

ICTR-01-76-T
04-10-2004
(2967-2963)



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

2967

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-T

JUDICIAL RECORDS/ARCHIVES
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ICTR
2004 OCT -4 P 3:38

**DECISION ON DEFENCE MOTION TO OBTAIN JUDICIAL RECORDS PURSUANT
TO RULE 68**

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, Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the “Defence Motion to Obtain All the Prior Statements and/or Judicial Records which Witnesses KSS and KEH Gave to Authorities in Rwanda”, filed on 24 September 2004, and the oral request for the disclosure of the judicial records of Emmanuel Rekeraho, made on 18 August 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 and oral request.

INTRODUCTION

1. The Defence written motion raises the issue of the scope of the Prosecution’s disclosure obligations pursuant to Rule 68 with respect to Rwandan judicial documents pertaining to Witnesses KEH and KSS.
2. Witness KEH testified before the Chamber on 31 August and 1 September 2004. During his testimony, he indicated that he had testified in judicial proceedings in Gikongoro, but added that these proceedings did not in anyway involve Aloys Simba or the events at the Murambi Technical school.¹ Rather, the proceedings involved local people who had torched houses and killed livestock in his sector.² The Defence made an oral request for the Prosecution to obtain any judicial documents pertaining to Witness KEH during the status conference on 1 September 2004.
3. Witness KSS testified before the Chamber on 14 September 2004. During his testimony, Witness KSS indicated that he had given statements about events to the police and Public Prosecutor in Rwanda other than those he discussed in his testimony.³
4. On 13 and 14 July 2004, the Prosecution disclosed to the Defence the French and English versions of the Rekeraho judgement as a prospective exhibit. On 18 August 2004, the Defence made an oral request pursuant to Rule 68 for the disclosure of the judicial dossier of Rekeraho. The Prosecution stated that it was under no obligation to produce the file because the dossier was not in its possession and it did not intend to call Rekeraho as a witness.⁴ The Prosecution has previously noted that the document would be introduced at trial by its investigator.⁵ In addition,

¹ T. 1 September 2004 pp. 33-34

² T. 1 September 2004 p. 34.

³ T. 14 September 2004 pp. 53-57.

⁴ T. 18 August 2004 p. 25; T. 2 September 2004 pp. 1-2.

⁵ T. 12 August 2004 p. 16; T. 18 August 2004 p. 25.

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the Prosecution has stated that it formed part of the materials that Alison Des Forges consulted in order to form her expert opinion.⁶

SUBMISSIONS

5. The Defence motion requests the Chamber to instruct the Prosecution, pursuant to Rule 68, to obtain Rwandan judicial documents related to proceedings involving Witnesses KEH and KSS. The Defence argues that the Prosecution has an obligation pursuant to Rule 68 to provide it with witnesses' prior statements concerning the same events about which they testify.

6. The Prosecution argues that it has no obligation under Rule 68 to provide the Defence with copies of Rwandan judicial documents pertaining to Witnesses KEH and KSS. In support of this position, it points to the Defence's concession that the requested documents are not in the possession of the Prosecution, but rather the Rwandan authorities. The Prosecution also asserts that the Defence has not demonstrated that the requested material is exculpatory or even potentially exculpatory, noting that the witnesses in cross-examination stated that the domestic proceedings in which they were involved were not related to the Accused. Moreover, the Prosecution highlights the Defence's failure to demonstrate that it has diligently searched and failed to obtain the requested material before filing its motion.

DELIBERATIONS

7. The Chamber is seized with a written motion to order the Prosecution to obtain the judicial records pertaining to Witnesses KEH and KSS. Moreover, the Defence has orally requested the Chamber to order the Prosecution to obtain the judicial dossier of Rekeraho. As this request raises similar issues as the motion, the Chamber considers it expedient to address also oral request in the present decision.

8. The Prosecution's obligation pursuant to Rule 68 is to disclose exculpatory evidence or evidence which may affect the credibility of Prosecution evidence, where such evidence is in its possession.⁷ It is not disputed that the requested documents are not within the Prosecution's possession. Thus, the motion must be dismissed. The Prosecution's disclosure obligations under the Statute and the Rules do not extend to pursuing every possible avenue of investigation into a witness's credibility on behalf of the Defence.⁸

⁶ T. 2 September pp. 1-2.

⁷ *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 5-6. See also *Bagosora et al.*, Decision on Motion for Disclosure under Rule 68 (TC), 1 March 2004, para. 5; *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Nzirorera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, para. 11.

⁸ *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, para. 6 ("The disclosure obligation under Rule 68 relates to "the existence of evidence known" to the Prosecutor. A literal interpretation might suggest that mere knowledge of exculpatory evidence in the hands of a third party would suffice to engage the responsibility of the Prosecutor under that provision. However, to adopt such a meaning, would, in the extreme, allow for countless motions to be filed with the sole intention of engaging the Prosecutor into investigations and disclosure of issues which the moving party considered were 'known' to the Prosecutor. This would not be in conformity with Article 15

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9. That being said, this Chamber has in the past ordered, pursuant to Rule 98, the Prosecution to use its good offices to request the Rwandan judicial records of detained witnesses.⁹ The Chamber has previously recognized that these documents are important for the preparation of the Defence given their relevance to credibility.¹⁰ However, Witnesses KEH and KSS are neither detained nor alleged accomplices. The Chamber is reluctant to issue a similar order in this case where, from the testimony of these witnesses, the materials requested by the Defence do not appear to directly relate to the credibility of any allegations against the Accused.

10. In addition, at this stage it is not entirely clear whether or for what purposes the Rekeraho judgement will be used at trial. Without a greater showing as to the relevance of this document and the need for challenging its credibility, the Chamber declines to order the Prosecution to request his judicial records, particularly where he will not be appearing as a witness.¹¹

11. As is the general practice in the Tribunal, the Defence must first make its own independent efforts to secure evidence it wishes to use at trial other than exculpatory material in the possession of the Prosecution.¹² Once the Defence demonstrates its inability to obtain relevant material despite its good faith efforts, it may then seize the Chamber and request appropriate judicial assistance pursuant to Article 28 of the Statute. Absent such a showing, the Defence motion is premature.

of the Statute. Under that provision, the Prosecutor is responsible for investigations. She shall act independently and not receive instructions from any source.”)

⁹ See, e.g., *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 10-11

¹⁰ See, e.g., *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 10-11.

¹¹ At present, the Defence has submitted only: “With regard to the Rekeraho judicial file, the Prosecutor has just submitted before this Court that he’s not obliged to produce the judicial file as part of the judgement which he disclosed to us because he does not intend to call that witness, but that witness might be called by an expert witness. Now, I think in the interests of this case, the Defence reiterates that we do need that file, and we’d like the Court to take due note of our position in this regard.” T. 2 September 2004 p. 4.

¹² *Bagosora et al.*, Request to the Government of Rwanda for Cooperation and Assistance (TC), 31 August 2004, para. 3; *Bagosora et al.*, Decision on the Defence for Bagosora’s Request to Obtain the Cooperation of the Republic of Ghana (TC), 25 May 2004, para. 6; *Bagosora et al.*, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004, para. 4.

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FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion and oral request.

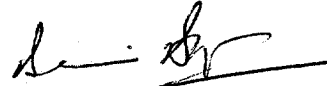
Arusha, 4 October 2004



Erik Møse
Presiding Judge



Sergei Alekseevich Egorov
Judge



Dennis C.M. Byron
Judge

(Seal of the Tribunal)

