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(19408 – 19400)

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AMENG

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

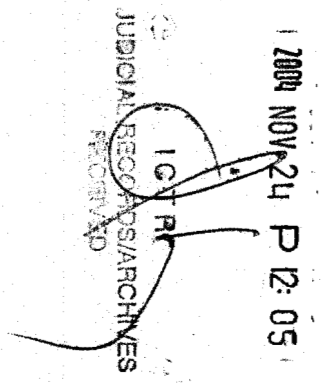
Or: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 24 November 2004



The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-T

DECISION ON BICAMUMPAKA'S URGENT MOTION TO DECLARE PARTS OF THE TESTIMONY OF WITNESSES GTA AND DCH INADMISSIBLE

Office of the Prosecutor:
Mr. Paul Ng'arua
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Mr. Elvis Bazawule
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Counsel for the Defence:
Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil **for Casimir Bizimungu**
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");

SEISED of "Bicamumpaka's Urgent Motion to Declare Parts of the Witnesses GTA and DCH's Testimony Inadmissible", filed on 16 September 2004 (the "Motion");

HAVING RECEIVED

(i) The "Prosecutor's Extremely Urgent Response to Jerome Bicamumpaka's Motion to Declare Parts of the Witness GTA and DCH's Testimony Inadmissible", filed on 17 September 2004 (the "Response"), and

(ii) "Bicamumpaka's Reply to the Prosecutor's Extremely Urgent Response to the Motion to Declare Parts of the Witness GTA and DCH's Testimony Inadmissible", filed on 27 September 2004;

SUBMISSIONS

Relief Sought

1. The Defence requests the Chamber to direct the Prosecution not to lead any evidence from Witness DCH in relation to events involving the Accused and the killing of John Vuningoma, and to exclude the testimony of Witness GTA already received in this respect.

Supporting Arguments

2. The Defence submits that Witness GTA's testimony, received between 8 and 10 March 2004, and Witness DCH's Witness Statements, dated 20 February 2000 and 23 July 2003, support facts that are not alleged in the Indictment against the Accused.

3. The Defence argues that to admit witness testimonies and other evidence in relation to material facts not pleaded in the indictment violates the basic rights of an Accused to be informed in detail of the nature and cause of the charges against him or her so as to adequately prepare his or her defence, as guaranteed by Articles 17(4) and 20(4) of the Statute of the Tribunal (the "Statute") and Rule 47(C) of the Rules of Procedure and Evidence (the "Rules").

4. The Defence submits that according to the jurisprudence of the Tribunal, a witness may not testify on facts not pleaded with sufficient particularity in the Indictment,[1] and, witness statements are insufficient in and of themselves to set out the

[1] *Motion*, para. 5; The Defence cites *Prosecutor v. Niyitegeka*, Case No. ICTR-99-14-A, Judgement [AC], 9 July 2004, para. 193, and *Prosecutor v.Kupreskic et al.*, Case No. IT-95-16, Judgement [AC], 23 October 2001, para. 88 as authority for its proposition.

material facts alleged against the Accused, in order to determine evidence that is admissible during trial.[2]

5. According to the Defence, the jurisprudence of the Tribunal is clear that an indictment must plead murder of individuals with heightened particularity, including the names of victims, the location and dates of events, and the "means by which the acts were committed". The Defence further submits that according to the Appeals Chamber Judgment in *Kupreskic*, unless "hundreds of men" were killed, the Indictment must specify the identity of the victims.

6. According to the Defence, there is no mention of John Vuningoma in the Indictment. Indeed, there is no mention of the Accused's involvement in a killing in Gitarama. Therefore, the required level of specificity in the Indictment has not been met, and the Prosecution may not lead evidence on the Accused's alleged participation in the murder of John Vuningoma.

7. The Defence states that it should not be required at this stage of the proceedings to revisit its investigations into events concerning the killing of John Vuningoma. Any such investigation at this stage would be hasty, inadequate, and would be highly prejudicial to the right of the Accused to a fair trial.

8. In relation to the testimony of Witness GTA, who testified between 8 and 10 March 2004, and who was cross-examined by the Defence, the Defence submits that the opportunity to cross-examine the Witness does not suffice to overcome the prejudice accrued to the Defence, since the charges alleged by the Witness were not included in the Indictment. The Defence cites a Decision of the Appeals Chamber as authority for this proposition.[3]

Prosecution Response

9. The Prosecution opposes the Motion. In its submission, the Prosecution indicates that the Indictment contains allegations specifically dealing with the Accused's criminal activities in Gitarama, besides those the Defence highlights in its Motion.[4] The Prosecution categorises its case as one where the Accused perpetrated and is responsible for widespread killings and other transgressions of international humanitarian law over a period of time *throughout* Rwanda, not excluding any *préfecture*, including Kigali. It identifies paragraphs 6.14, 6.30, 6.35, and 6.54 as being the relevant paragraphs of the Indictment alleging the criminal conduct of the Accused in Gitarama to which the evidence of Witnesses GTA and DCH are material, and go to provide proof. In particular, paragraph 6.54 of the Indictment is an example of specificity in the Indictment showing

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[2] *Motion*, para. 6; The Defence cites *Prosecutor v. Niyitegeka*, Case No. ICTR-99-14-A, Judgement [AC], 9 July 2004, para. 221, and *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, Judgement [TC], 25 February 2004, para. 66 as authority for its proposition.

[3] *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.3 and AR 73.4, Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence (AC), 15 July 2004, para. 23-24

[4] *Response*, para. 5(i).

that members of the Government encouraged their subordinates in the militia, military and the general population to kill in Gitarama.

10. The Prosecution submits that the relevance, or materiality of evidence to an indictment and the degree of specificity of an indictment depend upon the nature of the Prosecution's case, the nature or mode of the Accused's participation in the alleged crime, the complexity of the crimes, and the geographical area and period over which the crimes are committed. Taking these factors into consideration, the paragraphs of the Indictment identified adequately set out the facts in Witnesses GTA and DCH's statements and their testimony are thus admissible.

11. The Prosecution provides the Trial Chamber with a summary of GTA's testimony of 9 and 10 March 2004. The testimony includes a statement that the Accused ordered the killing of a man called John Vuningoma at a roadblock.[5]

12. The Prosecution provides a summary of DCH's "proposed testimony", which at the time of filing of the Response, had already commenced but was not yet complete. The summary includes reference to the Witness's anticipated testimony that the Accused ordered a soldier in Gitarama to shoot a man called John Vuningoma. The soldier obeyed the instructions and shot and killed the man.[6]

13. The Prosecution submits that no prejudice has been caused to the Accused, and he cannot be surprised, since "the redacted statements of witnesses GTA and DCH were disclosed to the Defendants before the commencement of the trial, and the un-redacted ones of witness GTA (who has already finished his testimony) were disclosed in with the Pre-Trial Brief dated 23 October 2003 while those of DCH were disclosed in 19 December 2003, June and September 2004 [sic]."[7]

14. The Prosecution quotes a previous Decision of the Trial Chamber given in respect of the evidence of Witness GTD relating to events occurring in Gitarama *Préfecture* as supporting its contention that the facts contained in the statements of Witnesses GTA and DCH are sufficiently pleaded in the Indictment.[8]

15. The Prosecution submits that the military were under the control of the Government supervised directly by the Minister of Defence and the soldiers were their subordinates. The Accused ordered his subordinates to shoot and kill John Vuningoma and the soldiers obeyed his instructions.

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[5] *Response*, para. 8.
[6] *Response*, para. 8
[7] *Response*, para. 18
[8] The Prosecution cites *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Urgent and Confidential Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKF, GBN, ADT and GTD [TC], 1 July 2004, para. 15.

Defence Reply

16. The Defence highlights the fact that in the Response, the Prosecution does not question the Defence assertion that allegations of killings must be pled with heightened particularity in the Indictment.

17. The Defence submits that paragraph 6.54 of the Indictment, cited by the Prosecution as demonstrating specificity in the Indictment in relation to the present matter, does nothing of the sort. There is no mention of the individual killed, the location of the killing or the time of the killing. Paragraphs 6.14, 6.30 and 6.35- cited by the Prosecution as showing events in Gitarama- do not meet the heightened standard of particularity concerning the killing of an individual. Neither are they included in the Gitarama subsection of section 7 of the Indictment, where the Prosecution pleads with specificity the events in various geographical regions. Specifically:

(i) Paragraph 6.14 makes no mention of Vuningoma or his killing. It does not mention the name of the soldier who allegedly killed Vuningoma. Neither is there a mention of Gitarama *préfecture*.

(ii) Paragraph 6.30 makes no mention of Vuningoma, or his killing. There is no mention of the name of the soldier who allegedly killed Vuningoma, or the relationship of the soldier to the Accused. The paragraph mentions Gitarama, but only as a part of a list of prefectures, in which a list of individuals "knew or had reason to know that their subordinates had committed or were preparing to commit errors [sic], and failed to prevent these crimes from being committed or to punish the perpetrators thereof."

(iii) Paragraph 6.35 makes no mention of Vuningoma, his killing, the soldier who allegedly killed him, or the soldier's relationship with the Accused. There is also no mention of Gitarama *préfecture*.

18. The Defence claims that the Response is factually incorrect. The redacted witness statements were not disclosed before the start of trial. Even though the Trial started on 3 November 2003, no statement of Witness DCH was disclosed before 19 December 2003 despite the fact that the statement of Witness DCH concerning the Accused's killing of John Vuningoma was taken in February 2000.

DELIBERATIONS

19. The Trial Chamber is of the view that the Appeals Chamber Decision in the *Nyitegeka* 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:[9]

[9] *The Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004

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), "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."[10] *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."[11]

[...]

195. Failure to set forth the specific Material Facts of a crime constitutes a "material defect" in the Indictment.[12] 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.[13] *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."[14]

20. Further, the Trial Chamber notes the Decision of the Appeals Chamber in the *Nyiramasuhuko* case[15] 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.[16]

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[10] *Kupreškić et al.* Appeal Judgement, para. 88.
[11] *Id.*, para. 89.
[12] *Id.*, para. 114.
[13] *Ibid.* (emphasis added).
[14] *Ibid.*
[15] *Nyiramasuhuko v. Prosecutor*, Case No ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004.
[16] (Internal footnote omitted).

> 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.

21. From the jurisprudence of the Appeals Chamber quoted above, it is clear that if the Accused is to be charged with the murder of an individual, the Indictment must set out "the identity of the victim, the time and place of the events and the means by which the acts were committed."[17]

22. It is also clear from the quoted jurisprudence that the failure to specifically plead the allegation of the murder of John Vuningoma in the Indictment does not *necessarily* render the evidence inadmissible, since it may be relevant to proof of the other allegations specifically pleaded in the Indictment. Should it be so relevant, and should the Trial Chamber determine that the paragraphs in the Indictment clearly set out the relevant charges against the Accused, including the material facts underpinning the charges, there would be no reason to exclude the evidence. As the Trial Chamber has decided on previous occasions,[18] where the Indictment sets out the material facts underpinning the charges, but is lacking in specificity on the details, the Trial Chamber may look to the pre-trial disclosure to determine whether the Accused would be prejudiced by the admission of the evidence.

23. The Trial Chamber recalls that unredacted disclosure of the statements of Witnesses GTA was made at the same time as the Prosecution Pre-Trial Brief, filed on 20 October 2003.[19] Unredacted disclosure of the statements of Witness DCH was first made on 19 December 2003.[20]

24. The Trial Chamber further recalls its previous ruling on the addition of Witnesses DCH to the Prosecution Witness list:

> Regarding the addition of Witnesses DCH, GHT, and GHY who were inadvertently omitted in the Prosecutor's Witness list, the Trial Chamber notes that they had nonetheless been included in the Prosecutor's Pre-Trial Brief of 20 October 2003. In addition, Witness GHT's statement was disclosed on 15 December 2000; Witness GHY's statement was disclosed on 20 August 2002; and Witness DCH's statement was disclosed on 19 December 2003. The Trial Chamber is of the view that the addition of these witnesses does not constitute an addition *per se* but is to be considered as a correction of a mistake by the Prosecutor. Further, the Trial Chamber notes that the Defence has had

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[17] *Kupreškić et al.* Appeal Judgement, para. 89.
[18] See for example *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicamumpaka's Motions to Declare Parts of the Testimony of Witnesses GHT, GHY and GHS Inadmissible [TC], 21 October 2004, para. 17; Also, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision – Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004 [TC], 4 October 2004.
[19] *Response*, para. 18; Prosecution's Pre-Trial Brief Pursuant to Rule 73 *bis* (B)(i), filed on 20 October 2003;
[20] *Response*, para. 18; *Reply*, para. 7.

> sufficient notice of the particulars of these witnesses and of the content of their prospective testimony, and will not be unduly prejudiced by their addition to the Prosecutor's Witness List.[21]

25. The Trial Chamber recalls that the Defence for Bicamumpaka did not oppose this Motion.

26. The Defence cites paragraphs 23 and 24 of the Appeals Chamber's Decision on Mugiraneza's interlocutory appeal on exclusion of evidence as authority for its proposition that the opportunity to cross-examine Witness GTA does not suffice to overcome the prejudice accrued to the Defence, since the charges alleged by the Witness were not included in the Indictment. The cited paragraphs read as follows:

> The Trial Chamber claims that its decision to not exclude the evidence of Witness GTE, concerning the crimes Mugiraneza is alleged to have committed in Kibungo Prefecture, is based on the notion that no prejudice accrued to Mugiraneza given the Defence's opportunity to cross-examine the witness. In contrast, with respect to Bizimungu, the Trial Chamber excluded the evidence of witnesses in relation to the alleged crimes of which Bizimungu allegedly incurred criminal responsibility in Ruhengeri Prefecture on the basis that that geographical region had not been pleaded in the Indictment. The Trial Chamber failed to render clear reasoning on this issue.
>
> For the foregoing reasons, the Appeals Chamber is not satisfied that the Trial Chamber committed no error in the exercise of its discretion in holding that the evidence of the identified witness could be led in relation to Counts 1 and 3 of the Indictment, and by its refusal not to exclude the evidence of GTE. As the Appeals Chamber is unable to identify the basis of the distinction drawn by the Trial Chamber between the two co-accused the decision of the Trial Chamber in relation to Mugiraneza is reversed. The Trial Chamber is directed to re-consider the request of Mugiraneza in light of the guidance above.

The Trial Chamber finds that the quoted paragraphs do not support the Defence proposition. The Appeals Chamber merely directed the Trial Chamber to render clear reasoning on the distinction between its two seemingly inconsistent decisions. In this regard, the Trial Chamber recalls its recent Decision.[22]

27. Indeed, the Trial Chamber notes that the Defence took no objection at any stage to the testimony of Witness GTA regarding the evidence of the murder of John Vuningoma, and proceeded to cross-examine the witness comprehensively and in such a manner as to suggest that it was adequately prepared for the testimony of the Witness.

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[21] *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosecutor's Very Urgent Motion Pursuant to Rule 73 bis (E) for Leave to Vary the Prosecutor's List of Witnesses (Confidential) (TC), 23 June 2004, para. 20

[22] *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision – Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004 [TC], 4 October 2004

Accordingly, the Trial Chamber sees no reason to exclude from the record the evidence of Witness GTA in relation to this event.

28. Based on the jurisprudence of the Appeals Chamber quoted above, the Trial Chamber finds that the Indictment does not plead with sufficient particularity the allegations regarding the alleged killing of John Vuningoma. Consequently, the Trial Chamber will disregard the testimony as evidence in support of Count Six of the Indictment. However, for the reasons stated in paragraphs 22 and 23, the evidence of both GTA and DCH is admissible and may be relevant to other charges in the Indictment.

29. However, it is not yet the time for the Trial Chamber to determine whether the evidence in relation to the killing of John Vuningoma supports other allegations in the Indictment. This will be done after all the evidence has been received, after the Trial Chamber has had the opportunity to consider the arguments of the Parties, and after it has reviewed the evidence as a whole, with a view to making its findings thereon.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion in part, in the following terms only:

> The Trial Chamber will disregard the evidence of Witnesses GTA and DCH on the killing of John Vuningoma in relation to Count Six of the Indictment.

DENIES the Motion in all other respects.

Arusha, 24 November 2004

Khalida Rachid Khan	Lee Gacuiga Muthoga	Emile Francis Short
Presiding Judge	Judge	Judge

(Seal of the Tribunal)