ICTR-98-41-T

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

17-11-2006
(31514-31510)

ORIGINAL: ENGLISH

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 17 November 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No.: ICTR-98-41-T

DECISION ON NSENGIYUMVA MOTION FOR ADJOURMENT DUE TO ILLNESS OF THE ACCUSED

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Gregory Townsend

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 "Motion Requesting Suspension of Trial on Medical Grounds", filed by the Nsengiyumva Defence on 8 November 2006;

CONSIDERING the Registrar's Submissions, filed on 13 November 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. Presentation of evidence by the Nsengiyumva, Bagosora, and Ntabakuze Defence teams closed on 13 October 2006.[1] With the exception of four Bagosora witnesses and one Ntabakuze witness, the present and final session of the trial is devoted exclusively to hearing witnesses on behalf of Kabiligi.[2]

2. On 8 November 2006, Lead Counsel for Nsengiyumva announced that his client was ill and unable to attend proceedings. He indicated that the Accused had no intention of waiving his right to be present, and requested a suspension of the trial until his client was able to return to court.[3] A written motion, filed simultaneously, argued that "most of the witnesses about to take the stand, e.g. ALL 42 and Kambanda are particularly important witnesses whose testimony he absolutely must follow".[4] After an adjournment to allow the Defence time to more fully consult with their client, the Chamber received a medical report from the Registry indicating that "one week rest is recommended for his condition to improve".[5]

3. The Chamber asked whether there were any witnesses of less importance to the Nsengiyumva Defence whom the Accused would consent to be heard in his absence. Lead Counsel responded:

> Now, as I said in the morning, the other witnesses may have nothing obvious, on the face of it, that will have an impact on the defence of the Accused person. But, we do not know what is likely to come out of the cross-examination of those witnesses by the Prosecution, and that is where our difficulty is. So that out of abundant caution, it will be safe that the Accused person is in court to give instructions when issues that are likely to be prejudicial arise during cross-examination either by the Prosecution or by the other Defence teams.[6]

In respect of Witnesses Kambanda and ALL-42, Lead Counsel explained that the situation

> is slightly different. It's both the prejudicial testimony and also the possibility of getting exculpatory testimony from those two witnesses. We will lose that if the

[1] T. 13 October 2006 p. 1 (Status Conference).
[2] *Bagosora et al.*, Decision on Bagosora Motion to Present Additional Witnesses and Vary Its Witness List (TC), 17 November 2006; T. 13 October 2006 p. 6 (Status Conference).
[3] T. 8 November 2006 pp. 1-2; T. 14 November 2006 p. 24 (draft).
[4] Motion, para. 6.
[5] Registrar's Submissions, filed on 13 November 2006; Exhibit DNS-229A.
[6] T. 8 November 2006 p. 8.

> Accused is not in court, because we believe that they have important – particularly, the first one, ALL-42, he has important information that we could elicit from him....[7]

4. After hearing the parties, the Chamber ruled orally that it would proceed with the examination-in-chief of Witness ALL-42, but would reserve its position as to the timing of any possible Nsengiyumva and Prosecution cross-examination of the witness.[8] Upon completion of the witness's examination-in-chief and cross-examination by the two other Defence teams, the Nsengiyumva Defence re-affirmed that it was not in a position to decide whether to cross-examine the witness. The Chamber decided to postpone the remainder of the witness's testimony.[9]

5. The Kabiligi Defence then called Witness YC-03. At the end of the examination-in-chief and the Prosecution cross-examination the following day, 9 November 2006, the Nsengiyumva Defence indicated that it was not able to take a position in respect of any additional cross-examination of the witness. The Chamber decided that the witness would remain in Arusha, subject to possible recall by the Nsengiyumva Defence, which should consult with its client on the basis of the transcripts in order to determine whether to cross-examine the witness.[10] After the completion of the examination-in-chief of the next Kabiligi witness, Witness LAX-2, the Nsengiyumva Defence again reserved its right to conduct a cross-examination.[11] On 13 November 2006, the Nsengiyumva Defence repeated its objection to hearing evidence in the absence of the Accused. The Chamber nevertheless heard Kabiligi Witness FB-25, who had previously appeared in the trial as Ntabakuze Witness DM-190.

6. On 13 November 2006, the Chamber received a second medical report from the Registry stating that the Accused would be able to attend trial hearings effective 14 November 2006, subject to being able to take a ten-minute break every two hours, and to elevate his leg.[12] The next day, the Accused was present in court, but complained that he was in significant pain that made it difficult for him to consult meaningfully with his counsel.[13]

DELIBERATIONS

7. Article 20 (4)(d) of the Statute recognizes the right of an accused "to be tried in his or her presence". This right, however, is not absolute; it is subject to "the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective".[14] Furthermore, implied waiver of this right may arise where an accused is given the opportunity to attend trial, but declines to do so without establishing good cause for the absence.[15] No implied waiver will arise where an accused shows good cause, such as the existence of a medical condition that makes attending trial impossible.[16]

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[7] T. 8 November 2006 p. 9.
[8] *Id.* pp. 9-11.
[9] T. 9 November 2006 p. 30.
[10] *Id.* p. 75.
[11] T. 10 November 2006 p. 5. The other Defence teams declined to cross-examine the witness.
[12] Registrar's Submissions, filed on 13 November 2006; Exhibit DNS-229B.
[13] T. 14 November 2006 p. 2 (draft).
[14] *Zigiranyirazo*, Decision on Interlocutory Appeal (AC), 30 October 2006, para. 14.
[15] *Barayagwiza*, Decision on Defence Counsel Motion to Withdraw (TC), 2 November 2000, paras. 6-7.
[16] *Kajelijeli*, T. 2 October 2001 p. 33; *Krstic*, Case No. IT-98-33-T, Decision Adjourning the Trial (TC), 15 January 2001, para. 27.

8. Failure to attend proceedings because of illness must be substantiated by a professional medical assessment.[17] The Chamber accepts, on the basis of the first medical report submitted by the Registry, that the Accused was unable to attend trial proceedings on 8, 9, 10 and 13 November 2006. On 14 November 2006, the Accused came to court and addressed the Chamber, saying that he was in pain which prevented him from following the proceedings or engaging in meaningful consultations with his lawyers.[18] Although the Chamber is sympathetic to this claim, it must be guided by the medical report prepared by the attending physician. That report says that the Accused was sufficiently recovered to attend the trial on 14 November 2006. As of that date, the Accused's absence from court has not been substantiated by a professional medical opinion. The Chamber must infer in such circumstances that the Accused's absence is not justified by good cause.[19] Having said this, the Chamber remains open to any further medical reports that may suggest the contrary, and is anxious to ensure that the Accused is closely monitored to ensure that he receives the highest possible standard of health care.[20]

9. The Chamber does not consider that any unjustifiable restriction has been placed on the Accused's right to be present at his trial. First and foremost, the case for the Accused has already closed. None of the witnesses now being called by the other Defence teams appear to be adverse to the Accused. Nsengiyumva argues, nonetheless, that prejudicial testimony might be elicited by the Prosecution from those witnesses, in particular of Witness ALL-42 and Kambanda, and that the Defence might be able to obtain exculpatory testimony from these and other Kabiligi witnesses.

10. The Chamber has taken measures to address the concerns raised by the Nsengiyumva Defence, to the extent that they are justified. The Prosecution cross-examination of Witness ALL-42 was deferred until 16 November 2006. The testimony of other witnesses has been heard, but the Chamber has indicated its openness to specific submissions to allow the recall of these witnesses for additional questioning and, in one case, directed that a witness remain in Arusha to provide the Nsengiyumva Defence, in consultation with the Accused, an opportunity to decide whether to do so.[21] Transcripts and video-recordings of the testimony are available to the Accused so that he can meaningfully and knowledgeably consult with his Defence team about the need to cross-examine the witness or, at least, to offer more specific submissions concerning the relevance of the their testimony to the Accused.

11. The Nsengiyumva Defence has been unable to show the relevance to the Accused of any testimony heard in his absence. The only specific area of potential interest identified by the Nsengiyumva Defence during the testimony so far concerns a few questions posed to Witness LAX-2 concerning his knowledge of a Prosecution witness.[22] Witness LAX-2 made no reference to Nsengiyumva in his testimony, and the context in which he mentions the Prosecution witness is unrelated to any testimony by that witness against the Accused.[23] The Chamber considers the connection between this testimony and Nsengiyumva to be, at its

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[17] *See e.g. Naletilic and Martinovic*, T. 31 May 2002 pp. 12117-12118; *Kajelijeli*, T. 2 October 2001 p. 33; *Krstic*, Case No. IT-98-33-T, Decision Adjourning the Trial (TC), 15 January 2001, para. 27. In these cases, the Chambers found that there was an implied waiver of the Accused's right to be present.

[18] T. 14 November 2006 p. 2.

[19] *Naletilic and Martinovic*, T. 31 May 2002 p. 12117-12118; *Kajelijeli*, T. 2 October 2001 p. 33.

[20] T. 14 November 2006 pp. 1-3.

[21] T. 9 November 2006 p. 76.

[22] *Id.* pp. 83-84; T. 10 November 2006 pp. 1-2.

[23] T. 9 November 2006 pp. 87-88; T. 10 November 2006 p. 5.

highest, marginal. No undue restriction is placed on the Accused's right to be present at his trial by permitting this testimony to be heard under the conditions described above.

12. The Defence has invoked the recent Appeals Chamber decision in *Zigiranyirazo* to reverse a Trial Chamber decision to hear a witness in The Netherlands while the Accused observed proceedings by video-link in Arusha, accompanied by his counsel. A series of factors show that precedent to be inapposite. The witness being heard in that case was considered a "key Prosecution witness" against the accused, whereas the witnesses here are appearing on behalf of another co-Accused and no showing has been made that these witnesses have any particular relevance to Nsengiyumva.[24] A further consideration was the Appeals Chamber's opinion that other options could have been explored to ensure that the Accused was present during the hearing of the witness. The Appeals Chamber did not accept as determinative or as sufficiently established the claims that the witness's security would be at risk by travelling to Arusha, and that the Accused was barred from entering The Netherlands for the hearing.[25] No such considerations are relevant in the present case. Finally, Mr. Zigiranyirazo was being tried alone. Here, the Chamber must consider the potential impact of an adjournment on, in particular, the rights of the Accused Kabiligi. Significant, long-term efforts are often required to ensure the appearance of witnesses before this Tribunal. The risk of losing witnesses poses a much greater threat of prejudice to the Accused Kabiligi than the speculative and remote prejudice to the Accused Nsengiyumva.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 17 November 2006

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[24] *Zigiranyirazo*, Decision on Interlocutory Appeal (AC), 30 October 2006, para. 21.
[25] *Id.*, paras. 18, 20.