International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
14-02-2007
(32416-32413)

32416
S. Mwasa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 14 February 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON ADMISSION OF STATEMENT OF KABILIGI WITNESS UNDER RULE 89 (C)

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 for Admission of the Statement of Kabiligi Witness under Rule 89 (C)", filed by the Kabiligi Defence on 13 December 2006;

CONSIDERING the parties' submissions during the Status Conference on 19 January 2007;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Kabiligi Defence requests that the Chamber admit the statement of Witness LG-1/U-03 into evidence pursuant to Rule 89 (C) of the Rules of Procedure and Evidence. It argues that the statement has the sufficient indicia of reliability, being obtained by the Nsengiyumva Defence shortly before the witness died in early 2006, and that the statement is relevant and probative to the defence of the Accused.[1]

2. At the status conference on 19 January 2007, the Chamber asked the Kabiligi Defence if the statement at issue goes to the acts or conduct of the Accused.[2] The Defence answered that the statement is relevant to the Defence case and that the Chamber should be guided by Rule 89 (C) and not confined by the requirements of Rule 92 *bis*.[3] The Prosecution argued that the Kabiligi request must be guided by Rule 92 *bis* and that the statement is inadmissible because Rule 92 *bis* prohibits written evidence that goes to the acts and conduct of the accused.[4]

DELIBERATIONS

3. The Chamber disagrees with the Kabiligi Defence argument that it has discretion to admit witness statements solely on the basis of Rule 89 (C) and does not find the jurisprudence cited in support of this argument persuasive. This Chamber has repeatedly held that the admission of written statements is governed by Rule 92 *bis*:

> The detailed standards set out in Rule 92 *bis*, combined with the general requirement in Rule 90 (A) that testimony be given orally, indicate that testimonial statements can be admitted into evidence only through Rule 92 *bis*.[5]

4. Further Tribunal jurisprudence affirms that Rule 89 (C) does not operate as an independent means by which the Chamber may admit statements that are inadmissible under Rule 92 *bis*. The Appeals Chamber has specifically held that:

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[1] Motion, paras. 3-4, 26.
[2] T. 19 January 2007 p. 14.
[3] T. 19 January 2007 pp. 18-19.
[4] T. 19 January 2007 p. 19.
[5] *Bagosora et al.*, Decision on Admission of Statements by Deceased Witnesses (TC), 19 January 2005, para. 15; *Bagosora et al.*, Decision on Defence Motion for Admission of Statement of Witness LG-1/U-03 Under Rule 92 *bis* (TC), 11 December 2006, para. 3.

> a party cannot be permitted to tender a written statement given by a prospective witness to an investigator of the OTP under Rule 89 (C) in order to avoid the stringency of Rule 92 *bis*. The purpose of Rule 92 *bis* is to restrict the admissibility of this very special type of hearsay to that which falls within its terms. By analogy, Rule 92 *bis* is the *lex specialis* which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89 (C), although the general propositions which are implicit in Rule 89 (C) – that evidence is admissible only if it is relevant and that it is relevant only if it has probative value – remain applicable to Rule 92 *bis*. But Rule 92 *bis* has no effect upon hearsay material which was not prepared for the purposes of legal proceedings.[6]

5. The Defence refers to two cases in support of its argument that the Chamber may apply Rule 89 (C) instead of Rule 92 *bis*. First, it refers to an Appeals Chamber decision in the *Kordic & Cerkez* case.[7] However, as recognized by the Defence, this decision was rendered prior to the introduction of Rule 92 *bis* into the ICTR Rules in July 2002. Second, the Defence refers to the *Rutaganda* Appeals Chamber Judgement of May 2003. However, the Appeals Chamber did not address the application of Rule 92 *bis* therein as the dispute on appeal related to other issues.[8]

6. Rule 92 *bis* provides in relevant part that "[a] Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment". In addition, a statement must meet the criteria of Rule 89 (C), namely that the evidence be relevant and have probative value.

7. In October 2006, the Nsengiyumva and Bagosora Defence teams jointly filed a motion similar to the one at issue, in which they sought to admit admission of another statement of Witness LG-1/U-03. The Chamber found that the statement possessed sufficient indicia of reliability to satisfy the requirements of Rule 92 *bis* and admitted most parts of the statement. However, the Chamber excluded four paragraphs of the witness statement that concerned the acts and conduct of the accused, as deemed inadmissible under Rule 92 *bis* (A).[9]

8. The statement that the Kabiligi Defence submits for admission does not meet the requirements of Rule 92 *bis* and expressly goes to the acts and conduct of the Accused. In fact, almost every question posed to Witness LG-1/U-03 falls in this category. Consequently, the Chamber finds the statement inadmissible.

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[6] *Galic*, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 31. *See also Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rules 89 (C) and 92 *bis*) (TC), 20 May 2004, para. 23-28; *Nyiramasuhuko et al.*, Decision on the Prosecutor's Motion to Remove From Her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses (TC), 22 January 2003, para. 20.

[7] *Kordic & Cerkez*, Decision on Appeal Regarding Statement of a Deceased Witness (AC), 21 July 2000, para. 27 (concluding that the statement lacked sufficient indicia of reliability to be admitted under Rule 89 (C)).

[8] Rutaganda, Judgement (AC), 26 May 2003, paras. 262-279 (considering whether the Appellant had established sufficient indicia of reliability under Rule 89 (C) to have the statement admitted at trial). This issue is distinct from the one at issue because the admission of witness statements must meet the criteria of both Rule 92 *bis* and Rule 89 (C). *See* paras. 4 and 6 of the present decision.

[9] *Bagosora et al.*, Decision on Defence Motion for Admission of Statement of Witness LG-1/U-03 Under Rule 92 *bis* (TC), 11 December 2006, paras. 5, 9.

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FOR TI E ABOVE REASONS, THE CHAMBER

DENIE! the motion.

Arusha, 4 February 2007

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

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