



UNITED NATIONS
NATIONS UNIES

ICTR-99-50-T
17-11-2004
(19104-19101)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

19104
mugiraneza

OR: ENG

TRIAL CHAMBER II

Before Judges: 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

2004 NOV 17 P 1:43
ICTR
JUDICIAL RECORDS/ARCHIVES
RECORDED

**DECISION ON THE PROSECUTOR'S MOTION AND NOTICE PURSUANT TO
RULE 92bis(E)**

Office of the Prosecutor:

Paul Ng'arua
Ibukunolu Babajide
Justus Bwonwonga
Elvis Bazawule
George William Mugwanya
Shyamlal Rajapaksa

Counsel for the Defence:

Michelyne C. St. Laurent and Alexandra Marcil for Casimir Bizimungu
Howard Morrison and Ben Gumpert for Justin Mugenzi
Pierre Gaudreau and Michel Croteau for Jérôme-Clément Bicamumpaka
Tom Moran and Christian Gauthier 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 "Prosecutor's Motion and Notice Pursuant to Rule 92bis(E) Showing Widespread and Systematic Rapes Committed Throughout the Territory of Rwanda During the Period Covered by the Temporal Jurisdiction of the Tribunal", filed on 23 September 2004 (the "Motion");

NOTING

- (i) "Mugenzi's Response to the Prosecutor's Motion Pursuant to Rule 92bis Showing Widespread and Systematic Rapes Committed Throughout the Territory of Rwanda During the Period Covered by the Temporal Jurisdiction of the Tribunal", filed on 11 October 2004;
- (ii) "Mugiraneza's Response to the Prosecutor's Motion Pursuant to Rule 92bis Showing Widespread and Systematic Rapes Committed Throughout the Territory of Rwanda During the Period Covered by the Temporal Jurisdiction of the Tribunal", filed on 11 October 2004;
- (iii) The "Strictly Confidential Response from Casimir Bizimungu to the Prosecutor's Motion Pursuant to Rule 92bis of the Rules of Procedure and Evidence", filed on 12 October 2004;
- (iv) "Bicamumpaka's Objection to and Response to the Prosecutor's Notice and Motion Pursuant to Rule 92bis Showing Widespread and Systematic Rapes Committed Throughout the Territory of Rwanda During the Period Covered by the Temporal Jurisdiction of the Tribunal", filed on 13 October 2004;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Evidence (the "Rules"), particularly Rule 92bis of 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 Prosecutor's Motion

1. The Prosecution gives Notice pursuant to Rule 92bis(E) of the Rules asking that the Trial Chamber admit as evidence the witness statements of 51 witnesses in lieu of oral testimony. The Prosecution also requests that none of the witnesses be required to appear for cross-examination.

The Defence Responses

2. The Defence for Mugenzi argues that the Prosecution has been inconsistent on the number of new witnesses to be admitted, varying between 28, 30 and 51 in the Motion. In any event, according to the Defence for Mugenzi, Bicamumpaka, Bizimungu and Mugiraneza, these witnesses cannot be admitted because they are all new witnesses who have never before been listed as witnesses on whom the Prosecution would rely in these proceedings.



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3. The Defence for Mugenzi argues that the Chamber's order of 4 June 2004 to the Prosecution to compile a "Final List of Witnesses" was intended to produce a reduced and streamlined list of witnesses. The Defence for Mugenzi contends that the Prosecution has instead violated the entire basis of this order by adding as many as 51 new witnesses to the list. The Defence for Mugenzi states that the injustice of adding so many new witnesses must be considered prior to any consideration of the matter in terms of Rule 92bis because in order to admit a written statement under Rule 92bis, that statement must be from a witness. Therefore, according to the Defence for Mugenzi and Bizimungu, admission of the person to the list of witnesses must precede the acceptance of his written statement under Rule 92bis.

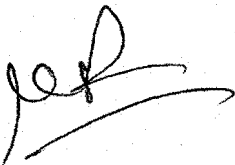
HAVING DELIBERATED

4. Pursuant to Rule 92bis (A), "[a] Trial Chamber may admit, in whole or in part, **the evidence of a witness in the form of a witness statement** in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment." [Emphasis added].
5. The text of Rule 92bis (A) implies that for a statement to be admitted pursuant to this Rule, its author must first be a witness. A person becomes a witness in the trial when his/her name has been entered in Prosecution's list of witnesses filed in the case. The Trial Chamber notes that none of the 51 persons whose statements are annexed to the Motion are mentioned in the Prosecutor's List of Witnesses submitted on 9 June 2004 or indeed on any other date. The Trial Chamber further notes that none of the makers of these 51 statements testified on any date prior to 9 June 2004. Therefore, the Trial Chamber considers that none of the makers of the statements sought to be introduced is a witness in the case within the meaning of Rule 92bis(A).
6. A recent Decision of the Trial Chamber in the case of *Prosecutor v. Nyiramasuhuko* adopts this interpretation:

It results from the text of Rule 92bis (A) that, for a statement to be admitted pursuant to this Rule, its author must be a witness. The Trial Chamber notes that Mr Charles Njogu and Mr. Stephen John Myall are not mentioned on the Prosecution List of Witnesses. Yet, for these affidavits to be considered for admission under Rule 92bis, the Prosecution should have moved the Trial Chamber pursuant to Rule 73bis (E) for leave to add their authors on its Witness List. Therefore, it is the view of the Trial Chamber that the motion for admission of these affidavits under Rule 92bis is not properly brought before the Trial Chamber as the aforementioned pre-condition has not been met by the Prosecution.¹

7. In the circumstances, the statements whose admission is sought do not constitute "the evidence of a witness" so as to bring them under the ambit of Rule 92bis (A).
8. The Trial Chamber therefore considers that the statements cannot be introduced pursuant to Rule 92bis (A) as they are not statements of witnesses in this case. Accordingly, the Trial Chamber is of the view that the Motion falls to be denied.

¹ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, "Decision on Prosecutor's Motion for Leave to Be Authorised to Have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92bis", 14 October 2004, para. 12.

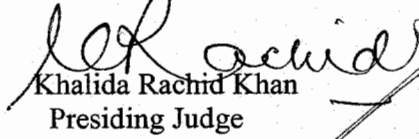


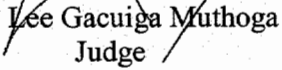
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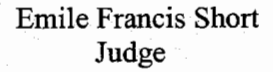
FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion.

Arusha, 17 November 2004


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


Emile Francis Short
Judge

(Seal of the Tribunal)