UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

Original: French

TRIAL CHAMBER II

Before Judge: Judge Laïty Kama, Presiding

Registry: Mr Antoine Mindua
Mr John Kiyeyeu

Decision of: 12 October 2000

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THE PROSECUTOR

v.

PAULINE NYIRAMASUHUKO

Case No. ICTR-97-21-T

DECISION ON THE DEFENCE MOTION FOR EXCLUSION OF EVIDENCE AND RESTITUTION OF PROPERTY SEIZED

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Dr. MINDUA K. M. Antoine
SIGNATURE: DATE: 12.10.2000

The Office of the Prosecutor:
Japhet Mono
Ibukunolu A. Babajide
Andra Mobberley

Counsel for the Defence:
Nicole Bergevin
Guy Poupart

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("THE TRIBUNAL"),

SITTING as Judge Laïty Kama, presiding, designated as single judge to hear this motion, pursuant to Rule 73 of the Rules of Procedure and Evidence ("The Rules");

CONSIDERING that on 29 May 1997, the Tribunal, acting in the person of Judge Yakov Ostrovsky, designated by the President, pursuant to Rule 28 of the Rules, confirmed the joinded indictment dated 26 May 1997, issued by the Prosecutor against Pauline Nyiramasuhuko and Arsène Shalom Ntahobali ("the Indictment");

CONSIDERING the warrant of arrest and the order for surrender, issued pursuant to Rules 54 to 61 of the Rules by Judge Ostrovsky against the Accused on 29 May 1997;

CONSIDERING that Pauline Nyiramushuko ("the Accused") was arrested and detained on 18 July 1997 in Kenya, pursuant to said warrant of arrest issued on 26 May 1997;

CONSIDERING that on 18 July 1997 the Accused was transferred to the United Nations Detention Facility in Arusha, pursuant to Rules 54 to 61 of the Rules;

CONSIDERING that, on 3 September 1997, the Accused made her initial appearance, pursuant to Rule 62 of the Rules, and the same day she pleaded not guilty to each of the eleven counts charged in the indictment against her;

SEIZED OF a Defence.motion, filed on 2 March 2000, for the exclusion of evidence and the restitution of property seized, pursuant to Rule 73 of the Rules;

CONSIDERING accompanying documents of the Defence motion for the exclusion of evidence and the restitution of property seized, filed on 18 April 2000;

CONSIDERING the solemn declaration of the Accused, dated 1 March 2000, transmitted by the Defence in support of said motion;

CONSIDERING the Prosecutor's Response received on 24 March 2000;

CONSIDERING the Statute and Rules of the Tribunal, notably Rule 73 of the Rules;

HAVING HEARD THE PARTIES at a hearing on 8 June 2000;

ARGUMENTS OF THE PARTIES

Pleas of the Defence

In its Motion, the Defence argues, *inter alia*:

The Arrest of the Accused and the Delay in Her Initial Appearance:

1. Firstly, the Defence contests the circumstances of the arrest of the Accused in Nairobi on 18 July 1997. The Kenyan authorities who acted pursuant to a warrant of arrest issued by the Tribunal "failed to inform the Applicant of the nature and grounds of the charges brought against her and of her rights", in violation of Articles 19(2) and 20(4) of the Statute and Rules 42, 43 and 55(C) of the Rules.

2. Secondly, not only did the Registry fail to inform the Accused, who was transferred to the Tribunal on the day of her arrest, of her rights until 30 July 1997, thirteen days later, but also neglected to notify her of the indictment until 9 August, 21 days later.

3. Finally, the Defence notes that the Accused did not make her initial appearance until 3 September 1997, 46 days after her transfer to the United Nations Detention Facility in Arusha. In regard to this issue, the Defence cites the Court of Appeals in the *Barayagwiza* Decision of 8 November 1999, according to which, "such delays (before appearing before a judge after one's arrest) must not exceed a few days".

The Search and Seizure of Property from the Residence of the Accused:

4. The Defence alleges that the search of the Accused's home and the resultant seizure of her property on 18 July 1997 in Nairobi, Kenya should not have occurred without an "order or any other form of judicial authorization". However, the warrant issued by the Tribunal referred only to the arrest of the Accused. The Defence finds that there has been a violation of the Accused's fundamental rights to the inviolability of one's private residence, a right recognized under Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, and to the right to a fair and just trial recognized under Articles 19 and 20 of the Statute.

5. The Defence notes that under Rule 40(A)(ii) of the Rules the Prosecutor may request a State "to seize all physical evidence" only in the event of urgency, urgency which did not exist in the present case, insofar as more than 47 days had lapsed between the issuance of the warrant of arrest on 29 May 1997 and its execution on 18 July 1997. This period of time should have allowed the Prosecutor to "request such orders as may be necessary from a Trial Chamber or a Judge", pursuant to the provisions of Rule 39(iv) of the Rules.

6. The Defence also points out that the search of a private residence should not be considered incidental to the arrest in that it is a violation of a fundamental right.

Accordingly, the warrant of arrest duly issued by the Tribunal did not provide implicit judicial authorization for the search of the Accused's residence and the seizure of property therein.

7. The Defence further submits that not only were these operations were illegal because of the absence of judicial authorization but also because of the procedures followed, notably, the failure to make an inventory of the property seized, to write a seizure record duly filled in and signed, and to seal the property seized. This was in violation of Rule 95 of the Rules, which provides that "[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings". The Defence maintains that in the face of so many procedural errors the evidence gathered by the Office of the Prosecutor should be excluded.

8. According to the Defence, the search and seizure were made by two investigators from the Office of the Prosecutor and not by Kenyan authorities. In support of this submission, the Defence provides the solemn declarations of the Accused and of her husband Maurice Ntahobali, who were both present during the operations. At the hearing the Defence emphasized the crucial difference between the case at bar and the *Karemera* Decision, rendered by Trial Chamber II on 10 December 1999, where the state authorities made the arrest and the Chamber held that it exercises no control over the legality of the operating procedures of a sovereign state.

9. While acknowledging that neither the Statute nor the Rules specifies the standard operating procedure of a search and seizure, the Defence argues that the duty to obtain a judicial warrant, to make an inventory, and to seal the property seized "comprise 'the general principles of law' and are in consonance with the spirit of the Statute, pursuant to Rule 89(B) of the Rules". The Chamber should base its ruling on these principles, particularly since they are codified as established laws of most countries, as in Article 118 of the Code of Kenyan Criminal Procedure , pursuant to which a judicial warrant must be obtained prior to any search or seizure.

Cumulative Violations of the Rights of the Accused

10. Finally, the Defence raises the argument that the rights of the Accused were violated thrice: in so far as she was not timely informed of her rights or of the reasons for her arrest until her delayed initial appearance; as the search and seizure without a judicial warrant was illegal; and finally, as the search and seizure operations led by the Office of the Procecutor were tainted by the illegal procedure. Citing the above-referenced *Barayagwiza* Decision, the Defence argues that the Accused has suffered cumulative violations resulting in accentuated and evident prejudice.

Relief Sought for the Violation of the Rights of the Accused

11. As relief for the alleged multiple violations of the rights of the Accused, the Defence requests the exclusion in evidence of all property seized, under Rule 95 of the Rules. The Defence also requests restitution of said property.

Response of the Prosecutor

The Prosecutor responds, *inter alia*:

Failure to notify the Accused of her rights and of the charges against her at the time of her arrest and after her transfer:

11. As concerns this issue, the Prosecutor notes that the warrant of arrest issued by the Tribunal, pursuant to the Statute and the Rules, rightly directed the Kenyan authorities, who were responsible for execution of the warrant, to advise the Accused of her rights and of the charges against her.

12. Furthermore, the Prosecutor notes that on 15 July 1997 the Registry of the Tribunal transmitted to the Attorney General of the Republic of Kenya all documents articulating the rights of all accused, under the State and the Rules, as well as the warrant of arrest and the Decision confirming the indictment, and requested that the documents be transmitted to the Accused upon arrest.

14. Concerning the failure to inform the Accused of the charges against her following her transfer to the Tribunal, the Prosecution notes that, if the Registry of the Tribunal "inadvertently" failed to promptly transmit the indictment issued against the Accused, this "omission" was remedied by the Registrar's subsequent action on 9 August 1997, when he responded to the requests made by the Accused by letter of 1 August 1997.

The Alleged Illegal Search and Seizure Due to the Absence of a Judicial Warrant

15. The Prosecutor argues that, in accordance with legal principles, the search and seizure were carried out by Kenyan authorities, as these operations were executed within the context of the arrest of the Accused at her residence, pursuant to the warrant of arrest issued by the Tribunal. The Prosecution argues that all search and seizures executed in such circumstances are incidental to the arrest and are therefore legally authorized on the issuance of a single warrant of arrest.

16. Therefore, according to the Prosecution, since the Kenyan authorities executed the search warrant, the same Kenyan authorities were responsible for conducting the search and seizure. In support of this argument, the Prosecutor recalls paragraph 56 of the *Ngirumpatse* Decision, ICTR-97-44-I, of 10 December 1999, in which Trial Chamber II held that "[t]he Tribunal is not competent to supervise the legality of arrest, custody, search and seizure executed by the requested State."

17. Consequently the Prosecutor requests the dismissal of the Defence Motion.

HAVING DELIBERATED,

The Alleged Violation of the Right of the Accused to be Informed of Her Rights and of the Nature of the Charges Against Her:

Regarding the Issue that at the Time of Arrest the Accused Was Allegedly Neither Informed of Her Rights Nor of the Charges Against Her by the Kenyan Authorities, in Violation of Articles 19(2) and 20(4) of the Statute and Rules 42, 43 and 55(C) of the Rules

18. In regard to this issue, we acknowledge that the Registrar transmitted to said authorities, by letter of 15 July 1997, the warrant of arrest, the transfer order, the confirmed indictment, and the statement of the rights of the accused under the Statute and the Rules, and requested that all of these documents be transmitted to the Accused at the time of her arrest, pursuant to Rule 55(B) of the Rules.

Regarding the Issue of the Alleged Delay in Informing the Accused of Her Rights and of the Charges Against Her, Following Her Transfer to and Detention in Arusha

19. The Accused submits that following her transfer to Arusha, she allegedly was not informed as to the charges against her and that she wrote to the Registrar to obtain such information. We observe that in response to said letter, the Registrar, on 26 July 1997, directly transmitted to the Accused the warrant of arrest, the order for transfer, and a document articulating all of her rights under the Statute and the Rules. Furthermore, we take note that in response to another letter from the Accused, dated 1 August 1997, the Registrar transmitted the indictment to her on 9 August 1997. While we deplore this delay, we do not consider that it constitutes a substantial violation of the fundamental rights of the Accused.

Regarding the Delay in the Initial Appearance

20. Clearly the initial appearance of the Accused on 3 September 1997 was not without delay, as required under Rule 62 of the Rules. However, we consider that this delay has not caused serious and irreparable prejudice to the Accused.

Regarding the Legality of the Search and Seizure Operations

21. A double infraction of the search and seizure operations is alleged: firstly, that these operations were conducted without a prior judicial warrant; and secondly, that requisite procedures generally recognized by both national legal systems and by international conventions, were not followed.

22. The Prosecutor submits that the issuance of a warrant of arrest by the Tribunal provides implicit authorization for the search and seizure of the surroundings incidental to the arrest.

23. Such is not our opinion. Searches and seizures violate, by their nature and their effect, fundamental individual rights recognized by most legal systems in the world and enshrined in International law, including, notably, the inviolability of a person's home. Accordingly, most national legal systems make any operation of this type conditional upon explicit judicial authorization, which may take the form of a warrant, an order, or rogatory letters. The laws of Kenya, whose State authorities arrested the Accused, are no exception, as exemplified in Article 118 of the Kenyan Code of Criminal Procedure, which provides: "... the Court, a magistrate or a justice of the peace may by written warrant (called a search warrant) authorize a police officer or any other person named in the search warrant to search... and... seize..." Another example is offered by the Fourth Amendment of the United States Constitution, which provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

24. We note that the arrest was not executed within the context of a procedural urgency, in so far as the warrant of arrest was issued on the basis of Rules 54 and 55 of the Rules on 29 May 1999, more than fifteen days before the arrest of the Accused. However, contrary to the argument of the Defence, search and seizures which are incident to such an arrest may well be characterized as urgent measures, particularly in light of the risk of destruction of evidence, as in the instant case.

25. It is to be remembered that, according to the Defence, the Office of the Prosecutor executed the search and seizure. As evidence in support thereof, the Defence produced the solemn declarations of the Accused and her husband. According to the Prosecutor, Kenyan authorities executed these operations.

26. In our opinion, whoever were the agents that executed the search and seizure, they were able to so proceed only in the presence and under the auspices of Kenyan authorities. Accordingly, we recall the words of Chamber II in the *Ngirumpatse* Decision, in keeping with well-established jurisprudence (*See* Decisions of *Karmera* of 10 December 1999, *Kajelijeli* of 8 May 2000 and *Nzirorera* of 7 September 2000):

> It is a sovereign state that executes the request, controls the authorities executing the request and against whom the person arrested may seek a remedy against the arrest, custody, search, and seizure under the laws of the request state.

27. According to the Defence, the search and seizure operations were tainted by the procedure in so far as there was no inventory made of the property seized, no seizure record duly filled in and signed, and no sealing of the property seized.

28. Although we observe that the Prosecutor has not refuted the absence of a search and seizure inventory record of property seized or the failure of Kenyan authorities to seal the property, we note that these operations were executed pursuant to the Kenyan Code of Criminal Procedure. Accordingly, we recall the *Ngirumpatse* Decision, mentioned above, holding that the Tribunal is not competent to determine the legality of operations executed by sovereign national authorities within the context of existing national legislation.

29. In regard to the allegation by the Defence that the evidence resulting from the search and seizure is inadmissible, we are of the opinion that this question can be raised and considered only during trial.

30. However, and in the interests of justice as well as equity, we consider that, more than three years after the execution of these operations, the Prosecution and the Defence must agree on a date to examine, inventory, then seal said property, to which the Defence has been denied access to date. If, during the examination of the said property, both Parties agree that any part of it is not necessary for the purpose of prosecution, such property will immediately be returned to the Accused. All these operations are to be conducted within a month from the present Decision, and a comprehensive record duly signed by the Parties is to be prepared.

FOR THESE REASONS,

WE, Judge Laïty Kama, Presiding Judge of Trial Chamber II, single designated Judge, pursuant to Rule 73 of the Rules, to hear the present motion;

I. **DISMISS** the Defence motion;

II. **ORDER** the Prosecution and the Defence to decide upon a date, within a month from the date of the present Decision, to examine and inventory all property seized, return to the Accused any part of the said property that both Parties agree is not necessary for the purpose of prosecution, then seal the remaining property seized, and to prepare a record to be signed by the Parties pertaining to all these operations.

Arusha, 12 October 2000

Laïty Kama
Presiding Judge

Seal of the Tribunal