



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-I
21-04-2005
(24455-24451)

24455
S. Munya

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 21 April 2005

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON POSTPONEMENT OF DEFENCE OF ACCUSED KABILIGI

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Paul Skolnik
René Saint-Léger
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

Ch

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"), 24454

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF an oral motion of 11 April 2005 by the Defence for Kabiligi, requesting an interval of four months between the end of presentation of witnesses of other Defence teams, and the start of its own presentation of witnesses;

CONSIDERING the oral submissions of the Defence for Bagosora on 11 April 2005; the Prosecution Response filed on 12 April 2005; the Kabiligi Reply filed on 13 April 2005; and the further oral submissions on 16 April 2005;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 24 March 2005, the Chamber denied a request by Lead Counsel for the Accused Kabiligi to withdraw; denied a request for severance filed by the Accused Kabiligi on his own behalf; and denied a request for certification of appeal concerning private representation of the Accused Kabiligi by his former Lead Counsel, Jean Yaovi Degli.¹ The effect of these three decisions was to maintain the appointment of Mr. Paul Skolnik as Lead Counsel for Kabiligi. That appointment had been made by the Registrar on 24 January 2005, following an order to do so issued on 19 January 2005 by the Chamber, acting under Rule 45 *quater*.² The appointment followed the disqualification of former Lead Counsel, Me. Jean Yaovi Degli, from the legal aid programme on the basis of findings of massive fraud and false billing.³ The present motion concerns the state of preparedness of the legal team under new Lead Counsel.

2. The Defence case began on 11 April 2005. The Accused are interspersing their witnesses as part of a single defence presentation, with the exception of the Defence of Kabiligi, whose obligation to file a pre-defence brief and present witnesses was suspended by the Chamber pending further submissions from his new defence team.⁴

SUBMISSIONS

3. The Kabiligi Defence requests a declaration that its case shall commence no earlier than four months after the presentation of witnesses for all other Defence teams has concluded.⁵ The team is said to be in a state of disarray: a new Co-Counsel and Legal Assistant need to be hired and briefed; seventy prospective witnesses need to be interviewed and summaries of testimony prepared; and the pre-defence brief needs to be written.⁶ None of these tasks can be performed during the presentation of other witnesses, during which time

¹ *Bagosora et al.*, Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign Him as Lead Counsel for Gratien Kabiligi (TC), 24 March 2005; *Bagosora et al.*, Decision on Request for Severance By Accused Kabiligi (TC), 24 March 2005; *Bagosora et al.*, Decision on Request for Certification of Appeal Concerning Private Representation (TC), 24 March 2005.

² *Bagosora et al.*, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005.

³ *Bagosora et al.*, Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratien Kabiligi (Registrar), 26 October 2004.

⁴ T. 1 March 2005 p. 9.

⁵ As an exception, the Kabiligi Defence has no objection to the presentation of two Bagosora expert witnesses after the Kabiligi witnesses. Reply, p. 7.

⁶ Lead Counsel indicates that he is seeking to replace present Co-Counsel who, in any event, is said to have virtually no knowledge of the case. T. 11 April 2005 p. 4; Reply, para. 12.

Lead Counsel must be in court. Breaks during the course of the trial will not be sufficient to undertake the time-consuming task of interviewing witnesses, and will need to be devoted instead to preparing the new members of the team.⁷ The Accused, who has a right under Article 20 of the Statute to adequate time and facilities to prepare his defence, is not at fault for the withdrawal of his former Lead Counsel, which is the source of the difficulties now facing the Defence. Furthermore, in light of the protracted period taken by the Prosecution for the preparation and presentation of its case, the doctrine of equality of arms requires an adequate delay. A four-month period would be adequate in the circumstances.⁸ A declaration is also sought that witness summaries are to be disclosed thirty days before the start of presentation of its witnesses, and that the opening statement is to be given on the first day of that presentation.

4. The Prosecution opposes the period requested, suggesting that the pre-defence brief should be delayed for six weeks, and the opening statement for a period of eight weeks.⁹ Delaying the presentation of Kabiligi witnesses until four months after the presentation of all other defence witnesses is inherently uncertain and could lead to requests by other Accused to recall their witnesses. Further, the inadequate staffing of the team is the fault of the Accused himself and cannot justify the delay requested. The Kabiligi Defence is endowed with a Co-Counsel who can prepare the defence case while Lead Counsel is in court.

5. Though not opposing the motion, the Accused Nsengiyumva and Ntabakuze wish to have the opportunity to testify after the Kabiligi witnesses, so as to be able to address all factual matters raised during the trial.¹⁰ The Bagosora Defence requests that two of its expert witnesses testify after the Kabiligi witnesses, so as to be able to testify on all factual matters raised during the trial. The Kabiligi Defence does not oppose the request.

DELIBERATIONS

6. As the Chamber has recognized in its previous decisions, the request for a delay in the presentation of the Kabiligi Defence is well-founded. At a status conference on 21 December 2004, the commencement of the Defence case as a whole was postponed from 12 January 2005 to 30 March 2005, with a concomitant extension of deadlines for disclosure of witness information and pre-defence briefs.¹¹ The date for the filing of the Kabiligi pre-defence brief was postponed to 28 February 2005, subject to submissions from Kabiligi's new Lead Counsel, once appointed.¹² At a further status conference on 1 March 2005, whose purpose was precisely to gauge the state of Defence preparedness, the start of the Defence case was postponed by a further two weeks. The deadlines for filings by the Kabiligi Defence, and the start of its case, were suspended indefinitely.¹³

7. The question now is the extent of the delay which should be granted to the Defence, and how that delay should be formulated in the context of an ongoing trial of uncertain duration. The proper application of the fair trial principles set forth in Article 20 to the present circumstances depends on a variety of factors including the extent and nature of the Prosecution evidence, the situation of the defence team, and the pace of the ongoing trial.

⁷ T. 18 April 2005 pp. 49-50.

⁸ *Id.* 1-2.

⁹ Response, paras. 4-5. The proposed delay appears to run from the present date.

¹⁰ T. 18 April 2005 pp. 52-53.

¹¹ T. 21 December 2004 pp. 31-33.

¹² *Id.* p. 32. Other Defence teams were required to file their pre-Defence briefs by 3 January 2005, and unredacted witness information by 7 February 2005.

¹³ T. 1 March 2005 pp. 11, 19.

8. Lead Counsel for Kabiligi argues that the Chamber should not consider breaks between trial sessions as presenting any opportunity for the preparation of the defence case. In particular, he argues that a mission to see witnesses can require a block of several weeks, and that the break after the present trial session must be devoted to training and briefing his new colleagues. The Chamber accepts that Lead Counsel will, in the immediate future, have to spend time preparing his new colleagues to become active members of the Kabiligi Defence team. Taking this and other submissions into consideration, a three-week adjournment will be granted during the present session, probably in late-May and early-June, which was originally scheduled to continue uninterrupted through 15 July 2005. Depending on the availability of Defence witnesses and submissions of the parties, the trial session after that break may continue through to the end of July 2005.

9. The Chamber accepts that during that first adjournment the Kabiligi Defence may not be in a position to make direct progress on the pre-defence brief or the preparation of witnesses. Briefing and training of new colleagues is a necessary and reasonable prerequisite of their ability to contribute to the preparation of the Defence. Once that initial period is over, however, the Chamber is not convinced that the Kabiligi Defence will be unable to undertake preparations in parallel with trial sessions, and during subsequent breaks in the trial. Indeed, in light of past experience, and submissions of Defence counsel as to the expected rhythm of the trial, the accumulated duration of those breaks may constitute a substantial fraction of – or even equal – the four months requested. In these circumstances, the length of the adjournment before the start of the Kabiligi Defence cannot be determined in isolation from the duration and pace of the Defence case.

10. The relief requested in the present motion is, accordingly, premature. The Chamber will remain open to submissions concerning the length of the final adjournment needed by the Kabiligi Defence before the presentation of its witnesses as the schedule for completion of other witnesses becomes more definite.

11. The Kabiligi Defence requests that its pre-defence brief, along with a list of witnesses and summaries of their testimony, be due thirty days prior to the date scheduled for the presentation of its witnesses. This deadline would be more favourable than the deadlines imposed on the other Defence teams.¹⁴ Nevertheless, the deadline requested is reasonable in light of the particular circumstances of the Kabiligi Defence. Furthermore, the burden of preparation on the Prosecution will be substantially lighter than it was when three sets of Defence witnesses were disclosed at once. The brief shall be accompanied by, or include, summaries of the testimony of witnesses. An indication of the initial sequence of witnesses shall also be provided. The Kabiligi Defence shall, as requested, be permitted to deliver an opening statement on the first day of the presentation of its witnesses.

12. The Accused has absented himself from trial proceedings since the start of the Defence case. This is regrettable. The presence of the Accused in court is in the interest of the most effective Defence case possible and in the interests of justice.

¹⁴ In anticipation of the trial starting on 12 January 2005, the Defence teams were required to file a complete list of witnesses, and the summaries of testimony of those to be called during the first trial segment, on 12 November 2004 (61 days before the defence case); the pre-Defence brief itself was to be filed on 15 December 2004 (28 days before the defence case). T. 14 October 2004 p. 15. When the start of Defence was postponed to 30 March 2005, the Defence was obliged to file its pre-Defence brief by 3 January 2005 (86 days before the defence case), and to disclose all unredacted witness information by 7 February 2005 (51 days before the defence case). T. 21 December 2004 p. 32.

FOR THE ABOVE REASONS, THE CHAMBER


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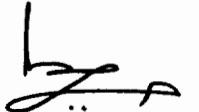
DECLARES that the pre-defence brief, as defined in Rule 73 *ter* (B), as well as a sequence of initial witnesses, shall be filed no later than thirty days before the date scheduled for the presentation of the first Kabiligi witness;

DECLARES that the Kabiligi Defence shall deliver its opening statement on the day scheduled for the presentation of its first witness;

DENIES the motion in all other respects.

Arusha, 21 April 2005


Erik Møse
Presiding Judge


Jai Rām Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

