International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
30-04-2007
(37320-37315)

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S.Mwasa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 30 April 2007

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THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

DECISION ON BAGOSORA MOTION TO EXCLUDE TESTIMONY RELATING TO IMMIGRATION DOCUMENTS

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Kartik Murukutla

The Defence
Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
Marc Nerenberg
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

37319

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 Appeals Chamber Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B), dated 25 September 2006;

CONSIDERING the Bagosora Defence "Submissions on Disclosure Obligations of the Prosecutor Pursuant to an Appeals Chamber Decision and Motion to Exclude a Portion of Testimony", filed on 7 November 2006;

CONSIDERING the Prosecution and Defence Submissions, filed on 21 March 2007 and 27 March 2007, respectively;

HEREBY RENDERS its decision.

INTRODUCTION

1. During the testimony of Nsengiyumva Defence Witness LT-1 on 26 April 2005, the Prosecution sought to question the witness about a statement she gave to immigration officials in her country of residence in order to impeach her credibility. The Defence disputed the Prosecution's right to reveal the identity of a protected witness to national immigration authorities with the purpose of obtaining his or her prior statements. It also argued that such immigration documentation, if obtained by the Prosecution in its investigation, should be disclosed to the Defence. After hearing submissions by the parties, the Chamber adjourned questioning of the witness and invited the parties to make written submissions on the issue.[1]

2. The Nsengiyumva Defence thereafter filed a motion requesting disclosure of immigration materials for all Nsengiyumva Defence witnesses, in particular Witnesses LIG-2 and LT-1, and any other potential Defence witnesses.[2] The Chamber denied the motion and held that the Prosecution practice of disclosing immigration documents at the commencement of cross-examination was permissible.[3] The Nsengiyumva and Kabiligi Defence requests for certification to appeal the Chamber's decision were granted on 22 May 2006.[4]

3. The Appeals Chamber ordered the Prosecution to permit inspection by the Defence of all the requested immigration documents that it intended to use as exhibits during cross-examination. It remitted to the Trial Chamber the issue of whether other immigration documents require disclosure by the Prosecution if they are material to the preparation of the

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[1] T. 26 April 2005 pp. 65-85. The witness was never recalled to testify.

[2] Anatole Nsengiyumva's Extremely Urgent Motion Requesting Disclosure of Documents, and/or Materials Relating to Immigration, Refugee or Asylum Status of Defence Witnesses Pursuant to Articles 19 & 20 of the Statute & Rules 66, 68, & 70 of the RPE, filed on 16 May 2005.

[3] *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, paras. 8, 12 (hereinafter "Trial Chamber Decision").

[4] *Bagosora et al.*, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements (TC), 22 May 2006.

Defence case.[5] The Trial Chamber has subsequently applied the reasoning of the Appeals Chamber Decision.[6]

SUBMISSIONS

4. Referring to the Appeals Chamber Decision, the Bagosora Defence moves to exclude portions of testimony of all Bagosora Defence witnesses who were challenged by previously undisclosed immigration documents, in particular Witness L-02.[7] It argues that the Prosecution has been in continuing violation of its disclosure obligations since the Appeals Chamber Decision and that, consequently, the Defence has suffered serious prejudice.[8]

5. The Prosecution submits that the Defence is impermissibly seeking the retroactive application of the Appeals Chamber Decision. The Defence did not object to the use of the immigration statement during the cross-examination of Witness L-02 and used the document during its re-examination. Any potential prejudice by the use of immigration statements must be considered trivial.[9]

DELIBERATIONS

6. In its second submissions, the Defence asserts that the Prosecution response should not be considered by the Chamber because it is time-barred.[10] Although the Prosecution filed its submissions well beyond the prescribed time limit under Rule 73 (E), the Chamber has discretion to consider late-filed submissions and, in the present instance, chooses to do so.[11]

7. The Defence requests the exclusion of "all testimony elicited by the Prosecution during cross-examination relating to immigration documentation in particular in relation to Witness L-02".[12] There is no reference to any other Bagosora witnesses or portions of their testimony which the Defence seeks to exclude. Consequently, the Chamber limits its consideration to Witness L-02.[13]

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[5] *Bagosora et al.*, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence (AC), dated 25 September 2006 (hereinafter "Appeals Chamber Decision").

[6] For example, Defence Witness KVB-19 testified as a Ntabakuze Defence witness on 5, 6, and 9 May 2005 and was recalled on 27 and 28 September 2006 as a Kabiligi Defence witness. At the time of his recall, the Chamber disallowed questions in relation to a previously undisclosed immigration statement ("Turning now to our consideration, irrespective of whether this document we are now dealing with will be used as an exhibit or not, we interpret the Appeals Chamber decision to the effect that the immigration document is to be seen as material to the Defence and should have been made accessible. We do not know the contents of this document, but this must be the approach. And the remedy here is, in our view, exclusion of further questioning on this document, as this immigration statement potentially could have influenced the recall of the witness"). T. 28 September 2006 p. 24.

[7] The witness testified under her own name. T. 1 December 2005 pp. 1-2.

[8] Defence submissions, paras. 5, 16, 28.

[9] Prosecution submissions, paras. 7-10.

[10] Defence 27 March 2007 submissions, paras. 2-5.

[11] *Bagosora et al.*, Decision on Kabiligi Request for Particulars of the Amended Indictment (TC), 27 September 2005, para. 3; *Bagosora et al.*, Decision on Defence Motions to Amend the Defence Witness List (TC), 17 February 2006, para. 2.

[12] Defence submissions, p. 6.

[13] The Defence submissions contain references to Witnesses RX-6 (paras. 1-3), who was a Kabiligi witness, and LT-1 (paras. 6-10), who testified for Nsengiumva.

8. Rule 66 (B) of the Rules of Procedure and Evidence provides:

> At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

9. The Defence seeks exclusion of evidence based on the Appeals Chamber's interpretation of Rule 66 (B). The relevant portion of the decision reads:

> 9. In accord with the plain meaning of Rule 66 (B) of the Rules, the test for materiality ... is the relevance of the documents to the preparation of the defence case. Preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence. Indeed, for the Appellants, the immigration documents are material to the preparation of their defence because these documents may improve their assessment of the potential credibility of their witnesses before making a final selection of whom to call in their defence. The Appeals Chamber cannot exclude that this is an appropriate basis for authorizing the inspection of documents if the requisite showing is made by the defence. There are few tasks more relevant to the preparation of the defence case than selecting witnesses. The Trial Chamber is the appropriate authority to make this case-specific assessment in the first instance under the appropriate standard.[14]
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> 10. The Appeals Chamber observes that this plain reading of Rule 66 (B) of the Rules does not create a broad affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination, as suggested by the Trial Chamber. Rule 66 (B) is only triggered by a sufficiently specific request by the defence, which in turn engages reciprocal disclosure obligations on the defence's part under Rule 67 (C). In this case, as the Trial Chamber recognized, the defence sought a precise category of documents, namely immigration-related material, admittedly in the possession of the Prosecution.
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> 11. ... Nonetheless, in the Appeals Chamber's view, there is no requirement for the defence to make independent efforts to obtain material prior to receiving requested disclosure under the Rules. A request under Rule 66 (B) is one of the methods available to the defence for carrying out investigations.
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> 12. Finally, the Appeals Chamber notes that the Impugned Decision in fact provided for the disclosure of at least some of the requested material, the documents intended as exhibits, at the time of cross-examination. This framework may be appropriate in some circumstances for certain material. The Appeals Chamber affirms that the Trial Chamber is best placed to determine both the modalities for disclosure and also what time is sufficient for an accused to prepare his defence based on the timing of such disclosure. It is evident, however, that disclosure at the time of cross-examination is insufficient to the extent, as in this case, that the requested materials are intended to assist the defence select its witnesses.

[14] Appeals Chamber Decision, para. 9 (citations omitted).

10. It follows from the Appeals Chamber Decision that immigration documents can be material to the preparation of the Defence if the requisite showing is made. Such information may improve the Defence assessment of the potential credibility of its witnesses. The Appeals Chamber found that the Trial Chamber is the appropriate authority to make this case-specific assessment in the first instance.[15]

11. Objections should normally be raised at the time impugned evidence is sought to be introduced, but there may be instances in which it is acceptable for objections to be raised at a later stage.[16] The Chamber notes that, at no point during the Prosecution cross-examination of Witness L-02, did the Defence object to the use of her statement to immigration authorities on the grounds that the Prosecution had failed to disclose the statement to the Defence.[17] The only substantive objection by the Defence counsel consisted of a request that Witness L-02's cross-examination on the immigration documents be placed under seal, a request which the Chamber granted.[18] The Defence then re-examined the witness on the document, and this testimony was also placed under seal.[19]

12. The Chamber cannot exclude the possibility that the Defence did not object to the use of the documents in light of the Trial Chamber's decision of 27 September 2005, which clearly allowed for disclosure at the commencement of cross-examination.[20] Since Witness L-02 testified in the interim period between that decision by the Trial Chamber and the Appeals Chamber's decision of 25 September 2006, the Bagosora Defence had no reason to know that the Trial Chamber Decision might be overturned. This said, the Chamber notes that the Defence did not raise the issue immediately following the issuance of the Appeals Chamber Decision and instead waited six weeks before filing the present motion.

13. The Defence asserts that the use of Witness L-02's immigration statement "came as a complete surprise to the Bagosora Defence and it therefore suffered a prejudice thereby".[21] In the Chamber's view, the Defence has not made the proper showing that disclosure of the immigration statement was material to the Defence assessment of whether to select the witness. She is the Accused's wife, and the Defence must have known that she had given a statement to immigration authorities. Irrespective of whether the Defence was actually in possession of her statement, there is reason to believe that it was aware of at least the general substance of her explanations to the immigration authorities. Defence counsel did not challenge the actual use of the statement by the Prosecution but focused his efforts on placing the portion of her testimony concerning the statement under seal. He proceeded to ask questions about the document during his re-examination of the witness. Even if the

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[15] Appeals Chamber Decision, para. 9.

[16] *See, e.g. Bagosora et al.*, Decision on Ntabakuze Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, para. 45: ("Accordingly, when an objection based on lack of notice is raised at trial (albeit later than at the time the evidence was adduced), the Trial Chamber should determine whether the objection was so untimely as to consider that the burden of proof has shifted from the Prosecution to the Defence in demonstrating whether the accused's ability to defend himself has been materially impaired. In doing so, the Trial Chamber should take into account factors such as whether the Defence has provided a reasonable explanation for its failure to raise its objection at the time the evidence was introduced and whether the Defence has shown that the objection was raised as soon as possible thereafter").

[17] The Bagosora Defence undertook to provide the reference for its objection to the use of the statement but has failed to do so. Defence submissions, p. 2 (footnote 6).

[18] T. 1 December 2005 pp. ii-iii (under seal), 48, 57.

[19] T. 1 December 2005 pp. xiv-xvi (under seal).

[20] Trial Chamber Decision, paras. 8, 12.

[21] Defence Submissions, para. 11.

immigration statement had been disclosed at an earlier stage, the Chamber finds that the Defence would most likely have called Witness L-02 in light of the testimony she had to offer on her husband's conduct during the relevant time period.

14. The Chamber finds that the Defence has not made the requisite showing that the admission of the witness' immigration statement materially impaired the Accused's ability to prepare his defence and finds exclusion of Witness L-02's testimony on immigration documents unmerited.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 30 April 2007

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

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