



ICTR-98-41-T
02-12-2005
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
(25960-25957)

25960
12/12/05

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 2 December 2005

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

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**DECISION ON KABILIGI APPLICATION FOR CERTIFICATION
CONCERNING DEFENCE CROSS-EXAMINATION AFTER
PROSECUTION CROSS-EXAMINATION**

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the Kabiligi “Application for Certification [to] Appeal the Trial Chamber’s Oral Decision on the Denial of the Right of the Defence to Cross-Examine a Defence Witness After the Prosecution Had Terminated its Cross-Examination”, filed on 28 October 2005;

CONSIDERING the Prosecution response, filed on 9 November 2005, and the Kabiligi “Motion to Preclude the Prosecution from Replying or Pleading to the Kabiligi Application”, filed on 11 November 2005;

HEREBY DECIDES the application.

INTRODUCTION

1. On 21 October 2005, the Chamber ruled orally that the Kabiligi Defence could ask certain limited questions based on issues raised during the Prosecution’s cross-examination of Defence Witness LE1 but that the Defence was precluded from asking questions on a matter which the Chamber deemed to be a “general issue which has been on the table throughout the proceedings”.¹ The Chamber reaffirmed the principle enunciated in its Decision on Modalities for Examination of Defence Witnesses of 26 April 2005 (the “26 April 2005 decision”) that questions by Defence teams, other than the one(s) calling the witness, should generally be asked before the Prosecution begins its cross-examination.² In its oral decision, the Chamber recognized, however, that Defence teams should be permitted to ask additional questions of a witness where new and adverse information emerges during the Prosecution’s cross-examination.³

2. The Defence thereafter filed an application for certification of the issue to the Appeals Chamber. On 11 November 2005, the Chamber issued an oral decision denying the Kabiligi Defence request for certification. The Chamber indicated that a written decision would follow.⁴

DELIBERATIONS

3. The first requirement for certification of an appeal under Rule 73 (B) is that the decision at issue “involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial”. The crux of the Kabiligi Defence

¹ *Bagosora et al.*, T. 21 October 2005 pp. 43, 49.

² *Bagosora et al.*, T. 21 October 2005 p. 43. The Chamber’s 26 April 2005 decision denied the Prosecution’s request to set general rules concerning the examination of Defence witnesses on the grounds that the issue was best decided on a case-by-case basis. The Chamber noted that, despite the fact that this is a multi-accused case, the same general principles for cross-examination apply and that each accused has a right to ask questions of a witness after the examination-in-chief by the party or parties presenting the witness. The Chamber further held that the scope of the questioning by other co-accused need not be limited to issues that are “adverse” to that accused, as suggested by the Prosecution. *Bagosora et al.*, Decision on Modalities for Examination of Defence Witnesses (TC), 26 April 2005, paras. 3, 5.

³ *Bagosora et al.*, T. 21 October 2005 p. 43.

⁴ *Bagosora et al.*, T. 11 November 2005 pp. 3-4.

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argument is that the Chamber's decision limiting the subject matter of its cross-examination of Witness LE1 amounted to a deprivation of the Accused's right to cross-examination in violation of Article 20 (4) (e) of the Statute.⁵ The Defence asserts that it should be allowed to cross-examine a Defence witness, even after the Prosecution's cross-examination provided that the Prosecution is given an opportunity to conduct further cross-examination. The Defence asserts that a ruling by the Appeals Chamber would clarify the "complicated procedural workings of joint proceedings" so as to allow the parties to streamline questioning of Defence witnesses and to shorten the length of the proceedings. Both of these issues may have a substantial impact on the conduct of the proceedings and the outcome of trial and should therefore be certified to the Appeals Chamber.

4. The Prosecution opposes certification of the Chamber's decision and points to the Chamber's 26 April 2005 decision which ordered that questioning of Defence witnesses by other Co-Accused would be decided on a case-by-case basis. The Defence did not seek to appeal this earlier decision and is therefore without recourse to challenge that decision at this stage of the proceedings.

5. The Chamber agrees with the Kabiligi Defence that any infringement of the right to cross-examination may affect the fair and expeditious conduct of the proceedings and the outcome of trial. This does not, however, mean that all issues touching upon cross-examination of witnesses should be certified to the Appeals Chamber for resolution. Rule 90 addresses the testimony of witnesses and vests the Trial Chamber with discretion to decide what inquiries are appropriate for cross-examination.⁶ In situations where an appeal is based on an exercise of discretion by the Trial Chamber, the scope of review by the Appeals Chamber is limited.⁷ The Appeals Chamber has repeatedly emphasized the primacy of Trial Chamber rulings involving an exercise of discretion and has noted that interlocutory appeals under Rule 73 (B) are only warranted under exceptional circumstances.⁸

6. The second consideration for certification of an appeal under Rule 73 (B) is whether a ruling by the Appeals Chamber "may materially advance the proceedings". The Kabiligi Defence argues that the Chamber's case-by-case approach to issues of whether to allow cross-examination by Defence teams after the Prosecution has finished its cross-examination leads to inconsistent rulings, as in the case of Witness DM-25, and slows down the pace of the proceedings.⁹ The Prosecution makes no arguments on this point.

⁵ *Bagosora et al.*, T. 21 October 2005 p. 49.

⁶ Rule 90 (G) (iii) of the Rules of Procedure and Evidence.

⁷ *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries (TC), 21 July 2005, para. 5; *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5.

⁸ A Trial Chamber's decision will only be overturned if the challenged decision was "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion". *Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (AC), 1 November 2004, paras. 9-10. See also *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5; *Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, para. 5.

⁹ Witness DM25 testified before this Chamber on 11-13 April 2005. After the end of the Prosecution's cross-examination, the Chamber allowed the Bagosora, Nsengiyumva and Ntabakuze teams to cross-examine the witness based on information arising out of the Prosecution's cross-examination. The Prosecution was then given the opportunity for additional cross-examination.

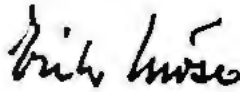
7. As this Chamber has previously held, the question of whether resolution of the matter by the Appeals Chamber may materially advance the proceedings “requires consideration not only of the effect on proceedings assuming that there would be a reversal or modification of the Chamber’s decision, but also whether there is serious doubt as to the correctness of the legal principles at issue”.¹⁰ The Defence has failed to raise such doubt on the Chamber’s decision, in large part because the decision rested on an exercise of the Chamber’s discretion.

8. Moreover, the determination of whether to allow cross-examination of a witness by a Defence team will continue to require a case-by-case analysis and will depend on the actual subject matter of the Prosecution’s cross-examination of each witness at issue.¹¹ Consequently, the Chamber does not find that resolution of this matter by the Appeals Chamber would materially advance the proceedings.

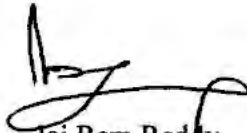
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Kabiligi Defence’s application for certification.

Arusha, 2 December 2005



Erik Mose
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



¹⁰ *Bagosora et al.*, Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO (TC), 11 December 2003, para. 6. See also *Bagosora et al.*, Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA (TC), 5 December 2003, para. 10.