

ICTR-99-50-T
27-04-2005
(21033-21029)

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Amw

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: 27 April 2005

JUDICIAL RECORDS ARCHIVES
ICTR
2005 APR 27 A 11: 58
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The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-T

**WRITTEN REASONS FOR ORAL RULING OF 23 MARCH 2005 ON THE
STAGE FOR DETERMINING AN EXPERT WITNESS'S PARTIALITY**

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justus Bwonwonga
Mr. Elvis Bazawule
Mr. Shyamlal Rajapaksa
Mr. William Mubiru
Mr. Olivier De Schutter

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 Ms. Marie-Pierre Poulain for Prosper Mugiraneza

[Signature]

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 “Chamber”);

RECALLING the Chamber’s oral ruling of 23 March 2005 on whether the issue of the partiality of a proposed Expert Witness could be raised in cross-examination by Defence Counsel during the qualification proceedings; Further recalling that the Chamber informed the Parties that written reasons for the ruling would be given at a later stage;

CONSIDERING the Rules of Procedure and Evidence (the “Rules”), particularly Rule 94 *bis* of the Rules;

NOW ISSUES the written reasons for its ruling.

1. In the course of the qualification proceedings (*voir dire*) of proposed Prosecution Expert Witness Rubaduka on 22 March 2005, Prosecution Counsel objected to the following question put to the witness during cross-examination by Defence Counsel for Mugenzi:

You would agree with me, I hope, Mr. Rubaduka, that a person who comes to give expert testimony before a court has an obligation to check very carefully the factual material on which he bases his opinions.¹

2. The Prosecution objected to this question on the ground that it related to the evidence of the expert witness itself, and should be raised at a later stage in the proceedings, if and when the witness is qualified. The Mugenzi Defence explained that it intended to test the witness’s impartiality, with a view to demonstrating that Expert Witness Rubaduka is partial and should be excluded from giving evidence. The Prosecution objected to this course of action, submitting that the correct time for cross-examination of an expert witness on issues relating to partiality or impartiality is after the Chamber has qualified the witness as an expert.
3. The only question before the Chamber therefore was the proper stage at which the assessment of the witness’s impartiality should be made.
4. The Rules are silent as to the procedure for taking expert evidence, and the Chamber may adopt the approach that it considers best to arrive at a fair determination of the case, in accordance with Rule 89(B) of the Rules.²

¹ T. 22 March 2005, p.2

² *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003 para. 164



5. Defence Counsel for Mugenzi submitted that there is a preliminary bar to the testimony of an expert witness if he or she can be shown to be partial. Counsel cited a Decision in the case of *Akayesu* as support for his argument.³
6. The Mugenzi Defence admitted that issues of partiality go to the credibility of a factual witness before the Chamber. However, it contended that expert witnesses are expected to be impartial, and although other issues on credibility could be raised during the cross-examination if the witness is qualified and goes on to speak about his report, the proper stage to test the impartiality of the witness is before the witness is qualified as an expert.⁴
7. The other Defence teams supported the submissions of the Mugenzi Defence. Defence Counsel for Casimir Bizimungu contended that any matter that could result in the exclusion of an expert witness's testimony should be raised as early as possible, ideally before he or she is qualified.⁵ Defence Counsel for Prosper Mugiraneza agreed with the submission of the Mugenzi Defence, and added that "if a witness doesn't - if the expert witness did not arrive at his opinion in an independent and impartial way, that goes to the relevance of his opinion. It is all one package, the admissibility."⁶
8. The Prosecution opposed the Defence analysis and urged the Chamber to recall that it had already decided on the procedure to be followed in the qualification of experts in this trial; namely, that the first stage of qualification should be a determination of whether the proposed expert witness meets the criteria for qualification, followed by the second phase, the "trial phase", where the machinery of cross-examination will extend to all possible issues to be raised by the Defence, including the witness's objectivity.⁷
9. The Prosecution pointed out that in the *Akayesu* case cited by the Defence for Mugenzi, the proposed expert witness was an accused person who was in custody awaiting trial charged with the same charges as the Accused in the *Akayesu* case. However, in the present case the proposed expert is not facing any criminal charges and there is no clear preliminary issue of partiality that the Chamber must address.⁸
10. In rebuttal of this argument, the Mugenzi Defence submitted that the distinction drawn by the Prosecution is spurious, since a man is innocent until proven guilty, and his detention in the United Nations Detention Facility should have no bearing on his impartiality.⁹

³ T. 22 March 2005, p.13; *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness (TC), 9 March 1998

⁴ T. 22. March 2005, pp.12-14

⁵ T. 23 March 2005, p.5

⁶ T. 23 March 2005, p.14

⁷ T. 23 March 2005, p.16

⁸ T. 23 March 2005, p.17

⁹ T. 23 March 2005, p.20



REASONS

11. The Chamber notes that the question of the correct stage for raising impartiality of a proposed expert witness was dealt with in the *Bagosora et al.* case, where during the proceedings, the Presiding Judge stated:

Mr. Ogetto, there is no question at this stage with regard to the partiality or impartiality of the witness, so I want to put an end to that right away. [...] That is an issue at a later stage in the proceedings. If the court accepts her as an expert witness, than at that stage you can go into the issue of whether she is prejudiced or not prejudiced. [...] You will notice that we were confining Mr. Constant to what was relevant for the purposes of whether the witness is a competent witness to give evidence as an expert. That is the issue.¹⁰

12. In the same case, during its oral ruling on whether or not Prosecution Witness Alison Desforges could be considered an expert, the Chamber clarified its position with respect to questions of impartiality:

The Chamber finds that Dr. Des Forges' education as an historian in the history of Rwanda and her experience as a human rights observer of human rights breaches in Rwanda qualify her to tender an opinion as an expert in these domains. In this connection, the Chamber finds that the Defence preoccupation with her alleged lack of impartiality or independence in the field of observation of human rights breaches in Rwanda goes to the weight that the Chamber may accord her opinion and does not prevent it from being admitted. The Defence shall have an opportunity at trial to cross-examine and challenge Dr. Des Forges' independence and impartiality.¹¹

13. The Chamber concurs with the position taken by the bench in the *Bagosora et al.* trial on the determination of the appropriate time to raise any questions of impartiality.
14. Pursuant to its discretion under Rule 89(B) of the Rules, the Chamber determined that the procedure which would best favour a fair determination of the matter before it is to have a clear separation of the stage when the Chamber examines solely the qualifications and competence of the witness as an expert witness, such determination being based upon relevancy and competency. Should the witness be qualified by the Chamber as an expert, any challenges based upon partiality or bias can then be put to him or her during cross-examination on his evidence.

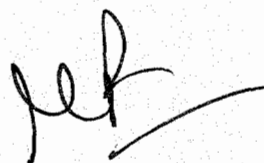
15. On 23 March 2005, the Chamber ruled as follows:

MADAM PRESIDENT:

The hearing is resumed.

¹⁰ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. 2 September 2002, p.63

¹¹ *Ibid.*, T. 4 September 2002, pp. 7-8.




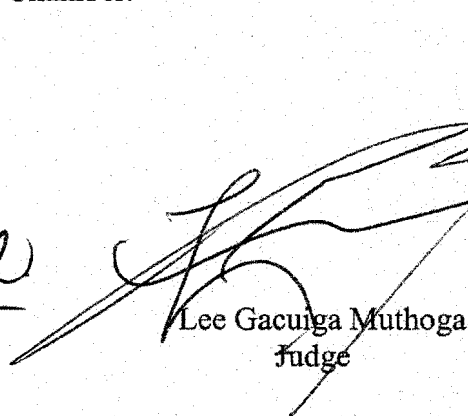
We have deliberated and the brief oral ruling is as follows: The issue for determination before the Chamber is whether the impartiality or the independence of the witness is a prerequisite for qualifying him as an expert witness during these *voir dire* proceedings. The Chamber, having heard the submissions of the parties is of the view that it is premature to go into the question of impartiality or credibility before the Chamber decides whether the witness is qualified as an expert witness. Such questions may be raised if and when he is qualified as an expert witness. The written reasons for this ruling will be given at a later stage.

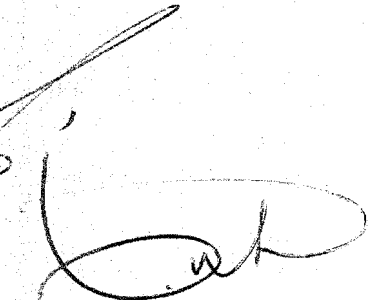
Any pending motion relating to the credibility or impartiality of the witness will be dealt with after the Chamber decides whether to accept the witness as an expert witness.¹²

16. The Chamber is of the opinion that, as a general rule, the partiality or impartiality of expert witnesses goes to the weight the Chamber attaches to their testimony and report after qualification. Issues relating to the impartiality and credibility of the witness may be the subject of cross-examination by the Defence after the witness has been qualified as an expert and the expert report of the witness has been admitted into evidence. In the instant case, the Chamber made it abundantly clear that the first phase of the witness's testimony would be devoted solely to the question of whether the witness, by virtue of his qualification and experience, qualifies as an expert witness on the subject matter he intended to provide assistance to the Chamber.

Arusha, 27 April 2005


Khalida Rachid Khan
Presiding Judge


Lee Gacunga Muthoga
Judge


Emile Francis Short
Judge

[Seal of the Tribunal]



¹² T. 23 March 2005, p.23 (emphasis added)