



UNITED NATIONS
NATIONS UNIES

ICTR-98-42-T
(01-10-2004)
(10898-10891)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 1st October 2004

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO
Case No. ICTR-97-21-T
Joint Case No. ICTR-98-42-T

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON PROSECUTOR'S MOTION FOR VERIFICATION OF THE
AUTHENTICITY OF EVIDENCE OBTAINED OUT OF COURT, NAMELY THE
ALLEGED DIARY OF PAULINE NYIRAMASUHUKO**
(Rules 89(C) and 89 (D) of the Rules of Procedure and Evidence)

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Josette Kadji, Charles Tchacounte Patie for Sylvain Nsabimana
Duncan Mwanyumba, Normand Marquis
for Arsène Shalom Ntahobali
Titinga Frédéric Pacere, Richard Perras for Alphonse Nteziryayo
Nicole Bergevin, Guy Poupart for Pauline Nyiramasuhuko

to the

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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 “Prosecutor’s Motion for Verification of the Authenticity of Evidence Obtained Out of Court, Namely the Alleged Diary of Pauline Nyiramasuhuko (Rules 89(C) and 89 (D) of the Rules of Procedure and Evidence)”, filed on 7 September 2004 (the “Motion”);

CONSIDERING Nyiramasuhuko’s “Response to the Prosecutor’s Motion for Verification of the Authenticity of Evidence Obtained Out of Court, Namely the Alleged Diary of Pauline Nyiramasuhuko (Rules 89(C) and 89 (D) of the Rules of Procedure and Evidence)”, filed on 13 September 2004 (the “Response”);

CONSIDERING the Prosecutor’s “Further Motion for Verification of the Authenticity of Evidence Obtained Out of Court, Namely the Alleged Diary of Pauline Nyiramasuhuko (Rules 89(C) and 89 (D) of the Rules of Procedure and Evidence)”, filed on 15 September 2004 (the “Further Motion”);

CONSIDERING the Prosecutor’s “Reply to Nyiramasuhuko’s Response to the Prosecutor’s Motion for Verification of the Authenticity of Evidence Obtained Out of Court, Namely the Alleged Diary of Pauline Nyiramasuhuko (Rules 89 (C) and 89 (D) of the Rules of Procedure and Evidence)”, filed on 17 September 2004 (the “Reply”);

CONSIDERING the “Report of Forensic Document Expert Antipas Nyanjwa, Filed Under Rule 94 *bis* (A) For Disclosure to the Defence and to Be Filed With the Trial Chamber”, filed on 20 September 2004 (the “Report”);

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 (A).

SUBMISSIONS BY THE PARTIES

Prosecutor’s Motion

1. The Prosecution submits that the Trial Chamber is entitled pursuant to Rules 89 (C) and 89 (D) to exercise its discretion and request the certification of evidence obtained out of Court. The Prosecution is relying on the 30 January 1998 Decision of the International Criminal Tribunal for the Former Yugoslavia Trial Chamber in the *Blaskic* Case which stated that authentication refers to matters concerning genuineness of a document, i.e. whether the document is indeed what it purports to be, and not the method by which it came to be in the possession of a party.
2. The Prosecution produces, in Annex III of its Motion, affidavits that are related to the chain of custody of Nyiramasuhuko’s diary. The Prosecution submits that the Chamber is entitled to admit them as evidence of the chain of custody, and to order the verification of their authenticity.

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3. The Prosecution also refers to the 11 April 2002 Decision in the *Kajelijeli* Case which, although it denied the Prosecution Motion, did accept that Rule 89 (D) grants the Trial Chamber the discretionary power to verify the authenticity of evidence obtained out of court.¹ Accordingly, the Prosecution asks the Trial Chamber to appoint an expert to analyse the handwriting in the diary and the handwriting in samples of letters written by Pauline Nyiramasuhuko that are annexed to the Motion, and to give an expert opinion as to the authorship of the diary. The Prosecutor produces in Annex I three letters sent to the Registry, which, according to the Prosecutor's submissions, are handwritten and signed by Pauline Nyiramasuhuko. The Prosecutor also produces the signature of Pauline Nyiramasuhuko in her passport in Annex II. The Prosecution submits that without "importuning" the Accused for a handwriting sample, it can provide a sufficient number of samples so that an expert duly appointed could analyse them with the handwriting in the diary. The Prosecution submits that such an Expert would assist the Chamber in determining whether Pauline Nyiramasuhuko was the author of the diary.
4. The Prosecution also produces affidavits, which allegedly show a clear chain of custody from the seizure of the diary to its delivery to the ICTR (Annex III). The Prosecutor submits that he only has a faxed copy of these affidavits and proposes to file the original copy as soon as it is obtained. The Prosecution is seeking admission of these affidavits in order to shed light on the issues that have been presented in the case upon the oral Motion of Nyiramasuhuko dated 24 June 2004. These affidavits, if admitted into evidence, would provide great assistance to the Trial Chamber.
5. The Prosecution submits in the alternative, that if the Trial Chamber opts not to order the verification of the authenticity of the diary, the Prosecutor has the right to bring in its own handwriting expert to examine the letters and diary. The Prosecutor relies on the above mentioned decision in the *Kajelijeli* Case ruling that each Party can bring the evidence it requires without invoking the Chamber's discretion.
6. The Prosecution therefore requests the Trial Chamber to exercise its discretion under Rule 89 (D) or permit the Prosecutor to provide any useful information that would go towards the verification of the authenticity of the diary.

Defence's Reply

7. Defence for Nyiramasuhuko first reminds the Chamber the proceedings relating to Nyiramasuhuko's diary so far.
8. On the issue of affidavits and their admissibility, the Defence stresses that, on 23 June 2004, the Prosecution admitted that, during the search and seizure operations as well as when documents seized arrived at the Tribunal, no inventory was taken. It was only taken after the 12 October 2000 Order. The Defence further stresses that it was not until the evening of 23 June 2004 that the Prosecution produced the evidence register form that is annexed to the current Motion. Such disclosure was *post-facto* as it was

¹ *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Decision on the Defence Motion for Verification of the Authenticity of Evidence Obtained Out of Court (TC), 11 April 2002.

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filed after that the Trial Chamber had rendered its Decision on the admissibility of the Diary.

9. The Defence submits that for such *post-facto* disclosure to be admissible, it must be limited to new elements that were not in the Prosecution's custody and that the Prosecution was not aware of at the time of its earlier submissions. The Prosecutor cannot allege that he did not know that members of the OTP and Kenyan policemen could testify on arrest and seizure proceedings, as well as the custody of the alleged Diary.
10. Pursuant to Rule 92 *bis* A (ii), the Defence submits that the Prosecution cannot file written statements as evidence without having the statement's authors heard before the Chamber. The Defence quotes Trial Chamber III's Decision of 20 May 2004 in the *Muhimana* Case:² "Rule 89 (C) does not provide for the production of evidence without the accused being entitled to cross-examine it. Neither does Rule 92 *bis* jeopardize this right."
11. The Defence further submits that it would not be appropriate for the Chamber to admit those affidavits as evidence of the diary's chain of custody as long as the Appeals Chamber has not determined the current Appeal. The Appeals Chamber decision could render moot any decision rendered by the Trial Chamber on the issue of Nyiramasuhuko's Diary.
12. Therefore, the Defence submits that the annexed affidavits should be declared inadmissible.
13. On the issue of the appointment of an Expert Witness, the Defence first stresses the Prosecutor's lack of diligence and submits that the request is out-of-time and should therefore be rejected. The Defence submits that the Defence always referred to the "alleged" Nyiramasuhuko's Diary and that it was therefore up to the Prosecution to produce evidence of its authenticity. The Prosecutor never gave any evidence, nor asked for any expertise on this issue. Now the Prosecutor moves at the end of the Prosecution Case when the issue of the diary's admissibility is pending before the Appeals Chamber. This lack of diligence should lead to the Motion being dismissed.
14. The Defence submits that the Prosecution is trying to add a further expert-witness to the Prosecution Case. The Defence is relying on Trial Chamber I's Decision of 26 June 2001 in the *Nahimana* Case:³ Quoting the *Jelisić* Case, the Decision ruled that it was in the interests of justice "that any evidence necessary to ascertain the truth be presented to it and be subject to examination by the parties. However, such interests must not prejudice the principle that the accused has the right to trial without undue delay." (par. 17).
15. The Defence further quoted: "According to Rule 94 *bis*, the Prosecutor shall disclose to the opposing party the full statement of an expert witness to be called as early as possible. It shall be filed with the Trial Chamber not less than twenty-one days prior

² *Prosecutor v. Muhimana*, Case No. ICTR-95-1-T, Decision on Prosecution Motion for admission of Witness Statements (Rules 89 (C) and 92 *bis*) (TC), 20 May 2004.

³ *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Decision on Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001.

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to the date on which the expert is expected to testify" (par. 34). And : "The Chamber is not convinced that the Defence is taken by surprise. It is true that the Defence cannot instruct their potential expert witnesses. The Chamber notes, however, that the Prosecution experts will not be testifying in the near future, and that further time will elapse before the experts for the Defence will give evidence." (par. 37).

16. If the Chamber granted the Motion, the Defence submits that this would infringe Article 20 (4) (b) of the Statute, which says that the Accused has a right to be given time and facilities for the preparation of his defence.
17. Furthermore, should the expert be appointed, the Defence submits that the lack of diligence by the Prosecutor would result in undue delay, in violation of Article 20 (2) and 20 (4) (C) of the Statute.
18. Therefore, the Defence submits that the Chamber should use neither its discretionary power pursuant to Rule 89 (D), nor grant the Prosecutor's Motion for leave to add one more witness to its list.

Prosecutor's "Further Motion"

19. The Prosecution submits that the original affidavit, a copy of which was attached in Annex I of the Further Motion, has come into its possession.

Prosecutor's Reply

20. The Prosecution submits that the Trial Chamber is entitled to use its discretion under Rules 89 (C) and (D) to admit the documents which show the chain of custody of the diary, and to hear a handwriting expert on the subject of the authenticity of the diary. The Prosecution submits that Counsel for Nyiramasuhuko never pleaded that the diary was not Nyiramasuko's. The Prosecution submits that the Defence would have the opportunity to challenge the handwriting expert during cross-examination if the Trial Chamber decides to hear his evidence.
21. The Prosecutor stresses the difference between an inventory of items seized, which was not done, and the Evidence Register Form, which is a document showing the chain of custody.
22. The Prosecution submits that, if the Trial Chamber decides to admit the affidavits, it would be in a position to weigh this evidence regarding the chain of custody.
23. The Prosecution submits that Accused Nyiramasuhuko has never denied being the author of the diary. She has consistently fought not to have it admitted into evidence and has tried to suggest that the missing pages may have contained exculpatory evidence. According to the Prosecution, these points imply that she is indeed the author of the diary.

The Report

24. On 20 September 2004, the Prosecution filed a document entitled "Report of Forensic Document Expert Antipas Nyanjwa, Filed Under Rule 94 bis (A) For Disclosure to

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the Defence and to Be Filed With the Trial Chamber". In its submissions attached to the Report, the Prosecution explained that it intended this document to be filed under Rule 94 *bis* (A) for the purpose of disclosure to the Defence. The Prosecution announced that the French version of the Report would be filed as soon as possible.

HAVING DELIBERATED

On the Admission of Affidavits

25. The Trial Chamber observes that the documents which the Prosecution seeks to be admitted include:

- an undated letter signed by Mr Stephen John Myall, former Co-Coordinator/Team Leader of the Strategy Team in the Office of the Prosecutor;
- a document bearing two declarations: one by Mr Stephen John Myall and signed by a person designated as a "witness"; the other declaration by the "witness" whose name is handwritten and barely legible. Both declarations are dated 26 July 2004.
- an "Evidence Register Form" bearing the number K004-3686- K004-3692: this document bears several signatures, but the identities of the persons who signed the document are not clear.
- an undated letter signed by Mr Charles Njogu, Acting Inspector of the CID Headquarters Nairobi, Kenya;
- a document bearing two declarations: one by Mr Charles Njogu and signed by a person designated as a "witness"; the other by the "witness" identified as "Mrs M. Odero, Principal Magistrate". Both declarations are dated 4 August 2004.

26. The Trial Chamber notes that the Prosecution seeks to have the Trial Chamber consider and admit documents produced in Annex III of the Motion as relevant evidence of probative value pursuant to Rule 89 (C). The Trial Chamber further notes the provisions of Rule 89 (C) that it may admit any relevant evidence which it deems to have probative value. However, it is the view of the Trial Chamber that Rule 89 (C) only contains general provisions related to the admissibility of evidence. Admission of evidence in the form of written statements, such as the letters from Mr Stephen John Myall and Mr Charles Njogu and the attached declarations, is specifically governed by Rule 92 *bis* with certain factors and conditions to be satisfied. But the Prosecution has not based its motion for admittance of the annexed affidavits on Rule 92 *bis*. Therefore, the Trial Chamber denies the Motion on this point for lack of legal basis.

On the Appointment of an Expert Witness

27. The Chamber notes that the Prosecution seeks to have the Trial Chamber request verification of the authenticity of the diary of Accused Nyiramasuhuko in accordance with Rule 89 (D). Pursuant to Rule 89 (D), the Chamber may request verification of the authenticity of evidence obtained out of Court.

28. The Trial Chamber notes that requests under Rule 89 (D) are part of the discretionary power of the Chamber. It is a power which the Chamber may exercise *suo motu*,

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without any Party being entitled to request the Chamber to use it. The existence of that power does not shift the responsibility which Rule 85 has placed on a Party to present its case as it should in the usual manner. As stated in the 11 April 2002 Decision rendered in the *Kajelijeli* Case,⁴ it is the view of the Trial Chamber that it belongs to each Party to bring the evidence it requires for its case by itself, without invoking the Chamber's discretion. Therefore, the Chamber denies the Motion on this point.

29. The Trial Chamber notes the Prosecution's alternative prayer to the effect that, if the Chamber opts not to exercise its discretion to request the verification of the authenticity of the diary, the Prosecution has the right to have the available letters from the Accused Nyiramasuhuko and the diary considered by a handwriting expert as part of the case for the Prosecution. Having denied the Prosecution's Motion for the Chamber to exercise its discretion, the Trial Chamber is of the view that the Prosecution may wish to follow up this matter, and hereby grants the alternative prayer.
30. The Trial Chamber further notes that, after filing the Motion, the Prosecution took the initiative to contact a handwriting Expert and filed a Report in this connection with the Registry. The issue of this Expert and his Report as they have been presented are not properly before the Trial Chamber at this stage as they go beyond the scope of this Motion. The Trial Chamber notes for example that the Expert Witness is not on the list of witnesses the Prosecution intends to call. Consequently, it is the view of the Trial Chamber that the Report filed by the Prosecution on 20 September 2004 under Rule 94 *bis* cannot be admitted at this stage.
31. The Trial Chamber notes that the appointment of an additional Expert Witness at this stage of the proceedings first requires, pursuant to Rule 73 *bis* (E), leave from the Chamber to add such witness to the list of witnesses the Prosecution intends to call in the presentation of its case. Therefore, it is up to the Prosecution, if it so wishes, to move the Trial Chamber under the appropriate rules.
32. The Trial Chamber also notes submissions by the Defence that the Prosecution lacked diligence and its request to have the authenticity of the diary verified is out-of-time, but considers that such submissions should be considered at a later stage, once the Prosecution has brought this matter before the Chamber in an appropriate manner.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

GRANTS PARTIALLY the Motion and considers that the Prosecution, if it so wishes, can follow up this matter;

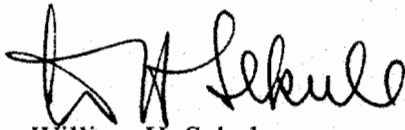
DENIES the Motion on the other points;

⁴ *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Decision on the Defence Motion for Verification of the Authenticity of Evidence Obtained Out of Court (TC), 11 April 2002, para. 13.

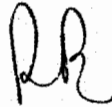
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DECIDES that the Report of Forensic Document Expert Antipas Nyanjwa, filed under Rule 94 bis (A) for Disclosure to the Defence and To Be Filed With the Trial Chamber is not admissible at this stage.

Arusha, 1st October 2004



William H. Sekule
Presiding Judge



Arlette Ramarason
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

