ICTR-99-54A-T
20. 8. 2002
(1011 — 1006)

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ordre.

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: 20 August 2002

The PROSECUTOR
v.
Jean de Dieu KAMUHANDA

Case No. ICTR-99-54A-T

DECISION ON KAMUHANDA'S MOTION FOR PARTIAL ACQUITTAL PURSUANT TO RULE 98 *bis* OF THE RULES OF PROCEDURE AND EVIDENCE

Office of the Prosecutor
Douglas M. Moore
Ibukunolu Alao Babajide
Dorothée Marotine

Counsel for the Defence
Aïcha Condé
Patricia Mongo

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Rwanda 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 "*Requête aux fins d'acquittement partiel – article 98 bis du règlement de procédure et de preuve*", filed on 2 July 2002 (the "Motion");

(ii) the "Prosecutor's Response to the Defence Motion for Partial Acquittal – Rule 98 *bis* of the Rules of Procedure and Evidence", filed on 18 July 2002 (the "Prosecutor's Response");

CONSIDERING the Indictment against Jean de Dieu Kamuhanda signed by the Prosecutor on 27 September 1999, (the "Indictment");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 98*bis* of the Rules;

NOW DECIDES the Motion after having heard the Parties on 19 August 2002.

SUBMISSIONS OF THE PARTIES

Defence Submissions

1. The Defence requests the partial acquittal of Jean de Dieu Kamuhanda (the "Accused") pursuant to Rule 98 *bis* of the Rules. The Defence submits that the Prosecution has failed to present evidence on the basis of which a reasonable Trial Chamber could pass judgment in respect of Count 1 (conspiracy to commit genocide) and Count 6 (crime against humanity - rape).

Count 1: Conspiracy to Commit Genocide

2. The Defence submits that "conspiracy to commit genocide" presupposes some consultation, collaboration or planning before the genocide is committed. The Defence recalls that the Prosecution is bound by its indictment, and argues that the Prosecution identifies those with whom the Accused is alleged to have conspired, and describes the conspiracy as taking place at a national level. The Defence notes that the Prosecution case regarding this charge was built on the testimony of five witnesses: GEL, GEQ, GAB, GET and GKI. The Defence submits that although the issues of the reliability and credibility of these witnesses should be considered at the end of the trial, it is clear that their testimony cannot sustain a conviction on this count by a reasonable chamber.

3. The Defence argues that the Prosecution was unable:

a) To prove any act or agreement that might be construed as a conspiracy between the Accused and any of the people listed in the Indictment;

b) To bring any witness to testify that the Accused had been in the company of any of the people listed in the indictment;

c) To bring any witness to suggest a time or place that the Accused might have conspired with any of those listed in the indictment.

4. Further, the Defence submits that the Prosecution's evidence relates to an alleged conspiracy at a local level, the Gikomero commune, rather than the national level described in the Indictment. The Defence notes that none of the witnesses brought by the Prosecution was present at any of the alleged meetings, nor was able to state who was supposed to have participated in them.

Count 6: Crimes Against Humanity (Rape)

6. The Defence notes the events alleged in paragraphs 6.45-46 of the Indictment that form the basis of this count. These paragraphs allege that the Accused "personally led attacks of soldiers and *Interahamwe* against Tutsi refugees. During the attack on the school in Gikomero, the militia also selected women from among the refugees, carried them away and raped them before killing them." The Defence notes that the Prosecution adduced evidence from, Witness GAG and Witness GEP, to substantiate this count. However, the Defence argues that no reasonable chamber could find the Accused guilty of this count on the basis of their testimony.

7. The Defence submits that neither witness was a victim of the rapes and that neither actually witnessed the rapes and therefore their accounts are based on hearsay. The Defence notes that hearsay evidence is not inadmissible *per se* in proceedings before the Tribunal, but should be assessed on a case-by-case basis according to its relevance and probative value. The Defence notes that it has been held that hearsay evidence is likely to be valid if it is corroborated by eyewitness accounts. Applying these principles to the testimony of Witness GEP and Witness GAG, the Defence argues that no reasonable tribunal could convict the Accused of this count. In order to sustain this argument the Defence submits that:

a) Witness GEP was unable to identify the person who allegedly informed him of the rapes;
b) The two witnesses differed completely on the circumstances in which the victims were taken away before being raped;
c) Neither witness knew the identity of the alleged victims;
d) Neither witness was able to state where the rapes took place.

Prosecution's Response

9. As a preliminary matter, the Prosecution reminds the Chamber that technically it had not concluded its case because Witness GEK, who had been recalled on behalf of the Defence, has not yet been heard.

10. The Prosecution supporting the jurisprudence upon which the Defence relies, argues that the legal test in Rule 98*bis* of the Rules is that the Defence must demonstrate to the Chamber that the evidence adduced, if believed, is insufficient for a conviction. In the instant case, the Prosecution argues that the Defence has not shown this. On the other hand, it argues that the evidence she has adduced conclusively establishes a *prima facie* case against the Accused in respect of the two counts.

11. Regarding the Count of Conspiracy, the Prosecutor essentially submits that the Motion is based on a false premise and therefore it fails to understand the nature of the Prosecution case. Firstly, the Prosecution argues that since the Count of Conspiracy as stated in the Indictment does not mention any names, then the evidence adduced by the Prosecution has been with regard to the Accused's agreement "with others" to commit the offence upon

which the said count is based. The Prosecution argues that, according to the Opening of 3 September 2001, the case against the Accused concerns the events in Gishaka and Gikomero between 8 to 12 April 1994, thus the conspiracy which mentions "with others" may be between the Accused and the militia or soldiers unknown to the Prosecution.

12. The Prosecution argues that conspiracy is essentially an agreement to commit an act between two people and that the agreement can be inferred from the acts of the Accused in Gikomero and in Gishaka. The Prosecution thus relies on the overt acts of the Accused to demonstrate that a conspiracy was in place.

13. The Prosecution notes that the Defence admits that there was a conspiracy at a local level and she argues that such an admission destroys the Motion because the conspiracy at the local level is the very essence of the Count of Conspiracy.

14. Regarding the Count of Rape, the Prosecution essentially submits that although the evidence before the court in support of the Count of Rape is hearsay, it is evidence that the Chamber admitted pursuant to Rule 89(C) of the Rules. The Prosecution further argues that said evidence, in the form of witness testimony states that the raped women were removed from the massacre site only after attendance of the Accused and his co-conspirators.

15. The Prosecution thus prays that the Motion be dismissed.

HAVING DELIBERATED

16. As a preliminary matter, the Chamber notes that although Witness GEK has yet to be heard as she is being recalled on behalf of the Defence, the Prosecution did close its case formally.

17. The Chamber notes that the Motion is brought pursuant to Rule 98*bis* of the Rules, which provides: "If, after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts."

18. Trial Chamber III has interpreted Rule 98*bis* of the Rules in its Decision of 27 September 2001 in the case of *Prosecutor v. Semanza*.[1] The said Trial Chamber subscribed to the Appeals Chamber Judgement in the International Criminal Tribunal for the Former Yugoslavia's (the "ICTY") *Prosecutor v. Jelisic*, which considered that, "[t]he reference in Rule 98*bis* to a situation in which 'the evidence is insufficient to sustain a conviction' means a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt."

19. Regarding the determination of credibility and reliability, the Chamber recalls the ICTY case of *Prosecutor v. Kordic and Cerkez,* in its "Decision on Defence Motions for Judgment of Acquittal," of 6 April 2000, at para. 28 that, "[g]enerally, the Chamber would

[1] *See* "Decision on the Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza after Quashing the Counts Contained in the Third Amended Indictment (Article 98*bis*) of the Rules of Procedure and Evidence) and the Decision on the Prosecutor's Urgent Motion for Suspension of Time-Limit for Response to the Defence Motion for a judgement of Acquittal," at para.14.

not consider questions of credibility and reliability in dealing with a motion under Rule 98*bis*, leaving those matters to the end of the case. However, there is one situation in which the Chamber is obliged to consider such matters; it is where the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case."

20. In the instant case, the Defence seeks a Judgement of Acquittal in respect of Count I on Conspiracy to Commit Genocide and Count 6 on the Crime Against Humanity (Rape). The Chamber shall consider the merits of the Defence Motion with respect to the two Counts.

Count 1: Conspiracy to Commit Genocide

21. The Chamber recalls Count 1, like all Counts begins with citation of the paragraphs, which are part of the Count, and which specifically mention names of the persons the Accused is alleged to have conspired with, for example, paragraphs 5.1, 6.14, 6.18, 6.22, 6.31, 6.32, 6.37, 6.48, 6.56, 6.87, 6.89 and 6.90 in the Indictment.

22. The naming of some of the alleged conspirators is in line with the jurisprudence of the Tribunal with regard to the Count of Conspiracy.[2]

23. In this regard, therefore, the Chamber finds that the Count of Conspiracy should be read as a whole including the paragraphs in the Indictment cited in support of the Conspiracy charge. Having considered the evidence provided by the Prosecution for Count 1, taken together with the referred paragraphs which name some of the alleged conspirators, the Chamber is not satisfied that the evidence is sufficient to sustain a conviction on the charge of Conspiracy to Commit Genocide. The Chamber thus grants the Motion for Judgement of Acquittal with respect to Count 1: Conspiracy to Commit Genocide.

Count 6: Crimes Against Humanity (Rape)

24. The Chamber notes that both the Defence and the Prosecution agree that the evidence adduced in support of this count is hearsay and that hearsay evidence is admissible under the Rules. Nevertheless, the Defence argues that no reasonable Chamber could find the Accused guilty of this count on the basis of the testimony of the witnesses heard. However, the Prosecution points out that the said evidence was admitted pursuant to Rule 89(C) of the Rules.

25. The Chamber notes that the said evidence of rape was admitted pursuant to Rule 89(C) of the Rules and as has been enunciated at para. 20 in this Decision, the Chamber will not determine the reliability and credibility of the evidence of these witnesses at this stage of the proceedings. The Chamber is of the view, therefore that the Prosecution has adduced sufficient evidence to sustain Count 6: Crimes Against Humanity (Rape). The Chamber therefore denies the Defence Motion to enter a Judgement of Acquittal with respect to Count 6: Crimes Against Humanity (Rape).

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[2] *See* "Decision on the Preliminary Motion Filed by the Defence based on Defects in the Form of the Indictment," of 24 November 1997 in the case of *Prosecutor v. Nahimana*; "Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/ Lack of Adequate Notice of Charges,)" of 4 April 1997 in the case of *Prosecutor v. Blaskic*

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Motion and enters a Judgement of Acquittal with respect to Count 1: Conspiracy to Commit Genocide.

DENIES the Motion to enter a Judgement of Acquittal with respect to Count 6: Crimes Against Humanity (Rape).

Arusha, 20 August 2002

William H. Sekule
Presiding Judge

Winston C. Matanzima Maqutu
Judge

Arlette Ramaroson
Judge

Seal of the Tribunal