



UNITED NATIONS
NATIONS UNIES

ICTR-96-8-T
06-05-2004
(477-474)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 6 May 2004

The PROSECUTOR

v.

Élie NDAYAMBAJE

Case No. ICTR-96-8-T

JUDICIAL RECORDS
2004 MAY -6 P 5:22

DECISION ON DEFENCE MOTION
REQUESTING THE RECALL OF WITNESS "QAQ"
BASED ON THE DECISION OF THE APPEALS CHAMBER
IN THE MATTER OF PROCEEDINGS UNDER RULE 15BIS (D)

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the “Chamber”);

BEING SEISED of the “Defence Motion Requesting the Recall of Witness ‘QAQ’ Based on the Decision of the Appeals Chamber in the Matter of Proceedings Under Rule 15*bis*(D)” (the “Motion”), filed on 6 January 2004;¹

CONSIDERING the “Prosecutor’s Response to Ndayambaje’s Motion Requesting for the Recall of Witness ‘QAQ’ Based on the Decision of the Appeals Chamber in the Matter of Proceedings Under Rule 15 *bis* (D)” (the “Response”), filed on 8 January 2004;

NOTING the “Decision in the Matter of Proceedings Under Rule 15 *bis* (D)” issued by Trial Chamber II on 15 July 2003 and the “Decision in the Matter of Proceedings Under Rule 15 *bis* (D)” (the “Appeals Chamber Decision”) issued by a full bench of the Appeals Chamber on 24 September 2003;

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the matter, pursuant to Rule 73 (B), on the basis of the written submissions of the Parties.

SUBMISSIONS OF THE PARTIES

Defence Motion

1. The Defence submits that, pursuant to the Appeals Chamber Decision, the Trial Chamber may recall any witness whose testimony will assist the substitute judge in assessing a witness’ credibility at trial. The Defence contends that Judge Bossa could not assess the credibility of Witness QAQ, who she did not observe in court, and of whose testimony there is no video recording. Thus, the Defence requests that the Chamber recall Witness QAQ to enable Judge Bossa to make an informed decision on his credibility, and issue such orders as it may deem necessary to allow the Accused to cross examine Witness QAQ.
2. To support its reasoning, the Defence cites the Appeal Chamber Decision, in particular paragraphs 35, 37 and 38, which grants the Trial Chamber discretion to recall witness not heard by the substitute judge to assess matters of credibility based on the witness’ demeanour.
3. The Defence submits that Witness QAQ, a friend of the Accused, testified on events at Kabuye Hill and the vicinity of Kabuye, and on an anti-Tutsi speech made by the Accused at a meeting held in June 1994. The Defence contends, with supporting

¹ The Motion was filed in French and originally entitled: *Requête afin d’inviter la Chambre II à rappeler le témoin QAQ en vertu de la décision de la Chambre d’Appel intitulée : “Decision in the Matter of Proceedings Under Rule 15Bis(D)”*.

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abstracts from the transcripts of the Witness' testimony, that the Witness' testimony on the Accused's alleged anti-Tutsi speech raises issues of credibility such as:

- the Witness was located 100 metres away hiding in an anti-erosion ditch in a sorghum field, with stalks two metres high, surrounded by 'sitarya' weeds when he heard the Accused speak, allegedly over a microphone which altered the speakers' voices;
 - at the time of the meeting, Witness QAQ, having fled his home, feared being killed, was in hiding from the public, had walked all night to the venue of the meeting, and was not in the best state of mind to grasp the actual words uttered;
 - the Witness did not go to the meeting to sit down and listen to the speeches;
 - the Witness, from his hideout, did not see, or try to see, the speakers at the meeting;
 - the Witness remembered only the few pertinent words implicating the Accused from the meeting;
 - the Witness' claim that the Accused Nteziryayo and Ndayambaje were recognized only because their names were listed, and not because he recognized them from their voices;
 - the Witness' confirmed that he did not hear all that was said;
 - the Witness did not follow the speech to the end;
 - the official court reporter used the exclamation mark in the transcript of Witness QAQ's testimony;
 - Witness QAQ's opinion of Accused Ndayambaje was transformed, on the basis of hearing the words "dirt" in Ndayambaje's speech, and the Witness subsequently accepted rumours on Ndayambaje.
4. The Defence contends that Witness QAQ's conduct must be carefully considered. According to the Defence, a careful reading of the transcripts suggests that the Witness' demeanour was important beyond his utterances, as indicated by the use of the exclamation mark in the official transcript.

Prosecutor's Response

5. The Prosecutor adopts all the submissions made in his "Response to Ndayambaje's Motion Requesting for the Recall of Witness QAR" and prays the Trial Chamber to dismiss the Motion.

DELIBERATION

6. The Trial Chamber recalls the Appeals Chamber Decision:²

"if the Judge assigned by the President certifies 'that he or she has familiarized himself or herself with the record of the proceedings' (which, as mentioned above, does not in this case include video-recordings) and thereafter accordingly joins the bench of the Trial Chamber, the recomposed Trial Chamber may, on a motion by a Party or *proprio motu*, recall a witness on a particular issue which in the view of the Trial Chamber involves a matter of credibility which the substitute judge may need to assess in the light of the witness's demeanour."

² Para. 35 of the Appeals Chamber Decision.

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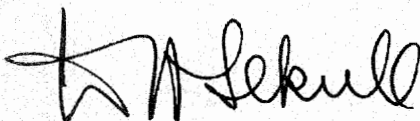
7. Accordingly, for a witness to be recalled, the moving Party shall identify a particular issue which involves a matter of credibility which the substitute judge may need to assess in the light of the witness' demeanour. The witness may then be recalled to be heard again on this specific issue.
8. Other issues of credibility, related to the substance of the evidence, do not justify the recall of witnesses. Such issues would have already been addressed by the Defence during the cross-examination of the witness and can be raised again at the end of the proceedings, in particular in the closing briefs.
9. The issues of credibility raised in the current Motion are related to the substance of the evidence, which may be relevant in the closing arguments. The Defence does not raise any specific issue which in the view of the Trial Chamber involves a matter of credibility which the substitute judge may need to assess in the light of the witness' demeanour.

FOR THE ABOVE REASONS,

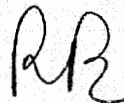
THE TRIAL CHAMBER

DENIES the Motion in its entirety;

Arusha, 6 May 2004



William H. Sekule
Presiding Judge



Arlette Ramarason
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

