



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Navanethem Pillay
Judge Andrézia Vaz

Decision of: 5 November 2001

**THE PROSECUTOR
v.
ELIZAPHAN NTAKIRUTIMANA
GÉRARD NTAKIRUTIMANA**

**Case No. ICTR-96-10-T
and
Case No. ICTR-96-17-T**

**DECISION ON THE MOTION OF THE DEFENCE TO STRIKE
THE TESTIMONY OF WITNESS YY**

For the Defence:

Mr. Ramsey Clark
Mr. Edward M. Medvene

For the Prosecutor:

Mr. Charles Adeogun-Phillips
Mr. Wallace Kapaya
Ms. Boi-Tia Stevens

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”);

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Navanethem Pillay, and Judge Andréia Vaz;

BEING SEIZED OF a motion by the Defence, dated 8 October 2001, to strike the testimony of Prosecution Witness YY;

TAKING ACCOUNT of the oral hearing on 10 October 2001;

HEREBY DECIDES the motion.

INTRODUCTION

1. Prosecution Witness YY testified before the Trial Chamber on 1, 2 and 3 October 2001. Prior to this, a statement by the witness arising from an interview with Prosecution investigators on 25 October 1999 had been made available to the Defence (“the prior statement”). No other information about the content of Witness YY’s intended testimony was disclosed by the Prosecution.

2. In the course of his testimony, Witness YY alleged that on a day around the end of April or the beginning of May 1994, between 8 and 9 a.m., from his hiding place outside Murambi Church, “I was able to see both of [the Accused] shooting inside the church, and later on I noticed that some people had been killed inside the church”.¹ The witness identified three of the ten or so persons allegedly killed in this incident, including a pregnant woman and a child.²

SUBMISSIONS OF THE PARTIES

Defence

3. In its motion, the Defence submitted that the Prosecution failed to inform the Defence prior to the testimony of Witness YY that he would testify that the two Accused shot and killed refugees inside Murambi Church. According to the Defence, this had not been revealed in disclosures of the Prosecution even in the most general way.

4. In view of the fact that the Accused had “no basis for anticipating” that Witness YY might testify that they had shot people at Murambi Church, the Prosecution’s failure, according to the Defence, to inform the Accused that the witness would make such serious allegations constitutes a violation of the right of the Accused to be informed in detail of the acts they are alleged to have committed, and of their

¹ Transcripts of 2 October 2001 p. 38.

² Ibid. pp. 37-38; and transcripts of 3 October 2001 p. 19.

right to prepare their defence. In its oral submissions the Defence again emphasised the alleged fault of the Prosecution: “how can it be considered fair notice if there’s no mention that Dr. Gérard was ever at the church [and], with respect to the Pastor, they only talk about sheets off a roof and not shooting ten people?”³

5. The Defence argued that for this reason Witness YY’s testimony should be struck in its entirety. In its motion the Defence also asserted an additional, or alternative, reason for the same remedy, namely that the testimony of Witness YY taken in its entirety is inherently improbable and lacking in credibility.

Prosecution

6. At the hearing, the Prosecution argued that the Defence has not been prejudiced because it has had “every opportunity” to cross-examine the witness and to attempt to impeach his credibility. In the Prosecution’s view, the last paragraph of Witness YY’s prior statement of 25 October 1999 gave “an advance indication” of the testimony of the witness.⁴

7. As to the overall credibility of Witness YY, the Prosecution referred to a document from the organisation “African Rights”, in which statements attributed to Witness YY conformed, according to the Prosecution, with the allegations forming the basis of the present motion.

DELIBERATIONS OF THE CHAMBER

Lack of Advance Notice

8. The Chamber will first address the issue whether the Defence had sufficient advance notice of Witness YY’s testimony that the Accused attacked and shot persons at Murambi Church. Paragraph 4.16 of the indictment of 7 July 1998 contains the specific allegation that Elizaphan Ntakirutimana, when at Murambi Church, ordered the destruction of its roof. There is no mention there or elsewhere in the indictment that Gérard Ntakirutimana was at Murambi Church, or that killings occurred there.

9. Other paragraphs of that indictment are generally formulated. According to paragraph 4.13 the two Accused participated in attacks “in the area of Bisesero which continued almost on a daily basis for several months”. Paragraph 4.15 provides that during the months of these attacks (April through June 1994, see paragraph 4.12) the two Accused “attacked Tutsi survivors and others, killing or causing serious bodily and mental harm to them”.

10. The formulation of these paragraphs is broad enough to cover the information provided by Witness YY. However, it contains no specific allegation, for instance, of names of perpetrators, locations, dates or victims of such attacks. In the present

³ Transcripts of 10 October 2001 p. 44.

⁴ Ibid. pp. 45-46.

case, for prior notice of more specific information it is necessary to turn to Witness YY's statement given to investigators of the Tribunal on 25 October 1999. The last paragraph of that statement reads as follows:

I saw Dr. Gérard Ntakirutimana in all attacks when I was at Mugonero complex and Bisesero hill. I saw him running after refugees and shooting them. Also, I saw Pastor Elizaphan Ntakirutimana on several occasions. He was armed with a gun. All the time I saw him he was transporting killers in his car. I also saw him when supervising Interahamwe to take off the iron sheets of Murambi Adventist Church. The church was used by refugees to take shelter during the night. While hiding on Bisesero hill's I saw dead bodies without hands.⁵

11. This paragraph contains general information. It states that Gérard Ntakirutimana was shooting at refugees, but makes no reference to Murambi Church. The Chamber notes that the church lies within the area of Bisesero (in the broad sense), but not on Bisesero hill. Elizaphan Ntakirutimana is alleged to have been at the church supervising the removal of its roof, but no mention is made of him killing anyone. It is true, as stated by the Prosecution, that both Accused are placed in a context in which people are being killed. However, there is little or no precise information equivalent to that contained in Witness YY's testimony. It is clear, therefore, that the Defence had notice of attacks and of the allegation that Elizaphan Ntakirutimana had a gun, but not of Witness YY's assertion that both Accused participated in the killing of a pregnant woman and a child, among others, seeking refuge inside Murambi Church.

12. The Chamber will now consider the measure, if any, required to address the lack of prior notice of Witness YY's testimony in relation to new information concerning Murambi Church. There is no evidence that the Prosecution had any prior knowledge of Witness YY's above-mentioned serious allegations to enable it to disclose it to the Defence. It further recalls the Chamber's recent decision on the motion of the Defence to strike Witness DD from the list of prospective Prosecution witnesses, on the ground that his reconfirmation statement contained a serious allegation not present in his earlier written statement. In dismissing the motion, the Chamber noted that witness statements "do not purport to give exact and all information about the testimony[;] ... testimonies often expand or provide more details than previous statements to investigators".⁶ The Chamber also observed that even though the incident alleged by Witness DD was not to be found as a specific allegation in the indictment, "the situation is the same in relation to other alleged killings by both Accused".⁷ The said comments are equally applicable to the present case.

13. It is indeed a drastic measure to strike out the entire testimony of Witness YY on the basis that he volunteered unexpected elements of information in his oral testimony in court. It is in the interest of justice that the Prosecution place all available evidence before the Trial Chamber and that the Chamber hear and evaluate

⁵ Statement p. 5. (The witness signed the statement on 7 December 1999.)

⁶ Transcripts of 1 October 2001 p. 152.

⁷ Ibid. p. 151.

such evidence. There are remedies available to the Defence which may cure any prejudice it alleges. The Defence could have asked for more time to prepare for cross-examination, but did not do so. The presentation of the Defence case commences on 14 January 2002. Consequently, the Accused still have adequate time to prepare their defence. Moreover, the Defence may, if it so wishes, apply for the recall of Witness YY and cross-examine him anew on the particular point. It is also at liberty, of course, to stress, at the stage of closing argument under Rule 86 of the Rules of Procedure and Evidence, the discrepancies between Witness YY's testimony and his prior statement.

14. For the reasons stated above, the Chamber does not find that lack of advance notice to the Defence of a portion of Witness YY's oral testimony constitutes a sufficient basis to strike that testimony in whole or in part.

Lack of Credibility

15. As for the alleged "inherent improbability" and "lack of credibility" of Witness YY's testimony, taken as a whole, the Chamber notes that this point was mentioned only in passing by the Defence, with few reasons given. The Chamber considers the issue of credibility to be part of the merits of the case and will make its own assessment of the testimony and all the evidence in due course.

FOR THESE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 5 November 2001

Erik Møse
Presiding Judge

Navanethem Pillay
Judge

Andrésia Vaz
Judge

(Seal of the Tribunal)