



UNITED NATIONS  
NATIONS UNIES

ICTR-98-42-T  
8. 7. 2002  
(7189 - 7185)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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- smb

OR: ENG

**TRIAL CHAMBER II**

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

**Registrar:** Adama Dieng

**Date:** 6 July 2002

**The PROSECUTOR**

v.

**Joseph KANYABASHI et al.**

**Case No. ICTR-96-15-T  
Case No. ICTR-98-42-T**

JUDICIAL RECEIPTS SERVICES  
ICTR  
2002 JUL - 8 AM 11:03  
V. K. /

**DECISION ON KANYABASHI'S MOTION TO EXCLUDE  
WITNESS "FAI"'S TESTIMONY AGAINST HIM  
PURSUANT TO RULES 54 AND 73 OF THE RULES**

Office of the Prosecutor  
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**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 urgente de Joseph Kanyabashi demandant que le témoignage du témoin portant le pseudonyme FAI ne soit pas versé au dossier contre lui* (Art. 54 et Art. 73 Règlement de procédure et de preuve)," filed on 12 June 2002 (the "Motion");
- (ii) The "Prosecutor's Response to Kanyabashi's Urgent Motion to Exclude FAI's Testimony Against Him," filed on 18 June 2002 (the "Prosecutor's Response");
- (iii) The "*Réplique de Joseph Kanyabashi à la réponse du Procureur suite à la 'Requête urgente de Joseph Kanyabashi demandant que le témoignage du témoin portant le pseudonym FAI ne soit pas versé au dossier contre lui,'*" filed on 24 June 2002;
- (iv) The Prosecutor's "Corrigendum to the Prosecutor's Response to Kanyabashi's Urgent Motion to Exclude FAI's Testimony" (the "Prosecutor's Corrigendum") filed on 26 June 2002;
- (v) The "Prosecutor's Reply to Kanyabashi's "Réplique" to Exclude FAI's Testimony," filed on 1 July 2002; and

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 54, 73 and 73*bis* of the Rules;

**NOW DECIDES** the Motion pursuant to Rule 73 of the Rules on the basis of the written briefs only as filed by the Parties.

**SUBMISSIONS OF THE PARTIES**

*Defence Submissions*

1. The Defence submits that Witness FAI's testimony should be excluded from the Prosecution's case against Kanyabashi (the "Accused"). The Defence notes that Witness FAI was not listed as a witness who would testify against the Accused in the Prosecution's pre-trial brief, filed on 10 April 2001. The Defence therefore argues that to allow Witness FAI to testify against the Accused would be in contravention of Rule 73*bis*(B) of the Rules and Article 20(4) of the Statute because Kanyabashi was not given sufficient notice and opportunity to prepare his defence. The Defence does not request that FAI be prevented from testifying. The Defence requests only that FAI's testimony not be considered as evidence against Kanyabashi.

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2. The Defence notes the Decision of Trial Chamber III of 23 May 2002<sup>1</sup>, which states that the purpose of Rule 73bis(B) is to implement, "the right of the Accused to be informed in detail of the nature and cause of the charges against him, which is guaranteed in Article 20(4) of the Statute."<sup>2</sup> The Defence also recalls three decisions of this Chamber, which have emphasised the same right of the Accused to be informed of the case against him in order to have adequate time to prepare his defence<sup>3</sup>. The Defence submits that this right of the Accused has been violated by the late disclosure of Witness FAI's testimony against him. The Defence argues that none of the three unredacted statements given by Witness FAI previously served on the Defence<sup>4</sup> had mentioned the Accused by name. Furthermore, the Defence contends that the case brought against the Accused by Witness FAI is based on different facts to the evidence of other witnesses listed to testify against the Accused. Therefore, the proposed testimony of the other witnesses could not give notice to the Defence of the facts alleged by Witness FAI.
3. The Defence submits that the first time Witness FAI mentions the Accused by name is in a redacted statement disclosed to the Defence on 6 June 2002 whereas it was signed by the Witness on 2 February 2001, and was only disclosed following a decision of this Chamber on 31 May 2002<sup>5</sup>. The Defence denies that it was clear to the Accused that this statement was an elaboration of a previous statement by Witness FAI. Therefore, the Defence argues that this late disclosure does not provide the Accused with an adequate opportunity to prepare his defence.
4. The Defence emphasises that the present concern is with disclosure of the witnesses who will testify and not the extent or nature of witness testimony. As a result, the opportunity to cross-examine Witness FAI will not remedy the prejudice caused to the Accused. Furthermore, the Defence contends that an adjournment at this stage will not allow sufficient time to conduct the appropriate investigations regarding Witness FAI.
5. The Defence submits that the Accused would never have been confronted with the testimony of Witness FAI but for the joinder of the defendants in this case. Therefore, the Defence submits that, if this witness is allowed to testify against the Accused, then the rights of the Accused will have been prejudiced by the joint trial.

#### *Prosecution's Response*

6. The Prosecution contends that, though the Pre-Trial Brief submitted to the Chamber and the Defence pursuant to Rule 73bis(B) does not give formal notice to the Accused that the testimony of Witness FAI is directed against him, he is given constructive notice of this fact by:

<sup>1</sup> *Prosecutor v. Bagosoro et al.*, Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-trial Brief and on the Prosecutor's Counter-Motion, 23 May 2002

<sup>2</sup> *ibid.* para. 12

<sup>3</sup> *Prosecutor v. Joseph Kanyabashi*, Décision quant à la requête du Procureur concernant la protection des victimes et des témoins, 6 March 1997; *Prosecutor v. Nyiramasuhuko et al.*, Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses, 8 June 2001; and *Prosecutor v. Nyiramasuhuko et al.*, Decision on the Prosecutor's Motion to Stay Disclosure Until Protection Measures are Put in Place, 27 March 2002

<sup>4</sup> Statements dated 24 February 2000, 22 October 2000 and 12 October 2001

<sup>5</sup> *Prosecutor v. Nyiramasuhuko et al.*, Decision on the Prosecutor's *Ex-parte* Motion Pursuant to Rule 66(C) to be Relieved of Obligation to Disclose Certain Documents, 31 May 2002

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- a. The Prosecution's disclosure, in the Pre-trial Brief, of the content of Witness FAI's proposed testimony, in which meetings between Sylvain Nsabimana and all bourgmestres are described;
  - b. The fact that the Accused was a bourgmestre during the period in which these meetings are alleged to have taken place, and
  - c. Paragraph 6.43 of the Indictment, which alleges that the Accused took part in the same meetings that FAI will testify to.
7. The Prosecution contends that the 28 January 2001 statement<sup>6</sup> objected to by the Defence is an elaboration of a previous statement made by the witness on 22 October 2000<sup>7</sup>, to which no Defence objection was made, thus estopping the present Defence objection.
  8. The Prosecution asserts that Witness FAI's testimony is not prejudicial to the Accused given that several other witnesses have testified and will testify to the Accused's presence at the alleged meetings.
  9. The Prosecution explains that the requirements under Rule 73bis of the Rules for provision of a pre-trial brief by the Prosecutor, the Decision of 23 May 2002 by Trial Chamber III<sup>8</sup>, and this Chamber's statements during the session of 21 March 2002<sup>9</sup> support the Defence claim that the Prosecution is required to provide reasonable notice to the Accused of the evidence against him. The Prosecution claims, however, that this requirement has been fully satisfied in the present case.
  10. The Prosecution further submits that, given the facts that the Chamber has adjourned proceedings in this case until 14 October 2002 and that Witness FAI is not scheduled to testify until 14 November 2002, the Accused now has more than five *additional* months to prepare for the evidence and cross-examination of the Witness. The Prosecution argues that this added time ameliorates any risk of prejudice to the Defence by the late disclosure of FAI's 28 January 2001 statement.
  11. The Prosecution further asserts that the facts to which Witness FAI is to testify are essential to the Prosecution's case against the Accused and that neither the facts themselves nor Witness FAI's testimony as to these facts are a surprise to the Defence.

## DELIBERATIONS

<sup>6</sup> Date as amended by the Prosecutor's Corrigendum.

<sup>7</sup> In the Prosecutor's Response this statement is referred to as both the 22 October 2000 statement and the 21 October 2002 statement. The amendments of both these dates to 22 October 2000 are made by the Prosecutor's Corrigendum.

<sup>8</sup> *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva, Gratién Kabiligi, and Aloys Ntabakuze*, Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-trial Brief and on the Prosecutor's Counter-Motion, 23 May 2002

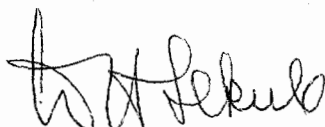
<sup>9</sup> See transcript of the hearing in this case dated 21 March 2002 at pages 32-33.

12. The Defence submissions that the Accused would never have been confronted with the testimony of Witness FAI but for the joinder of the defendants in this case is, in the opinion of the Chamber, unfounded. The Chamber notes that the testimony in contention was discovered during the course of the Prosecutor's ongoing investigations into other matters not connected with this case, and would have been equally relevant to the case against the Accused had he been tried separately. Therefore the Chamber considers that no prejudice has been caused to the Accused in this regard.
13. Furthermore, the Chamber finds that there is no legal basis to bar FAI from giving this evidence in Court in the case of the Accused, this being additional information discovered during the course of further investigations and duly recorded in a written statement.
14. Although the Chamber finds that the Prosecutor has made late disclosure to the Defence of Witness FAI's 28 January 2001 statement, the Chamber is of the view that since the Trial has been adjourned until 14 October 2002, and since Witness FAI is not now scheduled to testify until that session, the Defence will have at least three months to prepare its cross-examination. The Chamber is of the opinion that such a time period is adequate notice and opportunity for the Accused to prepare his defence pursuant to Article 20 of the Statute, and consequently, the Defence suffers no prejudice by this late disclosure.

**FOR THE ABOVE REASONS, THE TRIBUNAL**

**DENIES** the Defence Motion.

Arusha, 6 July 2002



William H. Sekule  
Presiding Judge



Winston C. Matanzima Maqutu  
Judge



Arlette Ramaroson  
Judge

