



UNITED NATIONS
NATIONS UNIES

ICTR-96-8-T
06-05-2004
(469 - 466)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

469 smbz

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroso
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 SECTION
2004 MAY -6 P 5:22

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

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Defence Counsel

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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 ‘TO’ Based on the Decision of the Appeals Chamber in the Matter of Proceedings Under Rule 15 *bis* (D)” (the “Motion”), filed on 19 December 2003;¹

CONSIDERING the “Prosecutor’s Response to Ndayambaje’s Motion Requesting for the Recall of Witness ‘TO’ Based on the Decision of the Appeals Chamber in the Matter of Proceedings Under Rule 15 *bis* (D)” (the “Response”), filed on 24 December 2003;

CONSIDERING the “Defence Reply to Prosecutor’s Response to Ndayambaje’s Motion Requesting for the Recall of Witness ‘TO’ Based on the Decision of the Appeals Chamber in the Matter of Proceedings Under Rule 15 *bis* (D)” (the “Reply to the Response”), filed on 07 January 2004;²

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.

Defence Motion

1. The Defence recalls that Witness TO testified on 4, 5 and 6 March 2002 before the Chamber composed of Judges Sekule, Ramaroson and Maqutu. As far as the Defence knows, there was no video record of her testimony that could permit Judge Bossa to examine his demeanour before the court.
2. The Defence submits that the credibility of Witness TO depends, to a large extent, on the witness’ demeanour when he testified before the Trial Chamber on 5 March 2002 on the issue of alcoholic drinks served at the party organized for Accused Nteziryayo’s parents. According to the Defence, Witness TO was successively ill at ease, embarrassed, evasive and aggressive while questioned on this particular issue.

¹ The Motion was filed in French and originally entitled: *Requête afin d’inviter la Chambre II à rappeler le témoin TO en vertu de la décision de la Chambre d’Appel rendue le 24 septembre 2003 intitulée : “Decision in the Matter of Proceedings Under Rule 15Bis(D)”*.

² The Reply was filed in French and originally entitled: *Réplique à la Réponse du Procureur à la Requête d’Élie Ndayambaje intitulée : « Requête afin d’inviter la Chambre II à rappeler le témoin TO 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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3. The Defence submits that Witness TO's demeanour during his testimony in regard to his consumption of alcoholic drinks is crucial in determining the credibility of the testimony as a whole.
4. Therefore, Ndayambaje requests the Chamber to recall Witness QAR to be heard on all these events.

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:³

"[i]f 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."

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 during the cross-examination of the witness and can be raised again at the end of the proceedings, in particular in the closing arguments.
9. The Defence submits that Witness TO's demeanour, including his alleged illness at ease, embarrassment, evasiveness and aggressiveness, before the Chamber, pertinent to whether he drank alcohol during the party at Accused Nteziryayo's relatives home, raises an issue of credibility.
10. It is the view of the Trial Chamber that the alleged demeanour of Witness TO on the issue of his alleged consumption of alcoholic drinks during the party at Accused Nteziryayo's relatives home is an issue which may involve a matter of credibility which the substitute Judge may need to assess in the light of the witness' demeanour.

³ Para. 35 of the Appeals Chamber Decision.

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FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

GRANTS the Motion,

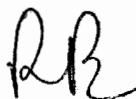
ORDERS the recall of Witness TO before the Chamber,

DECIDES that the recall be limited to cross-examination on the issue of Witness consumption of alcoholic drinks during the party at Accused Nteziryayo's relatives home.

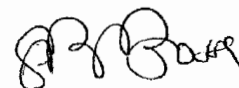
Arusha, 6 May 2004



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

