ICTR-98-42-T
6. 06. 2002
(6787 – 6784)

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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. Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 6 June 2002

2002 JUIN -6 P 5:23

THE PROSECUTOR

v.

Alphonse NTEZIRYAYO and Sylvain NSABIMANA

Case No. ICTR-97-29-T

Case No ICTR-98-42-T

DECISION ON NTEZIRYAYO'S MOTION TO RULE HEARSAY EVIDENCE INADMISSIBLE

The Office of the Prosecutor:

Silvana Arbia
Jonathan Moses
Gregory Townsend

Counsel for Nteziryayo:

Titinga Frédéric Pacere
Richard Perras

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:

i) the "Motion to Rule Hearsay Evidence Inadmissible (Rule 89(C) of the Rules of Procedure and Evidence)" filed on 22 April 2002 (the "Motion");

ii) the "Prosecutor's Response to Nteziryayo's Motion to Exclude Part of the Testimony of Witness TA as Hearsay," filed on 29 April 2002, (the "Prosecutor's Response");

iii) "Alphonse Nteziryayo's Reply to the Prosecutor's Response to the Motion to Rule Hearsay Evidence Inadmissible" filed on 2 May 2002 (the "Defense Reply to the Prosecutor's Response");

iv) the "Prosecutor's Response to Nteziryayo's *Réplique* on his Motion to Exclude Part of the Testimony of Witness TA as Hearsay," filed on 9 May 2002 (the "Prosecutor's Response to Nteziryayo's *Réplique*");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") specifically Rule 89(C);

NOW CONSIDERS the matter solely on the basis of the written briefs of the Parties pursuant to Rule 73(A) of the Rules;

SUBMISSIONS OF THE PARTIES:

Defense Submissions

1. The Defense requests the Chamber to declare inadmissible part of the testimony of Witness TA as it is hearsay evidence made on 29 October and 7 November 2001. [1]

2. The Defense argues that Rule 89(C) of the Rules provides for the admissibility of the aforementioned part of the said witness' testimony. The Defense relies on the ruling of the Appeals Chamber in the *Akayesu* and *Musema* Decisions to argue that discretionary powers of the Trial Chambers to admit evidence under the said Rule are not unlimited and that admissibility depends on the reliability of said evidence.[2] Thus, by applying the principles laid down under the said two Appeals Chamber Decisions, the Defense argues that the testimony of Witness TA is not reliable thereby rendering it inadmissible under Rule 89(C) of the Rules.

3. The Defense further submits that, relying on the principles laid down in the above-mentioned Appeals Chamber Decisions, any Motion calling for the determination of the reliability of evidence can be brought only after a witness has been cross-examined. The Defense therefore argues that the timing of the Motion is proper.

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[1] *See* Transcript of hearing of 29 October 2001 at pages 62 to 67 and Transcript of 7 November 2001 at pages 29 to 30 [English Version].

[2] *See* the Appeals Chamber Decision of 1 June 2001 in *Akayesu*, paras 285, 286 and 287 and the Appeals Chamber Decision of 16 November 2001 in *Musema*, para. 46.

4. Finally, the Defense prays that the Motion be heard orally rather than be decided on the basis of the written briefs so as to allow other Defense Teams to make submissions on the matter.

Prosecutor's Submissions

5. The Prosecutor argues that the Motion is not founded in law. She argues that the Motion seeks to appeal the admission of an already admitted testimony because during trial, the Defense could have made a timely objection and moved to have the said testimony stricken from the record. In any case, hearsay evidence is admissible under Rule 89 of the Rules, as indicated by the jurisprudence of the Tribunal and the Appeals Chamber[3]l. The Prosecutor alternatively argues that the Motion is a premature closing argument.

6. Additionally, the Prosecutor argues that the Motion is not founded in fact. She submits that the Defense has mis-characterised witness TA's testimony and that it confuses the evidence. In essence, the Prosecutor argues that witness TA's testimony is reliable because it is first-hand hearsay testimony. (emphasis theirs)

7. The Prosecutor finally submits that it would be premature to exclude witness TA's testimony at this time because other witnesses, not yet heard, may provide corroboration.

8. Regarding the Defense request to have the Motion heard orally, the Prosecutor submits that it is the discretion of the Chamber.

AFTER HAVING DELIBERATED

9. As a preliminary matter, regarding the Defense request to have the Motion heard in open court to allow other Defense Teams to ventilate their views on the matter, the Chamber notes that, as indicated by the "Proof of Service" dated 9 May 2002, the Motion was served on each of the Accused in the Butare Case and facsimiles were sent to their respective Defense Counsel on the same date[4]. The Chamber considers that the Defense Teams have had ample notice of the Motion and were entitled to make any comment by way of written submissions, but failed to do so. The written submissions received to date are sufficient to enable the Chamber to decide the Motion. The Chamber therefore denies the Defense request and decides the Motion on the basis of the written submissions of the Parties, pursuant to Rule 73(A) of the Rules.

10. In the instant Motion, the Defense requests the Chamber to rule inadmissible certain parts of the testimony of Witness TA pursuant to Rule 89(C) of the Rules, which provides that "[a] Chamber may admit any relevant evidence, which it deems to have probative value".

11. The Chamber now considers whether this stage of the proceedings is an opportune time to bring a Motion for admissibility of the testimony of witness TA.

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[3] *See* the Judgement and Sentence of 6 December 1999 in the *Prosecutor v. Rutaganda* at para 18 and the Appeals Chamber "Decision on Prosecutor's Appeal on Admissibility of Evidence," of 16 February 1999 in *Prosecutor v. Aleksovski* and both the *Akayesu* and *Musema* Judgements above-cited.

[4] This is an official document distributed by the Tribunal, which indicates that service was effected from the Tribunal to the Parties involved in the matter at the indicated dates.

12. The Chamber notes that the Appeals Chamber in *Akayesu* at para 287 found that, "[w]hen a witness testifies, their evidence is admitted in that, in the absence of timely objection, it becomes part of the trial record, as reflected in the transcripts [...] the main safeguard applicable [...] is through the preservation of the right to cross-examine the witness on the hearsay evidence, which has been called into question."

13. In the instant case, the Chamber recalls that examination-in-chief concerning the testimony of Witness TA was conducted on 29 October 2001. On 7 November 2001 the Defense had the opportunity to cross-examine the witness specifically on the contested meeting. The Chamber is thus far satisfied that the Defense has been provided with sufficient opportunity to test the evidence of Witness TA.

14. Furthermore, it is the Chamber's view that the Defense still has the opportunity to make final submissions in its closing arguments on any evidence brought before the Chamber in the case against the Accused. During those final submissions, the Defense may, in argument, deal with the weight, quality and substance of any admitted evidence. Consequently, the Chamber denies the Defense Motion in all respects.

15. The Chamber considers this Motion to be frivolous and notes that in future such Motions may attract the sanctions stipulated under Rule 73(E) of the Rules, i.e., the non-payment and reimbursement to the Defense of all costs and fees associated with the preparation and filing of such Motions.

FOR THE ABOVE REASONS, THE TRIBUNAL:

DENIES the Defense Motion in all respects.

Arusha, 6 June2002,

William H. Sekule
Presiding Judge

Winston C. Matanzima Maqutu
Judge

Arlette Ramaroson
Judge

(Seal of the Tribunal)