



ICTR-99-50-T
6-10-2004
(18295 — 18288)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 6 October 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 MOTION OF DEFENDANT BICAMUMPAKA OPPOSING THE
ADMISSIBILITY OF WITNESSES GFA, GKB AND GAP**

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 Bicamumpaka
Mr. Tom Moran for Prosper Mugiraneza

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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 the "Motion of Defendant Bicomumpaka Opposing the Testimony of Witnesses GFA, GKB and GAP" filed on 12 July 2004, (the "Motion");

NOTING the "Prosecutor's Response to Jérôme Bicomumpaka's Motion Opposing the Testimony of Witnesses GFA, GKB and GAP" filed on 19 July 2004, (the "Response");

NOTING the "Motion to Extend Time to File (the "Motion for Extension of Time") and Jérôme Bicomumpaka's Reply to Prosecutor's Response to Bicomumpaka's Motion Opposing the Admissibility of the Testimony of Witnesses GFA, GKB and GAP" filed on 23 August 2004, (the "Reply");

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence for Jérôme Bicomumpaka requests that the Trial Chamber declare inadmissible the evidence of Witnesses GFA, GKB and GAP regarding Jérôme Bicomumpaka's involvement in events in Ruhengeri *préfecture*. The Defence moves the Trial Chamber to order the Prosecutor not to lead any such evidence from Witness GFA, who has not yet testified, and disregard any such evidence from Witnesses GKB and GAP, who have already testified.
2. The Defence asserts that the Indictment makes no specific allegations against Jérôme Bicomumpaka regarding activities in Ruhengeri *préfecture*. Therefore, the Defence argues, Jérôme Bicomumpaka is in the same position as Casimir Bizimungu, whose motion to declare inadmissible testimony on his acts in Ruhengeri *préfecture* was granted by the Trial Chamber¹ and upheld by the Appeals Chamber² on the basis that "there are no specific acts alleged against Casimir Bizimungu in relations to events that took place in Ruhengeri *préfecture* in any part of the Indictment."³
3. The Defence submits that the Trial Chamber should apply the same reasoning to declare inadmissible the testimony of Witnesses GFA, GKB, and GAP regarding Jérôme Bicomumpaka's activities in Ruhengeri *préfecture*.

¹ *The Prosecutor v. Casimir Bizimungu et al.*, "Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD, and GFA", 23 January 2004, (the "Decision of 23 January 2004").

² *The Prosecutor v. Casimir Bizimungu et al.*, "Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence", 25 June 2004.

³ Decision of 23 January 2004.

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4. The Defence argues that the availability of this relief should not be affected by the fact that Witnesses GKB and GAP have already testified. The Defence notes that the Motion was filed less than two weeks after the Appeals Chamber ruled on the related motion from Casimir Bizimungu. Furthermore, the Defence submits that the Appeals Chamber did not consider the Trial Chamber in error when it declared inadmissible testimony of witnesses who had already testified regarding Casimir Bizimungu's activities.

5. The Defence finally notes that after it announced an alibi for Witness GAP's allegations regarding Ruhengeri *prefecture*, the Prosecutor decided not to call the two main witnesses for the alibi.

Prosecutor Submissions

6. The Prosecutor argues that the issue of Witnesses GFA, GKB, and GAP with regard to Jérôme Bicomumpaka differs from the issue on which the Trial Chamber and Appeals Chamber ruled regarding the witnesses testifying about Casimir Bizimungu's acts in Ruhengeri *prefecture*.

7. Regarding Witnesses GKB and GAP, the Prosecutor submits that unlike Casimir Bizimungu, the Defence did not make timely objections to the testimony in question. Citing the Appeals Chamber about objections raised upon appeal,⁴ the Prosecutor argues that Jérôme Bicomumpaka waived his right to claim lack of notice and prejudice because he did not allege any prejudice when the witnesses testified and waited until six to seven months later to file his Motion. The Prosecutor notes that the Defence did not cross-examine Witness GKB and did not object to either Witness GKB's or Witness GAP's testimony in the Trial Chamber. The Prosecutor also notes that the Trial Chamber Decision regarding Casimir Bizimungu's similar motion stated that "objection[s] of this type should [be] raised as soon as possible, at minimum before the commencement of the evidence of the disputed witness."⁵

8. The Prosecutor further argues, based on Appeals Chamber statements about appeals submissions, that the Defence bears the burden of proof for showing he has been prejudiced by the testimony of Witnesses GKB and GAP. The Prosecutor submits that the Defence's lack of objection in the Trial Chamber to their testimony shows that he was not prejudiced by it.

9. Regarding Witness GFA, the Prosecutor contends that unlike Casimir Bizimungu, the Defence for Jérôme Bicomumpaka received sufficient notice of the allegations against him for acts in Ruhengeri. The Prosecutor notes that when Casimir Bizimungu filed his similar motion, Witness GFA, one of the five in question, was not on the witness list yet, while the Defence for Jérôme Bicomumpaka knew that Witness GFA was on the witness list and received his statements before filing its Motion.

⁴ *Nyitegeka v. The Prosecutor*, Case No. ICTR-96-16-A, Judgment, 9 July 2004.

⁵ Decision of 23 January 2004, para. 17.



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10. Alternatively, the Prosecutor submits that the Pre-Trial Brief has cured any defects in the Indictment regarding allegations against the Accused for acts in Ruhengeri. The Prosecutor points to Appeals Chamber decisions that allow such curing, and further argues that the testimony of Witnesses GKB and GAP and the anticipated testimony of Witness GFA about Jérôme Bicomumpaka's alleged acts in Ruhengeri *préfecture* are consistent with the Pre-Trial Brief.

11. Regarding the Defence's alibi for Witness GAP's allegations, the Prosecutor submits that one of the witnesses supporting the alibi was never a Prosecution witness, the other was removed from the Prosecutor's witness list on 23 June 2004, and both are available to be called by the Defence.

Defence Reply

12. According to the Defence, the Prosecutor's Response was received by the Legal Assistant, Me Philippe Larochelle, who was still present in Arusha on 12 July 2004. The Defence argues that the Legal Assistant was only given permission to meet with the Accused on 4 August and with the Lead Counsel on 11 August. The Defence contends that the Reply was drafted at the earliest opportunity and that it should be granted an extension of time to file the Reply.

DELIBERATIONS

13. As a preliminary matter, the Trial Chamber notes that the Defence Reply was filed more than one month after the Prosecutor's Response and after the deadline given by the Trial Chamber to reply. Further the Trial Chamber is not convinced by the reasons given by the Defence, namely that the Legal Assistant for the Defence was unable to meet with the Accused and in the impossibility of communicating with the Lead Counsel. The Trial Chamber is of the view that, although it had adopted a flexible approach in the past, the delay between the Response and the Reply is such that the Defence cannot reasonably expect the Trial Chamber to grant a motion for extension of time one month after the Reply was due. Therefore, the Trial Chamber will not take into consideration the Reply and will deny the Motion for Extension of Time.

14. The Trial Chamber, in the following reasoning, will rely on the case law of this Tribunal as well as on other legal authorities. The Trial Chamber is of the view that the Appeals Chamber Decision in the *Niyitegeka* case has accurately stated the position of both Tribunals on the issue of sufficiency and specificity of the Indictment. The Trial Chamber considers the following paragraphs as being particularly relevant:⁶

193. The law governing challenges to the failure of an Indictment to provide notice of Material Facts is set out in detail in the ICTY Appeals Chamber's Judgement in *Kupreškić*. The *Kupreškić* Judgement stated that Article 18(4) of the ICTY Statute, read in conjunction with Articles 21(2), 4(a) and 4(b),

⁶ *The Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-A, Judgement, 9 July 2004

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"translates into an obligation on the part of the Prosecution to state the Material Facts underpinning the Charges in the Indictment, but not the evidence by which such Material Facts are to be proven."⁷ *Kupreškić* discussed several factors that may bear on the determination of materiality, although whether certain facts are "material" ultimately depends on the nature of the case. If the Prosecution Charges personal physical commission of criminal acts, the Indictment should set forth "the identity of the victim, the time and place of the events and the means by which the acts were committed."⁸

[...]

195. Failure to set forth the specific Material Facts of a crime constitutes a "material defect" in the Indictment.⁹ Such a defect does not mean, however, that trial on that Indictment or a conviction on the unpleaded material fact necessarily warrants the intervention of the Appeals Chamber. Although *Kupreškić* stated that a defective Indictment "may, in certain circumstances" cause the Appeals Chamber to reverse a conviction, it was equally clear that reversal is not automatic.¹⁰ *Kupreškić* left open the possibility that the Appeals Chamber could deem a defective Indictment to have been cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the Charges against him or her."¹¹

15. Further, the Trial Chamber notes the decision of the Appeals Chamber in the *Nyiramasuhuko* Case¹² where it stated:

11. [...] for an indictment to be pleaded with sufficient particularity, it must set out the material facts of the Prosecution case with enough detail to inform the defendant clearly of the charges against him or her so that he or she may prepare his or her defence. The required degree of specificity depends very much on the facts of the case and the nature of the alleged criminal conduct. If an indictment does not plead the material facts with sufficient detail, this can be remedied in certain circumstances at trial, for instance, by amendment of the indictment. Where a defect remains, the question then arises whether the trial of the accused was rendered unfair.¹³

12. [...] the failure to specifically plead certain allegations in the indictment does not necessarily render the evidence inadmissible. The Trial Chamber has the discretion to under Rule 89(C) to admit any evidence which it deems to have probative value, to the extent that it may be relevant to the proof of the other allegations specifically pleaded in the Indictment.

⁷ *Kupreškić et al.* Appeal Judgement, para. 88.

⁸ *Id.*, para. 89.

⁹ *Id.*, para. 114.

¹⁰ *Ibid.* (emphasis added).

¹¹ *Ibid.*

¹² *Nyiramasuhuko v. Prosecutor*, Case No ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004.

¹³ (Internal footnote omitted).



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16. In determining the question of prejudice resulting from witness testimony that the Accused could not fairly have anticipated, it is important to consider whether the Prosecution had provided to the Defence "timely, clear and consistent" disclosure of the challenged testimony. In this regard, the Trial Chamber finds that the Prosecution Pre-Trial Brief, filed on 20 October 2003,¹⁴ gave sufficient notice to the Defence of the evidence underpinning the charges in the Indictment and disclosed the relevant witness statements of the impugned witnesses, in unredacted format on 8 October 2003 for Witnesses GKB and GAP.

17. With respect to Witness GKB the Trial Chamber notes that there is no mention of the Accused in his statements. The Trial Chamber also notes that the statements were disclosed to the Defence on 8 October 2003 and that the Pre-Trial Brief does not mention this particular Witness in relation to the events alleged. However, when GKB testified on 10 December 2003, he stated that the Accused was present at the swearing-in ceremony.¹⁵ The Trial Chamber considers that the fact that the Defence did not object at the time and did not even proceed to cross-examination when this witness testified on 8, 10, 12 and 15 December 2003 constitute a waiver of the right of the Accused to bring such a Motion for exclusion. The Trial Chamber reproduces here the intervention of the Defence Counsel:

MR. GAUDREAU:

Mr. President, as far as the Defence of Bicomumpaka is concerned, we also do not intend to cross-examine this witness because we have no interest in cross-examining her -- cross-examining him. And we also like to make the caveat that the fact of not cross-examining him does not mean that we accept *in toto* his testimony.¹⁶

18. Therefore, the Trial Chamber does not see any reason to exclude the testimony of Witness GKB in relation to the alleged presence of the Accused at the swearing-in ceremony as the Defence has been unable to show any prejudice that could have occurred due to the testimony of this witness.

19. Regarding Witness GAP, the Trial Chamber finds, after a careful review of the statements disclosed in an unredacted format on 8 October, that the alleged swearing-in ceremony and the participation of Bicomumpaka was mentioned with ample details. The Trial Chamber also notes that Witness GAP testified on 19, 20, 21, 22 and 23 January 2004 and that the Defence Counsel for Bicomumpaka proceeded to an extensive cross-examination, especially on the issue of the impugned meeting. Furthermore, the Trial Chamber observes that the impugned swearing-in ceremony was specifically mentioned in the Pre-Trial Brief in the following terms:

¹⁴ *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I, Prosecutor's Pre-Trial Brief Pursuant to Rule 73 bis (B)(i), 20 October 2003.

¹⁵ T. 10 December 2003, p. 26.

¹⁶ T. 11 December 2003, p. 2.

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278. Moreover, Bicomumpaka actively participated in the Interim Government's policy of removing local authorities opposed to massacres, and replacing them with those devoted to the cause. He actively participated in inciting the new authorities to prioritize the killing of Tutsis. *The Prosecutor will lead evidence to prove that on a date unknown between 19 and 16 April 1994, Bicomumpaka installed Mr. Nsabumugha new prefet for Ruhengeri and incited the killing of Tutsis. He spelt out the new prefet's function as the killing of Tutsis.* A few days after this, killing of Tutsis intensified in Ruhengeri.¹⁷

20. Additionally, the Trial Chamber notes that the Defence did not object at the time that Witness GAP gave evidence. Furthermore, in relation to Bicomumpaka's presence at the swearing-in ceremony, the Trial Chamber is of the view that Defence could not have suffered any prejudice considering its filing of a Notice of alibi with respect to Witness GAP and this particular event.¹⁸ The Trial Chamber recalls that this type of objection should be raised before the testimony of the impugned witness and that the Defence Counsel did not object to this part of the testimony in a timely manner.

21. Finally, the Trial Chamber is of the view that the evidence of Witness GAP, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment: 4.17, 6.9, 6.10, 6.18, 6.26, 6.30 and 6.35. The Trial Chamber considers that the said paragraphs state in sufficient details the material facts underpinning the charges in the Indictment, and that the pre-trial disclosure describe sufficiently the evidence by which such material facts are to be proved. Therefore, the Trial Chamber is satisfied that the Accused has received adequate notice of the case against him in a clear, timely and consistent manner and that no prejudice will be caused to the Accused by the admission of the testimony of Witness GAP.

22. With respect to Witness GFA, the Trial Chamber notes that the objection was raised before the testimony of the witness in a timely manner. The Trial Chamber also notes that, even though the statements of Witness GFA were disclosed on 19 December 2003 to the Defence, the name of Witness GFA already appeared in the Pre-Trial Brief in relation to the events mentioned in paragraph 278 as reproduced above. The statements contained a clear and consistent description of the swearing-in ceremony as well as the participation of the Accused in that particular event. The Trial Chamber acknowledges that the transcripts of the testimony of Witness GFA were only disclosed on 29 September 2004 but after a careful review of the transcript, the Trial Chamber concludes that there is no new information contained in this testimony.

23. Finally, the Trial Chamber is of the view that the evidence of Witness GFA, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment: 4.17, 6.9, 6.10, 6.18, 6.26, 6.30 and 6.35. The Trial Chamber considers that the said paragraphs state in sufficient

¹⁷ *The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-I, Prosecutor's Pre-Trial Brief Pursuant to Rule 73 bis (B)(i), 20 October 2003, para. 278. (Emphasis added).*

¹⁸ *The Prosecutor v. Jérôme Bicomumpaka et al., Case No. ICTR-99-50-T, Notice of Alibi from the Defence of Bicomumpaka Concerning Allegations Made By Witness GAP, 10 December 2003.*

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details the material facts underpinning the charges in the Indictment, and that the pre-trial disclosure describe sufficiently the evidence by which such material facts are to be proved. Therefore, the Trial Chamber is satisfied that the Accused has received adequate notice of the case against him in a clear, timely and consistent manner and that no prejudice will be caused to the Accused by the admission of the testimony of Witness GFA.

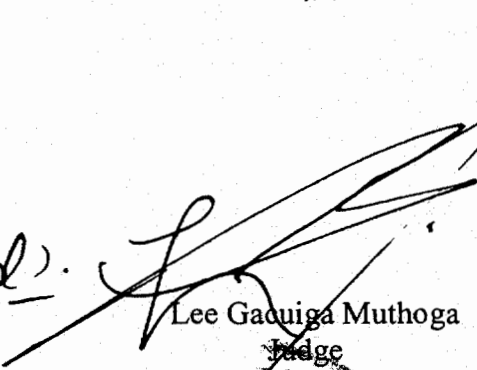
FOR THE ABOVE REASONS, THE TRIAL CHAMBER -

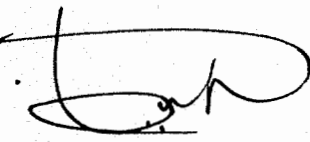
DENIES the Motion for Extension of Time and,

DENIES the Motion.

Arusha, 6 October 2004


Khalida Rachid Khan
Presiding Judge


Lee Gaciga Muthoga
Judge


Emile Francis Short
Judge

