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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-00-55A-A
27 August 2007
(994/H - 988/H)
P.T.

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 27 August 2007

Handwritten notes:
2007/08/28 A 11: 23
Tribunal Pénal International pour le Rwanda

THE PROSECUTOR

v.

Tharcisse MUVUNYI

Case No. ICTR-00-55A-A

ICTR Appeals Chamber
Date: *27 August 2007*
Action: *P.T.*
Copied To: *Concerned Judges, Parties, SLOS, LG, ALOS, LRS,*
Archives
P.T. Tchidimbo

Decision on Request to Admit Additional Evidence

Office of the Prosecutor:

- Mr. Hassan Bubacar Jallow
- Mr. James Stewart
- Ms. Linda Bianchi
- Mr. Renifa Madenga
- Mr. François Nsanzuwera
- Ms. Evelyn Kamau

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *Patrice Tchidimbo*
SIGNATURE: *[Signature]* DATE: *27/08/07*

Counsel for Tharcisse Muvunyi:

- Mr. William E. Taylor
- Ms. Abbe Jolles
- Mr. Dorian Cotlar

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of a motion filed on 28 May 2007 by Mr. Tharcisse Muvunyi ("Applicant") to admit additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules").¹ The Prosecution filed its response on 28 June 2007,² and the Applicant filed his reply on 10 July 2007.³

BACKGROUND

2. On 12 September 2006, Trial Chamber II convicted the Applicant of three counts of genocide, direct and public incitement to commit genocide, and other inhumane acts as crimes against humanity, and sentenced him to twenty-five years' imprisonment.⁴ On 12 October 2006, the Applicant filed a notice of appeal against his convictions and sentence.⁵ The Prosecution has also appealed against the Trial Judgement.⁶

3. On 29 March 2007, the Applicant requested the Appeals Chamber to order the Prosecution to disclose to him the transcripts of testimonies of Witnesses AND72 and AND14 from the *Nyiramasuhuko et al.* case, and to grant him leave to call these witnesses to present additional evidence on appeal in his case.⁷ The Appeals Chamber denied the request for additional evidence because the Applicant failed to satisfy the criteria under Rule 115 of the Rules.⁸ However, noting that the Prosecution agreed to disclose the requested transcripts, the Appeals Chamber stated: "After reviewing these transcripts, and within the time-frame provided for in the Rules, Mr. Muvunyi may elect to file a new application for the admission of additional evidence, fully addressing each of the requirements set out in Rule 115 of the Rules."⁹

¹ Accused Tharcisse Muvunyi's Motion to Take Testimony on Appeal Pursuant to Rule 115, 28 May 2007 ("Motion").

² Prosecutor's Response to "Accused Tharcisse Muvunyi's Motion to Take Testimony on Appeal Pursuant to Rule 115", 28 June 2007 ("Response").

³ Accused Tharcisse Muvunyi's Reply to Prosecution's Response to His Motion to Take Testimony on Appeal Pursuant to Rule 115, 10 July 2007 ("Reply").

⁴ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Judgement and Sentence, 18 September 2006, paras. 531, 545 ("Trial Judgement"). The Trial Judgement was pronounced on 12 September 2006, and the written judgement was filed on 18 September 2007.

⁵ Accused Tharcisse Muvunyi's Notice of Appeal, 12 October 2006, paras. 3-14 ("*Muvunyi* Notice of Appeal").

⁶ Prosecutor's Notice of Appeal and Motion for an Extension of Time within which to File Notice of Appeal, 17 October 2006.

⁷ Decision on Request to Admit Additional Evidence, 27 April 2007, para. 4 ("*Muvunyi* First Additional Evidence Decision").

⁸ *Muvunyi* First Additional Evidence Decision, paras. 8, 10.

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4. As with the first request to admit additional evidence,¹⁰ the present Motion seeks leave to call Witnesses AND72 and AND14 to appear before the Appeals Chamber. The Applicant claims that the evidence of Witnesses AND72 and AND14 undermines a factual finding of the Trial Chamber which supported his conviction for direct and public incitement to commit genocide.¹¹ The Trial Chamber found that, in April or May 1994, he addressed Hutu members of the population in Gikonko and blamed the *bourgmestre* for hiding a Tutsi man, named Vincent Nkurikiyinka. This statement and other remarks he made were found by the Trial Chamber to be understood by the population as a call to kill Tutsis.¹² Accordingly, the Trial Chamber found that, after this speech, *Conseiller* Gasana led a group of attackers to capture and kill Vincent Nkurikiyinka.¹³ In making findings on the Applicant's speech, the Trial Chamber relied solely on Prosecution Witness YAQ.¹⁴ To counter Witness YAQ's evidence on this point at trial, the Applicant presented the evidence of Defence Witness MO80 who testified that he did not hear about the meeting.¹⁵

5. In the Motion, the Applicant contends that the proposed evidence of Witnesses AND72 and AND14 contradicts in important respects the evidence given by Witness YAQ, which he alleges is the only evidence that underlies his conviction for direct and public incitement to commit genocide based on the Gikonko meeting.¹⁶ In support of the Motion, the Applicant attaches the closed session transcripts of the testimonies of Witnesses AND72 and AND14 in the *Nyiramasuhuko et al.* case.¹⁷ The Applicant submits that if called on appeal in his case, these witnesses will testify as to the circumstances surrounding the killing of Vincent Nkurikiyinka and that their testimony will show that the Applicant did not have any connection to this killing.¹⁸ The Applicant asserts that Witness YAQ is not credible¹⁹ and that, if the Trial Chamber had heard the evidence of Witnesses AND72 and AND14, its findings on the meeting at Gikonko would have been different.²⁰ Moreover, the Applicant contends that this relevant and credible information was in the possession of the Prosecution at the time of trial, but was not disclosed to him in accordance with Rule 68 of the Rules, and thus must be heard by the Appeals Chamber in order to prevent a miscarriage of

⁹ *Muvunyi* First Additional Evidence Decision, para. 9.

¹⁰ *Muvunyi* First Additional Evidence Decision, para. 3.

¹¹ Motion, paras. 3-7.

¹² Trial Judgement, paras. 190, 507.

¹³ Trial Judgement, para. 190.

¹⁴ Trial Judgement, paras. 182-186, 189, 190. The Trial Chamber, however, found that aspects of Witness YAQ's evidence other than with respect to the speech were corroborated to some extent by Defence Witness MO80, in particular relating to the specific attack against Vincent Nkurikiyinka. See Trial Judgement, para. 189.

¹⁵ Trial Judgement, paras. 187, 188.

¹⁶ Motion, paras. 5-7.

¹⁷ The evidence of Witness AND72 and AND14 given in the *Nyiramasuhuko et al.* case is annexed to the Motion. Witness AND72 testified on 6 December 2006 and Witness AND14 testified on 22 and 29 January 2007.

¹⁸ Motion, paras. 8, 9.

¹⁹ Motion, paras. 5, 6.

²⁰ Motion, paras. 13, 14.

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justice.²¹ In this respect, he asserts that Witness AND72 gave a statement to the Prosecution on 22 May 2001.²²

6. The Prosecution responds that the proposed additional evidence would not impact the verdict, and, in particular, points to aspects of each witness's account which corroborate the evidence relied on by the Trial Chamber.²³ Furthermore, the Prosecution disputes that it breached any disclosure violations.²⁴ In particular, the Prosecution asserts that the Applicant has not shown that the statement of Witness AND72, which was taken in 2001, is exculpatory.²⁵ The Prosecution also notes that the testimony of Witnesses AND72 and AND14 was given shortly after it made one of its periodic checks for potentially exculpatory material in this case.²⁶

DISCUSSION

7. Rule 115 of the Rules provides a mechanism for admission of additional evidence on appeal where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial.²⁷ According to Rule 115(A) of the Rules, a motion for additional evidence shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. In addition, Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial and must be relevant and credible. When determining the availability at trial, the Appeals Chamber considers whether the party tendering the evidence has shown that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence [...] before the Trial Chamber."²⁸ Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine in accordance with Rule 115(B) of the Rules whether the proposed additional evidence could have been a decisive factor in reaching the decision at trial.

²¹ Motion, paras. 15, 18.

²² Motion, para. 11.

²³ Response, paras. 10-46.

²⁴ Response, paras. 46-63.

²⁵ Response, paras. 55-58. The Prosecution annexed the statement.

²⁶ Response, paras. 48, 50-52. In this respect, the Prosecution notes that it searched for exculpatory material on 5 December 2006, and that Witnesses AND72 and AND14 testified in closed session on 6 and 7 December 2006 and 22, 25, and 29 January 2007, respectively. The Prosecution notes that its next search of material was scheduled for the week of 3 April 2007; however, the material had already been brought to its attention.

²⁷ *Muvunyi* First Additional Evidence Decision, para. 6, citing *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 4 ("*Nahimana et al.* Rule 115 Decision (8 December 2006)").

²⁸ See *Muvunyi* First Additional Evidence Decision, para. 6; *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 5, quoting *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion

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8. Furthermore, in accordance with established jurisprudence, where the evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party establishes that the exclusion of it *would* amount to a miscarriage of justice.²⁹ That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.³⁰

9. The Appeals Chamber finds that the proposed evidence of Witnesses AND72 and AND14, relating to the circumstances surrounding the killing of Vincent Nkurikiyinka, concerns a material issue examined in the Trial Judgment and therefore is generally relevant. The Trial Chamber considered the killing of Vincent Nkurikiyinka in the context of its findings on the Applicant's conviction for direct and public incitement to commit genocide.³¹ Though the Trial Chamber did not convict the Applicant of this killing, it does seem to have weighed the killing which followed his address at Gikonko, among other evidence, to illustrate that the population understood his words as a call to commit genocide.³² Moreover, the Trial Chamber considered the event as an aggravating circumstance in determining the sentence.³³

10. While the additional evidence is relevant, the Appeals Chamber will refuse to admit it if it does not appear to be reasonably capable of belief or reliance, without prejudice to a determination of the weight to be afforded.³⁴ The Prosecution has not disputed the *prima facie* credibility of the proposed evidence, and the evidence of Witnesses AND72 and AND14 was presented in the *Nyiramasuhuko et al.* case³⁵ and admitted by the Trial Chamber hearing that case. As discussed below, their evidence concerning the killing of Vincent Nkurikiyinka appears to be corroborated in certain respects by evidence presented in the Applicant's case. Moreover, although Witness AND72 was not an eye-witness to the events, he claims that he conducted inquiries into the circumstances surrounding the killing of Vincent Nkurikiyinka.³⁶ In addition, Witness AND14 was an eyewitness

for Admission of Additional Evidence, 10 December 2004, para. 9 (internal references omitted) ("*Ntagerura et al.* Appeal Decision").

²⁹ *Muvunyi* First Additional Evidence Decision, para. 7; *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 6 (citing cases).

³⁰ *Muvunyi* First Additional Evidence Decision, para. 7; *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 6.

³¹ Trial Judgment, para. 507.

³² Trial Judgment, paras. 507, 508.

³³ Trial Judgment, para. 539.

³⁴ *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 5.

³⁵ The evidence of Witness AND72 and AND14 given in the *Nyiramasuhuko et al.* case is annexed to the Motion.

³⁶ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR 98-42-T, T. 6 December 2006 pp. 19-20.

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to the killings.³⁷ Bearing this in mind, the Appeals Chamber is satisfied that the proposed evidence is sufficiently reliable and credible for purposes of admission pursuant to Rule 115 of the Rules.

11. The Appeals Chamber is not satisfied, however, that the Applicant has demonstrated that the proposed evidence was not available at trial in spite of the exercise of due diligence. The appearance of these witnesses for the defence in the *Nyiramasuhuko et al.* case as well as the relative importance of Witness AND72 in the area of the relevant events and Witness AND14's connection with the victim tend to suggest that these two witnesses could have been discovered and interviewed by the Applicant at the time of trial in the exercise of due diligence.³⁸ Furthermore, the Appeals Chamber finds that the Applicant did not show in what way he allegedly exercised due diligence and does not show that he carried out any particular investigation at that time to present all the available evidence before the Trial Chamber.³⁹ Accordingly, the Appeals Chamber finds that the proposed evidence which the Applicant seeks to introduce on appeal was available at trial.

12. The Appeals Chamber further finds no merit in the Applicant's contention that any disclosure violation on the part of the Prosecution prevented him from obtaining this material earlier. The Appeals Chamber notes that the Prosecution could have acted with greater diligence in providing the closed session transcripts of Witnesses AND72 and AND14 to the Applicant. Nonetheless, the Prosecution's diligence in disclosing the closed session transcripts of their evidence bears no relation to the Applicant's ability to obtain their proposed evidence at his own trial, which is discussed above. In this respect, Witnesses AND72 and AND14 testified for the defence in *Nyiramasuhuko et al.* in December 2006 and January 2007, respectively, and thus their evidence came into the Prosecution's possession after the conclusion of the Applicant's trial. Moreover, a review of the statement of Witness AND72, which was given to the Prosecution on 22 May 2001, reflects that it was prepared in connection with a different investigation and that it does not even concern the relevant events surrounding the killing of Vincent Nkurikiyinka.

13. The question remains whether the exclusion of the evidence of Witnesses AND14 and AND72 would amount to a miscarriage of justice. The Trial Chamber convicted the Applicant of direct and public incitement to commit genocide based on a speech that he gave to members of the population in Gikonko.⁴⁰ The Applicant does not point to anything in the proposed evidence of Witness AND14 or Witness AND72 which addresses this event. Rather, their evidence goes only to the subsequent killing of Vincent Nkurikiyinka. Their accounts of the killing do not appear to vary

³⁷ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR 98-42-T, T. 29 January 2007 p. 15.

³⁸ *Cf. Ntagerura et al.* Appeal Decision, para. 24.

³⁹ *Ntagerura et al.* Appeal Decision, para. 24.

⁴⁰ Trial Judgement, para. 507.

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in material respects from the findings of the Trial Chamber in that a mob of civilian assailants apprehended Vincent Nkurikiyinka from the Mugusa commune office, where he was being protected by the *bourgmestre*, and then killed him.⁴¹

14. The crux of the Applicant's argument appears to be that the accounts of Witnesses AND14 and AND72 are exculpatory because they do not implicate him in the killing.⁴² It is true that Witnesses AND14 and AND72 do not refer to the Applicant's role in the killing of Vincent Nkurikiyinka. However, this follows from the fact that neither witness appears to have attended or to have knowledge of the meeting in Gikonko commune, which was the key event that the Trial Chamber relied on in connecting the Applicant to this killing. In such circumstances, the fact that these witnesses do not connect the Applicant to the killing of Vincent Nkurikiyinka has limited probative value.⁴³ Moreover, the Trial Chamber did not convict the Applicant of direct and public incitement to commit genocide simply because he chastised the *bourgmestre* for hiding Vincent Nkurikiyinka, but also because he "equated Tutsis to 'snakes' who should be killed".⁴⁴ Accordingly, the Applicant has not shown that, if accepted, the evidence of Witnesses AND14 and AND72 would have impacted the verdict. In sum, the Appeals Chamber is not satisfied that the exclusion of the proposed additional evidence of Witnesses AND14 and AND72 would result in a miscarriage of justice.

DISPOSITION

15. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion.

Done in English and French, the English version being authoritative.

Done this 27th day of August 2007,
At The Hague,
The Netherlands.



[Seal of the Tribunal]

A handwritten signature in black ink, appearing to read "Fausto Pocar".

Judge Fausto Pocar
Presiding

⁴¹ See Motion, paras. 8, 9.

⁴² Motion, para. 10.

⁴³ See, e.g., *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgment, 21 May 2007, paras. 113, 211.

⁴⁴ Trial Judgment, para. 507.