International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

ICTR-00-55A-T
31-05-2006
(3453 - 3448)

Before: Judge Asoka de Silva, Presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 31 May 2006

ICTR JUDICIAL RECORDS/ARCHIVES
2006 MAY 31 A 11: 58

THE PROSECUTOR

v.

THARCISSE MUVUNYI

ICTR-2000-55A-T

DECISION ON MUVUNYI'S ADDITIONAL OBJECTIONS TO THE DEPOSITION TESTIMONY OF WITNESS QX PURSUANT TO ARTICLE 20 OF THE STATUTE AND RULES 44, 44*bis* AND 73(F) OF THE RULES OF PROCEDURE AND EVIDENCE

Office of the Prosecutor

Mr Charles Adeogun-Phillips, Senior Trial Attorney
Ms Adesola Adeboyejo, Trial Attorney
Ms Renifa Madenga, Trial Attorney
Ms Memory Maposa, Assistant Trial Attorney
Mr Dennis Mabura, Case Manager

Counsel for the Accused Person

Mr William E. Taylor, Lead Counsel
Ms Cynthia Cline, Legal Assistant

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

NOTING that Judge Florence Rita Arrey, who is currently away from the seat of the Tribunal, has had the opportunity to read this Decision in draft, agrees with it, and has authorised the Presiding Judge to sign on her behalf;

BEING SEIZED of the "Corrected Accused's Additional Objections to the Deposition Testimony of Witness QX", filed on 27 April 2006 (the "Motion");[1]

HAVING RECEIVED the "Prosecutor's Response to Accused Tharcisse Muvunyi's Additional Objections to the Deposition Testimony of Witness QX", filed on 28 April 2006 (the "Response");

RECALLING the "Decision on the Prosecutor's Extremely Urgent Motion for Deposition of Witness QX (Rule 71 of the Rules of Procedure and Evidence)", rendered on 11 November 2003, (the "Decision of 11 November 2003");[2]

NOW DECIDES the Motion pursuant to Rule 73(A) of the Rules on the basis of written submissions filed by the Parties.

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence prays the Chamber to strike from the record in this case, and not to consider the deposition testimony of Prosecution Witness QX taken on 4 and 5 December 2003. Alleging "ineffective assistance of counsel", the Defence submits that the Duty Counsel who represented the Accused at the deposition proceedings has "admitted that he was not familiar with the facts of the case". The Defence argues that as a consequence, Muvunyi was deprived of both his right to effective assistance of counsel and his right to cross-examination.

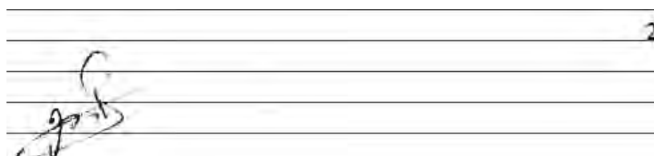
2. According to the Defence, the right to counsel provided in Article 20 of the Statute is "more than the right of an accused to have a warm body with a law license seated next to him in the courtroom." The Defence further argues that Rule 44*bis* of the Rules "envisions that duty counsel will provide only initial legal advice to an accused or suspect until such time as permanent [representation] is arranged." In the view of the Defence, it cannot be expected that Duty Counsel will become intimately familiar with the case, conduct investigations and/or provide definitive legal advice to a suspect or accused person.

3. The Defence submits that the Appeals Chamber has interpreted the requirement of effective assistance of counsel to mean *competent* counsel.[3] The Defence further submits

[1] Although the Defence does not so indicate, the Chamber understands that this "Corrected" version replaces the "Accused's Additional Objections to the Deposition Testimony of Witness QX" filed on 26 April 2006 and in ~~which the name of the Accused was wrongly spelt.~~

~~[2] This Decision in the pre-trial phase was rendered by Trial Chamber III~~

[3] Citing *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, paras 76-77



that the Supreme Court of the United States of America has determined that for a conviction or sentence to be vacated due to ineffective assistance of counsel, the defendant must show that there was deficient conduct falling outside the normal range of professional conduct, and that but for this deficient conduct, there is a reasonable probability that the result of the trial would have been different.[4] The Defence also asserts that the same Supreme Court has held that there is a presumption of ineffectiveness when Defence Counsel's performance is so deficient that there is a breakdown in the adversarial process to the extent that the Prosecutor's case is not tested in a meaningful way.[5]

4. Finally, the Defence submits that since the deposition was taken after one permanent lawyer had been dismissed and before a new one was assigned, "there was no counsel specifically charged with preparing the case for trial and determining where Witness QX's testimony fit into the overall scheme of the trial." The Defence further submits that Muvunyi "was denied his right to effective assistance of counsel," and that the Chamber can cure the error by striking the deposition testimony of Witness QX and not considering it for any reason.

The Prosecution

5. The Prosecution submits that the Defence motion to strike the deposition testimony of Witness QX "is out of time, falling outside the time frame contemplated by the Rules" for the presentation of preliminary objections. In the view of the Prosecution, the Defence motion is not only a "frivolous application", but is "both spurious and vexatious" as well.

6. The Prosecution further submits that before the Trial Chamber rendered its Decision of 11 November 2003, it considered and deliberated upon the reasons advanced by the Prosecution for the taking of the deposition. The Prosecution also notes that in a subsequent decision, the Chamber found that Duty Counsel was "competent to conduct the taking of the deposition of Witness QX" and that nothing in the Defence motion changes that finding.

7. According to the Prosecution, absent new facts or exceptional circumstances which were unknown to the Chamber at the time of the Decision in November 2003, "there are no provisions in the Rules allowing for a review" of such decisions. Therefore, submits the Prosecution, the Chamber should dismiss the Motion and deny the Defence filing costs.

HAVING DELIBERATED

8. The Chamber is mindful of the Rights of the Accused enshrined in Article 20 of the Statute, and in particular of the "minimum guarantees" provided in Article 20(4)(d) and (e), including the right of the Accused:

    (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

[4] Citing *Strickland v. Washington*, Supreme Court of the United States, 466 U.S. 668, 1984.
[5] Citing *United States v. Cronic*, Supreme Court of the United States, 466 U.S. 648, 1984.

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

9. The Chamber also recalls the provisions of Rule 44 *bis* on Duty Counsel, which should be read in conjunction with Rule 44 on the Appointment and Qualifications of Counsel. Pursuant to these rules, both Duty Counsel and Assigned Counsel are deemed to be competent. As stipulated in Rule 44(A), subject to verification by the Registrar, "a counsel shall be considered qualified to represent a suspect or accused, provided that he is admitted to the practice of law in a State, or is a University professor of law."

10. The Appeals Chamber has developed considerable jurisprudence at both the ICTR and the ICTY on the issue of the effective assistance of counsel. In *Kambanda*, it noted that the effectiveness of representation by assigned counsel must be assured in accordance with the principles relating to the right to a defence, in particular the principle of equality of arms.[6] In *Akayesu*, it affirmed that indigent accused have the right to be assigned competent counsel and that such right to competent counsel is guaranteed under the International Covenant on Civil and Political Rights (Article 14), among other international legal instruments.[7] In the *Tadic* case, however, the Appeals Chamber established that the test to be applied in assessing counsel's competence is that unless "gross negligence" is shown to exist in the conduct of either Prosecution or Defence counsel, due diligence will be presumed.[8]

11. The Chamber has also examined the two companion cases from the Supreme Court of the United States of America (US Supreme Court) cited by the Defence in support of the Motion. Apart from the fact that the Defence has failed to prove any deficient performance on the part of the Duty Counsel, as required by the US Supreme Court, it is worth noting that those cases are distinguishable from the instant one in multiple ways, but primarily because they both deal with final trial judgements involving convictions and sentences, while the present case is still at the trial stage and without a judgement.[9]

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[6] *Jean Kambanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000, paras. 33-34 and related footnotes.

[7] *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 76.

[8] *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence", 15 October 1998, paras. 46-50.

[9] In *Strickland v. Washington* [US Supreme Court, 466 U.S. 668, 1984], a criminal defendant acted against the advice of his assigned counsel and pleaded guilty to a string of murders and other violent crimes. He subsequently challenged the death sentence imposed on him by the trial court, alleging ineffective assistance of counsel. On appeal, the US Supreme Court held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." The Court then established a two-part test requiring a defendant to show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defence.

United States v. Cronic [US Supreme Court, 466 U.S. 648, 1984] involved a criminal defendant indicted on mail fraud charges. Shortly before the scheduled trial date, his retained counsel withdrew and the trial court appointed a young real estate attorney to represent him. Whereas the Government had taken four-and-a-half years to investigate the case and had reviewed thousands of documents in the process, the young lawyer had only 25 days for pre-trial preparation. The intermediate US Court of Appeals subsequently reversed the 25-year prison sentence, concluding that the defendant did not have the effective assistance of counsel for his defence. The US Supreme Court in turn reversed the ruling of the Court of Appeals, holding that the right to the effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." The Supreme Court also held that there is no necessary correlation between the amount of time spent on a case and the quality of representation delivered. It concluded that lawyers are

12. The Chamber is fully aware of the special circumstances under which the deposition of Witness QX was recorded in December 2003. In particular, the Chamber notes that pursuant to an application by the Accused, Trial Chamber III ordered the Registrar to withdraw Mr. Michael Fischer as Lead Counsel, but stated that this should not be interpreted as implying any delay in the commencement of the trial.[10] The Registrar on the following day gave effect to the Trial Chamber III Decision and appointed Mr. Francis Musei as Duty Counsel, pending the assignment of a new Lead Counsel for Muvunyi.[11] The deposition was taken in the presence of the Duty Counsel.

13. It should also be recalled that in the Decision of 11 November 2003, which authorised the taking of the deposition, Trial Chamber III determined that:

> In the instant case, the Chamber considers that Witness QX's age, coupled with his critical state of health, constitutes exceptional circumstances within the meaning of Rule 71 of the Rules. If the state of his health worsened, the Prosecutor would be deprived of his evidence. Furthermore the Chamber notes the Prosecutor's submission that the anticipated evidence of Witness QX is highly important to its case not only because he was allegedly an eyewitness of the acts alleged by the Prosecutor against both Accused, but also because his status makes him a special witness. The Chamber therefore considers that the interests of justice require that the evidence of Witness QX be taken by way of deposition, pursuant to Rule 71 of the Rules, before commencement of trial, so as to adequately facilitate the administration of justice.[12]

14. In a subsequent Decision dated 27 November 2003, Trial Chamber III denied Muvunyi's request for certification to appeal the Decision of 11 November 2003, ruling that Muvunyi would be adequately represented by Duty Counsel during the taking of the deposition.[13]

15. A review of the transcripts of the deposition proceedings on 4 and 5 December 2003 reveals that despite Muvunyi's strict instructions to the contrary, he was in fact represented by Duty Counsel, Mr. Francis Musei.[14] At the conclusion of the Prosecution's examination-in-chief of Witness QX, Duty Counsel made the following statement:

> My Lord, lest I should be accused of negligence, I think I would have to participate in cross-examination, even in the absence of instruction as I had earlier said.[15]

16. Before commencing the cross-examination, Duty Counsel also requested and obtained from the Court an adjournment until the following day "in order to look into the evidence

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presumed competent and that the burden rests on the defendant to demonstrate that there was a breakdown in the adversarial process.

[10] *The Prosecutor v. Tharcisse Muvunyi et al*, Case No. ICTR-2000-55-I (Joinder), "Decision on the Accused's Request to Instruct the Registrar to Replace Assigned Lead Counsel", 18 November 2003.

[11] "Decision of Withdrawal of Mr. Michael Fischer as Lead Counsel of the Accused Tharcisse Muvunyi", Registrar, 19 November 2003.

[12] *The Prosecutor v. Tharcisse Muvunyi, Idelphonse Nizeyimana, Idelphonse Hategekimana*, Case No. ICTR-2000-55-I, "Decision on the Prosecutor's Extremely Urgent Motion for Deposition of Witness QX (Rule 71 of the Rules of Procedure and Evidence)", 11 November 2003, para. 10.

[13] *The Prosecutor v. Tharcisse Muvunyi, Idelphonse Nizeyimana, Idelphonse Hategekimana*, Case No. ICTR-2000-55-I, "Decision on the Request of the Accused for Certification of Appeal against the Decision Authorising the Deposition of Witness QX (Rule 73(B) of the Rules of Procedure and Evidence)", 18 November 2003.

[14] T. 4 December 2003, p. 4.

[15] T. 4 December 2003, p. 27.

as a whole and make the necessary strategy in the approach of the witness."[16] The next day, 5 December 2003, Duty Counsel proceeded to cross-examine Witness QX and to represent the interests of the Accused.[17] The Chamber notes the Defence's allegation that the Duty Counsel has "admitted that he was not familiar with the facts of the case",[18] but after a review of the transcripts of the deposition proceedings, the Chamber has not been able to substantiate the allegation.

17. It is apparent from the foregoing analysis that Muvunyi's claim here falls short of meeting the standards established by the Appeals Chamber. The Chamber considers that during the deposition of Witness QX, Muvunyi was adequately represented by a Duty Counsel deemed competent pursuant to Rule 44; there was no indication of gross negligence on the part of the Duty Counsel; there was no allegation of improper or unprofessional conduct by counsel; his performance could not be said to have been deficient; there was no breakdown in the adversarial process; and, in the absence of a final judgement, there can be no claim that but for Duty Counsel's performance, the outcome of the trial would have been different. Furthermore, just because Duty Counsel's involvement in the case occurred between those of two permanent counsel, it does not necessarily follow that he was less competent or less effective at defending Muvunyi's cause. There is no necessary correlation between the amount of time spent on a case and the quality of representation delivered.[19]

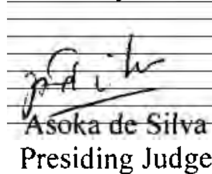
18. The Chamber is of the opinion that not only was the Motion filed out of time, but the issues raised therein were already sufficiently ventilated as far back as November 2003 and are now *res judicata*. The Chamber notes, for instance, that Muvunyi's request for certification of appeal against the Decision authorising the taking of the deposition was denied[20] and that the Defence has not pointed to any new facts that would justify a review of those earlier Decisions. Therefore, the Chamber considers the Motion to be frivolous and subject to sanctions within the meaning of Rule 73(F).

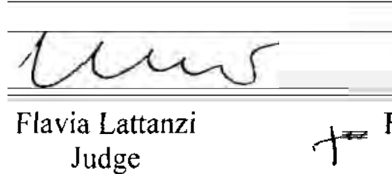
FOR THE FOREGOING REASONS, THE CHAMBER

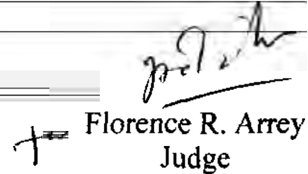
DENIES the Motion in its entirety and

ORDERS the Registry to deny the Defence all costs associated with the filing of the Motion.

Arusha, 31 May 2006







Asoka de Silva	Flavia Lattanzi	Florence R. Arrey
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[16] T. 4 December 2003, p. 27.
[17] T. 5 December 2003, pp. 2-7.
[18] See para. 2 of the Motion.
[19] *United States v. Cronic*, US Supreme Court, 466 U.S. 648, 1984.
[20] *The Prosecutor v. Tharcisse Muvunyi, Idelphonse Nizeyimana, Idelphonse Hategekimana*, Case No. ICTR-2000-55-I, "Decision on the Request of the Accused for Certification of Appeal against the Decision Authorising the Deposition of Witness QX (Rule 73(B) of the Rules of Procedure and Evidence)", 18 November 2003.