



ICTR-97-21-T
30-08-2005
(1824-1819)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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Mwamp

6870-1

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramarosan
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 30 August 2005

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO and Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T
Joint Case No. ICTR-98-42-T

JUDICIAL RECORDS ARCHIVES
ICTR
2005 AUG 30 P 3:55

DECISION ON ARSÈNE SHALOM NTAHOBALI'S NOTICE OF INTENTION TO FILE ON THE
RECORD WRITTEN STATEMENTS OF WITNESSES AND THE TRANSCRIPTS OF THEIR
TESTIMONY BEFORE THE ICTR IN LIEU OF ORAL TESTIMONY
(Article 92bis, Rules of Procedure and Evidence)

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Defence Counsel for Nteziryayo

Mr Titinga Frédéric Pacere, Mr Richard Perras

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED of the Defence for Ntahobali’s “Requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage”, filed on 3 August 2005 (the “Motion”);

HAVING RECEIVED:

- i. The “Prosecutor’s Response to Arsène Shalom Ntahobali’s Notice of Intention to File on the Record Written Statements of Witnesses and the Transcripts of their Testimony before the ICTR in Lieu of Oral Testimony – (Rule 92 *bis* of the Rules of Procedure and Evidence)”, filed on 9 August 2005 (the “Prosecutor’s Response”);
- ii. The “Réponse de Joseph Kanyabashi à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage”, filed on 9 August 2005 (“Kanyabashi’s First Response”);
- iii. The “Réplique sur la réponse du Procureur à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage et réplique à la réponse du Procureur sur la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier le rapport de l’enquêteur Ralph Lake en lieu et place de son témoignage et amendement auxdites requêtes et notifications”, filed on 15 August 2005 (the “Reply”);
- iv. The “Réponse de Joseph Kanyabashi à la réplique sur la réponse du Procureur à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage et réplique à la réponse du Procureur sur la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier le rapport de l’enquêteur Ralph Lake en lieu et place de son témoignage et amendement auxdites requêtes et notifications”, filed on 22 August 2005 (“Kanyabashi’s Second Response”);
- v. The “Réponse de Joseph Kanyabashi à la réplique consolidée de Shalom Ntahobali aux réponses de Joseph Kanyabashi et du Procureur à la requête de Arsène Shalom Ntahobali demandant de modifier sa liste ainsi que l’ordre des témoins de sa Défense et à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage”, filed on 23 August 2005 (“Kanyabashi’s Third Response”);
- vi. The “Réplique à la réponse de Joseph Kanyabashi sur la réplique et requête amendé de Arsène Shalom Ntahobali”, filed on 25 August 2005 (“Ntahobali’s Second Reply”);

CONSIDERING the provisions of the Statute of the Tribunal (the “Statute”), in particular Articles 19 and 20 of the Statute, and the Rules of Procedure and Evidence (the “Rules”), in particular Rule 92*bis*;

NOW DECIDES the matter, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.



SUBMISSIONS BY THE PARTIES

Defence for Ntahobali

1. The Defence for Ntahobali moves the Chamber to admit into evidence, pursuant to Rule 92 *bis*, the written statements made by Prosecution Witnesses QY and QBQ, together with the transcripts of the testimony of Witness QY in the *Muvunyi* proceedings, in lieu of both witnesses' testimonies. In the alternative, the Defence for Ntahobali seeks leave to recall both witnesses for cross-examination under Rule 92 *bis*.¹
2. In both cases the Defence for Ntahobali submits that the conditions stipulated in Rule 92 *bis* are satisfied for the statements and transcripts it seeks to have admitted.²
3. The Defence for Ntahobali argues that the matters contained in the statements and transcripts subject of this Motion go to the proof of a matter other than the acts and conduct of the Accused, namely, the test of the credibility of both Witnesses QBQ and QY. According to the Defence, both witnesses have made statements and testified to sexual violence, without having been consistent in their accounts.³
4. In the alternative, the Defence for Ntahobali seeks leave for both witnesses to testify before the Chamber under Rule 92*bis*.⁴
5. The Defence for Ntahobali attaches, in the Annexes to the Motion, both witnesses' statements, dated 2 September 2004. In addition, the Defence has submitted the relevant transcripts from the *Muvunyi* proceedings.

The Prosecutor's Response

6. The Prosecutor argues that Defence for Ntahobali has not satisfied the necessary criteria under Rule 92 *bis* (A) for either of these witnesses and on this basis, the Prosecutor moves the Chamber to deny the Motion in its entirety.
7. The Prosecutor submits that these witnesses' statements and the transcripts go to the proof of the acts and conduct of the Accused Ntahobali.⁵
8. In the alternative, the Prosecutor submits that should the Chamber deem it necessary to admit the said statements and relevant transcripts pursuant to 92 *bis* (A) (ii), the evidence should be specifically limited to issues raised with respect to rape.⁶
9. In addition, the Prosecutor submits that the credibility issues raised by the Defence for Ntahobali need to be tested before the Chamber in an oral hearing. As the statements the Defence for Ntahobali wishes to admit under Rule 92 *bis* are of critical importance to the Prosecutor's case against the Accused in proving individual criminal responsibility under Articles 6(1) and 6(3) of the Statute, the Prosecutor seeks that the Chamber recall both Witnesses QBQ and QY for cross-examination and re-examination on the particular issues raised by the Defence for Ntahobali in relation to rape. The Prosecutor argues

¹ See The Motion, paras. 9-10, 19, 23.

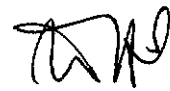
² The Motion, paras. 10, 20.

³ *Ibid.*, paras. 8,-9, 18-19.

⁴ *Ibid.*, para. 23.

⁵ Prosecutor's Response, paras. 4 and 12. The Prosecutor relies on the *Brdanin*, Decision on the Prosecutor's Motion for the Admission of Statements Pursuant to Rule 92*bis*-Bosanski Novi Municipality, Case No. IT-99-36-T, 17 January 2003, p. 2.

⁶ Prosecutor's Response, para. 5.



that this will give the Chamber the opportunity to assess their credibility as submitted by the Defence for Ntahobali.⁷

10. Further, the Prosecutor invites the Chamber to invoke its powers under Rules 54 and 98 to recall the said witnesses.⁸

Defence for Kanyabashi's Responses

11. The Defence for Kanyabashi raises no objections to the Chamber admitting both witness statements, dated 2 September 2004.⁹
12. However, the Defence for Kanyabashi objects to the admission of the transcripts of Witness QY's testimony from the *Muvunyi* proceedings.¹⁰ It argues that the transcripts does not prove any point other than acts and conduct of the Accused Ntahobali. Furthermore, the Defence for Kanyabashi contends that the transcripts also refer to strip-searches, *conseillers*, the *bourgmestre*, Rango Forest, and Nyange which indirectly refer to the Accused Kanyabashi.¹¹ The Defence for Kanyabashi also submits that the only possible solution would be to recall Witness QY and subject her to cross-examination, limited to issues of rape.¹²
13. The Defence for Kanyabashi further notes that whilst the Defence for Ntahobali has indicated an intention to file a motion in perjury, this had not been served on the parties. It submits that it is necessary for the Defence for Ntahobali to indicate within reasonable time the elements it wishes to raise in this perjury motion.¹³

Defence for Ntahobali's Replies¹⁴

14. The Defence for Ntahobali reiterates that the reason for seeking to admit the relevant witness statements and the transcripts is to challenge the credibility of Witnesses QBQ and QY.¹⁵
15. The Defence for Ntahobali corrects their previous submissions regarding Witness QBQ and submit that this witness testified in the *Bizimungu*, and not *Muvunyi*, proceedings as it had previously submitted. Accordingly, the Defence amends their submissions with respect to this witness.¹⁶ Furthermore, subsequent receipt of the transcripts in relation to Witness QY has enabled the Defence to amend the Motion with respect to this witness to include all of the transcripts, of 8, 9, and 13-15 June 2005.¹⁷
16. In response to the Prosecutor's objection, namely, that the statements and transcripts of these witnesses go to the acts and conduct of the Accused, rendering Rule 92 *bis* inapplicable, the Defence for Ntahobali submits that these documents challenge the credibility of the witnesses. The Defence argues that the first statements by these witnesses, which were tendered into evidence by the Prosecutor during these proceedings, go to the acts and conduct of the Accused. However, the Defence for Ntahobali submits that the latter statements, dated 2 September 2004, do not concern acts or conduct of

⁷ *Ibid.*, paras. 14-17. The Prosecutor relies on the *Bagasora et al.*, Decision on the Prosecutor's Motion for the Admission of Written Witnesses Statements Under Rule 92*bis*, 9 March 2004, para. 9; *Muhimana* Decision on the Prosecutor's Motion for the Admission of Witness Statements (Rules 89(c) and 92*bis*) 20 May 2004, pp. 5-6.

⁸ Prosecutor's Response, para. 6.

⁹ Kanyabashi's First Response, paras. 10-11; Kanyabashi's Second Response, paras. 16-17.

¹⁰ Kanyabashi's Second Response, para. 17.

¹¹ *Ibid.*, paras. 18-20.

¹² *Ibid.*, para. 21.

¹³ Kanyabashi's First Response, paras. 7, 9.

¹⁴ This section refers to the Defence for Ntahobali's replies dated 15 August and 25 August 2005.

¹⁵ Ntahobali's First Reply, paras. 13, 18, 27; Ntahobali's Second Reply, para. 9.

¹⁶ Ntahobali's First Reply, paras. 6-7.

¹⁷ *Ibid.*, paras. 8-10.



the Accused.¹⁸ Moreover, the Defence maintains that the excerpts in the relevant transcripts referring to the Accused were purely for the purpose of confronting the witness with her former statements in the *Muvunyi* proceedings and that these excerpts have already been admitted into evidence. Therefore, according to the Defence for Ntahobali, the documents relative to both Witnesses fall within the boundaries of Rule 92bis.¹⁹

17. With respect to the Defence for Kanyabashi's objections that the transcripts indirectly goes to the proof of the acts and conduct of its Accused, the Defence for Ntahobali maintains that neither the Accused Kanyabashi nor any acts or behaviour of any of the other Accused, bar Ntahobali, are mentioned in the said transcripts.²⁰
18. The Defence for Ntahobali further contends that the purpose of Rule 92bis is to protect the right of the Accused to cross-examine witnesses against him.²¹ It maintains that the Prosecutor has had the opportunity to examine Witness QY to provide explanations with respect to the alleged inconsistencies during the *Muvunyi* proceedings and is thus in possession of all the information the Defence for Ntahobali seeks to have admitted.²²

DELIBERATIONS

19. The Chamber notes that the Defence for Ntahobali seeks admission of the additional statements of Witnesses QBQ and QY dated 2 September 2004 and the transcripts of Witness QY's testimony in the *Muvunyi* proceedings, dated 8, 13, 14, and 15 June 2005 in lieu of oral testimony, pursuant to Rule 92bis, to assess the credibility of Witnesses QY and QBQ. The Chamber also notes that the transcripts of 9 June 2005 relates to a different witness. Whilst the Chamber takes note that the Defence for Ntahobali has corrected its submissions with respect to Witness QBQ, there is no application to admit the transcripts into evidence. The Prosecutor objects to the admission of both the statements and the transcripts, and the Defence for Kanyabashi to the admission of the said transcripts. Both parties submit that their objections are based on the premise that the statements and/or transcripts go towards the acts and conduct of the Accused and as such cannot be admitted under Rule 92 bis.
20. The Chamber recalls its Decision of 26 August 2005 where it held:
 70. The Chamber recalls that both Witnesses QY and QBQ testified for the Prosecution on 19 to 26 March 2003 and on 3 to 4 February 2004, respectively. The Chamber notes that during the course of their testimony, the Defence was given ample opportunity to fully cross-examine them.
 71. The Parties may therefore wish to make the proper application to recall the witnesses for further cross-examination on the alleged specific issues that may have arisen from either the additional statements and/or the testimony given in the *Muvunyi* proceedings.²³
21. In light of the above ruling, the Chamber has therefore indicated the course of action open to the Defence for Ntahobali, should it wish to examine these witnesses. The matter is therefore moot.
22. In addition, the Chamber finds that the said written statements and transcripts appear to refer to the acts and conduct of the Accused and therefore do not meet the requirements as outlined in Rule 92bis.

¹⁸ *Ibid.*, paras. 13-15.

¹⁹ *Ibid.*, paras. 16-20; Ntahobali's Second Reply, para. 10.

²⁰ Ntahobali's Second Reply, paras. 7, 8.

²¹ *Ibid.*, para. 21-23. The Defence relies upon: *Nyiramasuhuko et al.*, Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit into Evidence the Witness Statements of Four of Said Witnesses", 22 January 2003, para. 19; *Muhimana*, Decision of 20 May 2004, para. 20.

²² Ntahobali's First Reply, paras. 25-26.

²³ *Nyiramasuhuko et al.*, Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali (Rule 73ter (E), Rules of Procedure and Evidence), 26 August 2005, paras. 70-71.

- 23. The Chamber has considered the Prosecutor's submission, inviting it to invoke its inherent discretion under Rules 54 and 98.
- 24. The Chamber notes that it has ruled upon the options available to the Parties should they wish to either further cross-examine or re-examine these witnesses.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in all respects.

Arusha, 30 August 2005



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]