

ICTR-98-42-T
(10-05-2007)
(12126 - 12122)

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Mwamp



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 10 May 2007

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO *et al.*,

Joint Case No. ICTR-98-42-T

JUDICIAL RECORDS DIVISION
2007 MAY 10 P 3: 53

DECISION ON NTEZIRYAYO'S MOTION FOR CERTIFICATION TO APPEAL
THE ORAL DECISIONS OF 19 AND 23 APRIL 2007

Office of the Prosecutor

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Defence Counsel for Nteziryayo

Mr Titinga Frédéric Pacere
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy B. Bossa (the "Chamber");

BEING SEIZED of the "*Requête en certification d'appel des décisions orales des 19 et 23 avril 2007 concernant la divulgation des documents du dossier d'immigration du témoin de la Défense AND-44*," filed on 26 April 2007 (the "Motion");

CONSIDERING:

i) The "Prosecutor's Response to the '*Requête en certification d'appel des décisions orales des 19 et 23 avril 2007 concernant la divulgation des documents du dossier d'immigration du témoin de la Défense AND-44*,'" filed on 1 May 2007 ("Prosecution Response");

ii) The "*Réponse d'Alphonse Nteziryayo à la Prosecutor's Response to the 'Requête en certification d'appel des décisions orales des 19 et 23 avril 2007 concernant la divulgation des documents du dossier d'immigration du témoin de la Défense AND-44*,'" filed on 3 May 2007 ("Nteziryayo's Reply");

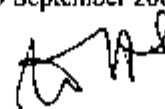
CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rule 73 (B) of the Rules;

NOW DECIDES the Motion, pursuant to Rule 73 of the Rules, on the basis of the written submissions of the Parties.

INTRODUCTION

1. On 19 April 2007, after the start of its cross-examination of Defence Witness for Nteziryayo AND-44, the Prosecution disclosed a document in connection with the Witness' immigration files. All Defence Counsel objected to the use of this document on the grounds that any party wishing to use a document for purpose of cross-examination should disclose it in a timely manner, and in any case before the start of its cross-examination.
2. On the same day, the Defence for Nteziryayo relied upon an Appeals Chamber Decision¹ and submitted that immigration files are specific and should have been disclosed much earlier than at the beginning of the cross-examination by the Prosecution. In its oral decision issued on the same day (the "Impugned Decision"), the Chamber ruled that documents that maybe used in cross-examination should be disclosed to the other party in a timely manner and in any case before the beginning of the cross examination unless there are other circumstances. The Chamber further emphasized that there is a distinction between the disclosure of documents to be used in cross-examination and disclosure obligations that a party may have at different stages of the proceedings and that distinction must be borne in mind. If the document

¹ *Prosecutor v. Bugosora et al.* Case No. 98-41-AR73, "Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence", (AC) 25 September 2006.



concerned is alleged to go beyond the requirement for cross-examination and would have necessitated an earlier disclosure, this element should be demonstrated. The Chamber therefore authorised the Prosecution to make use of the aforesaid document for cross-examination purpose after granting to the Parties additional time to get familiarised with it.²

3. On 23 April 2007 and during the cross-examination of Witness AND-44 by the Prosecution, the Defence for Nteziryayo objected again to the use of the immigration files in question on the same grounds. The Chamber overruled the objection and stressed that a decision had already been rendered on that issue on 19 April 2007.³
4. On 26 April 2007, the Defence filed a motion for certification to appeal the two oral decisions of 19 and 23 April 2007 which are in fact the same as the latter simply reiterated the former.

SUBMISSIONS OF THE PARTIES

The Defence

5. The Defence submits that the Impugned Decision involves an issue which would affect the fair and expeditious conduct of the proceedings because the Accused's right to a complete defence was breached. According to the Defence, it was not given the opportunity to assess Witness AND-44's credibility through his immigration files before calling him due to the Prosecution's failure to disclose. The Defence further submits that the Impugned Decision was rendered whereas the Defence was not allowed to put forward its submissions on the issue at stake.
6. The Defence submits that an immediate resolution by the Appeal Chambers of the matter may materially advance the proceedings. The Defence alleges that the Chamber might erroneously assess the credibility of Witness AND-44 in relying upon his prior statement, the existence of which was not known to the Defence in due time. The Defence further states that the aforesaid prior statement should be excluded as well as Witness AND-44's testimony in this respect. Finally, the Defence submits that if the Prosecution had disclosed the immigration files of Witness AND-44 as required by the Appeals Chamber,⁴ the Defence might have not called him as a witness.

The Prosecution

7. The Prosecution submits that none of the issues raised by the Defence fulfill the requirements of Rule 73 (B) justifying the certification to appeal. Furthermore, it alleges that during his testimony, Witness AND-44 conceded that he had in his possession his immigration documents and this fact should have been known by the Defence, irrespective of Prosecution disclosure.
8. The Prosecution submits that no request under Rule 66 (B) for prior inspection of the documents in question had been formulated and therefore, contrary to the Defence

² T. 19 April 2007, p. 52 (ICS).

³ T. 23 April 2007, pp. 21-22 (ICS).

⁴ *Prosecutor v. Bagosora et al.*, Case No. 98-41-AR73. "Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence". (AC) 25 September 2006

contention, the Chamber did not err in rendering the Impugned Decisions on 19 April and 23 April 2007.

The Defence Reply

9. The Defence submits that it had not filed any motion under Rule 66 (B) simply because it was not aware of the existence of the immigration documents at stake.
10. The Defence further submits that the Prosecution had the aforesaid documents since 12 February 2007 but had not made any effort to disclose them despite their specificity and the fact that it intended to use them to cross-examine Witness AND-44.

DELIBERATIONS,

11. The Chamber, recalling its jurisprudence⁵ notes that decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B).⁶ These conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered.⁷
12. Having reviewed the submissions of the Parties, the Chamber is of the opinion that in its Motion, the Defence generally revisited the thrust of its previous arguments which led to the Impugned Decision rather than demonstrating the conditions required for the Chamber to grant certification to appeal the Impugned Decision. The Defence has therefore failed to satisfy the criteria for the grant of certification under Rule 73 (B).

⁵ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004 paragraphs 12 - 16; *Prosecutor v. Ntahobali and Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paragraphs 14 - 17.

⁶ Under the first limb of Rule 73(B), the applicant must show how an appellate review would significantly affect (a) a fair and expeditious conduct of the proceeding, or (b) the outcome of the trial. This condition is not determined on the merits of the appeal. Second, the applicant has the burden of convincing the Chamber that an "immediate resolution by the Appeals Chamber may materially advance the proceedings."

⁷ *Prosecutor v. Nyiramasuhuko et al.*, "Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for Disclosure of Evidence", 4 February 2005, para.11; *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004 paras. 12 - 16; *Prosecutor v. Ntahobali and Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 14 - 17.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion for certification.

Arusha, 10 May 2007

William H. Sekule
Presiding Judge



[Seal of the Tribunal]

Solomy Balungi Bossa
Judge