



UNITED NATIONS
NATIONS UNIES

1872-00-56-T
03-04-2007
(64000-63997)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

64000
Amélie

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 3 April 2007

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU
Case No. ICTR-00-56-T

JUDICIAL RECORDS/ARCHIVES
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2007 APR - 31 A 11: 30

**DECISION ON DEFENCE MOTION TO RECALL PROSECUTION WITNESS AOE
FOR ADDITIONAL CROSS-EXAMINATION**

Office of the Prosecutor:

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Mr Moussa Sefou
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Mr Lloyd Strickland
Mr Abubacarr Tambadou
Ms Felistas Mushi
Ms Faria Rekkas
Ms Anne Pauline Bodley

Counsel for the Defence:

Mr Gilles St-Laurent and Mr Ronnie MacDonald for Augustin Bizimungu
Mr Christopher Black and Mr Patrick De Wolf for Augustin Ndindiliyimana
Mr Charles Taku for François-Xavier Nzuwonemeye
Mr Fabien Segatwa and Mr Scydou Doumbia for Innocent Sagahutu

INTRODUCTION

1. The trial in this case commenced on 24 September 2004. Prosecution Witness AOE testified on 8, 9, 13 and 14 June 2005. On 7 December 2006 the Prosecution closed its case.

2. On 12 March 2007, the Defence for Bizimungu filed a Motion requesting the recall of Prosecution Witness AOE for additional cross-examination on a document annexed to his July 2003 guilty plea before the Rwandan authorities (the "annex"), which the witness mentioned during his testimony before the Chamber. The Defence further requests the Chamber to order Prosecution Witness AOE to bring to Arusha all documents in his possession that are related to his testimony.¹ The Prosecution responded on 15 March 2007, opposing the request. On 21 March 2007, the Defence for Bizimungu filed a Reply.

DELIBERATIONS

3. As a preliminary matter, the Chamber notes that the Defence Reply was filed out of time and without further explanation. Accordingly, the Chamber will not consider the submissions made therein. The Chamber once again urges the Bizimungu team to apply more diligence and file documents within the time limit set forth by Rule 73(E) of the Rules of Procedure and Evidence.

i) The issue of notice

4. The Defence submits that the purported meeting of 7 April 1994 where the Accused Bizimungu allegedly made certain remarks was introduced into the Prosecution's Pre-Trial Brief based on the content of the "annex". The Defence argues that it is in the interests of justice to recall Prosecution Witness AOE so as to cross-examine him on these allegations, which are not even pleaded in the Indictment. The Prosecution responds that the allegation was introduced into the Pre-Trial Brief based on Witness AOE's statement, which was disclosed to the Defence in June 2004, and not on the "annex". The Chamber emphasizes that whether or not a certain fact is pleaded in the Indictment is an issue of notice. In its Decision of 15 June 2006, the Chamber recalled the relevant jurisprudence on the issue and held that the failure to plead material facts in the Indictment rendered it defective. The defect however may be cured subsequently through timely, clear and consistent notice.² There is no need to further address the issue at this stage.

ii) The Chamber's oral ruling of 13 June 2005

5. The Defence submits that the Chamber, in the course of Prosecution Witness AOE's testimony, orally granted the Defence's request to recall the witness if and when the "annex" was made available to the Defence and that the Prosecution at the time did not oppose the request. The Defence argues that this shows that the criteria for recalling witnesses, as established by the Tribunal's jurisprudence, have been met. The Chamber has carefully reviewed the transcripts of Witness AOE's testimony and does not agree with the Defence's suggestion. The Chamber's oral ruling of 13 June 2005 made it clear, *inter alia*, that "the witness, too, will be available for further cross-examination, if any, on that document."³ These words do not mean that the Defence was absolved from its responsibility to demonstrate that the legal requirements for recalling a witness are satisfied. Indeed, the

¹ "Requête de la Défense d'Augustin Bizimungu visant le rappel du Témoin AOE pour contre-interrogatoire additionnel."

² "Decision on Ndingiliyimana's Extremely Urgent Motion to Prohibit the Prosecution from Leading Evidence on Important Material Facts not pleaded in the Indictment through Witness ANF", paras. 26, 27

³ T. 13 June 2005, p. 15, lines 24-25.



Chamber's words, properly understood, would imply that recalling the witness for further cross-examination would have to be both necessary and legally justifiable.

iii) *Criteria for recalling a witness*

6. The Chamber notes the criteria for recalling witnesses for additional cross-examination:

A party seeking to recall a witness must demonstrate good cause, which previous jurisprudence has defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act. In assessing good cause, the Chamber must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness originally testified. The right to be tried without undue delay as well as concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature.⁴

7. Where the Defence seeks to question a witness on inconsistencies between testimony and any declarations subsequently obtained, it must demonstrate that the inability to put these inconsistencies to the witness will cause prejudice to the Accused. The Chamber will decide whether there is a need for the witness' explanation of the inconsistency or whether the inconsistency is minor or self-evident so that recall is not necessary.⁵

8. The Defence submits that there are important contradictions between Prosecution Witness AOE's testimony and the "annex"; for instance, contrary to his testimony, the "annex" does not mention at all that the events to which the witness testified took place in Rugeshi cellule. The Prosecution avers that there is no inconsistency. The Chamber notes that the "annex"⁶ only briefly refers to the alleged events of 7 April 1994, without mentioning the name of the cellule. The Chamber is not convinced that the failure to mention a certain cellule in this brief reference amounts to an inconsistency. A witness' testimony, where several questions from both parties are put to him or her on one specific event, tends to be more detailed and exhaustive than a prior statement. To recall a witness solely on the basis that some minor detail he mentions in his testimony was not mentioned in a prior statement, does not meet the test of the "most compelling of circumstances." In addition, the Defence failed to demonstrate that the inability to put the alleged inconsistency to the witness will cause prejudice to the Accused.

9. The Defence further requests additional cross-examination concerning the circumstances surrounding the annex to the guilty plea. The Chamber notes that the Defence itself admits that the issue had been dealt with "extensively" during Witness AOE's testimony.⁷ The request for additional cross-examination on this issue is thus not warranted.

⁴ Bagosora et al., "Decision on the Prosecution Motion to Recall Witness Nyanjwa" (TC), 29 September 2004, para. 6. See also Bagosora et al., "Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination" (TC), 19 September 2005, para. 2; Simba, "Decision on the Defence Motion to Recall Witness KEJ for Further Cross-Examination" (TC), 28 October 2004, para. 5.

⁵ Bagosora et al., "Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination" (TC), 19 September 2005, para. 3.

⁶ Unofficial translation.

⁷ "Au cours de la déposition du Témoin AOE, il a longuement été question d'un document intitulé « annexe »...", para. 2 of the Defence Motion.





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FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha 3 April 2007


Asoka de Silva
Presiding Judge


Read and approved by
Taghrid Hikmet
Judge
(absent at the time of the signature)

[Seal of the Tribunal]


Seon Ki Park
Judge



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

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From:	<input checked="" type="checkbox"/> Chamber Bruno Zehnder (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. A. Ndindillyimana et al.			Case Number: ICTR-00-56-T
Dates:	Transmitted: 3 April 2007		Document's date: 3 April 2007	
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☐ Reference material is provided in annex to facilitate translation.

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☐ Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

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