



ICTR-01-76-T
28-10-2004
(2984-2981)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

2984
S. Musera

OR: ENG

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 28 October 2004

THE PROSECUTOR

v.

Aloys SIMBA

Case No. ICTR-01-76-T

JUDICIAL RECORDS/ARCHIVES
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ICTR
2004 OCT 28 A 11: 05

**DECISION ON THE DEFENCE MOTION TO RECALL WITNESS KEL FOR
FURTHER CROSS-EXAMINATION**

Office of the Prosecutor:

Richard Karegyesa
Sulaiman Khan
Ignacio Tredici
Amina Ibrahim

Counsel for the Defence

Sadikou Ayo Alao
Beth Lyons

John

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

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

BEING SEIZED OF the “Requête de la Défense pour Ordonner une Nouvelle Comparution du Témoin de l’Accusation KEL en Vue de son Contre Interrogatoire à Huis Clos Conformément aux Dispositions de l’Article 73 du RPP”, filed on 7 October 2004;

CONSIDERING the Prosecution’s Response, filed on 12 October 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. Witness KEL testified from 7 to 9 September 2004. At the beginning of the cross-examination, Lead Counsel for the Defence stated that his Co-Counsel would “start the cross”.¹ At the close of the first day of the witness’s cross-examination, Co-Counsel indicated that her Lead Counsel had one area to cover.² The next day at the close of Co-Counsel’s cross-examination, she indicated that the Lead Counsel had “a very few short points”.³ Lead Counsel indicated that his questioning would last only about 30 minutes. The Chamber noted that it was exceptional in the Chamber’s practice to allow both Defence counsel to cross-examine a single witness but nonetheless allowed Lead Counsel to proceed, emphasizing that he had to “focus on the key issues” and “prioritise ... very, very strictly”.⁴

2. After a number of questions, the Defence indicated that it had one final question before moving into closed session. The Chamber indicated that the Defence should conclude its cross-examination and ask one final question. The Defence noted that it had not yet examined the witness in closed session, but added that “if the court decides otherwise we are going to abide by the Court’s decision. There’s no problem, Mr. President”.⁵ The Chamber, noting that the Defence had already been given an extensive opportunity to cross-examine the witness, again asked the Defence to ask one final question. The Defence without further objection indicated that it had no further questions.⁶

SUBMISSIONS

3. The Defence seeks to recall Witness KEL to cross-examine him in closed session. The motion argues that, despite Lead Counsel’s insistence, the Chamber did not permit him to ask the questions reserved for closed session. The Defence asserts that the Chamber implicitly granted

¹ T. 8 September 2004 p. 2.

² *Id.* p. 50.

³ T. 9 September 2004 p. 16.

⁴ *Id.* pp. 16-17.

⁵ *Id.* p. 24.

⁶ *Id.* p. 26.

John

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Lead Counsel the right to conclude the cross-examination when the Defence indicated at the outset that Co-Counsel would start the cross-examination. In the Defence's view, it was deprived of the right to cross-examine the witness under Rule 85. Failure to correct this error will compromise the rights of the Accused.

4. The Prosecution argues that the Defence had sufficient time to question Witness KEL and that it has not shown good cause to recall him.

DELIBERATIONS

5. In its recent decision in *Bagosora et al.*, the Chamber set forth the standard for recalling a witness:

A party seeking to recall a witness must demonstrate good cause, which previous jurisprudence has defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act. In assessing good cause, the Chamber must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness originally testified. The right to be tried with undue delay as well as concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature. For example, the Chamber has intimated in this case that the recall of a witness might be appropriate where a party demonstrates prejudice from an inability to put significant inconsistencies to a witness which arise from previously unavailable Rwandan judicial documents.⁷

6. Pursuant to Rule 90 (F) and (G), the Chamber has the authority to limit the examination of a witness to ensure the efficiency of the proceedings. The Chamber properly exercised this authority after extensive cross-examination by two Defence Counsel.

7. Contrary to the Defence's suggestions, the fact that Lead Counsel indicated that Co-Counsel would "start the cross" does not mean that the Chamber implicitly authorized the Defence to conduct a second cross-examination. It was only at the end of Co-Counsel's lengthy cross-examination that the Chamber allowed Lead Counsel to ask additional questions. Allowing two counsel to cross-examine a single witness is not the usual practice and requires the express approval of the Chamber.⁸

8. When granting Lead Counsel the right to ask additional question, the Chamber emphasised that the second examination must be short and focused. Therefore, it is clear from the record that from the outset the Defence was aware that any subsequent questioning was discretionary and limited. Lead Counsel requested about thirty minutes, and the Chamber even allowed him to proceed for nearly forty minutes. At no point prior to the end of Lead Counsel's questioning was the Chamber given notice of the need for a closed session. When the Chamber asked the Defence to ask its last question the Defence stated that there was no problem and concluded its cross-examination.

⁷ *Bagosora et al.*, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6 (internal citations omitted).

⁸ T. 9 September 2004 p. 16.

blm

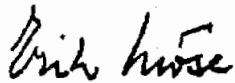
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9. Neither during the testimony of Witness KEL nor in its present motion has the Defence given any precise information about the purpose of further cross-examination in closed session. The motion only contains a vague reference to questions related to locations and the witness's personality. Absent further information, the Chamber cannot determine whether its decision to end cross-examination actually prejudiced the Defence.⁹ Consequently, the Defence has not shown that there is good cause to recall the witness.

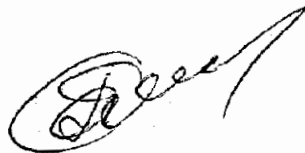
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion.

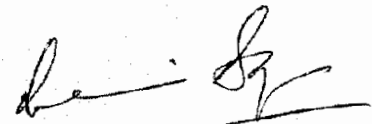
Arusha, 28 October 2004



Erik Møse
Presiding Judge



Sergei Alekseevich Egorov
Judge

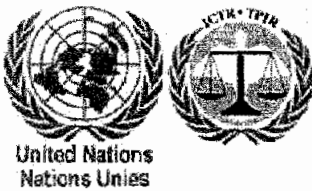


Dennis C.M. Byron
Judge

(Seal of the Tribunal)



⁹ See similarly *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, paras. 7-8.



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Case Name:	The Prosecutor vs. Simba		Case Number: ICTR-01-76-I	
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