



ICTR-98-41-T
23-05-2007
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

38290
IV94

(38290-38287)

TRIAL CHAMBER I

Before: Judge Erik Mose, presiding
Judge Jai Ram Reddy
Judge Sergei Aleksceovich Egorov

Registrar: Adama Dieng

Date: 23 May 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

JUDICIAL RECORDS/ARCHIVES
2007 MAY 23 P. 14-00
RECEIVED

DECISION ON NTABAKUZE REQUEST FOR RECONSIDERATION OR
CERTIFICATION CONCERNING ADMISSION OF STATEMENT BY
AMADOU BEMÉ

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

8/1

38289

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 Ntabakuze Defence "Motion for Reconsideration or for Certification for Appeal of the 12 April 2007 Trial Chamber Decision" etc., filed on 19 April 2007;

CONSIDERING the Prosecution response, filed on 24 April 2007;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Defence requests reconsideration or certification of the Chamber's decision of 12 April 2007, in which it declined to admit a sworn statement by Amadou Deme under Rule 92 *bis*.¹ Mr. Deme was scheduled to testify by video-link during the last trial session in 2006.² In September 2006, after failing to locate the witness, the Defence announced that it would not call him.³ On 22 January 2007, the Defence sought to admit his statement under Rule 92 *bis*.⁴

2. In its decision of 12 April 2007, the Chamber found that the Defence "had the opportunity to call Mr. Deme as a witness in 2006 but declined to do so. Instead it submitted his statement through its motion of 22 January 2007, after the closure of the evidentiary phase of the trial". The Chamber refused to admit the statement, having found no exceptional circumstances justifying its admission at that late stage of the proceedings.⁵

DELIBERATIONS

Reconsideration

3. Reconsideration is justified when there have been new circumstances since the filing of the challenged decision that affect the premise of the decision. It can also be permissible where the challenged decision was erroneous in law or an abuse of discretion.⁶

4. The Defence complains about the Chamber's application of the "exceptional circumstances" standard in connection with its request for admission of evidence. It argues that this standard was created in a decision dated 3 April 2007, and that its retroactive

¹ *Bagosora et al.*, Decision on Ntabakuze Motions to Admit Documents under Rule 92 *bis* (TC), 12 April 2007.

² *Bagosora et al.*, Decision on Testimony of Witness Amadou Deme by Video-Link (TC), 29 August 2006.

³ Email from Marc Nerenberg titled "cancellation of video testimony of Amadou Deme", dated 6 September 2006. This was confirmed in court. See T. 7 September 2006 pp. 83-84; T. 8 September 2006 p. 36.

⁴ *Bagosora et al.*, Ntabakuze Motion to Admit a Sworn Statement under Rule 92 *bis*, 22 January 2007.

⁵ Decision, para. 11.

⁶ *Bagosora et al.*, Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List pursuant to Rule 73 *bis* (E)" (TC), 14 July 2004, para. 7; *Bagosora et al.*, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E)" (TC), 15 June 2004, para. 9; *Bagosora et al.*, Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that Order (TC), 1 March 2004, para. 11.

bl

38288

application to a request dated 22 January 2007 was unfair.⁷ Furthermore, the standard was applied in violation of the principle of 'equality of arms', because it had not been applied to a Prosecution request for admission of evidence filed after the close of the Prosecution case.⁸

5. The Chamber recalls that it "has a broad discretion to direct the course of the proceedings in accordance with its fundamental duty to ensure a fair and expeditious trial pursuant to Article 19 (1) of the Statute."⁹ The Ntabakuze Defence was expected to close its case by 13 October 2006.¹⁰ Notwithstanding this deadline, the Chamber allowed the Defence to tender documentary evidence until 13 December 2006.¹¹ It also allowed witnesses for the Accused Nsengiyumva and Kabiligi to testify from 15 to 18 January 2007. This concluded the evidentiary phase of the trial. The Chamber could have subsequently refused to admit evidence. Instead, in certain exceptional cases, it allowed the Defence to tender documents after this date.¹² Thus, the exceptional circumstances standard has operated in favour of the Defence, and the Chamber cannot see how applying it has prejudiced the Defence.

6. Turning to the equality of arms issue, the Chamber observes that the mentioned Prosecution request was filed on the last day of its case, a day after it had finished calling its witnesses.¹³ However, the Prosecution did not breach a deadline for tendering documents. Thus, the Chamber did not require exceptional circumstances.¹⁴ The challenged decision therefore was not erroneous in law or an abuse of discretion. As no new circumstance has arisen since the decision, which affected the decision, reconsideration is not justified.

Certification

7. Pursuant to Rule 73 (B), certification to appeal may be granted if the challenged decision involves "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings". The latter includes a consideration of "whether a showing has been made that the appeal could succeed. That threshold would be met, for example, by showing some basis to believe that the Chamber committed an error as to the applicable law; that it made a patently incorrect conclusion of fact; or that it was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".¹⁵

⁷ Motion, para. 13 (referring to *Bagosora et al.*, Decision on Bagosora Motion to Tender Statement of Witness B-06 (TC), 3 April 2007).

⁸ Motion, paras. 3-4 (referring to *Bagosora et al.*, Decision on Admission of Statements of Deceased Witnesses (TC), 19 January 2005).

⁹ *Bagosora et al.*, Decision on Prosecutor's Interlocutory Appeals regarding Exclusion of Evidence (AC), 19 December 2003, para. 16.

¹⁰ T. 5 July 2006 pp. 13, 17.

¹¹ *Bagosora et al.*, Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List, 17 November 2006, para. 16.

¹² E.g. *Bagosora et al.*, Decision on Bagosora Motion to Tender Statement of Witness G-10 (TC), 3 April 2007.

¹³ *Bagosora et al.*, Prosecution Motion to Admit into Evidence the Statements of Various Deceased Witnesses, 15 October 2004.

¹⁴ *Bagosora et al.*, Decision on Admission of Statements of Deceased Witnesses (TC), 19 January 2005, para. 11 ("While it is certainly clear that no further court-time would be scheduled for hearing the Prosecution case, there is no suggestion that the Prosecution would be precluded from filing a motion for the admission of evidence by written procedure").

¹⁵ *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4 (relying on *Milosevic*, Decision on Interlocutory Appeals of the Trial Chamber's Decision on the Assignment of Defence Counsel (TC), 1 November 2004, para. 10).

6h

38287

8. According to the Defence, the erroneous application of the exceptional circumstances standard affected the fairness of the proceedings.¹⁶ The Chamber disagrees, as discussed above, that it erred in requiring exceptional circumstances to admit the statement at that stage.

9. The Defence further argues that the challenged decision was based upon false premises and incorrect reasoning. In particular, the Chamber erred in considering that the Defence had the opportunity to call Mr. Deme in 2006 and that its request was filed unjustifiably late. The Defence submits that it was unable to locate Mr. Deme in time for him to testify. It eventually managed to obtain his statement and immediately requested its admission.¹⁷ The Chamber recalls that in July 2006, the Defence indicated that it had been trying to locate Witness Deme "for more than a year".¹⁸ In August 2006, the Chamber authorized his testimony by video-link.¹⁹ A week later, the Defence announced that it would not call the witness as it could not find him.²⁰ At no stage in 2006 did the Defence suggest that it may seek to tender the witness' evidence in written form. Against this background, the Chamber reiterates its position that the lateness of the request was not justified.

10. The Defence also argues that the contested matters in Mr. Deme's statement, and his unavailability for cross-examination, go to the statement's weight and not admissibility.²¹ In the Chamber's view, whether or not it considered these factors does not change the fact that no exceptional circumstances were found to justify admitting the statement at that late stage.

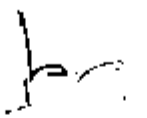
11. The Chamber has discretion to determine whether to admit evidence during trial. According to the Appeals Chamber, certification on questions of admissibility of evidence should not ordinarily be granted. It is rather the "absolute exception".²² The Trial Chamber finds no such exception in the present circumstances. The Defence did not establish that an incorrect legal standard was applied, or that the Chamber made an error of fact in applying the legal standard. The Defence simply disagrees with the manner in which the Chamber exercised its discretion. The Appeals Chamber has ruled that this kind of factual determination is not appropriate for certification.²³

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 23 May 2007


Erik Mase
Presiding Judge


Jai Ram Reddy
Judge
[Seal of the Tribunal]


Sergei Aleksceevich Egorov
Judge

¹⁶ Motion, para. 18.

¹⁷ Motion, paras. 3, 5-8.

¹⁸ *Bagosora et al.*, Ntabakuze Request to Allow Witness Amade Deme to Give Testimony Via Video-Link, 12 July 2006, para. 5.

¹⁹ *Bagosora et al.*, Decision on Testimony of Witness Amade Deme by Video-Link (TC), 29 August 2006.

²⁰ See footnote 3 above.

²¹ Motion, para. 14.

²² *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5; *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10.

²³ *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5.

