



UNITED NATIONS
NATIONS UNIES

ICTR-99-50-T
03-11-2008
(29473-29470)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 3 November 2008

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

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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Case No. ICTR-99-50-T

**DECISION ON JUSTIN MUGENZI'S SECOND MOTION FOR FORMAL
DISCLOSURE AND FOR LEAVE TO REOPEN HIS DEFENCE**

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
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Mr. Elvis Bazawule
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Mr. Kartik Murukutla
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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 Bicamumpaka
Mr. Tom Moran and Ms. Cynthia Cline for Prosper Mugiraneza

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29472

INTRODUCTION

1. The Defence for Justin Mugenzi (the "Defence") recently came into possession of seven redacted witness statements (the "Statements") that the Prosecutor, it is alleged, inappropriately failed to disclose during the course of this trial. The Defence asserts that the Statements are all "made by former members of the RPF either personally concerned in the infiltration of Government held areas in 1994 or with personal knowledge of the activities of others in so doing."¹
2. On 14 October 2008, the Defence moved for an order directing the Prosecutor to formally disclose the Statements and permitting the Defence to reopen its case in order to call some or all of the relevant witnesses.²
3. The Prosecutor objects to the Motion, arguing, *inter alia*, that evidence of RPF infiltration is already before the Chamber and therefore the Defence has failed to demonstrate any exceptional circumstances that would justify reopening Mugenzi's case.³
4. This is the second time the Defence has sought leave to reopen its case; on 10 June 2008, the Chamber denied a similar motion to reopen based on the disclosure of four statements detailing RPF activities in Government held territories.⁴ The Chamber found that the statements were not exculpatory under Rule 68 (A) of the Rules of Procedure and Evidence.⁵ The Chamber further noted that the Defence failed to "show how [evidence of possible commissions of offences by the RPF] would tend to disprove material facts alleged against Mr. Mugenzi, or undermine the credibility of the evidence intended to prove those facts."⁶

DISCUSSION

Request to Reopen Mugenzi's Defence

5. According to the jurisprudence of the Tribunal, a Trial Chamber may order a case to be reopened only in exceptional circumstances.⁷

¹ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Justin Mugenzi's Motion for Formal Disclosure and for Leave to Reopen his Defence", filed by the Defence for Justin Mugenzi on 14 October 2008, para. 11 (the "Motion").

² *Id.*, para. 16.

³ "Prosecutor's Response to Justin Mugenzi's Motion for Formal Disclosure and Leave to Reopen his Defence of 14 October 2008", filed by the Prosecutor on 17 October 2008, paras. 6, 7 (the "Prosecutor's Response").

⁴ *Bizimungu et al.*, Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence (TC), filed on 10 June 2008.

⁵ *Id.*, para. 20.

⁶ *Id.*, para. 22.

⁷ See *Bizimungu et al.*, Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence", 10 June 2008, para. 20; *Prosecutor v. Delalic et al.*, Case No: IT-96-21-T, Judgement (AC), 20 February 2001, para. 290; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, "Decision on the Prosecution Joint Motion for re-opening its Case and for reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-link", 16 November 2006, paras. 15, 16; *Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-T, "Decision on Defence Motion in Order to Admit into Evidence the Certified Copy Conform to the Original of the Extrajudicial



29471

6. The Defence asserts that such exceptional circumstances exist here because the Statements, which allegedly speak to RPF infiltration in Government controlled areas in 1994, are necessary for the Chamber to consider in adjudicating the Accused's liability for Direct and Public Incitement of Genocide.⁸ According to the Defence, the Prosecutor's case for public incitement is based, in material part, on the theory that Government speakers used "code words" in making public speeches, such that otherwise innocuous words, including "enemy" or "accomplices", would be understood by listeners to have a far more nefarious meaning, namely "Tutsis".⁹ The Defence disputes this interpretation, arguing instead that Government leaders, when using such terms, were in fact referring to "members of the population, and to an even greater extent infiltrated members of the RPF, who were pursuing a covert war behind enemy lines, and who could properly be described as the 'enemy' or 'accomplices'".¹⁰ The Defence submits that in order for the Chamber to determine whether or not to accept the Prosecutor's "code word" theory for public incitement, it must have before it evidence on whether the RPF had, in fact, secretly infiltrated Government territories.¹¹ The Statements are said to evidence this fact.

7. The Prosecutor objects, arguing that the Statements do not differ in substance or content from the testimony already given by several witnesses. Since evidence of RPF infiltration is already before the Chamber, the Prosecutor asserts that the uncovering of these additional statements cannot represent "exceptional circumstances" which would justify the reopening of Mugenzi's defence.¹²

8. The Chamber recalls that several witnesses, both from the Prosecution¹³ and Defence,¹⁴ have already testified to the fact, or accepted during the course of their testimony as a fact, that there were RPF infiltrators in Government controlled areas of Rwanda during 1994. The Chamber therefore agrees with the Prosecutor that this allegation, to the extent that it is relevant, is already part of the trial record.

9. As the Statements do not present any previously unknown, relevant, and probative factual allegations, the Chamber thus finds that their only marginal value is to further assist the Chamber in assessing the credibility of the testimony and evidence already presented. This is far from exceptional, especially considering that both Prosecution and Defence witnesses have, at the very least, conceded the fact which the Statements allegedly confirm. At this very late stage in the proceedings, the Chamber finds that the Defence has not demonstrated any exceptional

Declaration of Prosecution Witnesses", 14 August 2007, para. 7; *Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Nyiramasuhuko's Motion for Disclosure of Documents under Rule 68 and for Re-Opening of her Case", 29 April 2008, para. 49.

⁸ Motion, para. 8.

⁹ *Id.*, para. 2.

¹⁰ *Id.*, para. 4.

¹¹ *Id.*, para. 6.

¹² Prosecutor's Response, paras. 6-7.

¹³ See, e.g., Alison Des Forges, Transcript of 2 June 2005, pp. 33-34; Alison Des Forges, Transcript of 16 June 2005, pp. 66, 72-73; Alison Des Forges, Transcript of 8 June 2005, pp. 42-43.

¹⁴ See, e.g., Justin Mugenzi, Transcript of 9 November 2005, pp. 66-72; Justin Mugenzi, Transcript of 15 November 2005, pp. 43, 46-48, 58-59; Justin Mugenzi, Transcript of 10 November 2005, pp. 44-45; Emmanuel Ndindabahizi, Transcript of 1 May 2007, p. 56; Dr. Ruppel, Transcript of 3 October 2006, p. 8.



29470

circumstances that would warrant reopening of its case. This part of the Motion is therefore denied.

Request for Formal Disclosure

10. In the Motion, the Defence also seeks formal disclosure of the Statements.¹⁵ However, the Defence fails to put forth any statutory or legal basis under which such disclosure would be justified.¹⁶ The Motion is completely devoid of any discussion of the standards to be applied in considering a motion for formal disclosure and the application of those standards to the facts in this case.

11. The Prosecutor, while objecting to the Motion in its entirety, similarly fails to address the legal standards and factual issues the Chamber must consider in assessing the formal disclosure request.

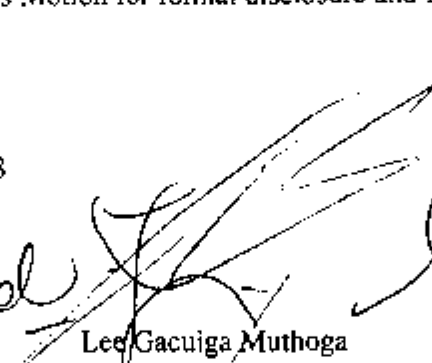
12. As the Defence has failed to put forth the necessary legal and factual arguments for the Chamber to adjudicate the request for formal disclosure, the Chamber finds that it is not in a position to decide the merits of the dispute. The Motion is therefore denied.


FOR THESE REASONS, the Chamber

DENIES Justin Mugenzi's Motion for formal disclosure and for leave to reopen his defence in its entirety.

Arusha, 3 November 2008


Khalida Raafiq Khan
Presiding Judge


Lee Gacuga Muthoga
Judge


For and on behalf of
Emile Francis Short
Judge



¹⁵ Motion, para. 16.

¹⁶ The Motion cites neither the Rules of Procedure and Evidence nor any jurisprudence of the Tribunal as a legal basis for the formal disclosure.