



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

28143

ICTR-99-50-T
23-07-2008
(28143-28139)

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

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**DECISION ON JUSTIN MUGENZI'S MOTION TO ADMIT INTO EVIDENCE THE
TRANSCRIPTS FROM THE *MUNYAKAZI* REFERRAL HEARING**

Rule 89 (C) 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
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 Laroche for Jérôme-Clément Bicamumpaka
Mr. Tom Moran and Ms. Cynthia Cline for Prosper Mugiraneza

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INTRODUCTION

1. The Mugenzi Defence seeks the admission into evidence of the final transcripts from the case of *Prosecutor v. Yussuf Munyakazi*.¹ On 24 April 2008, the *Munyakazi* Referral Bench heard submissions from the parties in that case on the issue of whether or not the case should be referred to the Republic of Rwanda for prosecution.² The international non-governmental organisation, Human Rights Watch ("HRW"), appeared before the Referral Bench as *amicus curiae* in those proceedings. During the hearing, the Prosecutor made certain submissions, criticising the methodology and conclusions of the *amicus curiae* brief submitted by HRW.³ The brief was based upon research supervised by Dr. Alison Des Forges, a Prosecution Expert Witness in the *Bizimungu et al* case.

2. The Defence submits that the Prosecutor's criticisms of Des Forges' research, as expressed in the *Munyakazi* hearing, can also be made of Des Forges' evidence in *Bizimungu et al* and thus, are relevant to the larger issue of her credibility. The Motion focuses primarily on the contradictory position of the Office of the Prosecutor, arguing that it would be an abuse of power for the Prosecutor in *Bizimungu et al* to refute the criticisms voiced by his colleague in *Munyakazi*.⁴ The Defence for Dr. Casimir Bizimungu filed a motion in support of Justin Mugenzi's request.⁵

3. The Prosecution opposes the Motion in its entirety. The Prosecution argues that the transcript of the referral hearing is not relevant to Mugenzi's case. It submits that the criticisms voiced in *Munyakazi* are not "probative of the guilt of the accused" but instead, "are merely submissions on matters of law designed to persuade a Trial Chamber" and as such, are not admissible evidence.⁶

BACKGROUND

The Role of Dr. Des Forges within Bizimungu et al and the Munyakazi Referral Hearing

4. On 31 May 2005, Dr. Alison Des Forges appeared as a witness for the Prosecution in *Bizimungu et al*. Her testimony continued until 23 June 2005. During this period, Des Forges'

¹ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Justin Mugenzi's Motion to Admit into Evidence the Transcripts from the *Munyakazi* Referral Hearing", filed on 13 May 2008, para. 21. ("Motion"). The Motion is brought pursuant to Rule 89 (C) of the Rules. See also *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis.

² An application for referral to a State is made pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence.

³ During his submission, Mr. Obote-Odora stated that the report "fails to provide the following information, the qualifications, experience, and expertise of Human Rights Watch researchers. It fails to provide the methodology used by Human Rights Watch researchers. It fails to provide the criteria used in identifying and selecting witnesses for interviews. It fails to provide qualifications, experience and political affiliation of witnesses selected for interview. It also fails, Your Honour, to provide human rights reports covering this period." See T. 24 April 2008 p. 9.

⁴ The Defence submits that the transcript must be admitted "in order for the Chamber to make a proper assessment of the integrity, or otherwise, of the Prosecutor's position in the instant case." See *Bizimungu et al.* Motion, para. 21.

⁵ *Id.*, "Réponses et Arguments de la Défense du Dr. Casimir Bizimungu à la Requete Intitulée: «Justin Mugenzi's Motion to Admit into Evidence the Transcripts from the Munyakazi Referral Hearing, »", filed on 19 May 2008.

⁶ *Id.*, "Prosecution's Response to Justin Mugenzi's Motion to Admit into Evidence the Transcripts from the *Munyakazi* Referral Hearing", filed on 19 April 2008, para. 21, ("Response").

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book, *Leave None to Tell the Story*, and a report entitled "Organization of the Civilian Self-Defence," based upon research which she supervised, were admitted into evidence.⁷

5. Counsel for Justin Mugenzi, Prosper Mugiraneza and Dr. Casimir Bizimungu cross-examined the Witness. On 31 May 2005, the Defence for Justin Mugenzi submitted an oral motion, requesting that the Chamber exclude any portions of Dr. Des Forges' testimony for which she would not reveal her sources.⁸ In an oral ruling delivered on 14 June 2005, the Chamber denied the motion.⁹ In a subsequent written decision, the Chamber explained its ruling by noting that non-disclosure of sources affected the weight, rather than the admissibility, of Des Forges' testimony.¹⁰

6. The *in bis* referral hearing for the *Munyakazi* case was held on 24 April 2008. HRW submitted an *amicus curiae* brief, which outlined perceived failings in the Rwandan judicial system. The report was based on research supervised by Dr. Alison Des Forges. During the hearing, the Prosecutor questioned the brief, criticising the methodology employed by HRW and the conclusions reached within the report.¹¹

7. In the *Bizimungu et al* case, the Defence for Prosper Mugiraneza called Dr. Mark Lawrence McPhail as an expert witness on 24 April 2008. During the examination-in-chief of the Witness, Counsel for Mugiraneza questioned Dr. McPhail about the evidence submitted by Dr. Des Forges in 2005, focusing primarily on her research methodology.¹² This line of questioning was continued by Counsel for Justin Mugenzi. Within his cross-examination, Counsel quoted a number of the Prosecutor's submissions in the *Munyakazi* referral hearing.¹³ Following an objection from the Prosecution, the Chamber ruled that the Defence could not read from a draft transcript of the hearing, or refer to statements made by counsel speaking from the bar.¹⁴ The Defence for Justin Mugenzi then filed the instant Motion.

DISCUSSION

Applicable Law

8. Under Rule 89 (C), the Chamber has broad discretion to admit any evidence which it deems to be relevant and of probative value.¹⁵ The party moving for the admission of the documents bears the burden of establishing *prima facie* that the document is relevant and has probative value.¹⁶

⁷ T. 31 May 2005 p. 35.

⁸ T. 31 May 2005 p. 94.

⁹ T. 14 June 2005 p. 58.

¹⁰ *Bizimungu et al*, Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges, 2 September 2005, para. 32.

¹¹ T. 24 April 2008 pp. 7, 8, 9, 10.

¹² T. 24 April 2008.

¹³ T. 24 April 2008 pp. 77, 78.

¹⁴ T. 24 April 2008 pp. 78, 79.

¹⁵ Rule 89 (C), Rules of Procedure and Evidence. *Bizimungu et al*, Decision on Defence Motions to Admit Church Records and School Records, (Rule 89 (C)) (TC), 2 June 2008 ("*Bizimungu* Decision"), para. 9, (citations omitted).

¹⁶ *Bizimungu* Decision, para. 9.

9. Evidence will be considered relevant, for the purposes of Rule 89 (C), if it can be shown that a connection exists between the evidence and proof of an allegation sufficiently pleaded in the indictment.¹⁷

10. Evidence tendered before the Chamber has probative value if it tends to prove or disprove an issue and has sufficient *indicia* of reliability.¹⁸ The requirements for reliability are low at the initial stage of admissibility and the moving party need only demonstrate "the beginning of proof that evidence is reliable."¹⁹

11. Finally, it has been held that any information related to the testimony or credibility of a witness should be treated as relevant and probative.²⁰

Have the requirements under Rule 89 (C) been met with respect to the final transcripts?

12. The Chamber finds that the transcript of the *Munyakazi* referral hearing lacks the necessary probative value to be admitted under Rule 89 (C).

13. Although there is Trial Chamber jurisprudence which supports a presumption in favour of admission in circumstances where the material sought to be admitted concerns a witness's credibility, the Chamber finds that there are significant considerations to outweigh any such presumption in this case.

14. The Chamber finds that the actual criticisms in the *Munyakazi* referral hearing do not tend to prove or disprove the issue of Des Forges' credibility in *Bizimungu et al.* The Prosecution's criticisms of Des Forges in the *Munyakazi* case were directed towards the methodology employed by HRW and its researchers in that case. Consequently, the criticisms shed no light upon the value or credibility of her testimony in a separate and unrelated case.²¹ The Chamber notes, in particular, that evidence sought to be admitted comprises oral submissions made from the bar table.²²

15. The Chamber also notes that the Defence seeks to attack the two contrasting positions taken by the Prosecution in relation to Des Forges' credibility. This is not relevant to the issue of Des Forges' credibility. While disparities within an expert witness' testimony in two separate cases may be relevant, inconsistencies in Prosecution submissions is not.

16. The Chamber finds that the Defence has failed to make a *prima facie* showing of the probative value of the material sought to be admitted.

¹⁷ *Id.*, para.10.

¹⁸ *Id.*, para.10.

¹⁹ *Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, para. 7.

²⁰ *Prosecutor v. Miroslav Kvocka et al.*, Case No. IT-98-30/1, Decision on Defence Motion to Introduce Exhibit Evidence, 17 April 2001, ("*Kvocka* decision").

²¹ During the Prosecution's oral submission, Mr. Jallow and Mr. Obote-Odora only referred to Des Forges once, noting simply that she had supervised the contested research. See T. 24 April 2008 p. 9.

²² The Chamber previously reached this conclusion during its oral ruling on the *Munyakazi* transcripts on 24 April 2008. See T. 24 April 2008 pp. 78, 79.



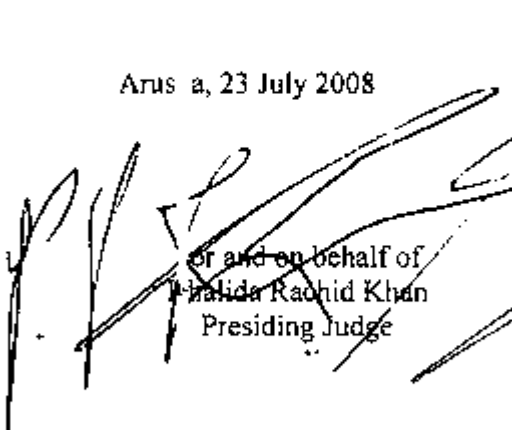
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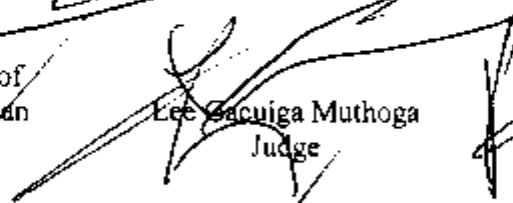
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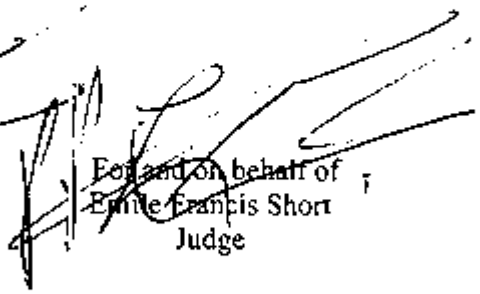
THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 23 July 2008


For and on behalf of
Fatima Rashid Khan
Presiding Judge


Lee Sacuiga Muthoga
Judge


For and on behalf of
Emile Francis Short
Judge

