



INTERNATIONAL
CRIMINAL TRIBUNAL

ICTR-98-42-T
05-11-2007
(12231-12224)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

12231
PM

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 5 November 2007

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

The Prosecutor v. Joseph KANYABASHI

Case No. ICTR-96-15-T

Joint Case No. ICTR-98-42-T

**DECISION ON NTAHOBALI'S AND NYIRAMASUHUKO'S ORAL MOTIONS TO
EXCLUDE CERTAIN EVIDENCE FROM THE EXPECTED TESTIMONY OF
KANYABASHI'S WITNESSES D-2-13-O, D-2-15-S AND D-20-II**

Office of the Prosecutor

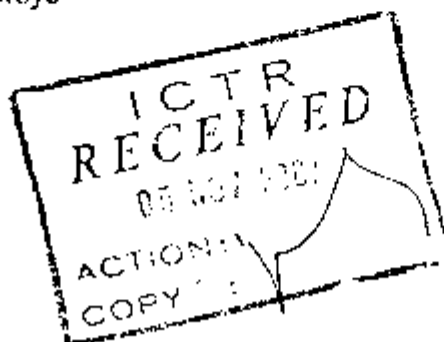
Ms. Silvana Arbia
Ms. Adelaide Whest
Ms. Holo Makwaja
Ms. Althea Alexis Windsor
Ms. Madeleine Schwarz
Ms. Astou Mbow
Ms. Tolulope Olowoye

Defence Counsel for Ntahobali

Mr. Normand Marquis
Mr. Bertrand Saint-Arnaud

Defence Counsel for Nyiramasuhuko

Ms. Nicole Bergevin
Mr. Guy Poupart



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 oral motions to exclude certain evidence from the expected testimony of Kanyabashi's Witnesses D-2-13-O, D-2-15-S and D-20-H, submitted by the Defence for Ntahobali and Nyiramasuhuko on 30 October 2007 ("Ntahobali's Motion and Nyiramasuhuko's Motion");

CONSIDERING the:

- (i) Prosecution's Response to the oral motions to exclude certain evidence from the expected testimony of Kanyabashi's Witnesses D-2-13-O, D-2-15-S and D-20-H, argued on 31 October 2007 ("Prosecution's Response");
- (ii) Response of Kanyabashi to the oral motions to exclude certain evidence from the expected testimony of Kanyabashi's Witnesses D-2-13-O, D-2-15-S and D-20-H, argued on 31 October 2007 ("Kanyabashi's Response");
- (iii) Reply of Ntahobali to the responses of the Prosecution and Kanyabashi to the oral motions to exclude certain evidence from the expected testimony of Kanyabashi's Witnesses D-2-13-O, D-2-15-S and D-20-H, argued on 31 October 2007 ("Ntahobali's Reply");
- (iv) Reply of Nyiramasuhuko to the responses of the Prosecution and Kanyabashi to the oral motions to exclude certain evidence from the expected testimony of Kanyabashi's Witnesses D-2-13-O, D-2-15-S and D-20-H, argued on 31 October 2007 ("Nyiramasuhuko's Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motions pursuant to Rule 73 on the basis of the oral submissions of the Parties only.

INTRODUCTION

1. On 31 December 2004, the Defence for Kanyabashi filed its Pre-Defence Brief, pursuant to Rule 73*ter* of the Rules. The Brief contained the list of witnesses the Defence intended to call and a summary of the facts about which each witness would testify, including a summary of the expected evidence of Witnesses D-2-13-O, D-2-15-S, and D-20-H.

2. On 11 May 2007 and on 19 October 2007, the Defence for Kanyabashi disclosed several will says and additional will says for Witnesses D-2-13-O, D-2-15-S, and D-20-H (the "contested will say statements").

3. On 30 October 2007, the Defence for Ntahobali submitted an oral motion to exclude certain evidence from the will says of 11 May 2007 and 19 October 2007 regarding Witness D-2-13-O, the additional will say of 19 October 2007 regarding Witness D-2-15-S, and the

additional will say of 19 October 2007 regarding Witness D-20-II. The Defence for Nyiramasuhuko joined Ntahobali's Motion.

SUBMISSIONS

Ntahobali

4. The Defence for Ntahobali submits that the contested will say statements disclosed for the first time the following information: 1) that Witness D-2-13-O would testify about Ntahobali's alleged involvement in the killing of a certain family near a roadblock as head of *Interahamwe*; about the presence of Ntahobali and a certain "Pierre" living in a house belonging to the *conseiller* of Sahera *secteur* at this roadblock; about the rumour of the death of a certain "Dco" at the roadblock and about Ntahobali's responsibility in the abduction of Tutsi from the University Hospital; 2) that Witness D-2-15-S would testify about Ntahobali's role in the control of a roadblock and 3) that Witness D-20-II would testify about Ntahobali's role in controlling a roadblock; Nyiramasuhuko crossing a roadblock near Kanyabashi's house in Mpare and about the presence of Nyiramasuhuko together with soldiers in a house in Mpare. The Defence submits that these are new facts and possibly new criminal allegations whereas the summaries for these witnesses, provided in Kanyabashi's Pre-Defence Brief, do not make any reference to Ntahobali.

5. The Defence states that the disclosure requirements for the Defence, pursuant to Rule 73ter (B)(iii) of the Rules, mirror the disclosure requirements for the Prosecution, pursuant to Rule 73bis (B)(iv). The Defence submits that the case law¹ of the ICTR and ICTY (International Criminal Tribunal for the former Yugoslavia) regarding Prosecution's disclosure obligation apply *mutandis mutatis* to the Defence under Rule 73bis, and that admitting the newly disclosed evidence contained in the contested will say statements would violate the Defence's right to a fair trial under Article 20 of the Statute.

Nyiramasuhuko

6. The Defence for Nyiramasuhuko submits that the contested will say statements disclosed new and unexpected facts about Nyiramasuhuko. Based on the case law cited by the Defence for Ntahobali, the Chamber should not admit this new information into evidence. The Defence argues that this remedy is necessary to prevent the Prosecution from refining its case after it has been closed.

The Prosecution's Response

7. The Prosecution opposes the motions and submits that on 29 June 2007, the Chamber denied a similar motion to exclude evidence of Witness D-2-13-O because the evidence was relevant and there were other remedies available.² The Prosecution submits that according to that Decision exclusion is not the appropriate remedy.

8. The Prosecution argues that under Rule 89 (C), the Chamber may admit any relevant evidence and that under Rule 90 (G), "the Prosecution may adduce any evidence during cross-

¹ The Defence cited *Kupreskic*, Appeals Decision of 23 October 2001; *Kajelijeli*, Decision of 11 April 2001, para. 8; *Karemira*, Decision of 24 November 2003, para. 13; and *Bagosora*, Decision of 4 November 2002, para. 18.

² Citing *Nyiramasuhuko et al.*, Case No. 98-42-T, Decision on Arsène Shalom Ntahobali's Motion to Exclude Certain Evidence from the Expected Testimony of Kanyabashi's Witness D-2-13-O, 29 June 2007.

examination which corroborates or reinforces evidence presented during the presentation of its case.”³ The Prosecution submits that all of the contested evidence was testified to by Prosecution and Defence witnesses.⁴

Kanyabashi's Response

9. The Defence for Kanyabashi opposes the motions and submits that they relate to the same issue decided on 29 June 2007. In particular, the Defence submits that the previous motion contested some of the evidence at issue now, so this evidence cannot be excluded. The Defence further argues that the evidence the Defence for Ntahobali and Nyiramasuhuko seek to exclude are contested issues that have already been litigated. The Defence agrees with the Prosecution and submits that nothing in the contested will say statements goes outside the scope of information that is already in evidence.

10. The Defence distinguishes the case law cited by the Defence for Ntahobali and notes that it applies to the Prosecution, not the Defence, and that the cited decisions referred in part to the Prosecution's indictment rather than the Pre-Defence Brief. In addition, the Defence claims that its Pre-Defence Brief is more comprehensive than Ntahobali's Pre-Defence Brief. The Defence requests that the Chamber allow Kanyabashi to contest the allegations made by the other Accused.

Nyiramasuhuko's Reply

11. The Defence for Nyiramasuhuko argues that it must be afforded the same rights as if Nyiramasuhuko was tried alone. The Defence refers to a specific portion of Witness D-20-11's will say statement, and submits that it contains a completely new fact, that the late disclosure prevents Nyiramasuhuko from understanding the case against her, and that case law provides for the exclusion of evidence that is new or that broadens the allegations against the accused.

Ntahobali's Reply

12. The Defence for Ntahobali argues that Ntahobali never incriminated Kanyabashi. The Defence argues that the information in the contested will say statements represent a sudden change of Kanyabashi's defence strategy that should not be allowed.

13. The Defence submits that the case law about the Prosecution's disclosure requirements is relevant to the Defence where there are multiple accused because the Defence may play the same role as the Prosecution. The Defence submits that allowing an accused to adduce evidence against another accused would alter the Prosecution's burden of proving its case beyond a reasonable doubt. Finally, the Defence argues that the right to cross examine is an insufficient remedy because the Defence has not had sufficient time or means to conduct the necessary investigations. The Defence requests that the Chamber follow its earlier rulings and decline to use the evidence against Ntahobali.

³ Citing *Bagasora et al.*, Case No. 98-41-T, Decision on Request for Severance of Three Accused, 27 March 2006.

⁴ The Prosecution refers to Witnesses FS, QCB, SJ, EA, TQ, TG, RE [sic], TB, TA, SX, QY and SS, Expert Witness Alison Des Forges, and Defence Witnesses WZ, NA, Ntahobali and Nyiramasuhuko.

DELIBERATIONS

14. With regard to disclosure obligations, the Chamber recalls that disclosure obligations of the anticipated evidence of the Prosecution and Defence differ.⁵ Under Rule 66 (A)(ii), the Prosecution shall disclose to the Defence “copies of the statement of all witnesses whom the Prosecutor intends to call to testify at trial” within certain timeframes. There is no such obligation on the part of the Defence. Therefore the case law cited by the Defence with respect to the disclosure obligations of the Prosecution is irrelevant.

15. Under Rule 73ter (B)(iii)(b), the Defence may be ordered by the Chamber to file a Pre-Defence Brief and a list of witnesses that it intends to call with “a summary of the facts on which each witness will testify.” These summaries or “will say statements” are not similar to witness “statements” under Rule 66 (A). In this case, at the Pre-Defence Brief stage, the Chamber recalls that the summary of the facts on which each witness was to testify was usually very brief and did not contain many details. It has been the practice of Defence teams to file such revised will say statements as their investigations progressed. After the filing of the Pre-Defence Brief, under Rule 67 (D), either party is under the obligation to “promptly notify” the other party and the Trial Chamber of the discovery of additional evidence which should have been produced earlier.

16. The Chamber also recalls that “will say statements” must be “clear enough to cover the scope of the proposed testimony of the witness; they must be full and comprehensive, not in the sense of giving all the details, but at least laying out the scope of what the witness is expected to cover in clear terms.”⁶ Will say statements must enable the other party or parties to prepare and to raise issues.⁷ They should be filed in a timely manner to enable the other parties to conduct effective cross-examination of the witnesses.

17. The Chamber finally recalls that evidence is admissible, pursuant to Rule 89 (C), if it is relevant to the case and if the Chamber deems it to have probative value. The Appeals Chamber construes Rule 89 (C) to provide Trial Chambers with broad discretion in assessing admissibility of evidence; a distinction must be drawn between admissibility of evidence and the exact probative weight to be attached to it; the probative weight is to be assessed by the Trial Chamber at a later stage; and the Chamber may admit evidence even if, at the end of the case, the Chamber may not hold the accused responsible for a charge which was not specifically pleaded.⁸

Witness D-2-13-O

18. The Chamber recalls its Decision of 29 June 2007 on Ntahobali’s motion to exclude certain evidence from the expected testimony of Kanyabashi’s Witnesses D-2-13-O disclosed

⁵ *Nyiramasuhuko et al.*, Decision on the Prosecutor’s Urgent Motion to Compel Disclosure of Unredacted Witness Statements by Nsabimana’s Defence, 29 June 2006, para. 14.

⁶ *Nyiramasuhuko et al.*, Decision on the Prosecutor’s Urgent Motion to Compel Disclosure of Unredacted Witness Statements by Nsabimana’s Defence, 29 June 2006, para. 15 citing *Nyiramasuhuko et al.*, Decision on Arsène Shalom Ntahobali’s Motion to Amend his Witness List and to Reconsider the Decision of 26 August 2005 Titled: “Decision on the Defence Motion to Modify the List of the Defence Witnesses for Arsène Shalom Ntahobali”, 27 January 2006, para. 24.

⁷ *Idem.*

⁸ *Nyiramasuhuko et al.*, Decision on Ntahobali’s motion to exclude certain evidence from the expected testimony of Kanyabashi’s Witnesses D-2-13-O, Case No. ICTR-98-42-T, 29 June 2007, para 6.

on 11 May 2007.⁹ In that Decision, the Chamber allowed that evidence be heard on the alleged killing of a certain family next to the road leading to the IRST. As far as these elements are concerned, the Chamber recalls that these matters are *res judicata* and cannot be reopened.

19. With respect to the 19 October 2007 will say of Witness D-2-13-O, the Chamber has reviewed the alleged new facts in turn.

20. Concerning the statement of Witness D-2-13-O regarding Ntahobali's presence at the roadblock together with a man called "Pierre," the Chamber considers that it may be relevant to Kanyabashi's case. Ntahobali appears to have testified to the responsibility of prefectural and communal authorities over the erection of roadblocks and patrols.¹⁰ He also appears to have testified about a man called "Jean-Pierre", living in a house belonging to the *conseiller* of Sahera *secteur*, who was among the persons manning a roadblock.¹¹ The Chamber notes that issues pertaining to the manning and controlling of roadblocks appear to be in contention. Furthermore, the alleged events appear to be already part of the Prosecution case.¹² In these circumstances, the Chamber is of the view that this evidence may not be excluded.

21. Concerning the statement of Witness D-2-13-O relating to the alleged presence of a certain Dèò at the roadblock in front of Nyiramasuhuko's house and his subsequent death, the Chamber is of the view that its relevance to Kanyabashi's case has not been demonstrated. Moreover, the alleged killing does not appear to have been part of the Prosecution's case. In these circumstances, the Chamber considers that there is no basis for this evidence to be led.

22. Concerning the statement of Witness D-2-13-O relating to Ntahobali's alleged role in the abduction of Tutsi at the University Hospital, the Chamber does not consider that its relevance to Kanyabashi's case has been demonstrated. Moreover, the Chamber recalls that Kanyabashi was partially acquitted of Paragraph 6.38 of the Indictment under Rule 98bis concerning the abduction of hospital patients in his presence.¹³ In these circumstances the Chamber considers that there is no basis for this evidence to be led.

Witness D-2-15-S

23. With respect to the 19 October 2007 will say of Witness D-2-15-S, the Chamber has reviewed the alleged new fact concerning Ntahobali's control of a certain roadblock. As noted above, the issue of manning and controlling of roadblocks is in contention. It would appear that Ntahobali alleged that prefectural and communal authorities had control over the erection of roadblocks.¹⁴ The Chamber considers therefore that this evidence may be relevant to Kanyabashi's case and that Kanyabashi is entitled to be heard on this matter. The issues concerning the manning and controlling of the roadblocks also appear to have been part of the

⁹ *Idem*.

¹⁰ See Ntahobali's testimony; T. 24 April 2006, p. 45, 47; T. 3 May 2006, pp. 55-57, 61, 64.

¹¹ T. 26 April 2006, pp. 15, 24.

¹² Regarding the mention of Jean-Pierre, see Witness SX, T. 27 January 2004 p. 16; T. 30 January 2004 p. 18 (ICS).

¹³ *Nyiramasuhuko et al.*, Case No. 98-42-T, Decision on Defence Motions for Acquittal under Rule 98bis, 16 December 2004, paras. 177, 178.

¹⁴ See Fn. 10

Prosecution case.¹⁵ In the circumstances, the Chamber considers therefore that this evidence may be led.

Witness D-20-H

24. With respect to the 19 October 2007 will say of Witness D-20-H, the Chamber has reviewed the alleged new facts. Concerning Ntahobali's alleged role in manning and controlling a roadblock, the Chamber has already noted that this matter is in contention and also included in the Prosecution's case. For the same reasons as stated above, the Chamber considers that this anticipated evidence may be relevant to Kanyabashi's case and therefore may be led.

25. Concerning the allegation that Kanyabashi did not have control of the roadblock erected near his house in Mpare and of Nyiramasuhuko's presence in a house in Mpare early July 1994, the Chamber considers that it may be in contention. It appears to relate to evidence submitted by Ntahobali in his evidence in chief. Indeed, although Nyiramasuhuko does not appear to have testified to her visit in Mpare, Ntahobali testified that he, together with his family including Nyiramasuhuko passed through Mpare when they fled Butare on 3 July 1994 and met with Kanyabashi who allegedly opened a roadblock for Ntahobali's family.¹⁶ Therefore, the Chamber considers that this anticipated evidence may be relevant to the Defence of Kanyabashi and may therefore be led.

26. Recalling its previous Decision of 29 June 2007, in a joint trial, the right to a full defence means that in a situation of antagonistic defence, an accused can bring evidence which may be incriminating for the other co-accused within certain limits.¹⁷ There are several remedies to ensure that each accused does not lose the rights that he or she would have if tried alone. Such remedies may include cross-examination, further cross-examination, recall, or rebuttal of evidence.¹⁸

27. The Chamber has taken into account the timeliness of the disclosure of the will say statements in issue. The anticipated evidence disclosed on 19 October 2007 appears to be relevant and not new, therefore the Chamber considers that the Defence has had sufficient time to prepare.

¹⁵ See only Witness TQ, T. 7 September 2004 pp. 11-12, 62-63 (ICS); Witness TB, T. 4 February 2004, pp. 42, 51-53, 61; T. 5 February 2004, p. 18.

¹⁶ T. 26 April 2006, pp. 44, 45, 47.

¹⁷ *Bagosora et al*, ICTR-98-41-T, Decision on Request for Severance of Three Accused, 27 March 2006, para. 5, referring to *Brdanin and Tatic*, ICTY-99-36-T, Decision on Motions by Momir Tatic for Separate Trial and for Leave to File a Reply, 9 March 2000, para. 29; *Brdanin and Tatic*, Decision on Request to Appeal, ICTY-99-36-A, 16 May 2000.

¹⁸ *Nyiramasuhuko et al*, Decision on Ntahobali's motion to exclude certain evidence from the expected testimony of Kanyabashi's Witnesses D-2-13-O, Case No. ICTR-98-42-T, 29 June 2007, para. 10; *Nyiramasuhuko et al*, Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Motion for Separate Proceedings, a new trial, and stay of proceedings, 7 April 2006, para. 70; *Nyiramasuhuko et al*, Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 8.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motions to exclude the portions of the anticipated evidence of Witness D-2-13-O as specified:

“He also noticed that a Tutsi called Déo was sitting on the ground. It was rumoured that he was allegedly killed.”

“While the witness was at the University hospital, he heard some Presidential Guard soldiers saying [...] that he used to come to the hospital to take Tutsi from there and killed them.”

DENIES the Motions in all other respects.

Arusha, 5 November 2007



Handwritten signature of William H. Sekule in black ink.

William H. Sekule
Presiding Judge

Handwritten signature of Arlette Ramarason in black ink.

Arlette Ramarason
Judge

Handwritten signature of Solomy Balungi Bossa in black ink.

Solomy Balungi Bossa
Judge

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