



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

31558
dh

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 4 February 2009

ICTR-99-50-T
04.02.2009
(31558-31555)

THE PROSECUTOR

v.

CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

2009 FEB - 4 P. 51
JUDICIAL RECORDS/ARCHIVES
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DECISION ON BICAMUMPAKA'S URGENT MOTION FOR DISCLOSURE
OF EXCULPATORY MATERIAL

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
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**

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INTRODUCTION

1. On 17 October 2007, Defence Witness OK-3 testified before the Trial Chamber on meetings which took place in 2003, during his detention in a Rwandan prison. According to Witness OK-3, a member of the Tribunal's Prosecution team was present at one of the meetings. Witness OK-3 testified that during these meetings, despite maintaining that he had never met Jérôme-Clément Bicomumpaka, he was told that he should admit to having held meetings with Bicomumpaka in 1994.¹ During cross-examination of Witness OK-3 by Prosecution counsel Mr. Bazawule ("Counsel"), Witness OK-3 identified Counsel as the member of the Prosecution team present during one of the meetings.²
2. On 28 November 2008, the Defence for Bicomumpaka ("Defence") filed a motion requesting that the Prosecution disclose, under Rule 68 (A) of the Rules, investigator's notes of any meetings with Witness OK-3.³ The Defence submits that the Prosecutor cannot claim privilege under Rule 70 because the investigator's notes are exculpatory material pursuant to Rule 68.⁴ The Defence further requests that the Prosecutor be ordered to certify that all exculpatory material relating to Witness OK-3 has been disclosed to the Defence.
3. The Prosecution filed a response on 3 December 2008 opposing the Motion.⁵ The Prosecution submits that it does not have any investigators' notes relating to Witness OK-3 and that Rule 68 (A) does not apply to the Defence request.

DISCUSSION

Law on Disclosure Under Rule 68

4. 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.⁶

¹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I, T. 17 October 2007, pp. 33, 34, and 36.

² Although Counsel denied having met Witness OK-3 prior to that day in court, the Chamber notes that Counsel did not testify and his response will not be treated by the Chamber as evidence. *Bizimungu et al.*, T. 17 October 2007, p. 46.

³ *Bizimungu et al.*, Bicomumpaka's Urgent Motion for Disclosure of Exculpatory Material, 28 November 2008 ("Motion").

⁴ Rule 70 sets out matters which are not subject to disclosure by the Prosecution and does not include material which falls under Rule 68. *See also Bizimungu et al.*, Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Witness Fidele Uwizeye for Further Cross Examination, 7 October 2009, para. 10.

⁵ *Bizimungu et al.*, Prosecutor's Response to Bicomumpaka's Urgent Motion for Disclosure of Exculpatory Material, 3 December 2008 ("Prosecutor's Response").

⁶ 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 also Bizimungu et al.*,



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5. According to the established jurisprudence of the Tribunal, where the Defence claims that the Prosecution has violated its obligation under Rule 68, 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.⁷

Should the Chamber Order Disclosure?

6. The Chamber considers that the Defence has defined the material sought with the requisite specificity. However, the Prosecution submits that the material is not in its custody or control. The Chamber recalls that the Prosecution is presumed to have diligently, and in good faith, discharged its obligation to disclose any exculpatory information,⁸ and that if the Defence claims that the Prosecution has not met its obligation under Rule 68, the onus is on the Defence to establish that the material requested exists, and is in the custody or control of the Prosecution.⁹ The Chamber finds that the Defence has not established that the material requested exists, and is in the custody or control of the Prosecution and the Chamber will, therefore, not make an order for disclosure of material which may not exist.¹⁰

7. Accordingly, the Chamber finds that the second limb of the criteria for establishing that the Prosecution is in breach of its disclosure obligations under Rule 68 (A), has not been met. The Chamber, therefore, need not proceed to consider whether the Defence has established a *prima facie* case that the material requested is exculpatory or potentially exculpatory.

8. In view of the Chamber's finding in this instance, that the Defence has not established that the Prosecution has violated its disclosure obligations, the Chamber does not consider it necessary to order the Prosecution to certify that all exculpatory material relating to Witness

Decision on Prosper Mugiraneza's Motion for Records of all Payments made directly or indirectly to Witness D, 18 February 2008, para. 4.

⁷ *Bizimungu et al.*, Decision on Justin Mugenzi's Request for Disclosure Order, 23 July 2008, para. 7; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006, para. 4; *The 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.

⁸ *Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17; and *Bizimungu et al.*, Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence, 10 June 2008, paras. 23-24.

⁹ *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A, Judgment (AC), 23 May 2005, para. 262; and *Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17.

¹⁰ *See for example, Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73.6, Oral Decision on Stay of Proceedings, 16 February 2006 (upheld by the Appeal Chamber's *Decision on Joseph Nzirorera's Interlocutory Appeal* (AC), 28 April 2006).



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OK-3 has been disclosed to the Defence. The Chamber, however, reminds the Prosecution of its continuing obligation under Rule 68 (E) of the Rules.

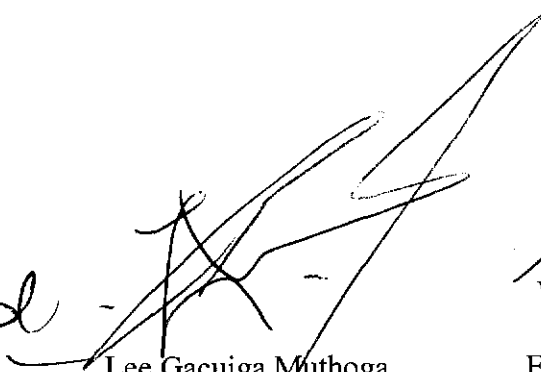
FOR THESE REASONS, the Chamber

DENIES the Defence Motion.

Arusha, 4 February 2009



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



With the consent, and
on behalf of
Emile Francis Short
Judge

[Seal of the Tribunal]

