



ICTR-01-76-I  
04-10-2004  
(2970 - 2968)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

2970

S. MUSA

OR: ENG

**TRIAL CHAMBER I**

**Before:** Judge Erik Møse, presiding  
Judge Sergei Alekseevich Egorov  
Judge Dennis C. M. Byron

**Registrar:** Adama Dieng

**Date:** 4 October 2004

**THE PROSECUTOR**

v.

**Aloys SIMBA**

*Case No. ICTR-01-76-I*

JUDICIAL RECORDS/ARCHIVES  
RECEIVED  
ICTR

2004 OCT -4 P 3:38

---

**DECISION ON THE DEFENCE MOTION TO EXCLUDE THE TESTIMONY OF  
WITNESS KSM**

---

**Office of the Prosecutor:**

Richard Karegyesa  
William T. Egbe  
Sulaiman Khan  
Ignacio Tredici  
Amina Ibrahim

**Counsel for the Defence**

Sadikou Ayo Alao  
Beth Lyons

*John*

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

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, presiding, Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

**BEING SEIZED OF** the “Defence Motion to Exclude the Testimony of Witness KSM”, filed on 20 September 2004;

**CONSIDERING** the Prosecution’s response, filed on 24 September 2004, and the Defence’s reply, filed on 29 September 2004;

**HEREBY DECIDES** the motion.

**INTRODUCTION**

1. The Defence motion requests the Chamber to exclude the testimony of Prosecution Witness KSM. The witness testified on 14 and 15 September 2004 about events allegedly involving Simba in Kinyamakara and Ruhashya communes.

**SUBMISSIONS**

2. The Defence’s principal ground for excluding Witness KSM’s evidence is that it does not relate to the Indictment. The Defence notes that the witness’s testimony principally concerned Simba’s alleged participation in a massacre in Kinyamakara commune and general killings in Ruhashya commune. The Indictment, however, refers to the distribution of weapons in Kinyamakara commune, not killings, and to two specific massacre sites in Ruhashya commune, which were not mentioned by the witness. The Defence claims that it lacked notice of these new allegations and would be prejudiced by their admission into evidence. The Defence also asserts that Witness KSM’s testimony should be excluded because the Prosecution failed to previously identify the points in the Indictment to which she would testify. Furthermore, in the Defence’s view, the witness appeared visibly upset and traumatized, which calls into question her capacity to testify, including the validity of her oath and the reliability of her recollections.

3. The Prosecution argues that the Defence has waived its rights to challenge KSM’s evidence on grounds of lack of notice because it failed to contemporaneously object during her testimony. According to the Prosecution, this failure, the Defence’s subsequent cross-examination, and the prior disclosure of the witness’s statement reflect that the Defence was not surprised or prejudiced by her testimony. The Prosecution concedes that the evidence pertaining to the massacres in Kinyamakara commune were not pleaded in the Indictment and thus cannot be a basis of conviction. Nonetheless, it submits that Witness KSM’s evidence is within the scope of the Indictment and should not be excluded. According to the Prosecution, Witness KSM’s testimony refutes Simba’s alibi and goes to proving Simba’s *mens rea* during the Ruhashya massacres as well as to establishing the general requirements of a widespread and systematic attack. In addition, the Prosecutor asserts that its summary of Witness KSM’s evidence in its motion seeking to leave to vary the witness list adequately specified the points to which the

witness was going to testify. The Prosecution also argues that the Defence's challenge to the validity of the witness's capacity to testify are not supported by the evidence.

## DELIBERATIONS

4. The Defence first raised the challenges contained in the present motion orally at the close of Witness KSM's evidence.<sup>1</sup> At that time, the Chamber noted the objections for the record and indicated that these issues should be addressed at the closing brief stage.<sup>2</sup> This preserved the Defence's objections for further consideration.<sup>3</sup>

5. At this stage of the case, the Chamber is not in a position to fully appreciate the evidentiary value of all aspects of Witness KSM's testimony. While lack of notice may preclude conviction on an unpleaded allegation, the Appeals Chamber has confirmed that the evidence may nonetheless be admitted to the extent that it may be relevant to the proof of any allegation pleaded in the Indictment.<sup>4</sup> The Prosecution has indicated that Witness KSM's testimony will corroborate other witnesses in connection with the massacres in Ruhashya commune, which are pleaded in the Indictment.<sup>5</sup> Moreover, in Chamber's view, neither party has sufficiently addressed in detail the potential problems with each allegation made by the witness or their specific relevance to other aspects of the Indictment or as background for the case.

6. Thus, the Chamber finds these submissions to be pre-mature and maintains its position that the parties address these issues in their closing briefs.

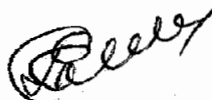
## FOR THE ABOVE REASONS, THE CHAMBER

**DENIES** the Defence motion.

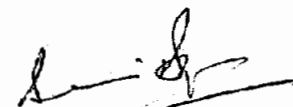
Arusha, 4 October 2004



Erik Møse  
Presiding Judge



Sergei Alekseevich Egorov  
Judge



Dennis C.M. Byron  
Judge



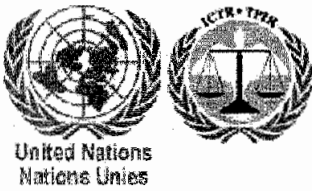
<sup>1</sup> T. 15 September 2004 p. 43.

<sup>2</sup> T. 15 September 2004 p. 44. This is particularly true for the Defence's arguments concerning the impact of trauma on the reliability of the witness's testimony, which goes to weight, not admissibility.

<sup>3</sup> *Niyitegeka*, Judgement (AC), paras. 199-200.

<sup>4</sup> *Ntahobali and Nyiramasuhuko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, paras. 14 and 15.

<sup>5</sup> T. 15 September p. 37.



# TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

**COURT MANAGEMENT SECTION**  
(Art. 27 of the Directive for the Registry)

## I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

<b>To:</b>	<input checked="" type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS K. K. A. Afande	<input type="checkbox"/> Appeals Chamber / The Hague R. Burriss
<b>From:</b>	<input checked="" type="checkbox"/> Chamber I <b>Judges Mose, Egorov, Byron</b> (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
<b>Case Name:</b>	The Prosecutor vs. <b>Simba</b>		<b>Case Number:</b> ICTR-01-76-I	
<b>Dates:</b>	Transmitted: <b>4 October 2004</b>		Document's date: <b>4 October 2004</b>	
<b>No. of Pages:</b>	<b>3</b>		<b>Original Language:</b> <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
<b>Title of Document:</b>	<b>DECISION ON THE DEFENCE MOTION TO EXCLUDE THE TESTIMONY OF WITNESS KSM</b>			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input checked="" type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
		<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
		<input type="checkbox"/> Submission from non-parties	<input type="checkbox"/> Submission from parties	
		<input type="checkbox"/> Accused particulars		

## II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

**CMS SHALL** take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

**Target Language(s):**

English  French  Kinyarwanda

**CMS SHALL NOT** take any action regarding translation.

Filing Party hereby submits **BOTH** the original and the translated version for filing, as follows:

Original	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

**CMS SHALL NOT** take any action regarding translation.

Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

English  French  Kinyarwanda

**KINDLY FILL IN THE BOXES BELOW**

<input type="checkbox"/> <b>The OTP</b> is over-seeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> <b>DEFENCE</b> is over-seeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:
--	---

JUDICIAL RECORDS/ARCHIVES  
 RECEIVED  
 ICTR  
 2004 OCT -4 P 381

## III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	<b>COMMENTS</b>	<input type="checkbox"/> Required date
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: