



ICTR-99-50-T
23-02-2004
(12337 - 12326)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

12337

amulya

Or: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 20 February 2004

INDICATED BY THE SECRETARY
19/02/04
2004 FEB 23 AM 05:53
[Signature]

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

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR DISCLOSURE OF
CLOSED SESSION TESTIMONY AND EXHIBITS RECEIVED UNDER SEAL
FOR WITNESS GAP**

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 Bicomumpaka
Tom Moran and Christian Gauthier for Prosper Mugiraneza

Counsel for Joseph Nzirorera

Peter Robinson

[Handwritten mark]

12336

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 “Trial Chamber”);

BEING SEIZED of “Joseph Nzirorera’s Motion for Disclosure of Closed Session Testimony and Exhibits Received under Seal for Witness GAP” filed on 26 January 2004, (the “said Motion”);

NOTING the “Prosecutor’s Response to Joseph Nzirorera’s Motion for Disclosure of Closed Session Testimony and Exhibits Received under Seal for Witness GAP” filed on 3 February 2004, (the “Response”);

NOTING the “Prosper Mugiraneza’s Response to Joseph Nzirorera’s Motion for Disclosure of Closed Session Testimony and Exhibits Received under Seal for Witness GAP” filed on 5 February 2004, (the “Prosper Mugiraneza’s Submission”);

TAKING INTO CONSIDERATION the “Decision on Prosecutor’s Motion for Protective Measures for Witnesses” issued on 12 July 2000, (the “Protective Measures Decision”);

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence for Joseph Nzirorera, an Accused in the case of *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, moves this Trial Chamber for an order “authorizing disclosure to him and his counsel the closed session transcripts and exhibits received under seal pertaining to Witness GAP”.
2. The Defence mentions that the said witness has already testified in the case of *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, between 19 and 23 January 2004 and is scheduled to testify in the case of *The Prosecutor v. Karemera et al.* in the next Trial session. According to the Defence, disclosure of the closed session testimony and exhibits received under seal is “necessary for the preparation of cross-examination of Witness GAP”.
3. The Defence agrees to be bound by the same protective measures that Trial Chamber II has already ordered with respect to the said witness.

Prosecution Submissions

4. In his response dated 3 February 2004, the Prosecutor submits that “he would, in principle, have no objection to the disclosure of certain closed session testimony and

69

12335

exhibits [...] relating to Witness GAP, so long as the protective measures afforded by Trial Chamber II obtain”.

5. However, the Prosecutor submits that, as the Trial Chamber’s Decision of 23 January 2004¹ excluded all of Witness GAP’s testimony from the trial record, “it would not serve any meaningful purpose to disclose the expunged testimony of Witness GAP”. Therefore, the Prosecutor argues that the Motion is now rendered moot.

Prosper Mugiraneza’s Submissions

6. The Defence for Prosper Mugiraneza responded that it has no objection to the disclosure of the closed session testimony and exhibits received under seal. However, according to the Defence, “regardless of whether some or all of Witness GAP’s testimony was ‘expunged’ by the Trial Chamber and regardless of whether the Trial Chamber will consider that testimony for any purpose, the fact remains that transcripts of the testimony exist and most important, are in possession of the Prosecutor”.

7. The Defence for Prosper Mugiraneza submits that, according to Rule 66(A), the Prosecutor has an obligation to disclose all prior statements of a witness to the Defence.

8. The Defence for Prosper Mugiraneza has no objection to the request that closed session testimony of Witness GAP be made available to the Defence in another Trial Chamber as a prior statement of Prosecution Witness GAP.

DELIBERATIONS

9. The Prosecutor submits that, since the Decision of 23 January 2004 “in essence excluded all of Witness GAP’s testimony, it would not serve any meaningful purpose to disclose the transcript of the expunged testimony of Witness GAP”.

10. The Trial Chamber notes that the Prosecutor has an obligation, pursuant to Rule 66(A), to disclose all prior statements of a witness he intends to call. The word “statement” includes also testimony before this Tribunal.² It is observed that when a protected witness has given evidence in closed session, the party seeking to obtain a copy of such proceedings should move the Trial Chamber, which granted the protective measures, to vary its order and disclose the closed session testimony.

11. As stated above, the content of a prior deposition is relevant for the Defence to conduct the cross-examination. In this particular case, the fact that the Trial Chamber decided to disregard the testimony of Witness GAP regarding events involving Casimir

¹ *The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-T*, “Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 23 January 2004, (the “Decision of 23 January 2004”).

² *The Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-A, ICTY*, “Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings”, 26 September 2000, para. 15.

ce

12334

Bizimungu in Ruhengeri *préfecture* will not prejudice the Defence for Joseph Nzirorera, who is an accused in a different case. The Trial Chamber is of the view that Joseph Nzirorera's right to cross-examine the said witness based on his previous testimony will not be affected by a decision which was motivated by an imprecision in the Indictment in the case of *The Prosecutor v. Casimir Bizimungu et al.*.

12. The Trial Chamber is of the view that the Prosecutor's contention, namely that the testimony of GAP has been expunged from the record and therefore would be meaningless for the Defence of Joseph Nzirorera, is not tenable in law, as the evidential value of such testimony is not affected by the exclusion in the case of *The Prosecutor v. Casimir Bizimungu et al.* for the reasons stated in paragraph 11 above.

13. In accordance with past practice, the Trial Chamber finds that it has the authority to revise decisions applicable to proceedings before it, including the conditions under which closed testimony and exhibits filed under seal are kept with the Registry. The Trial Chamber is of the opinion that, a valid reason for modifying an order governing the testimony of a protected witness is that the said witness is to testify in another case before this Tribunal. A transcript of the witness prior testimony is undoubtedly useful to the assessment of the consistency and credibility of the witness testimony.

14. The Trial Chamber follows past decisions in finding that its Protective Measures Decision should be modified, only to the extent of permitting the moving party access to the protected material, on condition that its terms shall apply *mutatis mutandis* to that party, viz the Defence for Joseph Nzirorera in this particular case.

15. The Trial Chamber is of the view that the closed session testimony and the exhibits filed under seal therewith shall be disclosed to the Defence for Joseph Nzirorera. However, the timing of disclosure of the material is a matter for the Trial Chamber seized of the case of *The Prosecutor v. Karemera et al.* which is in a better position to administer such decisions and ensure consistency of protective orders. Therefore, the Trial Chamber is of the opinion that the material shall be made available to the Trial Chamber seized of the case of *The Prosecutor v. Karemera et al.* which will then take the appropriate measures to disclose the material to the Defence for Joseph Nzirorera according to the Protective Measures Decision applicable to witnesses in this case.

FOR THE ABOVE REASONS, THE TRIBUNAL

DECIDES that the transcripts of the closed session trial testimony of Witness GAP in the case of *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, and exhibits filed under seal therewith shall be made available by the Registry to the Trial Chamber seized of the case of *The Prosecutor v. Karemera et al.*, which shall then be in a position to make any order which it sees fit in regard to the timing of its disclosure;

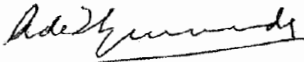
ORDERS that the Defence for Joseph Nzirorera in the case of *The Prosecutor v. Karemera et al.*, on receipt of the said closed session testimony of Witness GAP and

12333

exhibits filed under seal therewith shall be bound *mutatis mutandis* by the Protective Measures Decision of 12 July 2000 (attached as Appendix A);

DIRECTS the Registry to carry out the terms of this decision, and to continue to enforce the terms of the Protective Measures Decision of 12 July 2000.

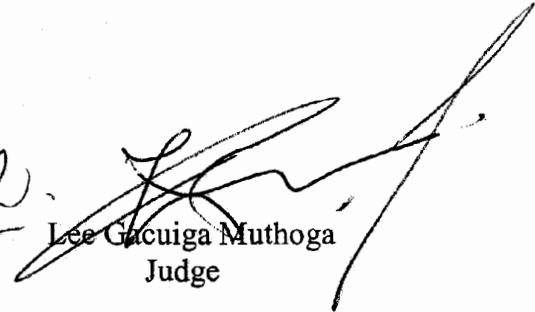
Arusha, 20 February 2004



Asoka de Zoysa Gunawardana
Presiding Judge



Khalida Rachid Khan
Judge



Lee Gacuiga Muthoga
Judge

