

ICTR-99-50-AR73.3 + AR73.4
15 July 2004
(738/h - 730/h)

738/h
RMM



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:

Judge Theodor Meron, Presiding Judge
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar:

Mr. Adama Dieng

Decision of:

15 July 2004

ICTR Appeals Chamber
Date: 15 July 2004
Action: PG
Copied To: Concerned Jtd

THE PROSECUTOR

Parties, Judicial Archi
LOs, LSS, RMM

v.

2004 JUL 15 A 11:02
[Signature]

**CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JEROME BICAMUMPAKA
PROSPER MUGIRANEZA**

Case No. ICTR-99-50-AR73.3 and AR73.4

**DECISION ON MUGIRANEZA INTERLOCUTORY APPEAL AGAINST
DECISION OF THE TRIAL CHAMBER ON EXCLUSION OF EVIDENCE**

Counsel for the Prosecution

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justus Bwonwonga
Mr. Elvis Bazawule
Mr. George Mugwanya

Counsel for the Defence

Ms. Michelyne C. St. Laurent
Mr. Howard Morrison
Mr. Ben Gumpert
Mr. Pierre Gaudreau

Case No. ICTR-99-50-AR73.3 and AR73.4

Mr. Tom Moran
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: ROSETTE MURUGO-MORRISON

5 July 2004

737/h

1. The accused Prosper Mugiraneza ("Mugiraneza") appeals a decision of the Trial Chamber¹ rejecting in part his motion for the exclusion of evidence of certain prosecution witnesses at his trial.² The Prosecution cross-appeals the Trial Chamber's partial grant of that motion.³
2. On 23 January 2004, the Trial Chamber ruled that certain prosecution evidence was inadmissible in the trial of Mugiraneza's co-accused, Casimir Bizimungu ("Bizimungu"). Following that decision, Mugiraneza filed a motion seeking the exclusion of that same evidence in relation to the case against him and relied upon the same arguments that had been made by Bizimungu. The Trial Chamber refused to grant Mugiraneza some of the relief sought, and his interlocutory appeal is against that partial refusal.
3. Mugiraneza bases his appeal on three grounds. First, Mugiraneza claims that the Trial Chamber abused the exercise of its discretion in his case by granting him less relief than that granted to his co-accused Bizimungu and in permitting the admission of evidence relating to conspiracy and complicity without considering whether that evidence was relevant to any of the specific allegations made in the indictment. Second, Mugiraneza claims that the Trial Chamber abused its discretion in denying him Rule 5(B) relief in relation to the evidence of Witness GTE, having granted similar relief to Bizimungu and excluded the evidence of Witness GKB. Third, by treating Mugiraneza differently from Bizimungu as outlined above, Mugiraneza claims that the Trial Chamber failed to treat two identically situated persons in the same way and failed to provide reasons why it rendered different decisions in relation to each.⁴
4. The Prosecution's interlocutory appeal, in contrast, relates to the part of Mugiraneza's motion that was granted by the Trial Chamber. It says that the Trial Chamber erred by excluding the evidence of the witnesses in relation to Kibungu and Cyangugu Prefectures on the basis that that evidence fell outside the Indictment, as those Prefectures had not been specifically identified in the Indictment.⁵ The Prosecution alleges that in excluding this evidence the Trial Chamber failed to consider the nature of its case; failed to consider the relevance or materiality of that evidence to charges in the Indictment and failed to consider that the degree of specificity to be pleaded in an Indictment depends on the nature of the Prosecution's case; and erred in finding that the failure of

¹ Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and For Other Appropriate Relief, 6 February 2004.

² Prosper Mugiraneza's Appellate Brief, 8 April 2004 ("Appeal Brief").

³ Decision on Prosecutor's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004, 24 March 2004; Prosecutor's Appeal Against Trial Chamber II Decision of 5 February 2004 Excluding the Testimony of Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW and GJZ Implicating Prosper Mugiraneza For All Crimes in Kibungu and Cyangugu Prefectures Except For The Crimes of Conspiracy And Complicity in Genocide, 31 March 2004 ("Prosecution's Appeal Brief").

⁴ Appeal Brief, par 5.

⁵ Prosecution's Appeal Brief, pars 8-9.

736/h

the Prosecution to identify Kibungu and Cyangugu Prefectures in the Indictment could not be cured by references made to those Prefectures in the Pre-Trial Brief or evidence adduced at trial.

Prosecution's Cross - Appeal

5. The Prosecution argues that, while the Trial Chamber's Impugned decision considered and understood its case with respect to the crimes of conspiracy and complicity in genocide, it failed to do so with respect to the crimes of genocide, crimes against humanity, and war crimes. It says that that error led the Trial Chamber to erroneously exclude relevant evidence that fell within the scope of the charges made in the Indictment. The Prosecution argues that the Indictment charges Mugiraneza under Articles 6(1) and 6(3) for all crimes identified in the Indictment throughout Rwanda. It says that the Trial Chamber misdirected itself by interpreting the charges made as excluding acts or omissions that occurred in Kibungu and Cyangugu Prefectures with respect to Mugiraneza's criminal responsibility for the crimes of genocide, direct and public incitement to commit genocide, crimes against humanity and war crimes.⁶

6. With respect to the claim that the Trial Chamber failed to consider the relevance of the excluded evidence to the Prosecution's case against Mugiraneza, the Prosecution says that the Indictment charges Mugiraneza with acts of genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity, direct and public incitement to commit genocide and war crimes throughout Rwanda, not excluding Kibungu and Cyangugu Prefectures.⁷ The Prosecution contends that in excluding the evidence in relation to these crimes within these Prefectures the Trial Chamber erred by failing to consider the materiality and relevance of the evidence to the charges in the Indictment, as well as the requisite degree of specificity required in light of the nature of the case pleaded by the Prosecution.⁸ The Prosecution further asserts that Mugiraneza committed the crimes alleged either individually, as a superior, and as a member of a joint criminal enterprise that perpetrated crimes throughout Rwanda.⁹ The Prosecution claims that the Trial Chamber "correctly allowed evidence of the affected witnesses regarding the crimes of conspiracy and complicity in genocide...[but] erred in failing to consider that in cases of massive and widespread crimes spanning over a wide geographical area and taking place over a period of time, the degree of specificity required of an Indictment is not as high as the Trial Chamber placed it..."¹⁰ Further, the Prosecution says, the Trial Chamber failed to consider whether the evidence

⁶ Prosecution's Appeal Brief, pars 14-22.

⁷ Prosecution's Appeal Brief, par 23.

⁸ Prosecution Appeal Brief, pars 24-27.

⁹ Prosecution Appeal Brief, par 41.

¹⁰ Prosecution Appeal Brief, par 38.

735/h

was relevant as evidence of *res gestae* and thus admissible under Rule 89 of the Rules of Procedure and Evidence.¹¹

7. In support of its arguments, the Prosecution points to a decision by a differently constituted Trial Chamber in the *Nyiramasuhuko* case. In that case, the Trial Chamber found that the evidence of specific criminal conduct of the accused, which was not directly pleaded in the indictment, was sufficiently pleaded in paragraphs of that indictment. The Prosecution relies on similar reasoning in this case.¹² In addition, the Prosecution points to the decision of the Trial Chamber in the *Kamuhanda* case. In that case the Trial Chamber held that, by pleading a Commune, the Indictment sufficiently pleaded and gave adequate notice of events that occurred in one of the many Secteurs. The Prosecution says that, by analogy, the pleading that the Accused committed crimes throughout Rwanda does not exclude any of the eleven Prefectures; indeed it impliedly includes all of them.¹³

8. The Prosecution further claims that the Trial Chamber erred in failing to consider whether the Prosecution had given the Defence adequate notice of the allegations of criminal conduct in relation to Kibungo and Cyangugu Prefectures by references in the Pre-Trial brief, the disclosed witness statements, the opening statement or the evidence adduced at trial.¹⁴

9. In response, Mugiraneza says that the Trial Chamber correctly determined that the evidence was not admissible in relation to alleged criminal activity in Kibungo and Cyangugu Prefectures. He says that nowhere in the indictment does the Prosecution plead that Mugiraneza incurred criminal responsibility for crimes that allegedly occurred in Kibungo and Cyangugu Prefectures. He argues that the Trial Chamber's decision was commensurate with his right to be informed of the nature of the case against him so that he may prepare to defend against it.¹⁵

10. With respect to the arguments of the Prosecution that the Trial Chamber failed to consider the relevance of the excluded evidence to its case, and in fact misunderstood the nature of its case, Mugiraneza says that none of the paragraphs in the indictment identified by the Prosecution satisfies the specificity requirements. Indeed Mugiraneza contends that the Prosecution's position "is that it can write an indictment as broadly as possible without identifying any specific acts done by the accused".¹⁶ Mugiraneza says that the issue is not whether the evidence is relevant to what the Prosecution thinks the indictment charges, but whether the Prosecution omitted to plead material facts in the indictment. Mugiraneza argues that the Trial Chamber correctly found that the

¹¹ Prosecution Appeal Brief, par 44.

¹² Prosecution Appeal Brief, pars 29-34.

¹³ Prosecution Appeal Brief, pars 35-36.

¹⁴ Prosecution Appeal Brief, pars 49-58.

¹⁵ Propser Mugiraneza's Reply to the Prosecutor's Appellate Brief, 16 April 2004, ("Reply Brief"), pars 15-26.

¹⁶ Reply Brief, par 26.

734/h

indictment was deficient in that it failed to include a concise statement of facts in relation to crimes committed in Kibungo and Cyangugu Prefectures and it was within its discretion to exclude evidence in relation thereto as irrelevant.¹⁷ Further, Mugiraneza says that the Prosecution's reliance on *Kamuhanda* is unhelpful and clearly distinguishable from this case.¹⁸

11. Mugiraneza also rejects as erroneous the Prosecution's arguments that the failure to plead material facts in the indictment can be cured by references made to these facts in the Pre-Trial Brief, witness statements and opening statements.¹⁹ He says that the role of the Trial Chamber in this instance was to make sure that the rights of the accused to a fair trial were not violated by the failure of the Prosecution to draft an indictment with the specificity required by the jurisprudence of the Tribunal.²⁰ Mugiraneza says that the Prosecution should have at a much earlier time brought a motion to amend the indictment, which was confirmed in 1999. The motion that the Prosecution eventually brought to amend the indictment, in August 2003, was rejected on the basis that permitting amendments at that time would prejudice the accused. This decision was affirmed by the Appeals Chamber. Mugiraneza submits that the Prosecution is now asking the Appeals Chamber to force the Trial Chamber to do indirectly that which it has already directly refused to do, that is to say to amend the indictment.²¹

Analysis

12. It is well established in the jurisprudence of this Tribunal that the Appeals Chamber will only interfere in the exercise of the discretionary power of a Trial Chamber where the challenging party establishes that the Trial Chamber misdirected itself as to the principle to be applied, or as to the law relevant to that exercise of discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.²²

13. Having considered the arguments of the parties, the Appeals Chamber is not satisfied that the Prosecution has identified any error in the Trial Chamber's exercise of its discretion in excluding the evidence of the identified witnesses in relation to criminal acts alleged to have occurred in Kibungo and Cyangugu Prefectures. The arguments now made by the Prosecution were largely put before the Trial Chamber and considered by it. The Trial Chamber recalled the

¹⁷ Reply Brief, pars 31-32.

¹⁸ Reply Brief, pars 27-29.

¹⁹ Reply Brief, pars 33-35.

²⁰ Reply Brief, pars 36-37.

²¹ Reply Brief, pars 37-40.

²² *Prosecutor v Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 9 October Denying Leave to File an Amended Indictment, 19 December 2003, par 9.

733/h

decisions it had rendered in relation to Bizimungu, the co-accused, on 23 January and 3 February 2004. Similar to the situation in that case, it noted that when questioned by the Trial Chamber the Prosecution was unable to identify any specific acts alleging criminal responsibility on the part of Mugiraneza in Kibungo and Cyangugu Prefectures.²³ This was in the context where, although the Prosecution has in part used the phrase "throughout Rwanda", it pleaded with specificity the various geographical regions in which Mugiraneza is alleged to have incurred criminal responsibility. The Trial Chamber held that the failure of the Prosecution to plead, as specific material facts, the allegations in relation to Kibungo and Cyangugu Prefectures would cause prejudice to Mugiraneza's defence as he had not been given sufficient notice of these allegations as guaranteed by Article 20 of the Statute.²⁴ The fact that the evidence may have been admissible pursuant to Rule 89 does not show any error on the part of the Trial Chamber in concluding that the fairness of the trial warranted the exclusion of that evidence. This conclusion was within the permissible scope of the Trial Chamber's discretion.

14. Although the Trial Chamber did not directly address the argument that the failure to plead the material facts in the indictment could be cured by references in the Pre-Trial Brief, witness statements and opening statements, it did recall its reasoning in relation to the decisions it rendered with respect to co-accused Bizimungu on 23 January and 3 February 2004, in which it justified this position by specific reference to the jurisprudence of the Appeals Chamber.²⁵

15. Finally, it is also well established that where the exercise of discretion is involved reasonable minds may differ. In this context the Prosecution's reliance upon decisions reached by other Trial Chambers in other cases is unhelpful. What the Prosecution is required to establish is a discernible error committed by the Trial Chamber in the exercise of its discretion in this case. Having not done so, the Prosecution's cross-appeal must fail.

Mugiraneza's Appeal

16. The Trial Chamber, while excluding the evidence of the witnesses identified in relation to crimes alleged to have been committed in Kibungo and Cyangugu Prefectures, permitted this evidence to be adduced in support of the charges of conspiracy to commit genocide alleged in Count 1 of the Indictment and complicity in genocide alleged in Count 3 of the Indictment. In concluding that the evidence was admissible in relation to these counts the Trial Chamber identified certain paragraphs in the Indictment as sufficiently setting out the material facts in relation to these

²³ Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony Is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief, 5 February 2004 ("Impugned Decision").

²⁴ Impugned Decision, pars 6-9.

732/h

offences. The Trial Chamber also refused to exclude the evidence of two witnesses who had already given their evidence, namely Witness GTE and Witness GKP, on the basis that the Defence for Mugiraneza did not take any objection at the time of their evidence. Further, because the Defence was given an opportunity to cross-examine the witnesses, no prejudice accrued to them. The Trial Chamber, therefore, refused to exclude the evidence of these two witnesses in respect to events implicating Mugiraneza in Kibungo Prefecture.²⁶

17. Mugiraneza identifies his interlocutory appeal as involving three issues:

- “1. Whether the Trial Chamber abused its discretion by giving Mugiraneza less relief than it granted Bizimungu when the two were situated identically?
2. Whether the Trial Chamber abused its discretion by allowing admission of evidence of conspiracy and complicity not relevant to the allegations in the indictment while excluding evidence irrelevant to other allegations in the indictment?
3. Whether the Trial Chamber abused its discretion by denying Mugiraneza relief pursuant to Rule 5(B) when it granted relief to an identically situated co-accused?”²⁷

18. Mugiraneza says that it is inconsistent with basic principles of fairness for one accused to be treated in one manner and another accused to be treated in a different manner.²⁸ He says that Trial Chambers “should not have unbridled discretion to treat one party in one way and another identically situated party differently without articulating some reason as to why they are treated differently”.²⁹ He argues that it cannot be disputed that he and Bizimungu, his co-accused, are identically situated and they had requested identical relief from the Trial Chamber, namely, “exclusion of evidence related to a specific, named prefecture where the indictment alleges no acts by the individual accused in that prefecture”.³⁰ Mugiraneza argues that the Trial Chamber’s decision in Bizimungu was legally correct and a proper exercise of its discretion. Mugiraneza says that while the Trial Chamber made reference to this decision in its reasoning and applied the same legal reasoning, it abused the exercise of its discretion by holding that the evidence was admissible against him in relation to Count 1, conspiracy, and Count 3, complicity in genocide, when it excluded exactly the same type of evidence as it related to Bizimungu.³¹ In essence, Mugiraneza argues that the Trial Chamber abused its discretion by granting him different relief on the same legal principles as that granted to Bizimungu, and as the decision rendered in Bizimungu’s case was

²⁵ Impugned Decision, par 6.

²⁶ Impugned Decision, par 10.

²⁷ Appeal Brief, par 4.

²⁸ Appeal Brief, par 14.

²⁹ Appeal Brief, par 15.

³⁰ Appeal Brief, par 16.

³¹ Appeal Brief, par 18.

731/h

correct, the Trial Chamber abused its discretion in granting Mugiraneza less relief than that which it granted to Bizimungu.³²

19. In response the Prosecution repeats the arguments made on its cross-appeal and asserts that the Trial Chamber erred in granting Mugiraneza any relief at all. Further the Prosecution contends that the Trial Chamber's decision was correct to allow the evidence to be admissible in relation to Counts 1 and 3 of the Indictment. The Prosecution also contends that the Trial Chamber's refusal to exclude the evidence of Witness GTE and Witness GKP was correct.³³

20. Mugiraneza filed a reply to the Prosecution's response.³⁴ That reply was filed out of time and no extension of time was sought by Mugiraneza for that reply to be validly received by the Appeals Chamber. Accordingly, the Appeals Chamber will not consider that reply in this Appeal.

Analysis

21. Having considered the arguments of the parties, the Appeals Chamber is troubled by the apparent disparity of treatment accorded to the accused Mugiraneza in relation to his co-accused Bizimungu without further explanation being given by the Trial Chamber for that difference of treatment. While the exercise of the discretion of different Trial Chambers in relation to different cases is an unhelpful comparison to make, where the exercise of discretion concerns co-accused situated in an identical situation and results in different treatment being accorded to each of them, then an assessment of the reasonableness of that distinction can only be made if the Trial Chamber provides reasons for that distinction. This is particularly so where the Trial Chamber recalled its reasoning in Bizimungu as being applicable to its decision in Mugiraneza. Indeed, in its submissions on the appeal in the Bizimungu case, the Prosecution submitted that there was no reasonable basis for the distinction made by the Trial Chamber between the two co-accused. The Prosecution submitted that:

"Indeed, in dealing with a similar motion brought by another person, Prosper Mugiraneza, in the same case, Trial Chamber II found that a number of paragraphs cited in the table above, namely: 6.14, 6.23, 6.25, 6.31 and 6.68, adequately set out the material facts in relation to the commission of the offences of complicity in genocide and conspiracy to commit genocide brought against Casimir Bizimungu. It is erroneous for

³² Appeal Brief, par 19.

³³ Prosecutor's Reply to Prosper Mugiraneza's Appeal, 20 April 2004.

³⁴ Prosper Mugiraneza's Response to the Prosecutor's Appellate Brief, 26 April 2004, filed 27 April 2004.

730/h

the case to be borne out in respect of one Accused person on the one hand and refused in respect of another".³⁵

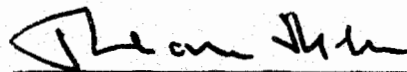
22. If there is a reasonable basis for the Trial Chamber exercising its discretion differently in relation to the two co-accused, the Trial Chamber failed to articulate that basis in its decision. The Trial Chamber found that Bizimungu would be prejudiced by the admission of the evidence sought to be excluded and, in contrast, that Mugiraneza would not be so prejudiced, in relation to the same counts, by the evidence relating to events in Prefectures not identified in the Indictment. In these circumstances, the Appeals Chamber cannot be satisfied that no such error occurred.

23. The Trial Chamber claims that its decision to not exclude the evidence of Witness GTE, concerning the crimes Mugiraneza is alleged to have committed in Kibungo Prefecture, is based on the notion that no prejudice accrued to Mugiraneza given the Defence's opportunity to cross-examine the witness. In contrast, with respect to Bizimungu, the Trial Chamber excluded the evidence of witnesses in relation to the alleged crimes of which Bizimungu allegedly incurred criminal responsibility in Ruhengeri Prefecture on the basis that that geographical region had not been pleaded in the Indictment. The Trial Chamber failed to render clear reasoning on this issue.

24. For the foregoing reasons, the Appeals Chamber is not satisfied that the Trial Chamber committed no error in the exercise of its discretion in holding that the evidence of the identified witness could be led in relation to Counts 1 and 3 of the Indictment, and by its refusal not to exclude the evidence of GTE. As the Appeals Chamber is unable to identify the basis of the distinction drawn by the Trial Chamber between the two co-accused the decision of the Trial Chamber in relation to Mugiraneza is reversed. The Trial Chamber is directed to re-consider the request of Mugiraneza in light of the guidance above.

Done in French and English, the English text being authoritative.

Done this 15th day of July 2004,
At The Hague,
The Netherlands.



Theodor Meron
Presiding Judge



³⁵ Prosecutor's Appeal Against Trial Chamber II Decision of 23 January 2004 Excluding the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA and Trial Chamber Decision of 3 February 2004 Excluding The Testimony of Witnesses AEI, GKE, GKF and GKI All Implicating Casimir Bizimungu In Crimes in Ruhengeri Prefecture, 1 March 2004, par 25.