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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

ICTR-99-52-A
13 December 2006
(9255/H - 9248/H)

P.T.

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 13 December 2006

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Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

ICTR Appeals Chamber
Date: 13 December 2006
Action: P.T.
Copied To: Concerned Judges
Parties SLOS, LOR, ALALLO

Archiver

Case No. ICTR-99-52-A

PUBLIC REDACTED VERSION

DECISION ON PROSECUTION'S MOTION FOR LEAVE TO CALL
REBUTTAL MATERIAL.

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SIGNATURE: *[Signature]* DATE: *13/13/06*

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Prosecutor's Urgent Motion for Leave to Call Rebuttal Evidence Pursuant to Rules 54, 85, 89, 107 and 115" filed by the Office of the Prosecutor ("Prosecution") on 27 November 2006 ("Motion") together with "Strictly Confidential Annexes to the Prosecutor's Urgent Motion for Leave to Call Rebuttal Evidence Pursuant to Rules 54, 85, 89, 107 and 115" filed confidentially on the same date ("Annexes"). Hassan Ngeze ("Appellant") did not respond to the Motion.¹

I. PROCEDURAL BACKGROUND

2. Trial Chamber I of the Tribunal ("Trial Chamber") rendered its Judgement in this case on 3 December 2003.² The Appellant filed his Notice of Appeal on 9 February 2004,³ amended on 9 May 2005,⁴ and Appellant's Brief on 2 May 2005.⁵ The Prosecution filed its Respondent's Brief on 22 November 2005.⁶ The Appellant replied on 15 December 2005.⁷

3. By its Decision of 23 February 2006,⁸ the Appeals Chamber admitted as additional evidence on appeal handwritten and typed copies of Witness EB's purported recantation statement dated April 2005 ("Recantation Statement")⁹ and the Forensic Report of Mr. Antipas Nyanjwa, an expert in handwriting, who assessed the authenticity of Witness EB's statement,¹⁰ pursuant to Rule 115 of

¹ The dead-line for filing a response to the Motion expired ten days after the filing of the Motion, or on 7 December 2006, and the Appellant has not filed a motion seeking for extension of the applicable time limit. (*See* para. 13 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 8 December 2006. The Appeals Chamber considers that the extended deadline of thirty days for filing a response to "a motion pursuant to Rule 115" under the cited provision is not applicable to motions for admission of rebuttal material, but rather concerns motions for admission of additional evidence on appeal).

² *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Trial Judgement").

³ Defence Notice of Appeal (Pursuant to Rule 108 of the Rules of Procedure and Evidence), 9 February 2004.

⁴ Confidential Amended Notice of Appeal, 9 May 2005.

⁵ Confidential Appellant's Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), 2 May 2005.

⁶ Consolidated Respondent's Brief, 22 November 2005.

⁷ Appellant Hassan Ngeze's Reply Brief (Article 113 of the Rules of Procedures and Evidence), 15 December 2005.

⁸ Confidential Decision on Appellant Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006 ("Decision of 23 February 2006").

⁹ Decision of 23 February 2006, para. 29; Confidential Decision on the Prosecutor's Motion for an Order and Directives in Relation to Evidentiary Hearing on Appeal Pursuant to Rule 115, 14 June 2006 ("Decision of 14 June 2006"), p. 3.

¹⁰ Report of the Forensic Document Examiner, Inspector Antipas Nyanjwa, dated 20 June 2005, Annex 4 to the "Prosecutor's Additional Submissions In Response to 'Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB'", filed confidentially on 7 July 2005 ("Forensic Report"). *See* Decision of 23 February 2006, para. 41.

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the Rules of Procedure and Evidence of the Tribunal ("Rules"), and ordered that Witness EB be heard by the Appeals Chamber, pursuant to Rules 98 and 107 of the Rules.¹¹

4. On 14 June 2006, the Appeals Chamber dismissed the Prosecution's request for an order to the Appellant to produce the original handwritten and typed versions of Witness EB's purported Recantation Statement and ordered Witness EB to appear, as a witness of the Appeals Chamber, at an evidentiary hearing, pursuant to Rule 115 of the Rules.¹² By the same decision, the Appeals Chamber modified the protective measures applicable to Witness EB and prohibited the parties, their agents or any person acting on their behalf from contacting Witness EB, unless expressly authorized to do so by the Appeals Chamber.¹³

5. Finally, by its Decision of 27 November 2006,¹⁴ the Appeals Chamber admitted as additional evidence on appeal a copy of the statement, in Kinyarwanda, purportedly written by Witness EB dated 15 or 16 December [year illegible] affirming his Recantation Statement ("Additional Statement") and its translations into English and French.¹⁵ By the same decision, the Appeals Chamber admitted as rebuttal material copies of the envelopes in which copies of the Additional Statement were received by the Prosecution.¹⁶

II. DISCUSSION

6. In rebuttal to the additional evidence admitted on appeal with respect to Witness EB, the Prosecution seeks to call two witnesses to give oral testimony, namely Prosecution Investigator Moussa Sanogo and Witness AEU,¹⁷ as well as to have admitted the "underlying documentary evidence relating to their testimony", including the Report from the Officer in Charge of the Division of Investigations dated 23 August 2006 ("Investigation Report").¹⁸ The Prosecution submits that the material proffered in rebuttal will "demonstrate that the purported recantation of Witness EB is false and unworthy of any credit, in that there is compelling evidence that the purported recantation is the product of a campaign to attempt to obstruct the course of justice, on

¹¹ Decision of 23 February 2006, para. 81.

¹² Decision of 14 June 2006, p. 5.

¹³ *Ibid.*, p. 6.

¹⁴ Confidential Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006 ("Decision of 27 November 2006"); see Public Redacted Version filed on 1 December 2006.

¹⁵ *Ibid.*, paras 39 and 44.

¹⁶ *Ibid.*, paras 42 and 44.

¹⁷ The Prosecution seeks to call Investigator Moussa Sanogo who is anticipated to testify on the subject of his investigations into the alleged recantation of Witness EB and "the wider context within which the purported recantation statement of EB was produced" as well as Witness AEU "who is anticipated to testify on the basis of the evidence contained in [the] written statement, dated 24 August 2005, given to the Special Counsel to the Prosecutor and investigators of the OTP" (Motion, para. 3; Annexes 1-5).

¹⁸ Motion, para. 3; Annex 6.

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behalf of the Appellant", as well as prove that "Witness EB was not subjected to any pressure by the OTP to cause him to deny a recantation that he made".¹⁹

7. Rule 115(A) of the Rules provides that rebuttal material may be presented by any party affected by a motion to present additional evidence before the Appeals Chamber. The Appeals Chamber recalls that rebuttal material is admissible if it directly affects the substance of the additional evidence admitted by the Appeals Chamber²⁰ and, as such, has a different test of admissibility from additional evidence under Rule 115 of the Rules.²¹ The Appeals Chamber also recalls that a hearing under Rule 115 of the Rules "is intended to be a sharply delimited proceeding for entering discrete, specific evidence into the record" and "is not intended to be a trial within a trial that opens the door to the exploration of every issue that might be raised during the hearing".²²

8. The substance of the additional evidence so far admitted by the Appeals Chamber relates to Witness EB's purported wish to recant his testimony provided at trial, notably with respect to the Appellant's participation in the killings in Gisenyi on 7 – 9 April 1994. The Appeals Chamber is satisfied that the anticipated testimony of Prosecution Investigator Moussa Sanogo directly affects the substance of the admitted additional evidence and is thus admissible as rebuttal material on appeal inasmuch as it would relate to his "investigation into the circumstances of the purported recantation of Witness EB's trial testimony".²³ However, the anticipated testimony of Investigator Moussa Sanogo, as well as that of Witness AEU, with respect to alleged attempts on behalf of the Appellant to approach other Prosecution witnesses with the view of recantation of their trial testimony, is not admissible as rebuttal material under Rule 115.

9. For the same reasons, the declaration of Investigator Moussa Sanogo dated 21 November 2006 is admissible inasmuch as it describes the circumstances in which Witness EB was interviewed on 22 and 23 May 2005,²⁴ but not with respect to general allegations against the Appellant's family and their purported interferences with Prosecution witnesses in Gisenyi.²⁵ The Appeals Chamber fails to understand, however, why this declaration was only made in late November 2006, i.e. some eight months after the Appeals Chamber decided to call Witness EB to

¹⁹ Motion, paras 11, 14-18.

²⁰ Decision of 27 November 2006, para. 42; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115, 3 March 2006 ("Haradinaj Decision"), para. 44; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Prosecution's Motion to Adduce Rebuttal Material, 12 March 2004 ("Kvočka Decision"), p. 3; *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Evidence, 31 October 2003, p. 5.

²¹ Decision of 27 November 2006, para. 42; *Haradinaj Decision*, para. 44; *Kvočka Decision*, p. 3.

²² *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Oral Decision (Rule 115 and Contempt of False Testimony), 19 May 2005 (Cf. T. 19 May 2002 (Appeals Hearing), p. 49, lines 34-36).

²³ Motion, para. 15. The Appeals Chamber notes that issues related to the alleged attempts by the Appellant to subvert the course of justice in the present appeal by way of threats, intimidation, bribing or other forms of interference with a witness should be addressed within the scope of Rules 77 and 91(B).

²⁴ Motion, Annex 1, pp 4-6.

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provide additional evidence on appeal. Nevertheless, in the instant case, considering that the statement taken from Witness EB on 23 May 2005 was disclosed to the Appellant on 7 July 2005,²⁶ the Appeals Chamber is satisfied that no prejudice was suffered by the Appellant in terms of his preparation for the appeals hearing on 16 January 2007.

10. The Appeals Chamber further admits the "*Compte-rendu de la fin de la mission du 16 au 18 octobre 2006 à Gisenyi*" dated 18 October 2006, inasmuch as it refers to the purported recantation of Witness EB.²⁷ The Appeals Chamber also admits as rebuttal material on appeal the Investigation Report with its annexes, since it is directly relevant to the substance of the Additional Statement. Finally, with respect to "Various Witness Statements Taken in the Course of the Investigations Led by Investigator Moussa Sanogo" in May 2005,²⁸ the Appeals Chamber is satisfied that the Statements of Witness EB dated 22 May and 23 June 2005 directly affect the substance of the Recantation Statement and thus, considers them admissible as rebuttal material on appeal.

11. While the Appeals Chamber finds the "End of Mission on Appeal Case in Gisenyi, 19th to 24th 2005 [sic]" dated 27 May 2005²⁹ relevant to Witness EB's Additional Statement as it confirms that investigators met Witness EB on 22 May 2005 and had his statement signed on 23 May 2005, it fails to find any information that would directly affect the substance of the admitted additional evidence and therefore, declines to admit it as rebuttal material. With respect to "*Compte-rendu de la mission effectuée à Gisenyi du 9 au 14 mai 2005*" dated 15 May 2005,³⁰ the Appeals Chamber notes that during the mission in question, the investigator did not meet Witness EB; therefore, this document does not directly affect the substance of the additional evidence on appeal.

12. In light of its findings above,³¹ the Appeals Chamber will not admit the Statements of Witness AEU dated 11-12 May 2005 (unsigned) and 24 August 2005,³² since they do not concern the purported recantation of testimony by Witness EB. As far as the Statements of Witnesses AFX, OAB, AHL, PA and DO are concerned,³³ the Appeals Chamber finds that, while they might be relevant to the allegations against the Appellant with respect to interference with the Prosecution's witnesses, these materials do not directly affect the substance of the additional evidence on appeal,

²⁵ *Ibid.*, pp 1-4.

²⁶ Prosecutor's Additional Submissions In Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB", filed confidentially on 7 July 2005 ("Additional Submissions"), Annex 2.

²⁷ Motion, Annex 2, notably paras 1-9, 21-28 and 42.

²⁸ Motion, Annex 7.

²⁹ Motion, Annex 3.

³⁰ Motion, Annex 4.

³¹ See *supra*, para. 8.

³² Motion, Annex 5.

³³ Motion, Annex 7. The Appeals Chamber notes that all these statements were communicated to the Appellant in July 2005 as annexes to the Additional Submissions.

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i.e. Witness EB's purported recantation.³⁴ Therefore, these documents are inadmissible as rebuttal material on appeal.

13. The Appeals Chamber notes the lateness of these submissions, considering that the decision to call Witness EB as additional evidence on appeal was taken in February 2006, and now turns to examine *proprio motu* whether the Prosecution acted in full conformity with its disclosure obligations under Rule 66 of the Rules. In this respect, the Appeals Chamber notes that the Investigation Report is dated 23 August 2006 and contains witness statements taken in August 2006 from staff members of the Prosecution concerning their missions with respect to Witness EB. Despite a number of explicit requests from the Appellant, including his motion of 19 June 2006,³⁵ to have access to any witness statement obtained by the Prosecution in the scope of its investigations on the issue, the Prosecution provided them to the Appellant only with the Motion.

14. The Appeals Chamber reiterates that Rule 66(B) applies to appellate proceedings and that, consequently, the Prosecution, on request of the Defence, "has to permit the inspection of any material which is capable of being admitted on appeal or which may lead to the discovery of material which is capable of being admitted on appeal".³⁶ In this respect, the Appeals Chamber recalls that "purely inculpatory material is not necessarily immaterial for the preparation of the Defence"³⁷ and that the Prosecution shall provide the Defence with access to any documents that are material to the preparation of the Defence, with the exception of Rule 70 material and, if necessary, request from the Appeals Chamber permission to withhold any information provided by these sources under Rule 66(C) of the Rules.³⁸ The Appeals Chamber considers that the statements attached to the Investigation Report fall within the scope of Rule 66(B) and are not protected by Rule 70³⁹ and therefore, should have been communicated to the Appellant upon his request for them. The report also mentions two interviews with Witness EB conducted by the Prosecution's Investigators in March 2006;⁴⁰ however, no information in this respect was communicated to the Appellant prior to the present Motion.⁴¹

³⁴ See *supra*, para. 8.

³⁵ Appellant Hassan Ngeze's Motion to Order the Prosecutor to Disclose Material and/or Statement/s of Witness EB Which Might Have Come in his Possession Subsequent to the Presentation of Forensic Expert's Report on Witness EB's Recanted Statement, 19 June 2006.

³⁶ Decision of 27 November 2006, para. 16; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, *Confidential Decision on the Prosecution's Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66(C)*, 27 March 2003, p. 4.

³⁷ *Id.*

³⁸ Decision of 27 November 2006, para. 16.

³⁹ See Decision of 27 November 2006, para. 14.

⁴⁰ Motion, Annex 6, p. 3 of the *Rapport d'enquête* and annex 2 thereto (e-mail from Mr. Aaron Musonda to Mr. James Stewart on the results of the interview with Witness EB on 7 March 2006).

⁴¹ The Appeals Chamber notes the "Prosecutor's Disclosure of Relevant Pages of the Gacaca Records Book Pertinent to Prosecution Witness EB's Testimony before the Gacaca, [REDACTED]" filed confidentially on 20 June 2006. However, this document only mentions the fact that it was obtained by the Prosecution's Investigators "from the Gacaca

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15. In light of the above, the Appeals Chamber concludes that the Prosecution acted in violation of its obligations under Rule 66(B) in this case. Considering that the Appellant has not suffered any apparent prejudice as a result of this violation, since these documents were communicated to him more than a month before the appeals hearing, the Appeals Chamber will not impose sanctions on the Prosecution for this violation. However, the Appeals Chamber warns the Prosecution of the possibility of sanctions should it again be found in violation of its disclosure obligations in the present case.

16. The Appeals Chamber also notes that although the submitted Statements of Witness AEU are dated 11-12 May 2005 (unsigned) and 24 August 2005, the Prosecution communicated them to the Appellant only with the Motion. However, the Appeals Chamber has already considered that these documents are irrelevant to the preparation for the appeals hearing on 16 January 2007⁴² and therefore finds that the question as to whether the Prosecution acted in violation of Rule 66(B) with respect to these documents needs not be considered.

III. DISPOSITION

17. For the forgoing reasons, the Appeals Chamber **GRANTS** the Motion **IN PART** and **ADMITS** as rebuttal material on appeal copies of the following documents:

- Declaration of Moussa Sanogo dated 21 November 2006, index numbers 8841/A-8835/A, to the extent specified in paragraph 9 above;
- *Compte-rendu de la fin de la mission du 16 au 18 octobre 2006 à Gisenyi*, dated 18 October 2006, index numbers 8834/A-8829/A;
- Investigation Report dated 23 August 2006 with its annexes, index numbers 8789/A-8745/A;
- Statements of Witness EB dated 22 May and 23 June 2005, index numbers 8742/A-8730/A.

The Appeals Chamber also **ORDERS** that, pursuant to Rules 98, 107 and 115 of the Rules, Investigator Moussa Sanogo shall be heard by the Appeals Chamber on 16 January 2007, as rebuttal material to the additional evidence admitted with respect to Witness EB. The Motion is **DISMISSED** in all other respects.

18. The Appeals Chamber **INSTRUCTS** the Registrar to assign exhibit numbers to the rebuttal material admitted hereby and place them under seal.

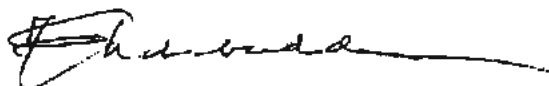
President of Dukore, on 5 May 2006" and does not refer to any contact with Witness EB in March 2006, as described in the Investigation Report, p. 3 [REDACTED].

⁴² See *supra*, para. 12.

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Done in English and French, the English text being authoritative.

Dated this 13th day of December 2006,
At The Hague, The Netherlands.



Mohamed Shahabuddeen
Judge of the Appeals Chamber⁴³



[Seal of the Tribunal]

⁴³ The Appeals Chamber renders this decision in the absence of the Presiding Judge, Judge Fausto Pocar, who is temporarily absent due to his responsibilities as President of the International Criminal Tribunal for the former Yugoslavia and is thus unable to exercise his functions as Presiding Judge. The Appeals Chamber has been authorized to do so by the President of the Tribunal pursuant to Rule 15bis(F) of the Rules and has elected Judge Mohamed Shahabuddeen as Presiding Judge in Judge Pocar's absence for the purpose of issuing this decision.