



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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ICTR-99-50-T
22-08-2007
(24275-24271)
TRIAL CHAMBER II

OR: ENG

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiya Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 22 August 2007

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

JUDICIAL AUTHORITY

2007 AUG 22 P 5:23

**DECISION ON JEROME BICAMUMPAKA'S APPLICATION FOR
CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S DECISION ON THE
RULE 92BIS ADMISSION OF FAUSTIN NYAGAHIMA'S WRITTEN STATEMENT**

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justus Bwonwonga
Mr. Elvis Bazawule
Mr. George William Mugwanya
Mr. Shyam Lal Rajapaksa

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for Casimir Bizimungu
Mr. Ben Gumpert and Mr. Jonathan Kirk for Justin Mugenzi
Mr. Pierre Gaudreau and Mr. Michel Croteau for Jérôme-Clément Bicamumpaka
Mr. Tom Moran and Ms. Marie-Pierre Poulain for Prosper Mugiraneza

INTRODUCTION

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1. The Defence for Jerome Bicamumpaka seeks certification to appeal this Chamber's Decision of 30 May 2007,¹ pursuant to Rule 73 (B) of the Rules of Procedure and Evidence. The Prosecution opposes the Defence motion, stating that the requirements of Rule 73 (B) have not been satisfied.²
2. In the Impugned Decision, the Chamber denied a Defence motion, brought pursuant to Rule 92bis of the Rules, for the evidence of deceased witness, Faustin Nyagahima, to be admitted in written form in lieu of oral testimony. The Chamber denied the motion on the grounds that: (i) the threshold requirement for admission – namely, that the statement goes to proof of a matter other than the acts and conduct of the Accused – had not been met, thereby rendering the testimony inadmissible; and (ii) that the Chamber was unable to satisfy itself that the statement possessed sufficient *indicia* of reliability as required by Rule 92bis (C).

DISCUSSION

3. Rule 73 (B) states that leave to file an interlocutory appeal of a decision may be granted if the issue involved “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” and where “an immediate resolution by the Appeals Chamber may materially advance the proceedings”. Even where these criteria are met, the decision to certify is discretionary and should remain exceptional.³
4. In deciding whether to grant leave to appeal, Trial Chambers do not consider the merits of the challenged decision. Rather, a Chamber's inquiry under Rule 73 (B) will involve only a consideration of whether the criteria outlined in the Rule have been satisfied.⁴

¹ *Prosecutor v. Bizimungu et al.*, Case No. 99-50-T, Decision on Jérôme-Clément Bicamumpaka's Motion for the Statement of the Deceased Witness, Faustin Nyagahima, to be Accepted as Evidence, 30 May 2007 (“Impugned Decision”).

² *Bizimungu et al.*, Prosecutor's Response to Jerome Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the “Decision on Jerome Clément Bicamumpaka's Motion for the Statement of the Deceased Witness, Faustin Nyagahima to be Accepted as Evidence” of May 30 2007, 12 June 2007, para. 2 (“Prosecutor's Response”).

³ *Bizimungu et al.*, Decision on Casimir Bizimungu's Request for Certification to Appeal the Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision Dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government, 22 May 2007, para. 6, (“Decision on Casimir Bizimungu's Request”); See *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing (TC), 14 March 2007, para. 4.

⁴ Decision on Casimir Bizimungu's Request, para. 7; see e.g., *Bizimungu et al.*, Decision on Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 “Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material” (TC), 4 February 2005, para. 28 (“Decision on Bicamumpaka's Request for Certification”); see also, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding (TC), 20 June 2005, para. 4.



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5. The Defence submits, *inter alia*, that certification should be granted on the grounds that the Impugned Decision: (i) contradicts the plain meaning of Rule 92bis and is erroneous in law;⁵ (ii) raises an issue that affects the fairness of the proceedings, namely the Accused's right to present a witness on his behalf pursuant to Article 20(4)(e) of the Statute of the Tribunal⁶, and in addition, the exclusion of Faustin Nyagahima's statement will create gaps in the defence of the Accused; (iii) raises an issue that affects the expediency of the proceedings, namely that without the evidence of Faustin Nyagahima, the proceedings will be delayed by the need of the Defence to find a replacement witness;⁷ (iv) involves an issue the immediate resolution of which by the Appeals Chamber will materially advance the proceedings – namely, by determining the need for the Defence to call any additional witnesses prior to the presentation of the Accused's defence, and curtailing any further delay in the proceedings.⁸

That the Impugned Decision is Erroneous in Law

6. The Defence argues that the written statement by deceased witness, Faustin Nyagahima, did in fact satisfy the indicia of reliability under Rule 92bis (C);⁹ the statement was signed by the witness, dated, notarized and taken under oath. Moreover, the Defence submits that the testimony described events not addressed in the Indictment and is therefore admissible according to the plain meaning of Rule 92bis (A).¹⁰ For these reasons, the Defence concludes that the Chamber misapplied Rule 92bis and that its Decision was erroneous in law.
7. The Chamber finds that this Defence argument—impugning the merits of the challenged Decision—is a ground for reconsideration, rather than a basis upon which the Chamber might certify its Decision. The Chamber recalls its Decision of 4 February 2005 in which it said:¹¹

“[C]onsiderations such as whether there was an error of law or abuse of discretion in the Impugned Decision are for the consideration of the Appeals Chamber after certification to appeal has been granted by the Trial Chamber. They are irrelevant to the decision for certification and will not be considered by the Chamber.”

⁵ *Bizimungu et al.*, Bicomumpaka's request pursuant to Rule 73 for Certification to Appeal “Decision on Jérôme-Clément Bicomumpaka's Motion for the Statement of the Deceased Witness, Faustin Nyagahima, to be Accepted as Evidence” of May 30 2007, 7 June 2007, para. 9 (“Defence Request”).

⁶ *Id.*, at para. 49.

⁷ *Id.*, at paras. 56, 61.

⁸ *Id.*, at paras. 62-62.

⁹ Rule 92bis (C) of the Rules states that “a written statement not in the form prescribed by [Rule 92bis] paragraph (B) may nevertheless be admissible if made by a person who has subsequently died...if the Trial Chamber: (i) is so satisfied on a balance of probabilities; and (ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of its reliability.”

¹⁰ Rule 92bis (A) of the Rules states that a written statement is admissible in lieu of oral testimony if it “goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.”

¹¹ Decision on Bicomumpaka's Request for Certification, 4 February 2005, para. 28



8. The Chamber recalls that decisions rendered pursuant to Rule 73 motions are not subject to appeal unless the elements of Rule 73 (B) are satisfied.¹² For this reason, the Chamber will not revisit the merits of its original Decision but will instead consider whether the criteria for certification have been satisfied.
9. The Chamber will now examine the Defence submissions in light of the criteria established under Rule 73 (B), turning first to the question of whether the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. If that criterion is satisfied, the Chamber will go on to consider whether an immediate resolution by the Appeals Chamber of that issue may materially advance the proceedings in this case.

Does the Impugned Decision involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial?

10. Under this criterion, the Defence asserts that the Impugned Decision constitutes a violation of the Accused's right, guaranteed by Article 20(4)(e)¹³ of the Statute, to obtain the attendance of a witness on his behalf under the same conditions as witnesses against him.¹⁴ The Defence notes that the statement of Faustin Nyagahima contradicts the allegations made by Prosecution Witness GHU and is therefore sought to impugn the credibility of GHU.¹⁵ For this reason, the Defence concludes that the Impugned Decision violates the Accused's fundamental right to a fair trial under Article 20(4)(e) and thus involves an issue that affects the fairness of the proceedings.
11. Furthermore, the Defence submits that the exclusion of the Statement will materially prejudice the defence of the Accused, thereby affecting the fair conduct of the proceedings and their outcome. The Defence states that, in preparation for Mr. Bicamumpaka's defence, Counsel considered the statement to be sufficient to refute the allegations made by Prosecution Witness GHU. As such, no additional witnesses were anticipated to testify on the subject and the only evidence on the record concerning the events alleged by GHU will be his.¹⁶ In addition, if the Impugned Decision is to remain in force, the Defence would be required to request a postponement of the proceeding for a few weeks in order to investigate and locate witnesses on behalf of the Accused that were present during the events described by GHU.¹⁷ The Defence submits that this potential delay in the proceedings can be avoided with a quick resolution by the Appeals Chamber and for these reasons certification is necessary in order to assure a fair and expeditious trial.¹⁸

¹² *Nyiramasuhuko et al.*, Decision on Nyiramasuhuko's Motion for Certification to Appeal", etc., (TC), 20 May 2004, para. 16 ("The Chamber recalls the jurisprudence that decisions rendered on Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B)");

¹³ Article 20(4)(e) of the Statute entitles the Accused to "examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her...."

¹⁴ Defence Request, para. 49.

¹⁵ *Id.*, paras. 4-5.

¹⁶ *Id.*, paras. 55, 63.

¹⁷ *Id.*, paras. 60-61.

¹⁸ *Id.*, para. 62.



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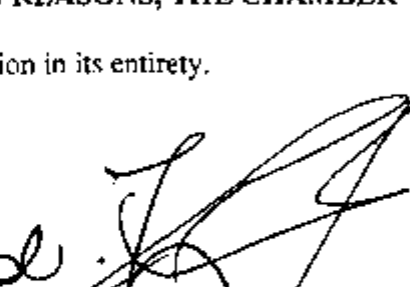
12. The Chamber notes that, pursuant to Articles 19 and 20 of the Statute, it is required to ensure that these proceedings are fair and expeditious; the Chamber must also preserve the minimum guarantees enumerated under sub-Article 20(4). Article 20(4)(e) entitles the Accused to obtain the attendance of witnesses on his behalf under the same conditions as those who give evidence for the Prosecution. The admission of witness testimony is governed by a number of Rules, notably, Rule 90(A), which requires that witnesses, in principle, be heard directly by the Chamber. Rule 92*bis* provides an exception to that general principle *only* where certain strict conditions have been satisfied. Rules 90(A) and 92*bis* apply to the Prosecution as well as the Defence. As such, an accused person's right pursuant to Article 20(4)(e) cannot be said to be violated by the mere denial of an application made pursuant to Rule 92*bis* of the Rules, since the strict conditions of Rule 92*bis* of the Rules must also be satisfied by the Prosecution where it wishes to invoke the Rule 92*bis* exception to Rule 90(A). Acceptance of the Defence argument would mean that the Chamber could not deny a Defence application brought pursuant to Rule 92*bis* without violating the Accused's right pursuant to Article 20(4)(e) of the Statute. This reasoning is clearly erroneous and contrary to the spirit of the Statute and of the Rules.
13. Furthermore, as regards the testimony of Prosecution Witness GHU and the Defence's intention to call evidence to establish his lack of credibility, the Chamber notes that the Defence has been given ample time to investigate this issue. The Defence is unlikely to close its case before October 2007, meaning that there is still further time for this issue to be investigated and additional witnesses called, if necessary. Additionally, the Defence's decision to rely upon the testimony of one witness to impugn the credibility of Witness GHU is a matter of Defence strategy, and is irrelevant to considerations of fairness under Rule 73 (B). Where that evidence is no longer available, for example by reason of death or the unavailability of a witness, this cannot be said to be an issue of fairness. The admission of evidence before this Tribunal is governed by the Statute and the Rules of Evidence and Procedure to which the Chamber must have primary recourse in determining admissibility issues.
14. Having found that the Defence has failed to satisfy the first requirement of Rule 73 (B), the Chamber need not consider whether an immediate resolution by the Appeals Chamber might materially advance the proceedings.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 22 August 2007


Khalida Rachid Khan
Presiding Judge


Lee Gacunga Muthoga
Judge


Emile Francis Short
Judge

[Seal of the Tribunal]

22 August 2007



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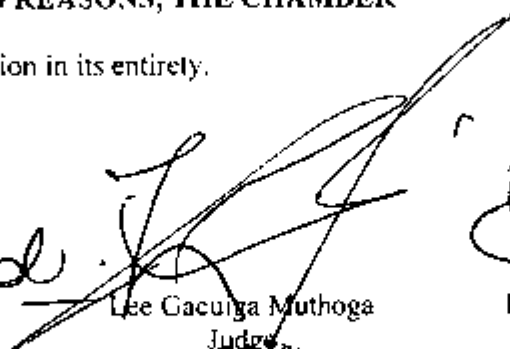
12. The Chamber notes that, pursuant to Articles 19 and 20 of the Statute, it is required to ensure that these proceedings are fair and expeditious; the Chamber must also preserve the minimum guarantees enumerated under sub-Article 20(4). Article 20(4)(e) entitles the Accused to obtain the attendance of witnesses on his behalf under the same conditions as those who give evidence for the Prosecution. The admission of witness testimony is governed by a number of Rules, notably, Rule 90(A), which requires that witnesses, in principle, be heard directly by the Chamber. Rule 92bis provides an exception to that general principle *only* where certain strict conditions have been satisfied. Rules 90(A) and 92bis apply to the Prosecution as well as the Defence. As such, an accused person's right pursuant to Article 20(4)(e) cannot be said to be violated by the mere denial of an application made pursuant to Rule 92bis of the Rules, since the strict conditions of Rule 92bis of the Rules must also be satisfied by the Prosecution where it wishes to invoke the Rule 92bis exception to Rule 90(A). Acceptance of the Defence argument would mean that the Chamber could not deny a Defence application brought pursuant to Rule 92bis without violating the Accused's right pursuant to Article 20(4)(e) of the Statute. This reasoning is clearly erroneous and contrary to the spirit of the Statute and of the Rules.
13. Furthermore, as regards the testimony of Prosecution Witness GHU and the Defence's intention to call evidence to establish his lack of credibility, the Chamber notes that the Defence has been given ample time to investigate this issue. The Defence is unlikely to close its case before October 2007, meaning that there is still further time for this issue to be investigated and additional witnesses called, if necessary. Additionally, the Defence's decision to rely upon the testimony of one witness to impugn the credibility of Witness GHU is a matter of Defence strategy, and is irrelevant to considerations of fairness under Rule 73 (B). Where that evidence is no longer available, for example by reason of death or the unavailability of a witness, this cannot be said to be an issue of fairness. The admission of evidence before this Tribunal is governed by the Statute and the Rules of Evidence and Procedure to which the Chamber must have primary recourse in determining admissibility issues.
14. Having found that the Defence has failed to satisfy the first requirement of Rule 73 (B), the Chamber need not consider whether an immediate resolution by the Appeals Chamber might materially advance the proceedings.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 22 August 2007


Khalida Rachid Khan
Presiding Judge


Lee Caciuga Muthoga
Judge


Emile Francis Short
Judge



22 August 2007