

ICTR-98-41-T
25-08-2004
(21531-21528)

21531
Inon



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

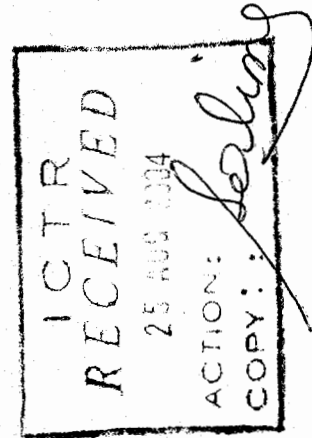
Date: 25 August 2004

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T



**DECISION ON PROSECUTOR'S MOTION TO ALLOW WITNESS DBO TO GIVE
TESTIMONY BY MEANS OF DEPOSITION**

Office of the Prosecutor

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the “Prosecutor’s Confidential Motion to Allow Witness DBO to Give Testimony by Means of Deposition Pursuant to Rule 71 of the Rules of Procedure and Evidence”, filed on 14 July 2004;

CONSIDERING the “Defence for Kabiligi’s Response”, filed by Counsel for Kabiligi on 20 July 2004; the “Nsengiyumva Defence Response”, filed by Counsel for Nsengiyumva on 21 July 2004; the “Bagosora Defence Response”, filed by Counsel for Bagosora on 26 July 2004; and the “Ntabakuze Defence Response”, filed by Counsel for Ntabakuze on 27 July 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 8 June 2004, the Prosecution requested a subpoena to compel Witness DBO, who is presently living in Germany, to appear to testify. The request was granted by the Chamber on 10 June 2004. In a letter of 25 June 2004, the German Embassy to Tanzania has informed the Tribunal that the witness is not prepared to travel to Arusha on grounds of psychiatric indication. On 14 July 2004, the Prosecution filed the present motion.

SUBMISSIONS

2. The Prosecution submits that the evidence of Witness DBO should be heard by deposition, pursuant to Rule 71, because exceptional circumstances exist and it would be in the interests of justice. The witness suffers from post-traumatic stress disorder, and the Prosecution contends that her fragile psychological condition and poor health constitute exceptional circumstances. The witness has a first-hand account of a meeting with Bagosora and his ordering of soldiers in May 1994, and it would be in the interests of justice to hear her. Moreover, the Prosecution submits that the decision by the Chamber to subpoena Witness DBO presupposes that the Chamber has already determined that allowing the witness to testify is in the interests of justice. The Prosecution proposes that the deposition be taken in Germany during the next trial session from 6 September 2004, with the Defence being allowed to cross-examine.

3. The Kabiligi Defence argues that the witness’s psychiatric condition makes her unable to give evidence and directly affects her credibility. Evidence of her condition has not been given to the Chamber, other than a letter from the German Embassy stating that the witness “is not prepared to travel to Arusha on grounds of psychiatric indication”. The Kabiligi Defence additionally argues that the interests of justice would not be served by granting the motion.

4. The Nsengiyumva Defence objects to the motion on similar grounds, in that the witness may be unable to testify irrespective of her location, the reliability of her testimony is questionable

given her condition, and no medical documentation evidencing her condition has been provided. Additionally, the Prosecution has not demonstrated the materiality of the testimony, the existence of exceptional circumstances and how the deposition would be in the interests of justice.

5. The Bagosora Defence joins in the Nsengiyumva response, pointing out the lack of a medical certificate and the bearing on credibility of the witness's psychological problems. Although the Chamber ordered a subpoena in respect of Witness DBO, it does not mean that it would be in the interests of justice to hear the witness by deposition.

6. The Ntabakuze Defence similarly submits that no evidence of the witness's condition has been provided, and argues that a psychiatric evaluation needs to be ordered. The reliability of the witness's testimony is also questioned, as it is not known if the witness is fit to testify.

DELIBERATIONS

7. The Rules provide that depositions are an exceptional measure, and the principle is that witnesses should be heard directly by the Chamber. Rules 90 (A) and 71 (A) are set out below.

Rule 90 (A)

Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.

Rule 71 (A)

At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.

8. A deposition *may* be ordered by a Chamber where exceptional circumstances exist and where it would be in the interests of justice to hear the witness by deposition. Additionally, the formal requirements of Rule 71(B) must be met. Previous cases have determined that poor health constitutes exceptional circumstances, and that the interests of justice would be assessed by considering the importance of the witness's anticipated testimony.¹ In an earlier decision in the instant case, the Chamber considered four criteria in determining the "interests of justice" prong: 1) that the testimony of the witness is sufficiently important to make it unfair to proceed without it; 2) that the witness is unable or unwilling to come to the Tribunal; 3) that the Accused will not thereby be prejudiced in the exercise of his right to confront the witness; and 4) that the practical considerations (including logistical difficulty, expense, and security risks) of holding a deposition in the proposed location do not outweigh the potential benefits to be gained by doing so.²

¹ *Nahimana et al.*, Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition (TC), 10 April 2003, paras. 7-8; *Muvunyi et al.*, Decision on the Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX (TC), 11 November 2003, para. 10.


² *Bagosora et al.*, Decision on Prosecutor's Motion for Deposition of Witness OW (TC), 5 December 2001, paras. 12-14, citing *Delalic et al.*, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference (TC), 28 May 1997.

9. In previous cases before the Chamber, the moving party provided evidence in support of its contention that the witness was in poor health and could not travel, by way of a medical certificate or an affidavit. The Prosecution has not offered any similar evidence in support of the alleged exceptional circumstances; the letter from the German Embassy only indicates that Witness DBO is "not prepared to travel to Arusha on grounds of psychiatric indication". The Chamber accepts that the witness's poor health constitutes exceptional circumstances and that her anticipated testimony may be of some importance. However, based on information now available to the Chamber concerning her medical condition, the Chamber is convinced that compelling the witness to testify would seriously affect her health, even if the testimony were given by deposition. The deleterious effect the deposition may have on the witness's psychiatric condition is an overriding concern. For this reason, in the exercise of its discretion, the Chamber denies the motion.

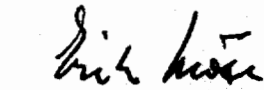
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 25 August 2004



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

