The date when the appearance is required;
6. The reason why personal appearance is required;
7. The details of travelling, subsistence and other expenses payable by the requesting state in respect of personal appearance of the witness.

The Central Authority shall notify the person in accordance with Kenyan law. The response of the person will be communicated to the requesting state. No

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witness shall be liable to penalty for refusal whether required to attend under summons or not, whether that be under Kenyan law or the laws of the requesting state.

Voluntary Attendance of Persons in Custody

Temporary transfer of a person in custody may be facilitated under a Letter of Request. Such request, however, may only apply to **foreign nationals above the age of 18**. If the person refuses consent, he/she cannot be punished nor be compelled under Kenyan law.

Any request must state:

1. The name of the person in custody;
2. If possible, the place of custody;
3. The destination address;
4. The reasons why personal appearance is necessary;
5. The period of time at or before the expiration of which the person in custody is to be returned to Kenya.

The obligation to return the person to Kenya continues even if the person is a national of the requesting state unless there is prior arrangement between Kenya, the requesting state and the person.

Search and Seizure of Property in Kenya

This will require a Kenyan court order. Accordingly, the requesting state shall specify the property to search and seize and all such information that would be reasonably be required to be produced in an application under Kenyan law for any necessary warrant or authorisation. This will include a full description of the criminal conduct concerned and explanation as to how the place to be searched is connected with the case/suspect; full details of any specific material to be seized; explanation as to why the material requested is considered both relevant and important evidence; grounds for searching the particular

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premises or person; the details of any official from the requesting state who would wish to be present or participate in the search and why their presence is necessary.

The Competent Authority (usually the police) will certify the result of any search, the place and circumstances of any seizure, the custody of any item seized and other relevant information. Where computers or other digital storage media are served, they will always contain material not covered by the original warrant. Accordingly, they will be examined by officers from the relevant Competent Authority to ensure that the material was included in the original warrant and does not contain material that is legally privileged. It may be necessary for officers from the requesting state to visit Kenya to be involved in the examination.

Lending of Exhibits

Where an exhibit has been admitted into evidence before a court in Kenya, a request may be made to have that exhibit lent to a requesting state. The request must include:

- I. A description of the exhibit in question;
- II. Designate a person or class of persons to whom the exhibit is to be given;
- III. State any reasons for the request as well as a description of any tests to be performed and a statement of the place of testing;
- IV. State the place to which the exhibit is sought to be removed;
- V. Specify a period of time within which the exhibit is to be returned to Kenya.

Upon lending an exhibit, the Central Authority shall notify the requesting state of a description of the exhibit, the authorisation of any tests to be performed as well as a statement of the place of testing and the period of time within which the exhibit must be returned.

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Requests for Evidence via Video Link

The basis for hearing witnesses in Kenyan courts via video link is Section 63A of the Evidence Act Cap 80 as amended. However, regulations governing this have yet to be established. There is currently no legal framework for the use of commercial, private premises or Embassies. If assistance is required to establish a video link, requesting states should be aware that there are limited court facilities in Kenya to do this. Accordingly, the following is required:

- I. A minimum of 8 weeks' notice is given prior to the date of the video conferencing hearing;
- II. A proposed time of day that link should be heard and the length of time that the witness is required;
- III. Email address of someone in the requesting authority that can be contacted at short notice to provide technical assistance;
- IV. Sufficient information for the Central Authority to identify and contact the witness(es);
- V. Details of any requirements of procedure to be followed in taking the evidence;
- VI. Any caution or formal notification of rights that should be given to the witness under the law of the requesting state;
- VII. Details of the technical requirements for establishing the link;
- VIII. A proposed time and date for a 'test run' of the live link.

The costs of facilitating the live link shall be borne by the requesting state. The Central Authority shall advise the requesting state of these costs before they are incurred.

Identification, Tracing, Asset Recovery, Freezing, Confiscation, Seizure of the Proceeds and Instruments of Crime

Before making a request under the section, use law enforcement cooperation to identify and trace assets in Kenya and use, as necessary, mutual legal

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assistance to obtain the evidence of those assets e.g. to obtain production orders of banking evidence.

Any request concerning proceedings involving asset recovery, tracing, identification, freezing, confiscation, seizure or restraint must include the following:

- I. Details of the property in question including type of property, size of the property, geographical location, ownership and registration details, current value;
- II. The connection between the property and the offence;
- III. Whether prior assistance has been given by Kenya and if so, details of the same;
- IV. If known, details on the source of funding, direct and indirect acquisition and chain of handling of the property;
- V. If known, details of third party interest, how it was acquired and the extent of the third party interest;
- VI. A certified copy of any freezing order, seizing decision or confiscation order made by a court and confirmation that it is not subject to appeal and is enforceable;
- VII. Where confiscation has been ordered in the absence of a conviction, the requesting state must provide evidence of death (i.e. certified death certificate); flight (e.g. immigration/border control details) and/or absence or any other appropriate cases as would justify the order in absence of conviction;
- VIII. The requesting state should give an explanation that will enable the court to consider whether there is a risk that the identified property will be dissipated if no order is made where freezing/restraint or seizure is requested.

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Grounds for Refusal of Requests for Asset Tracing and Recovery

In addition to the grounds for refusal given in **Part B above**, requests under this section may be refused where:

- I. The value of the property is insignificant;
- II. The requesting state does not provide sufficient or timely evidence.

Costs incurred by Kenya in investigations, prosecution or judicial proceedings for requests under this section shall be borne by the requesting state. The Central Authority shall communicate such costs to the requesting state before they are incurred.

INTERCEPTION OF COMMUNICATION

Request can be made for interception and immediate transmission of telecommunication or interception, recording and subsequent transmission of telecommunications.

Grounds for Request for Interception

1. The subject is in Kenya and the requesting state needs technical assistance of Kenya to intercept communications;
2. The subject is in Kenya and the requesting state's communication is capable of being intercepted;
3. The subject is in a third state and the requesting state needs technical assistance of Kenya to intercept. In such cases, the request must include proof of the subject's presence in a third state and proof that the third state has been informed accordingly.

Requirements for Request for Interception include:

1. Identification of the authority making the request;

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2. Confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation in the requesting state if such an order or warrant is required by law;
3. Information for the purpose of identifying the subject of the requested interception;
4. Details of the criminal conduct under investigation;
5. The desired duration of the interception in terms of actual time;
6. If possible, provision of sufficient technical data in particular the relevant network ID number, communications address or service identifier;
7. Assurance that the intercept product will be handled in accordance with any restrictions imposed;
8. That the intercept is proportionate to what is sought to be achieved.

In addition, requests may be made for stored communications; this means content data that is no longer in the course of transmission and which has been stored in a form that allows for retrieval.

Interception of Items during the Course of Carriage by a Public Postal Service

Where such a request is made, the request must include sufficient information so as to identify the item, the course of transit, anticipated delivery time, any courier (if applicable) and an explanation of how the item relates to the criminal investigation in the requesting state.

Preservation of Communication Data

This refers to the 'who', 'when', 'where' and 'how' of a communication but not the content of the communication. It includes text messages, emails and phone calls.

Such a request must include

1. Identity of the authority making the request;

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2. A brief description of the conduct under investigation;
3. A description of the communications data to be preserved, the time period of date required and its relationship to the investigation or prosecution and in particular whether the data includes:
 - a) Subscriber information;
 - b) Traffic data;
 - c) any other information that is held or obtained by the provider of a postal service or telecommunications service and which relates to the provision of that service but does not include content data;
4. An express statement that the requesting state intends to submit a request for legal assistance to obtain the communications data within **120** days. If a request is not received within 120 days, the data will no longer be preserved.

A request under this section may be refused if the Central Authority is of the view that compliance would be contrary to the laws of Kenya or would prejudice security, international relations or other essential public interests in Kenya.

Covert Electronic Surveillance

A request for deployment of covert electronic surveillance evidence can be made as long as it does not violate the laws of Kenya.

CONFIDENTIALITY

The Central Authority and Competent Authorities will not disclose content of mutual legal assistance without the consent of the requesting authority except where disclosure is necessary to obtain the cooperation of a witness or any other person concerned.

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Where public statements are made by a requesting state about assistance requested from Kenya, the Central Authority and relevant Competent Authority should be notified so that they can respond appropriately to media or public enquiries.

COLLATERAL USE

Where a requesting state wishes to use evidence obtained from Kenya for a different purpose to that stated in the original MLA request or to share that evidence with a third country, a formal request to do so must be made in writing to the Central Authority and must include the following:

1. Case name/reference number to enable identification of the original request;
2. What evidence is to be used /shared;
3. How this evidence will be used/shared;
4. Why this evidence is required in other proceedings.

URGENT REQUESTS

Do not mark a request as urgent unless it is urgent. Details as to why the request is urgent must be provided e.g. risk of dissipation of assets. Dates of any deadlines that need to be met must be provided.