ICTR-98-42-T
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(6832 — 6829)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER II

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

Registry: Adama Dieng

Date: 1 July 2002

The PROSECUTOR

v.

ARSÈNE SHALOM NTAHOBALI, et al.

Case No. ICTR-98-42-T

DECISION ON NTAHOBALI'S MOTION TO RULE INADMISSIBLE THE EVIDENCE OF PROSECUTION WITNESS "TN"

The Office of the Prosecutor
Silvana Arbia
Jonathan Moses
Gregory Townsend
Adesola Adeboyejo
Manuel Bouwknecht

Counsel for the Defence
Duncan Mwanyumba
Normand Marquis

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

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

BEING SEIZED OF:

(i) The « Requête de Arsène Shalom Ntahobali en exclusion de preuve" conformément à l'article 19 (1) du Statut et aux articles 73 et 89 du Règlement de procédure et de preuve » filed on 20 May 2002, (the "Motion");

(ii) The « Prosecutor's Response to the Requête de Arsène Shalom Ntahobali en exclusion de preuve » filed on 4 June 2002 (the "Prosecutor's Response");

(iii) The « Réplique du requérant à la réponse du Procureur à la requête de Arsène Shalom Ntahobali en exclusion de preuve », filed on 24 June 2002

CONSIDERING the Statute of the Tribunal (the "Statute"), in particular Article 19 of the Statute and Rules 73, 85, and 89 of the Rules of Procedure and Evidence (the "Rules");

CONSIDERING that the Parties were informed that the Motion would be decided solely on the basis of their written briefs, pursuant to Rule 73 of the Rules;

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence requests the Trial Chamber to rule Witness TN's testimony inadmissible pursuant to Art. 19 (1) of the Statute and Rule 89 of the Rules insofar as the identity of her alleged aggressors, including the Accused, rests exclusively on hearsay. Considering that the source of this hearsay is unknown and unverifiable, and in the absence of corroboration, a source that cannot be verified is unreliable by definition according to the Defence.

2. The Defence further argues that, while giving testimony, Witness TN was never able to identify the Accused as being the one who attacked her, known as "Shalom", and that Witness TN's physical description of her attacker does not correspond to that of the Accused. Therefore, the Chamber should not consider the testimony to be reliable.

3. The Defence cites the Appeals Chamber Decision of 16 November 2001 in *Prosecutor v. Musema*, in which the Appeals Chamber specified that the Trial Chamber did not commit an error when it declared that each Party must demonstrate that the documents that it wishes to admit as evidence must sufficiently meet reliability standards, and the Defence argues that this same standard should be applied to testimonial evidence.

4. The Defence further contends that Witness TN's testimony lacks not only reliability but also probative value: it lacks any "intrinsic" probative value because it cannot be probative without being credible, and it lacks any "extrinsic" probative value because no other witness testifying before or after Witness TN's testimony has corroborated her testimony.

5. The Defence argues that the above reasons justify its decision to forego its right to cross-examine Witness TN.

6. Accordingly, the Defence argues that, due to the lack of credibility and probative value of Witness TN's testimony and because of the prejudice to the Accused caused by Witness TN's testimony, the testimony must be ruled inadmissible.

The Response by the Prosecution

7. The Prosecution submits that the Motion is an appeal which is not well founded in fact or in law and that the Trial Chamber should either dismiss or deny it.

8. The Prosecution argues that the Motion seeks to appeal the admission of previously admitted testimony and that the Defence made a tactical decision not to cross-examine the witness on her testimony.

9. The Prosecution, relying on the Appeal Chamber decision in *Prosecutor v. Akayesu*, contends that a previously admitted testimony cannot be excluded by way of a motion.

10. The Prosecution argues that the Motion seeks to make a premature closing argument on the weight, quality, and substance of previously admitted testimony.

11. The Prosecution further contends that Witness TN's eyewitness account of incidents involving the Accused does not constitute hearsay evidence. Alternatively, the Prosecution argues that even if the testimony of Witness TN may be considered to be both hearsay and direct eyewitness evidence, it is well-settled law pursuant to ICTR and ICTY jurisprudence that hearsay evidence is admissible under Rule 89.[1]

12. The Prosecution maintains that other witnesses who have not yet been heard, may corroborate Witness TN's testimonial evidence about alleged murders committed by the Accused in her *secteur*, and that it would be premature to exclude this evidence.

The Reply by the Defence

13. The Defence submits that whatever undermines the fairness of the trial can cause evidence to be declared inadmissible, without necessarily being the subject of an objection during the witness's testimony.

14. The Defence argues that Witness TN's testimony about the name of her attacker was hearsay since the remarks regarding identity were made by someone other than the witness. The Defence further submits that, given the witness's incapacity to link the Accused to her attacker, all of her hearsay testimony is inadmissible.

15. The Defence contends that cross-examination of Witness TN would not have lent any validity to her testimony, in light of Witness TN's failure to identify the Accused.

16. The Defence argues that it is impossible for any other witness to corroborate Witness TN's testimony insofar as the Prosecutor's pre-trial brief does not mention any other witness who intends to testify about acts allegedly committed by the Accused which were the subject of Witness TN's testimony.

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[1] See *Prosecutor v. Rutaganda*, Case No ICTR-96-3-T, Judgement and Sentence, 6 December 1999, para. 18, stating: "The Rules do not exclude hearsay evidence, and the Chamber has the discretion to consider such evidence."

HAVING DELIBERATED

17. The Chamber notes that the testimony of Witness TN was admitted as evidence pursuant to Rule 89 (C) of the Rules, which states that "[a] Chamber may admit any relevant evidence which it deems to have probative value."

18. The Chamber recalls the holding of the Appeals Chamber in *Prosecutor v. Akayesu*: "[...] when a witness testifies, their (sic) evidence is admitted in that, in the absence of timely objection, it becomes part of the trial record as reflected in the transcript."[2] Further, in *Prosecutor v. Nteziryayo et al.*, the Chamber, citing *Akayesu,* denied the challenge to the admissibility of evidence given by a witness at an earlier stage of the proceedings.[3] In the instant case, the Chamber finds that the request for suppression of the evidence given by Witness TN is not a timely objection.

19. The Chamber considers that the challenge to both the credibility of Witness TN and the probative value of Witness TN's testimony should have been raised by the Defence in cross-examination pursuant to Rule 85 (B) of the Rules. The Chamber further notes that on 4 April 2002 the Defence declined the opportunity to cross-examine Witness TN.[4]

20. The Chamber agrees with the Prosecution that, pursuant to Rule 86 (A) of the Rules, the arguments raised in the Motion may be appropriate for closing arguments, at which time the issues of the credibility of Witness TN and the weight, quality and substance of Witness TN's testimony can be raised before the Chamber following the presentation of all the evidence.

21. The Chamber finds that the Defence's argument that hearsay evidence is *per se* impermissible lacks merit. Pursuant to Rule 89 (C) of the Rules and the jurisprudence of the Tribunal, hearsay evidence is permissible at the Chamber's discretion.

22. In light of the similar finding in *Prosecutor v. Nteziryayo et al.*[5], the Chamber considers that the issues raised by the Defence lack merit and that the Motion is frivolous. Accordingly, the Chamber warns Counsel that in the future, pursuant to Rule 73 (E) of the Rules, it will order, as a sanction, the non-payment to the Defence of all costs and fees associated with the preparation and filing of such frivolous motions.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in all respects.

Arusha, 1 July 2002,

William H. Sekule
Presiding Judge

Winston C. Matanzima Maqutu
Judge

Arlette Ramaroson
Judge

[Seal of the Tribunal]

[2] *Prosecutor v. Akayesu,* Case No ICTR-98-4-A, Judgement on Appeal, 1 June 2001, para. 287.
[3] See *Prosecutor v. Nteziryayo and Nsabimana*, Case No ICTR-97-29-T, Decision on Nteziryayo's Motion to Rule Hearsay Evidence Inadmissible, 6 June 2002, para. 11.
[4] See Transcript of Hearing of 4 April 2002, page 6, lines 9-16.
[5] See *Prosecutor v. Nteziryayo and Nsabimana*, Case No ICTR-97-29-T, Decision on Nteziryayo's Motion to Rule Hearsay Evidence Inadmissible, 6 June 2002.