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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 13 May 2002

The PROSECUTOR
v.
Jean de Dieu KAMUHANDA

Case No. ICTR-99-54A-T

DECISION ON THE PROSECUTOR'S MOTION FOR LEAVE TO CALL REBUTTAL EVIDENCE PURSUANT TO RULE 85(A)(iii) OF THE RULES OF PROCEDURE AND EVIDENCE

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion for Leave (and Notice) to Call Rebuttal Evidence Pursuant to Rule 85(A)(iii) of the Rules of Procedure and Evidence," filed on 14 April 2003; Annex A attached to the Motion; the Addendum of 15 April 2003; the Addendum of 22 April 2003; the Disclosure of 25 April 2003 and the Disclosure of 9 May 2003 (the "Motion");

HAVING RECEIVED AND CONSIDERED the "*Conclusions en réplique à la requête du Procureur aux fins d'être autoriser à présenter une réplique. – Article 85 A du réglement de procédure et de preuve,*" filed on 5 May 2003 (the "Defence's Response"); **AND** the "Prosecutor's Final Reply in the Matter of the Motion for Leave (and Notice) to Call Rebuttal Evidence Pursuant to Rule 85(A)(iii) of the Rules of Procedure and Evidence," filed on 7 May 2003 (the "Prosecutor's Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 85(A)(iii) of the Rules;

NOW DECIDES the Motion on the basis of the written briefs as filed by the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

Prosecution Submissions

1. The Prosecution, referring to the provisions of Rule 85 of the Rules, argues that notice to call rebuttal evidence is made only after the close of the Defence case.

2. According to the Prosecution, the case for the Defence rests on an "evidential tripod" consisting in: (i) the Accused's alibi as predicated on witnesses who said they saw him at his home during the periods he was supposed to have committed the offences he is charged with; (ii) that the road from the Accused's home to the scenes where he was supposed to have committed offences could not have been travelled upon by the Accused at the relevant periods; and (iii) the evidence of witnesses who testified that the Accused was at all relevant times not at the scenes of the locations where he is alleged to have committed the offences.

3. The Prosecution submits that the summaries of Defence witnesses were "scanty and of little or no benefit in disclosing the content of their evidence" to the point where it felt it was "ambushed." So, submits the Prosecution, it is entitled to present rebuttal evidence to refute Defence testimonies.

4. So, the Prosecution now seeks to bring nine (9) witnesses in order to rebut the testimonies of certain Defence Witnesses and "[p]rovide significant rebuttal to challenge the veracity and credibility of their testimonies."[1]

[1] The pseudonyms of the nine (9) rebuttal witnesses are: DBY, GNO, GNP, GNQ, GNR, GNS, GNT, GNU and GNV.

Defence's Response

5. The Defence objects to the Prosecution request. It argues that the nine (9) witnesses in rebuttal are not true rebuttal witnesses, but rather witnesses who may be used to buttress the Prosecution's case in chief.

6. Regarding the defence of alibi, the Defence submits that, pursuant to the requirements of Rule 67, it filed notice a number of months before the commencement of the trial. Therefore, the Prosecution was put into ample opportunity to interview all the alibi witnesses before and during the Prosecution case in chief. The Defence reminds the Chamber that the Prosecution was granted leave to modify its list of witnesses and added four (4) witnesses, two of whom (GKL and DAL) were for challenging the Accused's alibi.[2] The Defence submits that during this period, since the Prosecution was in possession of the statement of its rebuttal witness GNS they should have requested to vary their list and add him, as well as GKL and DAL.[3] Regarding GNQ, the Defence argues that the Prosecution should have been diligent because notice of alibi was given to it well before the commencement of trial so it should have obtained evidence to challenge the alibi during its case in chief.

7. Furthermore, the Defence argues that under Rule 85, the Prosecution is only permitted to bring rebuttal evidence when, during its case, the Defence adduced fresh matter that the Prosecution could not have reasonably foreseen. In this regard, the Defence argues that the Prosecution cannot now bring evidence to reinforce its case in chief particularly as the notice of alibi was given to it in good time. The Defence thus submits that the Chamber should deny the Prosecution request to bring witnesses GNQ and GNS in rebuttal to challenge the Accused's alibi.

8. Regarding the rebuttal witnesses GNV, GNT and DBY, the Defence argues that GNV's statement tends to corroborate GEK's testimony and DBY's statement corroborates DAL's testimony. GNT's statement tends to corroborate the testimonies of witnesses who were at the Gikomero Protestant Parish during the events of 1994. The Defence submits that these witnesses are not true rebuttal witnesses because they tend to re-enforce the Prosecution case in chief. The Prosecution should thus be denied its request to bring the said witnesses as rebuttal witnesses.

9. Regarding the question of the impossibility of travel between Kigali and Gikomero on/or between 12 April 1994, the Defence notes that the Prosecution seeks to bring witnesses GNO, GNU and GNR in rebuttal. The Defence argues that the Prosecution was obliged to address this question by bringing evidence to demonstrate how the Accused was able to be at the scenes where he is said to have committed the crimes. The Defence argues that in its case, it simply challenged the Prosecution evidence by demonstrating the impossibility of travel between Kigali and Gikomero during the period in question. In announcing his alibi in December 2000 and March 2001, the Accused indicated that he never left Kigali until 18 April 1994, when he went with his family to Gitarama. The Prosecution should have brought evidence as to how the Accused had been able to travel to the scenes of the crimes during this period. The Defence argues that this is a matter that could have been reasonably foreseen by

[2] *See* "Decision on the Prosecutor's Motion to Add Witnesses GKI, GKJ And GKL," of 6 February 2002; and "Decision on the Prosecutor's Motion to Add Witness DAL," of 15 February 2002.
[3] The said statement was signed on 18 November 2001.

the Prosecution and thus it is not new. The Defence thus submits that witnesses GNO, GNR and GNT should not be called in order to rebut this aspect of the Defence case.

10. Regarding GNP, the Defence submits that his evidence may be considered to be totally new evidence. GNP's statement talks of vehicles in the Ministry where the Accused worked, but it does not talk about the vehicle the Accused is alleged to have been travelling in when he was said to have been seen by Prosecution witnesses at the scenes of the crimes. The Defence argues that admitting this evidence will in effect be a *de novo* commencement of the trial. The Defence thus requests that this witness not be brought by the Prosecution.

11. The Defence thus prays that the Chamber find that the Defence has not, in its case, adduced fresh matter that the Prosecution could not have foreseen. The Defence also requests that the Chamber deny the Prosecution request to bring the evidence it seeks to bring because it should have brought said evidence in its case in chief.

Prosecution Reply

12. The Prosecution, in reply, reiterates its request to present rebuttal evidence and refers to the definition of Rebuttal evidence in Black's Law Dictionary (6th Edition) and argues that it has the right to call rebuttal evidence after the close of the Defence case.

13. Regarding the question of alibi, the Prosecution argues that the Defence has misread Rule 85. The Prosecution argues as irrelevant such considerations as the time when it met the rebuttal witnesses and the time when notice of alibi was given to it. Rather, the Prosecution submits, the key and relevant factor when considering rebuttal is "the *nexus* between what Defence alibi witnesses said on the stand and what rebuttal witnesses will testify to when called."

14. The Prosecution argues that the circumstances that applied in *Prosecutor v. Semanza* are different from this case because, in this case, the Prosecution seeks to contradict and counteract the Defence case. The Prosecution argues as erroneous and inconsistent with the Rules the Defence argument that - rebuttal is only granted when "a new question or a new defence is raised" during the Defence case.

DELIBERATIONS

15. Rule 85 of the Rules sets out the sequence that evidence is to be presented at trial; and sub-Rule (A)(iii) provides for the presentation of Prosecution evidence in rebuttal. This Rule is silent on the conditions upon which Chambers may grant the presentation of evidence in rebuttal.

16. Notwithstanding, as stated in the *Kajelijeli* Decision, the Trial Chamber recalls that there are two main conditions to be met by the Prosecution before the Chamber can exercise its discretion to allow rebuttal evidence.[4] The Chamber stated that the Prosecution must first "[d]emonstrate that the circumstances of the case are such that rebuttal evidence is permissible." In its Decision, the Chamber, in setting out the test for this pre-condition, quoted *Semanza* and ruled that the Prosecution is obliged to demonstrate that a new issue,

[4] *See* "Decision on the Prosecution Motion for Leave to Call Rebuttal Evidence (Rule 85)" of 12 May 2003 at para. 25 in the *Prosecutor v. Kajelijeli*

which it could not have reasonably foreseen, was raised during the Defence case.[5] Furthermore, as the Trial Chamber in *Semanza* indicated, "[r]ebuttal is not permitted merely to confirm or reinforce the Prosecutor's case, or to deal with collateral issues. Rebuttal is permitted when it is necessary to ensure that each party has an opportunity to address issues central to the case."[6]

17. The second condition as stated in the *Kajelijeli* Decision is that the specific evidence, which the Prosecution seeks to call in rebuttal, must be suitable for that purpose. The Chamber quotes a statement of the law as set out in *Semanza* which also cited by the International Criminal Tribunal for the Former Yugoslavia's case law in *Delalic* that;

> "The essence of the presentation of evidence in rebuttal is to call evidence to refute a particular piece of evidence which has been adduced by the defence. Such evidence is therefore limited to matters that arise directly and specifically out of defence evidence. Where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it, then generally speaking the Trial Chamber will be reluctant to exercise its discretion to grant leave to adduce such evidence. The Prosecution thus, cannot call additional evidence merely because its case has been met by certain evidence to contradict it."[7]

18. In the instant case, the Chamber notes that nowhere in its Motion does the Prosecution demonstrate specifically, if at all, that a new issue, which it could not have reasonably foreseen, was raised during the Defence case. Rather, the Chamber finds some merit in the Defence submission that the Prosecution, in producing statements of witnesses it seeks to call in rebuttal, is in effect reinforcing its case in chief.

19. With regard to the question of alibi, the Chamber notes that the Prosecution, while not contesting the fact that notice of alibi was timely given, states that it now seeks to contest the testimony of the Defence alibi witnesses. The Chamber is of the opinion that since the Prosecution had sufficient time within which to prepare a challenge to the Accused alibi, it cannot now request to bring evidence in rebuttal for what it should have done during its case in chief.

20. The Chamber thus finds that, contrary to the Prosecution submissions, in order for it to use its discretion to allow evidence in rebuttal, there are threshold conditions that must first be met by the Prosecution, taking into account that there must be an end to proceedings. On all the above, the Chamber denies the Prosecution request to bring evidence in rebuttal.

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[5] *See* "Decision on Defence Motion for Leave to Call Rejoinder Witnesses," of 30 April 2002 at para. 5 in *Prosecutor v. Semanza*

[6] *ibid*

[7] *See.*, "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case," of 19 August 1998 at para. 23 in *Prosecutor v. Delalic et al*

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Prosecution request to bring evidence in rebuttal.

Arusha, 13 May 2002

William H. Sekule
Presiding Judge

Winston C. Matanzima Maqutu
Judge

Arlette Ramaroson
Judge

Seal of the Tribunal