



UNITED NATIONS
NATIONS UNIES

ICTR-99-50-T
23-07-2008
(28112-28109)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

28112
m

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 23 July 2008

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

Case No. ICTR-99-50-T

2008 JUL 23 P 3:29
JUDICIAL RECORDS/ARCHIVES
RECEIVED

DECISION ON JUSTIN MUGENZI'S REQUEST FOR DISCLOSURE ORDER

Rule 68(A) of the Rules of Procedure and Evidence

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justus Bwonwonga
Mr. Elvis Bazawule

Mr. Shyamlal Rajapaksa
Mr. Olivier De Schutter
Mr. Kartik Murukutla
Ms. Ndeye Marie Ka

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Andrea Valdivia for **Casimir Bizimungu**
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**
Mr. Michel Croteau and Mr. Philippe Larochelle for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Cynthia Cline for **Prosper Mugiraneza**

28111

INTRODUCTION

1. Prosecution Expert Witness, Professor Deo Mbonyinkebe, testified before the Trial Chamber between 2 and 12 May 2005 on the material contained within his Report.¹ Professor Mbonyinkebe's Report was based, in part, upon the data obtained from some sixty respondents who were either interviewed by the Professor, or who completed questionnaires. Neither the questions asked of the respondents, nor the answers they gave, were annexed to the Professor's Report.

2. During Professor Mbonyinkebe's testimony, Defence Counsel for Justin Mugenzi, Mr. Gumpert, asked the Witness if he would provide the Defence with the "raw material" used to produce his Report – being the sixty questionnaires completed by the respondents.² The Witness undertook to provide them to the Prosecutor after the conclusion of his evidence. This was, in fact, never done.

3. During the presentation of the defence case for Prosper Mugiraneza, Defence Counsel for Justin Mugenzi, Mr. Kirk, again raised the issue of the original request for the provision of the questionnaires used in Professor Mbonyinkebe's Report, in anticipation of the testimony of Defence Expert Witness Dr. Mark McPhail.³ Counsel expressed the desire to use this material in his cross-examination of Dr. McPhail. The Chamber noted that the Prosecution was not under any disclosure obligation, as such, to provide the material;⁴ however, in order to facilitate the proceedings – notably, the cross-examination of Dr. McPhail – it asked the Prosecution to use its best efforts to obtain the said material.⁵ The material was not obtained, and Mr. Kirk cross-examined Dr. McPhail without having recourse to the material.

4. The Defence for Justin Mugenzi now moves the Trial Chamber to order the disclosure of the questionnaires, and any other relevant material, used by Prosecution Expert Witness Professor Mbonyinkebe in the preparation of his Report.⁶

¹ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-98-50-T, T. 2 May 2005 – 12 May 2005. See also Prosecution Exhibit P. 95.

² T. 3 May 2005, pp. 72-74.

³ T. 21 April 2008, p. 45; and T. 22 April 2008, p. 43.

⁴ T. 22 April 2008, p. 43, lines 18 and 24.

⁵ T. 21 April 2008, p. 45; and 22 April 2008, p. 43, line 32 – Madam President "... we'll request the Prosecutor to make all efforts to get hold of those materials. And if you don't get it, then you don't get it." During the course of these discussions, the Prosecutor, Mr. Ng'arua, advised the Chamber that the Prosecution had made a number of attempts to contact Professor Mbonyinkebe, and to obtain the material, but that it had been unsuccessful in these attempts – see T. 22 April 2008, p. 40, line 29 – "We have made every effort, so far, to get this material; we have written to Kigali and we have sent investigators, but we've had problems in the past, and especially after 2005, to get in touch with Mbonyinkebe. We actually don't even know whether he has gone back to Zaire, or to Congo, or whether he is still in Kigali. We've had a very big difficulty."

⁶ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-98-50-T, "Justin Mugenzi's Motion for Disclosure Order", filed on 12 May 2008 ("Motion"). The Motion is brought pursuant to Rule 68 (A) of the Rules of Procedure and Evidence ("Rules").



5. The Prosecution submits that the Motion should be dismissed, but submits that it is making every effort to locate Professor Mbonyinkebe. Further, it undertakes to inform the Trial Chamber, and the Defence, as soon as Professor Mbonyinkebe has been located and the material is in their custody.⁷

DISCUSSION

6. Rule 68 (A) of the Rules provides that “[t]he Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence.” Pursuant to Rule 68 (E), the Prosecution’s disclosure obligations under Rule 68 (A) are ongoing.⁸

7. According to the established jurisprudence of the Tribunal, where the Defence claims that the Prosecutor’s obligation under Rule 68 has been violated, it must: (i) define the material sought with reasonable specificity; (ii) establish that the material is in the custody and control of the Prosecution; and (iii) present a *prima facie* case that the material is exculpatory or potentially exculpatory. Information is exculpatory only if it tends to disprove a material fact alleged against the Accused, or if it undermines the credibility of evidence intended to prove those facts. This consideration depends on the nature of the charges and evidence heard against the Accused.⁹

8. While the Chamber considers that the Defence has defined the material sought with the requisite specificity, the Chamber notes that the Prosecution has consistently maintained that the material is not in its custody or control. The Chamber has already observed that the Prosecution is not under an obligation to disclose the material.¹⁰ Furthermore, the Prosecution has consistently maintained – both in oral submissions before the Chamber, and in its written Response – that it is making all efforts to contact the Witness, and to obtain the questionnaires. At this stage, the Chamber considers that the criteria for an order pursuant to Rule 68 (A) of the Rules has not been satisfied.

⁷ *Bizimungu et al.*, “Prosecutor’s Response to Justin Mugenzi’s Motion for Disclosure Order,” filed on 12 May 2008 (“Response”), para. 5.

⁸ Rule 68 (E) states: “Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.” See *Bizimungu et al.*, Decision on Prosper Mugiraneza’s Motion for Records of all Payments made directly or indirectly to Witness D, 18 February 2008, para. 4.

⁹ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, para. 4; and *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions against the Prosecution, para. 6; *Bizimungu et al.*, Decision on Prosper Mugiraneza’s Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI (TC), 14 September 2004, para. 11; see also *Bizimungu et al.*, Decision on Prosper Mugiraneza’s Motion for Records of all Payments Made Directly or Indirectly to Witness D, 18 February 2008, para. 4; and see also *Bizimungu et al.*, Decision on Jerome-Clement Bicamumpaka’s Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA, 21 April 2008, para. 9.

¹⁰ See para. 3 above, and footnote 4.



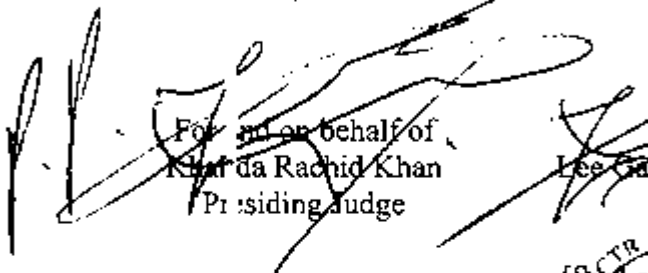
28109

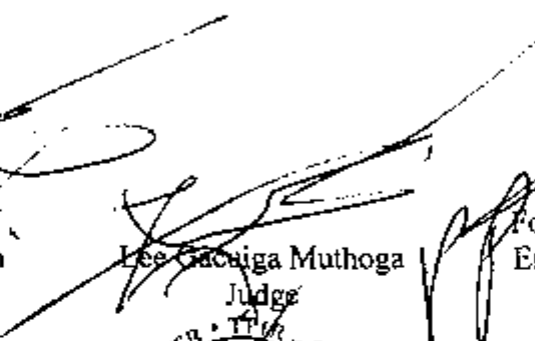
FOR THESE REASONS, the Chamber

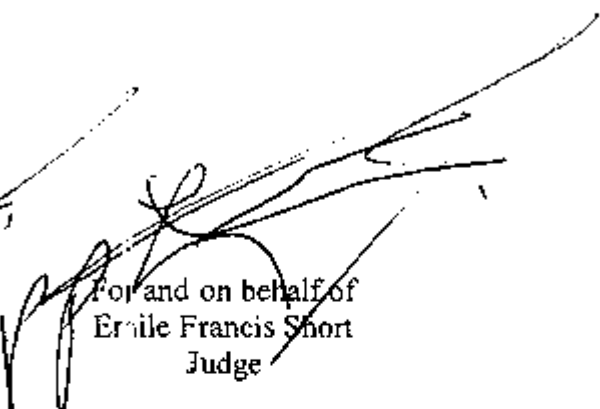
DENIES the Defence Motion in its entirety; and

REMINDS the Prosecution to continue to use its best efforts to contact Professor Mbonyinkebe, and to facilitate the provision of the requested material to the Defence, if and when it comes into the Prosecution's custody.

Arusha, 23 July 2008


For and on behalf of
Khafda Rachid Khan
Presiding Judge


Lee Gaciga Muthoga
Judge


For and on behalf of
Ernie Francis Short
Judge

