

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-99-50-T
17-11-2004
(19000-19096)

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Or: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 17 November 2004

The PROSECUTOR

v.

Casimir BIZIMUNGU

Justin MUGENZI

Jérôme-Clément BICAMUMPAKA

Prosper MUGIRANEZA

Case No. ICTR-99-50-T

JUDICIAL RESERVES/ARCHIVES
ICTR
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**DECISION ON BICAMUMPAKA'S REQUEST FOR CERTIFICATION TO
APPEAL A DECISION OF 6 OCTOBER 2004 ON BICAMUMPAKA'S MOTION
OPPOSING THE ADMISSIBILITY OF THE TESTIMONY OR WITNESSES
GFA, GKB AND GAP
(Rule 73 of the Rules)**

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 and Mr. Christian Gauthier for Prosper Mugiraneza

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 "Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal a Decision of 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of the testimony of Witnesses GFA, GKB and GAP" filed on 22 October 2004 (the "Motion");

NOTING

- (i) The "Prosecutor's Response to Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal a Decision of 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of the testimony of Witnesses GFA, GKB and GAP", filed on 28 October 2004;
- (ii) "Bicamumpaka's Reply to "Prosecutor's Response to Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal a Decision of 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of the testimony of Witnesses GFA, GKB and GAP"" filed on 8 November 2004;

NOTING the "Decision on Motion of Defendant Bicamumpaka Opposing the Admissibility of Witnesses GFA, GKB and GAP" (the "6 October 2004 Decision");

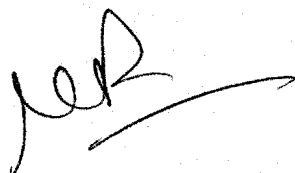
CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence seeks certification pursuant to Rule 73 of the Chamber's Decision dated 6 October 2004 which denied the Defence motion opposing the admissibility of witnesses GFA, GKB and GAP.
2. The Defence alleges that the question of admissibility of evidence significantly affects the conduct of the proceedings and the outcome of the trial and that the resolution of that question will materially advance the proceedings in conformity with the requirements of Rule 73(B) of the Rules.
3. As far as the conduct of the proceedings is concerned, the Defence recalls the Decisions on exclusion of evidence of 23 January 2004 and 3 February 2004 which were confirmed by the Appeals Chamber on 25 June 2004. The Defence also recalls the Decision on partial exclusion of evidence of 5 February 2004 which was directed



by the Appeals Chamber for reconsideration on 5 July 2004. The Trial Chamber gave its reasons on 4 October 2004 and maintained the 5 February 2004 Decision. On 6 October 2004, the Chamber denied Bicamumpaka's Motion on exclusion of evidence of witnesses GFA, GKB and GAP.

4. The Defence argues that without appellate resolution, Bicamumpaka may be convicted on all counts because Witnesses GFA and GAP's allegations support paragraphs of the indictment that support all counts of the indictment. The Defence alleges that this contrasts with the situation of accused Bizimungu and that the only difference between the two is the timing of their objections whereas the Accused are placed in identical situations. The Defence argues that in a joint trial, when an accused objects to the admissibility of certain evidence, the co-accused preserves its right to object at a later stage.

5. The Defence alleges that admissibility of evidence of acts against Bicamumpaka in the Prefecture of Ruhengeri certainly affects the outcome of the trial. The Defence alleges that the circumstances are analogous to the 18 March 2004 Decision where the Chamber allowed certification because the "issue of admissibility of testimonies of Prosecution witnesses could significantly affect the outcome of the trial against the accused, insofar as to whether the Trial Chamber will take into account the testimony of these witnesses for its final deliberations or not could significantly affect its deliberation."

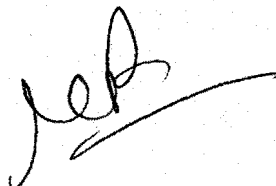
6. The Defence submits that an immediate resolution of the issue will materially advance the proceedings by knowing if a case can be made against Bicamumpaka for those alleged acts committed in Ruhengeri and to prepare a defence. The Defence also adds that resolving a radical difference between decisions on similar issues will also serve that purpose.

7. Finally, the Defence observes that all decisions dealing with exclusion of witnesses have been certified indicating that the conditions under the Rule are met.

The Prosecution's Response

8. The Prosecution opposes the Motion. The Prosecution recalls that the jurisprudence of this Tribunal states that certification under Rule 73(B) should only be granted in exceptional circumstances as stated in the 18 March 2004 Decision in *Prosecutor v. Nyiramasuhuko*.

9. The Prosecution alleges that the criteria of Rule 73(B) are not met because the Chamber's decision is correct and unlikely to be overturned by the Appeals Chamber. Contrary to the Defence's argument, Bicamumpaka and Bizimungu are not in exactly identical situations and particularly, the timing of their objections is different and the Trial Chamber has decided that this delay amounts to a waiver of Bicamumpaka's right to object to the testimonies of GKB and GAP. Moreover, the Prosecution alleges that the other difference between Bizimungu and



Bicamumpaka is the sufficiency of the notice to the Accused of the substance of GFA's evidence.

10. Finally the Prosecution argues that the Appeals Chamber has articulated the standard governing this case in its 15 July 2004 Decision on Mugiraneza's interlocutory appeal. As a result, the proceedings are unlikely to be materially advanced by yet another appeal.

The Defence's Reply

11. The Defence indicates that the Response does not adequately address the standard for certification and specifically the fact that the issue of exclusion of evidence has always been certified. Moreover, the Defence rejects the Prosecution's argument that the Chamber's Decision on certification could depend on the likelihood of the success of the appeal.
12. The Defence adds that in its application for certification to appeal the Decision excluding Witnesses GKB, GFA and GAP among others, the Prosecution had asserted that "the exclusion of evidence is sufficient for certification because it affects a fair determination of the matter" and that admissibility of evidence is similarly sufficient.

HAVING DELIBERATED

13. The Chamber recalls the Appeals Chamber Decision in *Nyiramasuhuko v. The Prosecutor*¹ restating the conditions of Rule 73(B) of the Rules for certification to be granted by a Trial Chamber and stating particularly on the issue of admissibility of evidence the following:

It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence.²

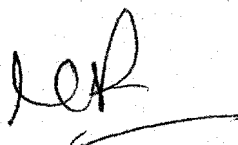
14. Furthermore, in the same Decision, the Appeals Chamber ruled that:

[T]he admission into evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted. These are to be assessed by the Trial Chamber at a later stage in the case when assessing the probative weight to be attached to the evidence.³

¹ *Nyiramasuhuko v. The Prosecutor*, Case No ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on Admissibility of Evidence [AC], 4 October 2004.

² *Idem*, par.5, footnote omitted.

³ *Idem*, par. 7, footnote omitted.



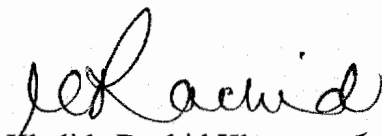
15. The Chamber also recalls the Appeals Chamber *Decision on Mugiraneza Interlocutory Appeal against a Decision of the Trial Chamber on Exclusion of Evidence* in which guidance was provided to the Trial Chamber with respect to issues of exclusion of evidence.⁴

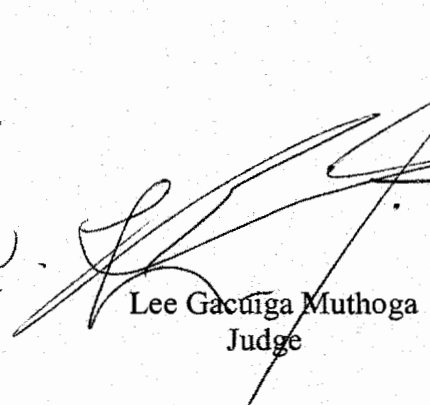
16. In light of the above mentioned Decisions and having considered the submissions of the Parties, the Chamber does not find that the conditions for certification under Rule 73 (B) have been met in the instant case. Moreover, the Chamber wishes to clarify that even if some decisions on admissibility of evidence have been certified, this does not necessarily mean, as the Defence submits, that all such decisions fall into a special category under Rule 73 carrying an automatic right of interlocutory appeal. This is not the case and the principle remains that all decisions rendered under Rule 73 "are without interlocutory appeal" save when the specific conditions of certification provided under sub Rule (B) have been met.

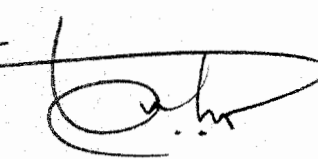
FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Defence Motion.

Arusha, 17 November 2004


Khalida Rachid Khan
Presiding Judge


Lee Gacuga Muthoga
Judge


Emile Francis Short
Judge

(Seal of the Tribunal)

⁴ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.3 and AR73.4, Decision on Mugiraneza Interlocutory Appeal Against a Decision of the Trial Chamber on Exclusion of Evidence, A.C., 15 July 2004.