



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
11-09-2006
(29325-29322)

29325

S. Musa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 11 September 2006

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THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON THE NSENGIYUMVA MOTION TO ADD
SIX WITNESSES TO ITS WITNESS LIST

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 "Confidential and Extremely Urgent Motion for Leave to Amend the List of Defence Witnesses", filed on 1 September 2006, and the Corrigendum thereto, filed on 7 September 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Nsengiyumva Defence requests leave to add six witnesses to its list of witnesses: ICJ-1, EAC-1, DEF-2, ICC-1, HQ-1 and USA-1. The Defence states generally that it has been obliged to seek out new witnesses to replace others who have died, disappeared, or refuse to testify. The witnesses are all residents of Rwanda, which makes them difficult to contact, according to the Defence. The motion gives a detailed summary of each witness's testimony, the Prosecution evidence which they are expected to rebut, and indicates, in many cases, that the witnesses are not duplicating the testimony of Defence witnesses already heard. The Prosecution has made no submissions.

DELIBERATIONS

(i) *Applicable Standard*

2. Rule 73^{ter} (E) of the Rules provides that:

After commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decisions as to which witnesses are to be called.

This standard has been previously been discussed in this case:

In interpreting a similarly worded provisions applicable to Prosecution witnesses, this Trial Chamber has held that amendments of a witness list must be supported by "good cause" and be in the "interest of justice." Similar principles have been applied in assessing Defence motions to vary a witness list. The determination of whether to grant a request to vary a witness list requires a close analysis of each witness, including the sufficiency and time of disclosure of the witness's information; the materiality and probative value of the proposed testimony in relation to existing witnesses and the allegations in the indictment; the ability of the other party to make an effective cross-examination of the witness; and the justification offered by the party for the addition of the witness.¹

¹ *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E) (TC), 26 June 2003, para. 14 (references omitted).

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Whether the addition of witnesses will result in “unfair surprise or prejudice” to the opposing party must be considered in light of the disclosure obligations of the moving party.²

(ii) *Addition of Witnesses*

3. The Defence has failed to offer specific justifications explaining when these witnesses were first discovered, or which witnesses they have replaced. The failure to do so makes it difficult to determine whether the attempt to add these witnesses at this late stage of the proceedings is justified. The lack of specificity in this respect weighs against the granting of the motion.

4. On the other hand, the potential importance of these witnesses is evident to the Chamber. Their testimony, as described in the motion, responds directly to Prosecution evidence of the conduct of the Accused. Some of the witnesses appear to be the only ones to rebut some elements of the Prosecution case. At least one of them, Witness IIQ-1, knew the Accused well during the events in question and may be in a position to offer relevant evidence. Furthermore, the expected testimony appears to be well-defined and narrowly-circumscribed, and the Defence expects that the examination-in-chief of all six witnesses could be completed in nine hours.

5. The Defence submits that it disclosed the identity of five of these witnesses to the Prosecution on 24 August 2006, and that that concerning the sixth is disclosed with the motion. Previous decisions which have granted amendments of Defence witness lists have required a minimum notice of thirty-five days to the Prosecution. Accordingly, sufficient time remains before the close of the Nsengiyumva Defence case to hear these witnesses with adequate notice to the Prosecution. On the other hand, the inability to call these witnesses within the remaining time can in no way be used to justify a prolongation of the Defence case. The deadline for the close of the Nsengiyumva Defence case, including the testimony of the Accused should he choose to testify, is 13 October 2006. The opportunity to call these additional witnesses depends on the Defence’s own ability to fit them within the existing judicial calendar.

6. In light of all the circumstances, an appropriate period of notice requires that these witnesses be called no earlier than 2 October 2006, subject to any waiver by the Prosecution.

² *Bagosora et al.*, Decision on Nsengiyumva Motion for Leave to Amend Its Witness List (TC), 6 June 2006, para. 3.

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FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the request of the Nsengiyumva Defence to add witnesses ICJ-1, EAC-1, DEF-2, ICC-1, HQ-1 and USA-1 to the witness list;

ORDERS, to the extent that it has not yet been provided, that any identifying information and summaries of their testimony be disclosed to the Prosecution;

DECLARES, subject to any waiver by the Prosecution, that the witnesses may not testify before 2 October 2006.

Arusha, 11 September 2006



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

