



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
19-09-2005
(25304-25301)

TRIAL CHAMBER I

25304
S. Mussa

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

Registrar: Adama Dieng

Date: 19 September 2005

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THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

**DECISION ON DEFENCE MOTION TO RECALL PROSECUTION WITNESS OAB
FOR CROSS-EXAMINATION**

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Paul Skolnik
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

25303

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

BEING SEIZED OF the Defence “Extremely Urgent Motion to Recall Prosecution Witness OAB for Cross-Examination Pursuant to Rules 54, 90 (G), 73 (A), 91 (B) of the Rules of Procedure and Evidence, and Articles 19 and 20 of the Statute”, filed by Counsel for Nsengiyumva on 8 July 2005;

CONSIDERING the Response of the Prosecution, filed on 13 July 2005; and the Reply of the Nsengiyumva Defence, filed on 3 August 2005.

HEREBY DECIDES the motion.

INTRODUCTION

1. On 24 and 25 June 2003, Prosecution Witness OAB testified in the present trial and was cross-examined by the Defence. Prior to his testimony, the witness had made two statements to Prosecution investigators, which had been duly disclosed to the Defence. After his testimony, Witness OAB made four additional written statements, which were also disclosed to the Defence. According to the Defence motion, contradictions between the statements and the testimony, as well as new allegations against the Accused, show that the witness gave false testimony and must be recalled for further cross-examination.

DELIBERATIONS

2. The Chamber has previously set forth the standard for recalling a witness:

A party seeking to recall a witness must demonstrate good cause, which previous jurisprudence has defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act. In assessing good cause, the Chamber must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness originally testified. The right to be tried with[out] undue delay as well as concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature.¹

3. Similarly, in another decision the Chamber held as follows:

The Defence may draw the Chamber's attention to inconsistencies between testimony of witnesses before this Chamber and any declarations obtained subsequently. If prejudice can be shown from its inability to put these inconsistencies to the witness, the Defence may submit motions for their recall; if there is no need for the witness's explanation of the inconsistency, because the inconsistency is minor or its nature is self-evident, then the witnesses will not be recalled.²

4. Based on these principles, the Chamber will consider whether there is good cause to recall Witness OAB. Inconsistencies between testimony and statements form part of this evaluation. In view of the Defence submissions, it is recalled that Rule 91 (B) does not

¹ *Bagosora et al.*, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6 (internal citations omitted). See also *Kayishema and Ruzindana*, Decision on the Defence Motion for the Re-examination of Defence Witness DE, August 1998, para. 14.

² *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003, para. 8.

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authorize the Chamber to recall a witness who is suspected to have given false testimony but only enables the Chamber to order investigations.

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5. The Defence has pointed out several matters that allegedly require further cross-examination.³ Two events relate primarily to statements OAB-1 and OAB-2, dated 17 January 1999 and 28 January 2000, respectively. The rape and murder of Theresa Longin was mentioned in the first but not in the second statement, whereas a meeting in Gisenyi on 7 April 1994 figured in the second but not in the first document. The Defence did cross-examine Witness OAB about these two alleged discrepancies.⁴ The Chamber has also reviewed the four subsequent statements (OAB-3 to OAB-6, dated from 3 September 2003 to 23 May 2005). The fact that they do not contain any reference to these two events is not a sufficient reason to recall the witness.

6. Another incident, involving Prefect Zilimwabagabo and the Director of a printing school (referred to in OAB-2 and OAB-4), was also dealt with during cross-examination of Witness OAB.⁵ Therefore, further testimony of the witness is not necessary. The event concerning a woman married to a man named Manu was mentioned in OAB-2 and OAB-3. The differences between these two statements do not require that the witness be recalled.

7. New allegations in the four post-testimony statements do not, in themselves, prejudice the Accused, as they do not constitute evidence against him. Therefore, the witness's accounts (in OAB-3 and OAB-5) concerning a Tutsi husband of a white woman and a man named Innocent do not require further cross-examination. The situation is similar as regards certain meetings with *Interahamwe* members that took place in April and June 1994. The Chamber has not found inconsistencies between post-testimony statements and Witness OAB's evidence that justify his recall. In its evaluation, the Chamber has noted that OAB-3, OAB-4 and OAB-6 focus on the alleged role of Joseph Nzirorera, Felicien Kabuga and Hassan Ngeze, respectively.

8. The Defence further argues that information in the latest post-testimony statement (OAB-6) made by the witness indicates that attempts were made to influence his testimony in another case before the Tribunal, and falsely implicate Nsengiyumva in certain crimes. The Chamber notes that the alleged attempts to influence the witness were made about two years after his testimony in the present case. They cannot therefore have affected the evidence. Moreover, according to that written statement, the witness refused to alter his testimony.

9. The Defence motion is denied. In view of the Defence submissions it should be added that this conclusion is in conformity with Articles 19 and 20 of the Statute, according to which the Accused has the right to a fair trial and to examine witnesses testifying against him, as well as case law.⁶

³ The Defence has listed "at least eight events" (Defence motion para. 20) but some of them are interrelated.

⁴ T. 25 June 2003 pp. 45-46; T. 24 June 2003 pp. 47-50.

⁵ The Defence incorrectly states that this incident was included in OAB-3 and OAB-4.

⁶ This Chamber granted the Defence request to recall Prosecution Witness PB-1 for further cross-examination (T. 18 May 2005, p.7), bearing in mind that the Prosecution did not object. The Defence has also referred to *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001 (TC). That decision is in several respects distinguishable from the present decision.

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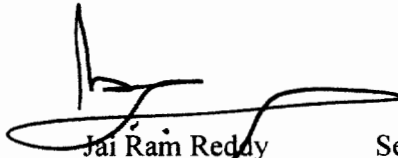
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 19 September 2005



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge



[Seal of the Tribunal]