

ICTR-99-50-T  
29-9-2004  
(18235 — 18227)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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Or: ENG

**TRIAL CHAMBER II**

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

**Registrar:** Mr. Adama Dieng

**Date:** 28 September 2004

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

JUDICIAL RECORDS/ARCHIVES  
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**DECISION ON JUSTIN MUGENZI'S MOTION IN RESPECT OF THE REPORT  
AND PROPOSED EVIDENCE OF JOSEPH NGARAMBE**

**Office of the Prosecutor:**

Mr. Paul Ng'arua  
Mr. Ibukunolu Babajide  
Mr. Elvis Bazawule  
Mr. Justus Bwonwonga  
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 Bicomumpaka  
Mr. Tom Moran for Prosper Mugiraneza

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

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

**BEING SEIZED** of the "Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe" filed on 23 June 2004, (the "Motion");

**NOTING** the "Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe" filed on 29 June 2004, (the "Response");

**HAVING RECEIVED:**

- (i) the "*Requête au soutien de Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe*" filed on 28 June 2004;
- (ii) the "Prosper Mugiraneza's Memorandum in support of Justin Mugenzi's Motion in Respect to the Report and Proposed Evidence of Joseph Ngarambe" filed on 30 June 2004;
- (iii) the "Mugenzi's Rejoinder to the Prosecutor's Response to a Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe" filed on 5 July 2004;
- (iv) the "*Réplique de Casimir Bizimungu à la réponse du Procureur concernant la déposition et le « rapport » du témoin Joseph Ngarambe*" filed on 5 July 2004 ;
- (v) the "Reply of Defendant Bicamumpaka to Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe" filed on 12 July 2004;
- (vi) the "Prosecutor's Response to Prosper Prosper Mugiraneza's Memorandum in support of Justin Mugenzi's Motion in Respect to the Report and Proposed Evidence of Joseph Ngarambe" filed on 12 July 2004;
- (vii) the "Prosecutor's Response to Defendant Bicamumpaka's Reply to Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe" filed on 19 July 2004;
- (viii) the "Prosecutor's Response to *Requête au soutien de Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe and Réplique de Casimir Bizimungu à la réponse du Procureur concernant la*



déposition et le « rapport » du témoin Joseph Ngarambe” filed on 23 July 2004 ;

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## ARGUMENTS OF THE PARTIES

*Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe.*

1. The Defence for Justin Mugenzi objects to the introduction into evidence of the document entitled, “Report on the anti-tutsi propaganda 1990-1994” and to Prosecution Witness Joseph Ngarambe on three grounds: (1) Joseph Ngarambe is not qualified to testify about the Report, and the Report itself is neither objective nor necessary; (2) the materials relied upon in the making of the Report were not disclosed to the defence; and (3) the Report attributes guilt for the events which are the subject of this trial.
2. According to the Defence, the Prosecutor has served on the Defence the “Report on the anti-tutsi propaganda 1990-1994” (“the Report”), which was commissioned by the International Criminal Tribunal for Rwanda (the “ICTR”). Joseph Ngarambe is identified as one of the authors of this report. According to the Defence, the witness summary submitted in relation to Joseph Ngarambe, does not mention the Report or his qualifications regarding the subject of the Report, but is concerned entirely with Joseph Ngarambe’s direct personal experiences before and after 6 April 1994. The Defence submits that Joseph Ngarambe does not appear on a list of expert witnesses disclosed by the Prosecution. As such, the Defence objects to Joseph Ngarambe being called to testify about the Report.
3. The Defence additionally argues that the authors express numerous personal interpretations and opinions. Moreover, the Defence argues that the Report did not rely on a sufficiently broad array of material and is therefore not objective.
4. In light of the above, the Defence requests that the Prosecutor be debarred from introducing the Report into evidence, and that Joseph Ngarambe’s testimony be limited to that of his “2000 witness statement”.
5. Further, the Defence argues that it is a breach of the principle of the equality of arms that the bulk of the sources used in preparing the Report were not made available to the Defence, and that the Prosecutor will be culling from these materials to prove the case against the defendants.
6. Finally, the Defence submits that the Report in question expresses an unsubstantiated and unqualified opinion as to the persons who were criminally liable for the genocide. The Defence contends that neither an expert or non-expert witness is permitted to testify to such matters, and therefore the Report should be barred and Joseph Ngarambe’s testimony thus limited to the matters of which he has factual knowledge.



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*Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe*

7. The Prosecutor moves the Trial Chamber to dismiss the Motion in its entirety, and to admit Joseph Ngarambe's Report without delay.

8. The Prosecutor argues that in the Media case the Trial Chamber admitted into evidence a similar report that was co-authored by Joseph Ngarambe, in conjunction with the testimony of expert witnesses Jean-Pierre Chrétien and Marcel Kabanda. Therefore, Joseph Ngarambe should be allowed to give evidence on another report which he authored himself.

9. The Prosecutor further submits, quoting *Prosecutor v. Simic, et al.*, before the International Criminal Tribunal for the former Yugoslavia (the "ICTY"), that the Rules establish a wide and liberal regime for the admission of evidence and that the contents of the Report, and methodology utilised in compiling it, can be challenged during cross-examination by the Defence. The decision to admit a piece of evidence does not influence the weight the Trial Chamber will eventually give to the evidence at the conclusion of trial. For this reason it is premature for the Defence to raise doubt about the witness at this stage.

10. The Prosecutor points out that this Trial Chamber followed a similar procedure in regards to the testimony of Prosper Higiuro when it dismissed the Defence motion to exclude portions of his evidence. The Trial Chamber held that the fact that certain areas of Higiuro's testimony were not alluded to in his prior statement or "will-say" statements was not sufficient to merit the exclusion of the new material.

11. The Prosecutor asserts that Joseph Ngarambe has over 21 years of experience with Rwandan social issues, including personal experience with political and media relations in Rwanda. Further, as an investigator of the Office of the Prosecutor, Joseph Ngarambe participated in the compilation of several reports on the role of the media in Rwanda, including one which was relied upon in the Media case.

12. The Prosecutor argues that absolute objectivity is not the correct test for admissibility of evidence and that it is the position of the Tribunal that a witness must testify before their testimony can be attacked.

13. The Prosecutor contends that Joseph Ngarambe has demonstrated in his Report the roles the various news media in Rwanda played in the genocide. Further, the Prosecutor alleges that the Report is relevant to the charges against Justin Mugenzi of direct and public incitement using the media. The Report contains several paragraphs on RTLM and the Prosecutor has already notified the Defence for Justin Mugenzi in "Prosecutor's Exhibit List A", the Pre-Trial Brief, and witness statements that it will demonstrate that Justin Mugenzi used RTLM to incite killings.

14. The Prosecutor asserts that Joseph Ngarambe should not be limited to the summary of anticipated testimony contained in the Pre-Trial Brief. Instead, the



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Prosecutor submits that, as a general principle, prior witness statements should be used to challenge credibility, since the evidence should be heard directly before the Trial Chamber.

15. The Prosecutor submits that it has already disclosed all the source material in his possession in his final exhibits list in a CD-ROM disclosed on 15 August 2002 and re-disclosed on 13 December 2002. The additional sources relied upon for the Report are newspapers, magazines and recordings which are available in the public domain for the Defence.

16. The Prosecutor alleges that the Defence request for access to the material used in the report in possession of the Prosecutor is moot since the Prosecutor has already disclosed all the material in his possession. Furthermore, the Prosecutor submits that the Defence has had the opportunity to inspect the Prosecutor's materials since 2002. Since the witness will testify in the middle of the next session, the Defence has ample time to prepare for cross-examination.

*Justin Mugenzi's Rejoinder to the Prosecutor's Response to a Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe*

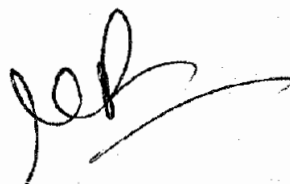
17. The Defence reiterates its request to bar the Prosecutor from adducing evidence from Joseph Ngarambe beyond what is contained in his witness statements; to order the Prosecutor to give the Defence access to the material relied upon in the making of the Report; and to fix a time limit for the preparation of a joint exhibit by the Prosecutor and the Defence containing all the published and broadcast material on which they seek to rely.

18. The Defence argues that it is a contradiction to present Joseph Ngarambe as both a fact and expert witness. The Defence submits that, pursuant to the case law in *Akayesu*, an expert witness must be impartial, even if absolute objectivity is not required of a fact witness. As such, the Defence contends that, by definition, a victim cannot also serve as an expert witness.

19. Moreover, the Defence asserts that the Prosecutor has failed to show that Joseph Ngarambe's testimony concerns "specific issues of a technical nature, requiring special knowledge in a specific field," which was required in *Akayesu*.

20. The Defence argues that the Media trial decision cited by the Prosecutor stands for nothing more than the admissibility of a translation of RTL M Broadcasts and Kangura articles, in conformity with an earlier oral decision. Notably, there is no mention of any report or the persons named in the Response.

21. The Defence contends that the Prosecutor's discussion of Rule 89(C), the right to cross-examine, the Higiwo Decision and the significance of written statements are irrelevant. The Defence emphasises that nowhere in the Report is it suggested that Justin Mugenzi authored inflammatory statements inciting massacres. The Defence submits that



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the source material may be relevant to the outcome of the trial, but the unobjective, inexpert handling of this material within the Report is not.

22. The Defence outlines the disclosures made to him by the Prosecutor and compares them with the sources used by Joseph Ngarambe. The Defence contends that it has only had access to a fraction of Joseph Ngarambe's sources, in violation of the principle of equality of arms and Article 20(4) of the Statute of the Tribunal.

23. The Defence further argues that it is irrelevant for the Prosecutor to contend that any sources within its possession which were not provided to Justin Mugenzi are also in the public domain. Rule 68(B) requires the Prosecutor to "make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor."

*Requête au soutien de Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe and Réplique de Casimir Bizimungu à la réponse du Procureur concernant la déposition et le « rapport » du témoin Joseph Ngarambe*

24. The Defence for Casimir Bizimungu concurs with the reasoning outlined in the Motion and argues that Joseph Ngarambe is only a fact witness and not an expert witness. According to the Defence, the Report cannot be admitted into evidence pursuant to Rule 89 of the Rules as it has no probative value and only includes "triple or quadruple hearsays".

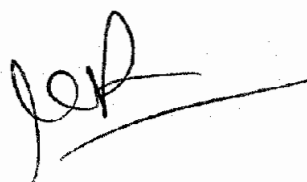
*Prosecutor's Response to Requête au soutien de Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe and Réplique de Casimir Bizimungu à la réponse du Procureur concernant la déposition et le « rapport » du témoin Joseph Ngarambe*

25. The Prosecutor submits that the Bizimungu Motion raises the same issues as those raised by Justin Mugenzi and Prosper Mugiraneza. Therefore the Prosecutor refers the Trial Chamber to his Responses filed in respect to the Mugenzi Motion and the Mugiraneza Memorandum.

*Prosper Mugiraneza's Memorandum in Support of Justin Mugenzi's Motion in Respect to the Report and Proposed Evidence of Joseph Ngarambe*

26. The Defence for Prosper Mugiraneza moves the Trial Chamber to exclude the expert report and opinion testimony of Joseph Ngarambe, and to limit Joseph Ngarambe to his actual knowledge of events as a fact witness.

27. The Defence argues that, pursuant to Rule 89(C), the Trial Chamber should look at several factors to determine if expert opinion evidence is relevant. These factors include, but are not limited to: (a) the use of accepted scientific principles, or some other knowledge, based on skill or expertise; (b) whether the expert properly applied the accepted principles; (c) whether the expert has the necessary expertise.



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*Prosecutor's Response to Prosper Mugiraneza's Memorandum in Support of Justin Mugenzi's Motion in Respect to the Report and Proposed Evidence of Mr. Joseph Ngarambe*

28. The Prosecutor prays that the Trial Chamber dismisses the Memorandum in its entirety. The Prosecutor notes that the Memorandum was not filed pursuant to any Rules, and that it is a burden to the judicial process because it merely underlines issues already submitted and answered.

29. Without prejudice to the above, the Prosecutor responds to the Memorandum by adopting and incorporating his response to the Motion.

*Reply of Defendant Bicamumpaka to Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe*

30. The Defence for Jérôme-Clément Bicamumpaka moves the Trial Chamber to bar the Prosecutor from introducing Joseph Ngarambe's Report into evidence; to order the Prosecutor not to adduce any evidence involving Jérôme-Clément Bicamumpaka from Joseph Ngarambe; or to prevent Joseph Ngarambe from offering any analysis of speeches made by Jérôme-Clément Bicamumpaka.

31. The Defence argues that there can be no "probative value in the evidence offered by a witness with 8 years of professional ties with the Office of the Prosecutor." In support of its contention, the Defence questions the credibility of a witness who gives some evidence of fact, before, during or after he gives evidence relating to anti-Tutsi propaganda for which he is paid. The Defence argues that the Prosecutor has hidden Joseph Ngarambe's Report from the Defence since the disclosure of Joseph Ngarambe's statement in 2000.

32. The Defence invokes Article 95 and asks the Trial Chamber to order the Prosecutor not to adduce evidence relating to Jérôme-Clément Bicamumpaka from Joseph Ngarambe. The Defence further submits that the methods Joseph Ngarambe used to obtain evidence against Jérôme-Clément Bicamumpaka would cast substantial doubts on its reliability and could damage the integrity of these proceedings.

*Prosecutor's Response to Bicamumpaka's Reply to Prosecutor's Response to Justin Mugenzi's Motion in Respect to the Report and Proposed Evidence of Mr. Joseph Ngarambe*

33. The Prosecutor notes that the issues raised by the Defence for Jérôme-Clément Bicamumpaka regarding Joseph Ngarambe's expertise, the capacity of his testimony, the factual content of his statement, and disclosure have already been raised in the Motion and Memorandum and have been addressed by the Prosecutor in his Response.

34. The Prosecutor asserts that Joseph Ngarambe was not employed by the OTP when his statement was taken and that Joseph Ngarambe has only worked for the OTP cumulatively for 628 days, thus the contention that he was in the employ of the OTP when he made his statement and Report are without factual basis.

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35. The Prosecutor opposes the motion because the Defence for Jérôme-Clément Bicamumpaka cannot discredit the Report by invoking Rule 95 when the report has not yet been tendered into evidence and Joseph Ngarambe has not yet appeared to testify about it.

36. The Prosecutor further argues that Joseph Ngarambe's Report is based on independent sources "and not necessarily based on information in possession of the OTP to which he may have had access during the course of his employment with the OTP." Therefore the Defence for Jérôme-Clément Bicamumpaka has failed to cast substantial doubts on the reliability of the report, or to show how its admission would damage the integrity of the proceedings, pursuant to Rule 95 of the Rules.

37. The Prosecutor contends that the Defence for Jérôme-Clément Bicamumpaka will have the opportunity to cross-examine Joseph Ngarambe as to facts he relied upon and methods he used. Because the Report has not been tendered before the Trial Chamber for consideration as to its relevancy, probative value, and admissibility the Defence motion lacks merit.

38. The Prosecutor further submits that another Trial Chamber of this Tribunal, in the *Simba* case, recently held that objections to an expert witness's methodology are arguments to be made when the Prosecution seeks to enter a report into evidence and the Defence can cross-examine.

39. The Prosecutor notes the new issues raised and asserts that the practice of filing replies by other Defence counsel may result in time consuming litigation that is an abuse of the judicial process. The Prosecutor contends that the Trial Chamber should discourage such a practice. Finally, the Prosecutor seeks to join issues and respond to the reply by adopting and incorporating his Response.

## DELIBERATIONS

40. It appears from the Prosecutor's submissions that Joseph Ngarambe is a fact witness and was never intended to be called as an expert. It is clear that this witness has not yet testified and the Prosecutor has only disclosed this Report to the Defence in conformity with the Rules. Although it does not seem very clear to the Trial Chamber what the Prosecutor intends to do with this Report, the Trial Chamber is of the view that such a report cannot be considered as an expert report and that therefore there is no legal basis for the Defence to object to its disclosure.

The Trial Chamber takes note of the objections of the Defence but considers that any assessment of the Report, the credibility or the objectivity of his author is premature at this stage of the proceedings.





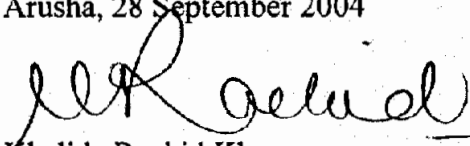
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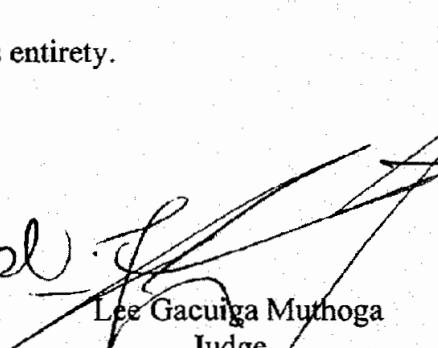
41. Therefore the Trial Chamber considers that Joseph Ngarambe shall be allowed to testify for the Prosecutor and that any objection regarding his testimony and the documents presented in support of his testimony shall be made during his testimony.

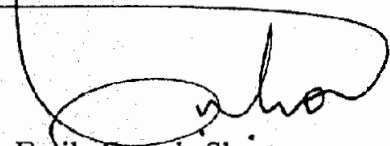
**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**DISMISSES** the Motion in its entirety.

Arusha, 28 September 2004

  
Khalida Rachid Khan  
Presiding Judge

  
Lee Gacuga Muthoga  
Judge

  
Emile Francis Short  
Judge

