



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

11681
Mwanja

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 04 April 2006

ICTR-98-42-T
04 - 04 - 2006
(11681 - 11676)

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO *et al.*
Case No. ICTR-97-21-T
Joint Case No. ICTR-98-42-T

2006 APR 11 10:00 AM
ICTR

DECISION

ON ARSÈNE SHALOM NTAHOBALI' S MOTION FOR CERTIFICATION TO
APPEAL THE "DECISION ON NTAHOBALI' S STRICTLY CONFIDENTIAL
MOTION TO RECALL WITNESSES TN, QBQ, AND QY FOR ADDITIONAL
CROSS- EXAMINATION"

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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 “*Requête d’Arsène Ntahobali afin d’obtenir la certification d’appel de la décision intitulée ‘Decision on Ntahobali’s Strictly Confidential Motion to Recall Witnesses TN, QBQ and QY for Additional Cross-Examination’*”, filed on 8 March 2006 but dated 7 September 2005 (the “Motion”);

CONSIDERING the “Prosecutor’s Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Recall Witnesses TN, QBQ and QY for Further Cross- Examination”, filed on 14 March 2006 (the “Prosecution Response”);

CONSIDERING the “*Réplique de Arsène Shalom Ntahobali à la ‘Prosecutor’s Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Recall Witnesses TN, QBQ and QY for Further Cross-Examination’*”, filed on 20 March 2006 (the “Defence Reply”);

NOTING the “Decision on Ntahobali’s Strictly Confidential Motion to Recall Witnesses TN, QBQ and QY for Additional Cross-Examination”, issued on 4 March 2006 (the “Impugned Decision”);

NOTING the facsimile titled: “In the matter of the Prosecutor vs. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko *et al.*”, issued by the Registry on 9 March 2006;

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rule 73 (B) and (C);

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

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence moves the Chamber for certification to appeal the Impugned Decision of 4 March 2006. The certification is sought with respect to the denial of the request to recall Witnesses TN and QBQ.
2. In relation to Witness TN, the Defence submits that the contradictions between her testimony in the instant proceedings and her testimony in the *Ndindiliyimana et al.* proceedings are not minor¹ and could cast doubt on her credibility.²
3. The Defence further asserts that in depriving the Defence of the possibility to confront Witness TN with some new elements, notably the letter from UNHCR and the Jean-Baptiste Nzisabira Judgment, the Chamber indirectly ruled upon the witness’ credibility without hearing her on these pertinent issues.³ The fairness and the

¹ Paragraph 12 of the Motion.

² Paragraph 13 of the Motion.

³ Paragraphs 17-20 of the Motion.



outcome of the trial are seriously affected as the Accused is denied the right to present exculpatory evidence.⁴

4. The Defence asserts that the immediate resolution of the matter by the Appeals Chamber at this stage would materially advance the proceedings in the sense that a debate under Rule 115 would be avoided on appeal, were the Accused convicted on the basis of allegations made by Witness TN.⁵
5. In relation to Witness QBQ, the Defence alleges that the Chamber issued an erroneous conclusion in the Impugned Decision which resulted in the denial of the recall of this witness. According to the Defence, the recall is solely aimed at establishing the fact that Witness QBQ made a subsequent out of court statement which is incompatible with the testimony that she has given in the instant proceedings: it is not aimed at demonstrating whether the aforementioned out of court statement is true or not.⁶ The Defence submits that the fairness or the outcome of the trial is seriously affected because it is not allowed to confront Witness QBQ with her out of court statement in which she admits having told lies under oath.⁷
6. Finally, the Defence asserts that the immediate resolution of the matter by the Appeals Chamber at this stage would materially advance the proceedings in the sense that a debate under Rule 115 would be avoided on appeal, were the Accused convicted on the basis of the allegations made by Witness QBQ.

The Prosecution

7. The Prosecution submits that the Defence has failed to meet the criteria under Rule 73 (B)⁸ and attempts to argue the appeal it is seeking certification for.⁹
8. The Prosecution contends that the Motion deals at considerable length with the issues already decided by the Chamber in its Impugned Decision.¹⁰
9. The Prosecution submits that it is the Chamber's responsibility to address the admissibility of evidence, including whether there are factors necessitating the recall of witnesses TN, QBQ, and QY for further cross-examination and the scope of Witness QY's cross-examination.¹¹ The Chamber has a duty to assess the materiality of the evidence that the proposed witnesses are expected to give.¹²
10. The Prosecution argues that there has been no compelling demonstration as to how the denial of the motion to recall witnesses would actually affect the fair and expeditious conduct of the proceedings.¹³ The Motion only claims an alleged violation

⁴ Paragraphs 33-34 of the Motion.

⁵ Paragraph 43 of the Motion.

⁶ Paragraph 60 of the Motion.

⁷ Paragraph 66 of the Motion.

⁸ Paragraph 10 of the Prosecution Response.

⁹ Paragraphs 3, 12, 16 and 29 of the Prosecution Response.

¹⁰ Paragraphs 3, 12 and 29 of the Prosecution Response.

¹¹ Paragraph 6 of the Prosecution Response.

¹² Paragraph 8 of the Prosecution Response.

¹³ Paragraphs 9 and 27 of the Prosecution Response.

of the right of the Accused to a fair trial.¹⁴ The Prosecution submits that contrary to the Defence assertions, the recalling of the witnesses will inordinately and significantly affect the fair and expeditious conduct of the proceedings in an adverse manner.¹⁵

Witness TN

11. The Prosecution submits that the Chamber fully considered the alleged discrepancies in the testimonies of Witness TN, before deciding that the issues are not significant enough to justify the recall of the witness.¹⁶
12. The Prosecution argues that the references to the *Ndindiliyimana et al.* proceedings and the Nzisabira Judgement can be dealt with by alternative procedures to tender documents, without the need to recall the witnesses.¹⁷
13. With respect to the evidence on the UNHCR camp at Munagano, the Prosecution submits that the document was not tendered by Witness TN, there is no direct link between the document and the witness and the Defence can use other procedures to produce legally admissible evidence in relation to the camp in lieu of recalling the witness.¹⁸
14. The Prosecution submits that the Defence relies extensively on the *Ndindiliyimana et al.* proceedings in its submissions while contending, at the same time, that the Chamber erred in law by basing its Impugned Decision on evidence from another case which is not part of the evidence in this case.¹⁹
15. The Prosecution submits that the Defence argument that the Chamber has been unfair lacks merit and is misconceived as the Defence has not attempted to produce the evidence in question other than through the cross-examination of Witness TN.²⁰ It is speculative to assume that documents like the Nzisabira Judgment and UNHCR documentation can be used to confront TN or any other witness in cross-examination without laying the proper legal foundation at the appropriate time.²¹
16. The Prosecution submits that the Defence has narrowly construed the Impugned Decision to mean the exclusion of the evidence, whereas the Prosecution reiterates that it is not essential to recall Witness TN for the documents sought to be admitted.²²

Witness QBQ

17. In relation to the Defence argument that it was unfair of the Chamber to deny it the opportunity to use an 'extra-judicial' statement to impeach the credibility of Witness QBQ, the Prosecution reiterates that the Chamber has the discretion to admit or

¹⁴ Paragraph 9 of the Prosecution Response.

¹⁵ Paragraph 11 of the Prosecution Response.

¹⁶ Paragraph 17 of the Prosecution Response.

¹⁷ Paragraph 18 of the Prosecution Response.


¹⁸ Paragraph 19 of the Prosecution Response.

¹⁹ Paragraph 20 of the Prosecution Response.

²⁰ Paragraph 21 of the Prosecution Response.

²¹ Paragraph 21 of the Prosecution Response.

²² Paragraph 22 of the Prosecution Response.


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exclude evidence and has the right to assess evidence and to determine issues of credibility.²³ The use of extra-judicial statements is determined by the Chamber on a case-by-case basis and it is not bound by what transpires in other proceedings.²⁴ This Chamber has consistently held that statements of witnesses as opposed to their actual testimonies before the Chamber are not evidence in these proceedings.²⁵

The Defence Reply

18. The Defence submits that the Prosecution Response of 14 March 2006 was filed out of time and should be dismissed. According to the Defence, the time frame of five days within which the Prosecution should have filed its response expired on 13 March 2006.

HAVING DELIBERATED,

19. As a preliminary matter, the Chamber finds that the Prosecution Response was filed on time, as the Registry's notification of 9 March 2006 specifies that "the Parties have five (5) days to file their Responses *after* receipt of this notification" [emphasis added]. The Chamber notes that the Prosecution acknowledged receipt of the notification on 9 March 2006 and the time frame for it to file its response therefore ran from 10 March 2006. Accordingly, the Chamber rejects the Defence request for dismissal of the Prosecution response.

20. The Chamber recalls Rule 73 (B), which stipulates:

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

21. The Chamber notes that decisions rendered on Rule 73 motions are without interlocutory appeal, except that the Chamber has discretion to grant certification in the very limited circumstances stipulated in Rule 73 (B). The Chamber may grant certification to appeal if both conditions of Rule 73 (B) are satisfied. Under the first limb of Rule 73 (B), the applicant must show how the Impugned Decision involves an issue that would significantly affect (a) the fair and expeditious conduct of the proceedings, or (b) the outcome of the trial. Under the second limb, the applicant has the burden of convincing the Chamber that an "immediate resolution by the Appeals Chamber may materially advance the proceedings". Both of these conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered.²⁶

²³ Paragraphs 25-26 of the Prosecution Response.

²⁴ Paragraph 26 of the Prosecution Response.

²⁵ Paragraph 26 of the Prosecution Response.

²⁶ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for Disclosure and Evidence", 4 February 2005, para. 11; *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004, paras. 12 – 16; *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence

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22. The Chamber notes the Defence submissions and observes that the reasons invoked by it constitute grounds of appeal, rather than grounds to support a motion for certification. The Chamber therefore concludes that the Defence has failed to meet the requirements provided for by Rule 73 (B).

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 04 April 2006



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]