

ICTR-99-50-T
15-09-2004
(17278-17275)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

17278
Mwanja

Or: ENG

TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan, Presiding
Judge Lee Gacuiga Muthoga
Judge Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 14 September 2004

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

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**DECISION ON PROSPER MUGIRANEZA'S MOTION PURSUANT TO RULE
68 FOR EXCULPATORY EVIDENCE RELATED TO WITNESS GKI**

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justus Bwonwonga
Mr. Elvis Bazawule
Mr. Shyamlal Rajapaksa

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for Casimir Bizimungu
Mr. Howard Morrison, Q.C. and Mr. Ben Gumpert for Justin Mugenzi
Mr. Pierre Gaudreau and Mr. Michel Croteau for Jérôme-Clément Bicamumpaka
Mr. Tom Moran for Prosper Mugiraneza

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion for Exculpatory Evidence pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI" filed on 13 February 2004, (the "Motion");

NOTING the "Prosecutor's Response to a Motion by Prosper Mugiraneza pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI" filed on 18 February 2004, (the "Response");

NOTING "Prosper Mugiraneza's Reply to the Prosecutor's Response to his Motion pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI" filed on 24 February 2004, (the "Reply") **AND** the "Supplement to Prosper Mugiraneza's Reply to the Prosecutor's Response to his Motion pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI" filed on 26 September 2004 (the "Supplement");

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence seeks exculpatory evidence in possession of the Registrar and/or the Prosecutor related to Witness GKI. The purpose of this evidence is to attack the credibility of the witness by showing that Witness GKI had met with members of the Office of the Prosecutor in preparation of his testimony though he denied such an allegation before the Trial Chamber.
2. According to the Defence, on 7 February 2004, two attorneys of the Office of the Prosecutor (the "OTP"), namely Mr. Babajide and Mr. Bazawule, were seen by the Defence at the United Nation Detention Facility (the "UNDF"). The Defence believes that the attorneys were at the UNDF to meet with detained witnesses and asserts that either the Prosecution or the UNDF (or both) has records that show the identities of detainees with whom the attorneys met.
3. The Defence submits that if such records show that the attorneys met with witness GKI, they are exculpatory according to Rule 68 of the Rules of Procedure and Evidence of the Tribunal, (the "Rules"). Therefore, the Trial Chamber may order for *in camera* inspection all records of visits by members of the OTP to persons detained in the UNDF. If the Trial Chamber finds that the documents are exculpatory, it should order the disclosure to the Defence.

Prosecution Submissions



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4. According to the Prosecutor, the Motion lacks foundation and should be denied. The Prosecutor submits that if there was a belief by the Defence that the witness had a meeting with Attorneys from the Office of the Prosecutor, he should have confronted the witness during cross-examination. The witness must be afforded the opportunity to explain himself during trial whether he had a meeting with attorneys and investigators based both in Kigali and Arusha or to those only based in Kigali.

Defence Reply

5. The Defence argues that the witness was asked whether or not he had met with representatives of the Office of the Prosecutor during cross examination. According to the Defence, the Prosecution did not deny that such a meeting took place; the response does not address the factual issue presented.

6. The Defence contends that the Prosecutor has a continuing duty to provide exculpatory evidence. According to the Defence, the exculpatory evidence sought by the Defence, if it exists, would be relevant to the Trial Chamber's determination of the weight to be given to Witness GKI's testimony.

DELIBERATIONS

7. Rule 68(A) of the Rules reads as follows:

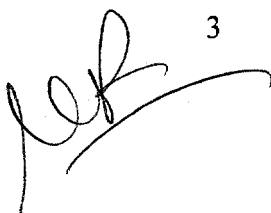
The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

8. The Trial Chamber is of the view that Rule 68 does not distinguish the type and nature of the material which has to be disclosed by the Prosecutor to the Defence. In addition, there is no time limit as to when the Prosecutor should disclose the information so the obligation under this rule is of a continuous nature. Therefore, the Prosecutor is under an obligation to disclose to the Defence any material known to him and which is favourable to the Accused in the preparation of his defence, regardless of the type and the nature of the material.

9. In line with this broad interpretation of Rule 68, the Trial Chamber concurs with the Appeals Chamber reasoning in the case of *The Prosecutor v. Radislav Krstic*:

[the] Appeals Chamber is conscious that a broader interpretation of the obligation to disclose evidence may well increase the burden on the Prosecution, both in terms of the volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory. Given the fundamental importance of disclosing exculpatory evidence, however, it would be against the interests of a fair trial to limit the Rule's scope...¹

¹ *The Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgment, 19 April 2004, para. 180.

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10. However, the Trial Chamber considers that Rule 68(A) does not impose an obligation on the Prosecutor to search for materials which he does not admit having knowledge of nor does it entitle the Defence to embark on a fishing expedition to obtain exculpatory material. It does, however, mean that where the Defence has specific knowledge of any information covered by the Rule and which is not currently within the possession or control of the Prosecutor, and the Defence requests that information in specific terms, the Prosecutor should attempt to obtain that information where the Prosecutor is in a better position than the Defence to do so. Once this is successfully done, that material should be disclosed to the Defence. This obligation stems from the Prosecutor's inherent and ongoing duty to fully investigate a case before this Tribunal.²

11. The Trial Chamber is of the opinion that the purpose of Rule 68 is not to facilitate the conduct of a fishing expedition on the sole basis of an unsworn assertion that someone saw two members of the Prosecution on a certain date at the UNDF. The Trial Chamber recalls that as the Defence stated in its Motion, it has "no specific proof that the witness actually met with the attorneys" nor can it say "without doubt that the attorneys from the OTP met with GKI as [he] believes". Therefore, the Trial Chamber is of the view that the record of all persons who visited the UNDF on this particular day cannot be considered as falling within the scope of Rule 68 but should be considered as mere speculation by the Defence Counsel that it could be exculpatory.

12. The Trial Chamber considers that the Defence has not demonstrated sufficient grounds under Rule 68 or any other rule for the Trial Chamber to order the production of the records of meetings between OTP attorneys and Witness GKI at the United Nations Detention Facility on or around 7 February 2004.

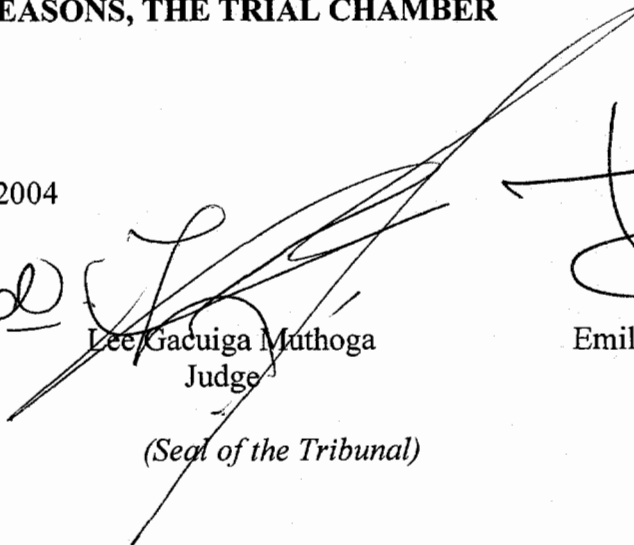
FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion.

Arusha, 14 September 2004

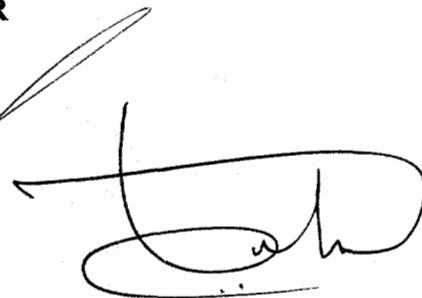


Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge

(Seal of the Tribunal)



Emile Francis Short
Judge

² *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Decision on Motion of Accused Bicomumpaka for Disclosure of Exculpatory Evidence", 23 April 2004, para. 9.