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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-00-55A-A
23 November 2007
(1197/H - 1190/H)

P.T.

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

Registrar: Mr. Adama Dieng

Decision of: 23 November 2007

THE PROSECUTOR

v.

Tharcisse MUVUNYI

Case No. ICTR-00-55A-A

ICTR Appeals Chamber
Date: 23 November 2007
Action: P.T.
Copied To: concerned Judges,
Parties, SLOS, LOS, ALOS, SS,
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**Decision on Motion for Reconsideration of Decision on Motion for Disclosure
and Request for Admission of Additional Evidence**

Office of the Prosecutor:

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

Counsel for Tharcisse Muvunyi:

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

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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COPIE CERTIFIÉE CONFORME À L'ORIGINAL, PAR MOI
NAME / NOM: *Patrice Tchidimbo*
SIGNATURE: *(Signature)* DATE: *23/11/07*

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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 by Mr. Tharcisse Muvunyi ("Applicant") for reconsideration of a previous decision of the Appeals Chamber¹ and a request for the admission of additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules") consisting of transcripts relating to Prosecution Witness QY.² The Prosecution responded on 11 October 2007,³ the Applicant filed a reply on 26 October 2007, and the Prosecution filed a reply concerning rebuttal material on 30 October 2007.⁴

I. BACKGROUND

2. On 12 September 2006, Trial Chamber II ("Trial Chamber") 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.⁵ On 12 October 2006, the Applicant appealed against his convictions and sentence.⁶ The Prosecution has also appealed against the Trial Judgement.⁷

3. In a previous motion filed on 7 June 2007, the Applicant alleged, *inter alia*, that Counsel for the Applicant had been informed that, during closed session in criminal proceedings against a Rwandan national in Canada, Witness QY admitted to giving false testimony in the *Nyiramasuhuko et al.* trial before the Tribunal at the instigation of the Prosecution.⁸ Witness QY was a witness on

¹ Decision on Motion for Disclosure, 20 July 2007 ("Impugned Decision").

² Accused Tharcisse Muvunyi's Motion to Reconsider Holding a Sanctions Hearing After Production of Witness QY Testimony and Montreal Trip by Co-Counsel (confidential), 11 September 2007 ("Motion").

³ Prosecutor's Response to "Accused Tharcisse Muvunyi's Motion to Reconsider Holding a Sanctions Hearing After Production of Witness QY Testimony and Montreal Trip by Co-counsel" and Prosecutor's Motion to Admit Rebuttal Material (confidential), 11 October 2007 ("Prosecution Response").

⁴ Tharcisse Muvunyi's Reply to Prosecutor's Response to Tharcisse Muvunyi's Motion to Reconsider Holding a Sanctions Hearing After Production of Witness QY Testimony and Montreal Trip by Co-Counsel and Prosecutor's Motion to admit Rebuttal Material, 26 October 2007 ("Reply"). Because the Reply responded to a request for admission of rebuttal material made by the Prosecution in its Response, the Prosecution filed Prosecutor's Reply to Accused Tharcisse Muvunyi's Response to the Prosecutor's Motion to Admit Rebuttal Material, 30 October 2007 ("Prosecution Reply Regarding Rebuttal Material").

⁵ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Judgement and Sentence, 18 September 2006, ("Trial Judgement"), paras 531, 545. The Trial Judgement was pronounced on 12 September 2006, and the written Judgement was filed with the Registry on 18 September 2007.

⁶ Accused Tharcisse Muvunyi's Notice of Appeal, 12 October 2006, paras 3-14.

⁷ Prosecutor's Notice of Appeal and Motion for an Extension of Time within which to File Notice of Appeal, 17 October 2006.

⁸ Accused Tharcisse Muvunyi's Motion to Produce Testimony of Witness QY Pursuant to Rule 68 and for Sanctions, 7 June 2007 ("Previous Motion"), paras 3, 6, 8, 13. The Appeals Chamber notes that the Applicant was referring to the trial of Désiré Munyaneza who is being tried for war crimes in Montreal, Canada.

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whose testimony the Trial Chamber relied, in part, in convicting the Applicant for other inhumane acts as a crime against humanity.⁹ For these reasons, the Applicant previously requested, *inter alia*, that the Prosecution disclose any information in its possession implicating its staff in soliciting false evidence pursuant to Rule 68, sought sanctions against the Prosecution for its interference in the administration of justice, and requested a hearing.¹⁰ In dismissing the Previous Motion, the Appeals Chamber held that the Prosecution was in the process of addressing the allegations of misconduct and that, "at this stage, the Appeals Chamber is not convinced that the Applicant has established that any information of Prosecutorial misconduct is in fact in the possession of the Prosecution such as to warrant the Appeals Chamber granting the relief sought."¹¹ The Appeals Chamber also held that it was not persuaded that the Applicant had shown any bad faith on the part of the Prosecution in the discharge of its disclosure obligations.¹² It is on this basis that the Applicant challenges the Impugned Decision.

II. REQUEST FOR RECONSIDERATION

4. The Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice.¹³ Bearing this in mind, the Appeals Chamber will consider the alleged errors of law and miscarriages of justice advanced by the Applicant.

5. In the Motion, the Applicant submits that although Witness QY was the only witness the Prosecution presented in his case on the finding related to the ESO roadblock at the Arah Quarter, such reliance appears misplaced in light of her admission in a proceeding in Canada to giving false testimony in another case before the Tribunal.¹⁴ He points out that Co-Counsel, Abbe Jolles, traveled to Canada and "has confirmed that Witness QY, who testified for the Prosecution in the trial of the Accused and also testified in the trial of Desire Munyaneza [in Canada], admitted to testifying falsely in the Butare case."¹⁵ He argues that the false testimony was given "due to the insistence of the Prosecutor" and that the same Prosecutor also worked on his trial.¹⁶ The Applicant

⁹ Trial Judgement, paras 450, 456, 530.

¹⁰ Previous Motion, paras 9, 13, 14; Impugned Decision, para. 4.

¹¹ Impugned Decision, para. 7.

¹² Impugned Decision, para. 7.

¹³ See, e.g., *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 203 ("Kajelijeli Appeal Judgement").

¹⁴ Motion, paras 4, 5 and 8.

¹⁵ Motion, para. 6.

¹⁶ Motion, para. 6.

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requests a hearing on the Motion, arguing that it "is unlikely that the prosecutor will uncover misconduct on their part".¹⁷

6. In response the Prosecution submits that the Applicant's allegation of Prosecutorial misconduct "is a speculative and unsubstantiated attack on the overall conduct and character of the Prosecution counsel involved."¹⁸ It argues that the "Applicant has no concrete evidence of any wrongdoing in his trial" and adds that "his assertion ought to be disregarded on this basis alone."¹⁹

Discussion

7. The Appeals Chamber recalls that in the Impugned Decision, it held that it was not convinced that the Applicant had established that "any information of Prosecutorial misconduct is in fact in the possession of the Prosecution such as to warrant the Appeals Chamber granting the relief sought" or that bad faith on the part of the Prosecution had been shown.²⁰ In his vaguely phrased submissions, the Applicant merely repeats allegations made in the Previous Motion which were rejected by the Appeals Chamber, but fails to show how the Appeals Chamber's findings were erroneous or how reconsideration thereof would prevent an injustice.²¹ Moreover, the transcript of proceedings in the trial of Désiré Munyaneza provided by the Applicant does not suggest any misconduct on the part of the Prosecution in this case, nor does the witness therein recant her testimony in this case.

8. In addition, the Appeals Chamber considers that the Applicant has not put forward any convincing reasons justifying his position that written submissions are inadequate to put forward his arguments in relation to the Motion.²² Thus, the Appeals Chamber sees no error in denying a request to schedule an oral hearing for arguments on the Motion as the written filings suffice to enable it to reach an informed decision.

¹⁷ Motion, paras 12 and 14.

¹⁸ Response, para. 44.

¹⁹ Response, para. 44.

²⁰ Impugned Decision, para. 7.

²¹ Previous Motion, paras 3-6.

²² The Appeals Chamber notes that generally, the granting of an oral hearing is a matter for the discretion of the Chamber and may legitimately be regarded as unnecessary when the information before the Chamber is sufficient to enable it to reach an informed decision. *Prosecutor v. Mitar Rasević and Savo Todović*, Case No. IT-97-25/1-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision denying Savo Todović's Application for Provisional Release, 7 October 2005, para. 29; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, para. 17; *Prosecutor v. Momcilo Krajišnik*, Case No. IT-00-39-AR73.1, Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 25 April 2005, para. 4.

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9. The Appeals Chamber further notes that in his Reply, the Applicant submits as an annex a report from Professor Reyntjens which, in the Applicant's view, contains exculpatory material.²³ The Applicant claims that he did not obtain the copy of the report from the Prosecution, and that this is a further indication of bad faith on its part.²⁴ The Appeals Chamber notes that the Prosecution opposes this argument.²⁵ Because the report of Professor Reyntjens is not part of the record, the Appeals Chamber will not consider it.

10. On the basis of the foregoing, the Appeals Chamber finds that the Applicant has neither demonstrated that the Appeals Chamber's reasoning in the Impugned Decision was erroneous nor the necessity of its reconsideration to prevent an injustice.

III. REQUEST FOR ADMISSION OF ADDITIONAL EVIDENCE

11. The Applicant furthermore requests that Witness QY's testimony in Desire Munyaneza's trial be admitted as additional evidence.²⁶ The Applicant argues, in addition to his preceding arguments, that as the testimony of Witness QY was essential to the finding of his guilt and that Witness QY was the only witness the Prosecution presented in relation to the finding based on the ESO roadblock at the Arab Quarter, its recantation might cause a reasonable fact finder to reverse the finding of guilt on that charge.²⁷ The Applicant also asserts that Witness QY's testimony in Canada "is inconsistent and contradicts her testimony" given in his case.²⁸ He states, without explanation, that the proffered evidence "could very well have been a decisive factor in the finding by the Trial Chamber that the Accused addressed members of the Hutu population in Gikongo and called for the population to kill Tutsis."²⁹ The Applicant adds that in these circumstances he did not receive a fair trial.³⁰

12. In response, the Prosecution argues as a preliminary issue that the request for the admission of additional evidence was filed out of time.³¹ The Prosecution essentially points out that the Applicant waited two and a half months before filing the Motion, yet fails to demonstrate good cause for this delay.³²

²³ Reply, para. 24.

²⁴ Reply, paras 23, 24.

²⁵ Prosecution Reply Regarding Rebuttal Material, paras 9-15.

²⁶ Motion, para. 16.

²⁷ Motion, paras 5 and 8.

²⁸ Motion, para. 7.

²⁹ Motion, para. 10.

³⁰ Motion, para. 6.

³¹ Response, paras 9-12.

³² Response, paras 9 and 10. The Appeals Chamber notes that the Applicant does not respond to this submission in his Reply.

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13. Regarding whether the Motion meets the test for admission of additional evidence on appeal, the Prosecution submits that the proffered evidence of Witness QY could not have affected the verdict and puts forward three arguments in support of this contention. First, the Prosecution argues that the proffered evidence does not relate to a fact or issue litigated at the Applicant's trial.³³ Second, it submits that the Trial Chamber also relied on witnesses other than Witness QY to make a finding of fact concerning inhumane acts meted out by ESO soldiers specifically at the Arab Quarter roadblock and relied on other witnesses who testified to other inhumane acts committed by ESO soldiers in other locations.³⁴ Lastly, it submits that the Applicant has offered no concrete evidence to support the contention that he did not receive a fair trial.³⁵ In addition, the Prosecution seeks the admission as rebuttal material of a solemn declaration sworn by Prosecution Counsel Adesola Adeboyejo to be considered in the context of the request for admission of additional evidence.³⁶

Discussion

14. As a preliminary matter, the Appeals Chamber first considers the Prosecution's argument as to the late filing of the Motion. The deadline for filing a motion under Rule 115 Motion in this case expired on 8 June 2007.³⁷ Therefore pursuant to Rule 115(A) of the Rules, any motion for admission of additional evidence filed at the present stage of proceedings is only admissible if the requesting party shows good cause for the late filing. The Appeals Chamber recalls that "the good cause requirement obliges the moving party to demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in question as soon as possible after it became aware of the existence of the evidence sought to be admitted".³⁸

³³ Response, para. 8, 16-31.

³⁴ Response, paras 8, 32-36.

³⁵ Response, para. 8.

³⁶ The Solemn Declaration of Adesola Adeboyejo is attached to the Response as Annex B. The Prosecution also attaches a memorandum from the Chief of the Appeals and Legal Advisory Division of the Prosecution, Mr. James Stewart, addressed to the Applicant's Lead Counsel, dated 22 June 2007; A letter from Larry Johnson, Assistant Secretary-General in charge of the Office of Legal Affairs, to Ms. Fall at the International Tribunal's Registry, dated 4 October 2007; and an excerpt of the Prosecutor's Regulation No.2 (1999) entitled Standards of Professional Conduct for Prosecution Counsel.

³⁷ The Appeals Chamber notes that the Applicant filed "Accused Tharcisse Muvunyi's Reply to Prosecutor's Respondent's Brief" on 9 May 2007. Therefore the deadline for filing a Rule 115 motion was 8 June 2007, being 30 days from this date.

³⁸ Nahimana Decision, 8 December 2006, para. 16; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Prosecution's Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 17 December 2004, p. 2; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Naletilić's Motion for Leave to File His Second Rule 115 Motion to Present Additional Evidence Pursuant to Rule 115, 27 January 2005, p. 3.

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15. Although Witness QY's testimony in Canada was partly given in closed session, the Prosecution disclosed it to the Applicant on 22 June 2007.³⁹ However, the Appeals Chamber observes that the Applicant did not submit the transcript of 26 March 2007 until 11 September 2007, that is, about two and a half months after it was disclosed to him. The Appeals Chamber agrees with the Prosecution that there appears to have been a delay in the filing of the Motion. However, even though the Applicant has not tried to explain the delay, the Appeals Chamber finds that good cause has been shown in view of the circumstances of this case, in particular considering that the transcripts were disclosed to the Applicant after the expiration of the time-limit for filing a Rule 115 motion. The Appeals Chamber reminds the parties, however, of their obligations when bringing a motion under Rule 115 of the Rules, including the requirement to specify in detail why time-limits were not observed.

16. 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 Trial Chamber and which is additional evidence of a fact or issue litigated at trial.⁴⁰ 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."⁴¹ 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.

17. 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

³⁹ Decision on Motion for Disclosure, para. 6; Disclosure of the Transcripts of the Testimony of Witness QY Given in the Trial of Désiré Munyaneza in Canada, pursuant to Rule 75(F)(ii) and Rule 68, 22 June 2007. The Prosecution disclosed the transcripts to the Applicant's counsel on a compact disk. The Appeals Chamber has not received nor reviewed the contents of the disclosure.

⁴⁰ Decision on Request to Admit Additional Evidence, 27 April 2007 ("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)").

⁴¹ 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 for Admission of Additional Evidence, 10 December 2004, para. 9 (internal references omitted) ("*Ntagerura et al.* Appeal Decision").

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diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party establishes that its exclusion *would* amount to a miscarriage of justice.⁴² That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.⁴³

18. The Applicant requests the Appeals Chamber to admit "the revised testimony" of Witness QY and attaches to his Motion as Annex A solely the transcribed part of Witness QY's testimony given in Canada on 26 March 2007. However, the Applicant has not provided any reference to the proffered additional evidence that would substantiate his claim that Witness QY allegedly admitted to giving false testimony in the *Nyiramasuhuko et al.* trial at the insistence of a Prosecution counsel. The Appeals Chamber observes that, in the tendered transcribed part of Witness QY's testimony given on 26 March 2007, Witness QY did not mention any proceedings before the Tribunal or that she was told to testify falsely. Accordingly, the Appeals Chamber finds that the Applicant has not shown that the proposed additional evidence is relevant in this respect. Similarly, the Applicant has failed to develop his argument that Witness QY's testimony in Canada is inconsistent and contradicts her testimony in the case before us. While the Motion refers in a footnote to a portion of the testimony dealing with an incident at a roadblock,⁴⁴ it is not apparent what the alleged inconsistency or contradiction is and how the additional evidence could have been a decisive factor in reaching the decision at trial. As such, it does not meet the requirements of Rule 115(B) of the Rules for admission of additional evidence on appeal.


IV. CONCLUSION

19. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Applicant's requests for reconsideration and admission of additional evidence and regards the Prosecution's request for admission of rebuttal material as moot.

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

Done this 23th day of November 2007,
The Hague,
The Netherlands.




Judge Fausto Pocar
Presiding

⁴² *Muvunyi* First Additional Evidence Decision, para. 7; *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 6 (citing cases).

⁴³ *Muvunyi* First Additional Evidence Decision, para. 7; *Nahimana et al.* Rule 115 Decision (8 December 2006), para. 6.

⁴⁴ See footnote 10 at para. 11 of the Motion.

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