



ICTR-99-50-T
30-01-2004
(12040 — 12037)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

12040
amms

Or: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Zoysa Gunawardana, Presiding
Judge Khalida Rachid Khan
Judge Lee Gacuiga Muthoga

Registrar: Adama Dieng

Date: 30 January 2004

The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jerôme BICAMUMPAKA
Prosper MUGIRANEZA
Case No. ICTR-99-50-T

2004 JAN 30 A 11:06
ICTR

**DECISION ON MOTION TO EXCLUDE PORTIONS OF THE EVIDENCE OF
WITNESS PROSPER HIGIRO**

Office of the Prosecutor:

Paul Ng'arua
Ibukunolu Babajide
Elvis Bazawule
George Mugwanya

Counsel for the Defence:

Michelyne C. St. Laurent and Alexandra Marcil for Casimir Bizimungu
Howard Morrison and Ben Gumpert for Justin Mugenzi
Pierre Gaudreau and Michel Croteau for Jérôme Bicamumpaka
Tom Moran and Christian Gauthier for Prosper Mugiraneza

9

12039

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the “Chamber”);

BEING SEIZED of the “Motion to Exclude Portions of the Evidence of the Witness Prosper Higiro” filed on 22 January 2004, (the “Motion”);

NOTING the “Prosecutor’s Response to Motion from Justin Mugenzi to Exclude Some Portions of the Evidence of the Witness Prosper Higiro” filed on 26 January 2004, (the “Response”);

NOTING the “Second Motion to Exclude Portions of the Evidence of the Witness Prosper Higiro” filed on 27 January 2004, (the “Second Motion”);

TAKING INTO CONSIDERATION the submissions made by both parties when this matter was taken up in open court on 27 January 2004;

RECALLING the Chamber’s ruling thereupon, denying the Motion;

NOW DELIVERS the reasons for its ruling:

1. This Decision deals with two Motions submitted by the Defence of Justin Mugenzi. The first Motion requested certain portions of the evidence of Prosecution Witness Prosper Higiro to be excluded from the Chamber’s consideration. The second Motion repeated the same request, additionally dealing with the Prosecution Response, which included a second will-say statement. It also adds further sections of his testimony which the Defence wish to have excluded from the Chamber’s consideration.
2. The Chamber is in possession of the full arguments of the Parties, having received both written submissions, and also having afforded the Parties the opportunity to argue their positions in court on 27 January 2004. This Motion was ruled upon by the Chamber after having heard those arguments, and after deliberation, the Chamber now delivers its reasoning.
3. The fundamental issue taken up in the Defence Motion is that they had not been given enough time to adequately prepare for cross-examination on all issues on which this Witness testified, because certain areas of this witness’s testimony in court (enumerated in the Motion and the Second Motion) were not alluded to in either the prior statement of this witness, nor in the will-say statements released by the Prosecution to the Defence.
4. The Defence does not suggest that it must be forewarned of every single point upon which the Witness will testify, however it does feel that upon certain important issues, adequate advance notice of the expected areas on which the witness will testify

12038

must be given. Basically, in the submission of the Defence, this was not done. Either there was insufficient detail in the statements and the will-say documents given, or (specifically in the case of the will-say documents) it was not released to the Defence within a time it considers to be sufficient.

5. According to the Defence, the same situation occurred with the testimony of Witness FW, and in order to correct any possible prejudice the Chamber ruled to exclude certain portions of that testimony. In the instant case, the Defence however admits that:

It is fair to observe that a great deal of entirely new material was adduced by the Prosecution through this witness which was not prejudicial to the Defence. Much of it was, in its general nature, exculpatory. The example given above of evidence about David Gatera is one such piece of material. The Defence have not sought to summarise that material here, nor do they take objection to its adduction, but the principle, that of a massive failure to comply with the rules of disclosure by the Prosecution, remains the same.¹

6. The Chamber in its directions to the Parties, and its oral ruling of 3 December 2003 made plain the Rules that it requires the Parties, and specifically the Prosecution, to follow in respect of disclosures.

7. Having considered the matter, the Chamber is of the view that the infringement complained of is rather more of a technical than a substantive nature, and that this technical infringement does not merit the exclusion of the evidence complained of. The new material deals with areas reasonably within the knowledge of the Accused (whether or not he agrees with the content) and which are reasonably incidental to matters on which the Defence had timely notice. Many of these "new" matters which the Defence complain of may relate to the credibility of the Witness. Contradictions or omissions between in court testimony and prior statements would often fall into this category. The Chamber observes that Defence Counsel, after having consulted with the Accused, can adequately deal with such matters in cross-examination and that the Court provided the Defence with additional time to consult the Accused.

8. Part of the "new" material from the testimony of the Witness which the Defence requests should be disregarded by the Chamber relates to an instruction given by the Accused that he ordered a *gendarme* to "shoot this little guy [the Witness]"² The Chamber notes that, in his statement dated 23 November 1995, the Witness refers to this event in the following terms: "He [Mugenzi] even sacked me when I was his '*Directeur de Cabinet*'. This happened on 15 November 1993 and he [Mugenzi] aimed his rifle at my head."³ The Chamber does not consider that the discrepancies between the two versions of the same event constitute new material, and that it goes to the question of credibility.

¹ Second Motion, para. 25

² Second Motion, para. 15

³ Statement of Prosper Higiro, 23 November 1995, p.2

12037

9. In any event, the Chamber is of the view that it may be appropriate for the Defence to refer to this matter during the closing arguments. At that stage, the Chamber will be able to evaluate evidence appropriately.

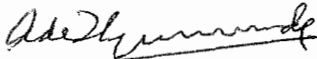
10. The Defence have suffered no real prejudice in this matter. The Chamber considers that apart from technical non-compliance with the Rules, the principal consideration for excluding or disregarding the testimony is the extent to which such testimony has prejudiced the Defence. Therefore, a party must show that such evidence, if received or considered, would cause material prejudice to that party. In this regard the Defence has failed to do so.

11. The Chamber reiterates that the Prosecution must continue to abide by the Rules of disclosure, specifically Rule 67 (D), and also the directions of this Chamber enunciated in its oral ruling of 3 December 2003.

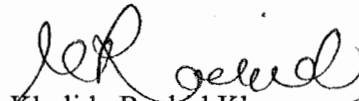
FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

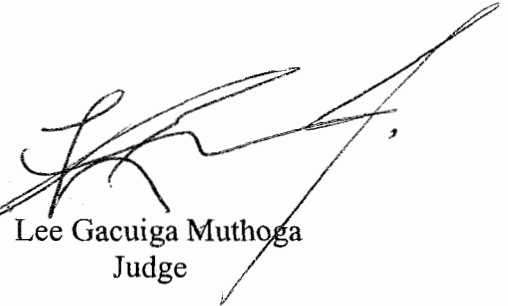
Arusha, 30 January 2004



Asoka de Zoysa Gunawardana
Presiding Judge



Khalida Rachid Khan
Judge



Lee Gacuiga Muthoga
Judge

