



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-99-50-T
9-02-2009
(31569-31565)

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OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 9 February 2009

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

Case No. ICTR-99-50-T

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DECISION ON JÉRÔME-CLÉMENT BICAMUMPAKA'S URGENT MOTION
FOR DISCLOSURE OF EXCULPATORY MATERIAL

Rule 68 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**

INTRODUCTION

1. Prosecution Witness GTA testified in this trial on 9 and 10 March 2004. He subsequently testified, under the pseudonym LAG, in the case of the *Prosecutor v. Simeon Nchamihigo* on 17 and 18 January 2007.
2. The Defence for Jérôme-Clément Bicamumpaka (“Defence”) requests an order, pursuant to Rule 68 of the Rules of Procedure and Evidence,¹ that the Prosecution disclose the open and closed session transcripts of Witness GTA’s testimony in *Nchamihigo*, as well as any exhibits filed during his testimony in that or any other case. The Defence also requests that the Chamber sanction the Prosecution for violating its disclosure obligations for nearly two years.²
3. The Prosecution opposes the Motion, arguing that the Defence has failed to show that any of the requested materials are exculpatory. The Prosecution also submits that it (the Prosecution) has determined that the requested materials are not exculpatory within the meaning of Rule 68, and therefore, are not subject to disclosure.³
4. In its Reply, the Defence disputes the Prosecution claim that the materials are not exculpatory. In addition, the Defence argues that Rules 66 (B) and 67 (D), read in conjunction, require the Prosecution to notify the Defence of new evidence material to its case, and to allow the Defence to inspect any new statements by Prosecution witnesses.⁴

DISCUSSION

5. Pursuant to Rule 68 (A), the Prosecution is obliged to disclose 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 Prosecution evidence.”⁵ The Prosecution’s disclosure obligations under this Rule are ongoing.⁶ Where the Defence believes that exculpatory material in the Prosecution’s custody or control has not been disclosed, it may request that the Trial Chamber order disclosure. Before the Chamber will grant a request under Rule 68, the Defence must sufficiently identify the material sought, show that it is in the custody or control of the Prosecution, and make a *prima facie* showing that it is exculpatory.⁷

¹ Unless otherwise specified, all further references to rules in this Decision are to the Rules of Procedure and Evidence.

² Bicamumpaka’s Urgent Motion for Disclosure of Exculpatory Material (Witness GTA-LAG), filed 12 November 2008 (“Motion”).

³ Prosecutor’s Response to Bicamumpaka’s Urgent Motion for Disclosure of Exculpatory Material (Witness GTA-LAG), filed 18 November 2008 (“Response”).

⁴ Bicamumpaka’s Reply to Prosecutor’s Response to Bicamumpaka’s Urgent Motion for Disclosure of Exculpatory Material (Witness GTA-LAG), filed 25 November 2008 (“Reply”).

⁵ Rule 68 (A) of the Rules of Procedure and Evidence.

⁶ Rule 68 (E) of the Rules of Procedure and Evidence; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 32.

⁷ Decision on Jérôme-Clément Bicamumpaka’s Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA (TC), 21 April 2008, para. 9; Decision



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6. The Prosecution correctly notes that the Defence has not made any effort in its Motion to show that the materials in question are exculpatory pursuant to Rule 68.⁸ In its Reply, however, the Defence points to three alleged contradictions among Witness GTA's testimony in *Nchamihigo*, his prior statements, and his testimony in this trial.⁹ The Defence also argues that Rules 66 (B) and 67 (D), read in conjunction, obliged the Prosecution to notify the Defence of Witness GTA's testimony in *Nchamihigo* and to allow inspection of this testimony by the Defence.¹⁰

7. As the moving party, the Defence bears the burden of making a *prima facie* showing that the materials sought are exculpatory. The purpose of a reply is to answer matters raised by the opposing party in its response. A moving party cannot wait until it receives a response to its motion and then attempt to meet its burden of persuasion in its reply. This approach suggests just the sort of fishing expedition that is prohibited under Rule 68,¹¹ and, absent special permission from the Chamber to file a rejoinder, deprives the responding party of a meaningful opportunity to meet the moving party's submissions.¹² For this reason, the Chamber shall not consider the Defence arguments raised for the first time in its reply concerning the Prosecution's obligations arising under Rule 66 (B) and 67 (D).

8. For its part, the Prosecution's submission that Witness GTA's confession and guilty plea in Rwanda, which apparently occurred subsequent to his testimony in this case, does not "dent the credibility of the witness" exceeds its discretion in making the initial determination as to what materials in its custody or control should be disclosed pursuant to Rule 68 (A). It is uncontroversial that the character of a witness, including evidence of involvement in crimes, is relevant to, and therefore "may affect" that witness's credibility.¹³ Moreover, pursuant to the jurisprudence of this Tribunal and the ICTY, any evidence of possible improper motives for providing testimony, including a desire to attain a lesser punishment or to shift blame for one's crimes to another (as in the case of accomplice evidence), also may affect a witness's credibility.¹⁴

on Bicumumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files) (TC), 17 November 2004, para. 14.

⁸ Response, paras. 8-9.

⁹ Reply, paras. 8-15.

¹⁰ Reply, paras. 6-7.

¹¹ See e.g., Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI (TC), 14 September 2004, para. 10; Decision on Jérôme-Clément Bicumumpaka's Motion for Judicial Notice of a Rwandan Judgement of 8 December 2000 and in the Alternative for an Order for Disclosure of Exculpatory Evidence (TC), 15 December 2004, para. 25.

¹² See e.g., *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness (TC), 4 March 2008, para. 10.

¹³ See e.g., *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-T, Judgement (TC), 18 December 2008, paras. 154, 164, 321; *The Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-T, Judgement (TC), 2 December 2008, paras. 31-35; *The Prosecutor v. Simeon Nchamihigo*, Case No. ICTR-01-63-T, Judgement (TC), 12 November 2008, para. 146, *The Prosecutor v. François Karera*, Case No. ICTR-01-74-T, Judgement (TC), 7 December 2007, paras. 52, 189; .

¹⁴ See e.g., *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Judgement (AC), 29 August 2008, paras. 125-133; *The Prosecutor v. Emmanuel Bagambiki et al.*, Case No. ICTR-99-46-A, Judgement



9. When determining whether to disclose materials under Rule 68, the Prosecution abuses its discretion when it passes judgement on the significance of character evidence or evidence of possible motives for testifying. The Prosecution is not free to determine that a witness's criminal conviction, guilty plea, or confession to crimes is not something that may affect the credibility of that witness's testimony. Such evidence is potentially exculpatory as a matter of law, and must be disclosed to the Defence pursuant to Rule 68 (A). The ultimate determination as to whether such evidence actually affects the credibility of Prosecution evidence is for the Chamber in its final assessment.

10. Similarly, the Defence has shown that Witness GTA contradicted himself with regard to his membership in the *Parti Liberal*.¹⁵ While the Defence should have pointed this contradiction out in its Motion instead of its Reply, the Chamber considers the Prosecution's dereliction in its duties to disclose potentially exculpatory material to be the more serious issue. As with evidence of bad character or possible ulterior motives, inconsistent statements are incontrovertibly relevant to a witness's credibility.¹⁶ In determining whether materials ought to be disclosed under Rule 68, the Prosecution should not pass judgement on the relative significance of any given inconsistency. Inconsistent statements from Prosecution witnesses are potentially exculpatory as a matter of law, and must be disclosed to the Defence.

11. Despite the deficiencies of the Defence Motion, the Chamber considers that, given the potentially exculpatory character of the materials discussed above, the Prosecution must disclose the transcripts of Witness GTA's closed-session testimony in the *Nchamihigo* case, as well as all exhibits entered during his testimony.

12. With regard to the Defence request that the Prosecution be sanctioned for its failure to disclose these materials, the Chamber notes with concern that the Prosecution's failure to disclose potentially exculpatory material related to Witness GTA in a timely manner is not an isolated incident. Moreover, the Chamber reiterates its concern over the Prosecution's apparent abuse of its discretion with regard to Witness GTA, and reminds the Prosecution of its continuing obligation to disclose exculpatory material pursuant to Rule 68 (E). The Chamber declines to sanction the Prosecution at this time, but will take the disclosure violation into account in its evaluation of the evidence, including consideration of the opportunity the Defence had to contest Witness GTA's evidence.

FOR THESE REASONS, the Chamber

GRANTS the Motion in part;

(AC), 7 July 2006, para. 205; *Zigiranyirazo*, Judgement (TC), paras. 154-155, 164, 321; *Bikindi*, Judgement (TC), paras. 31-35; *Nchamihigo*, Judgement (TC), paras. 17, 53, 146, 160, 196; *Karera*, Judgement (TC), para. 113, 165.

¹⁵ Reply, para. 11. *Compare* T. 9 March 2004, pp. 9-11, 53-54; T. 10 March 2004, pp. 21-22 (testifying that he was a member of the power faction of the PL party); *with Nchamihigo*, T. 17 January 2007, pp. 31, 47-50 (testifying that he was not a member of the PL, but describing himself as a "partisan" of that party).

¹⁶ See e.g., *Zigiranyirazo*, Judgement (TC), paras. 118, 172-175, 202, 248-49; *Bikindi*, Judgement (TC), paras. 31-35; *Nchamihigo*, Judgement (TC), paras. 15, 86, 150; *Karera*, Judgement (TC), para. 373.



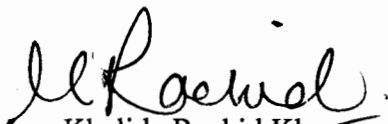
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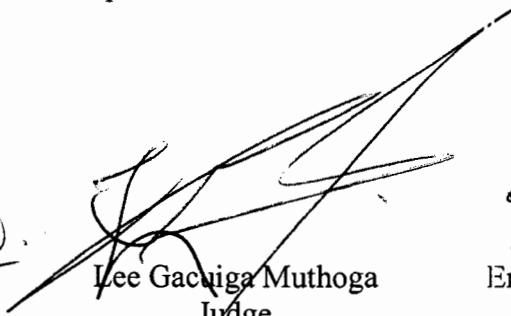
ORDERS the Prosecution to disclose as soon as possible, and, in any event, no later than five (5) days from this Decision:


- (i) closed session transcripts of Witness GTA's testimony in the *Prosecutor v. Nchamihigo* on 17 and 18 January 2007, where he testified under the pseudonym LAG;
- (ii) all exhibits filed in relation to Witness GTA's testimony in the *Prosecutor v. Nchamihigo*;

DENIES the Motion in all other respects.

Arusha 9 February 2009


Kl alida Rachid Khan
Presiding Judge


Lee Gacunga Muthoga
Judge


With the consent
and on behalf of
Emile Francis Short
Judge



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ORDERS the Prosecution to disclose as soon as possible, and, in any event, no later than five (5) days from this Decision:

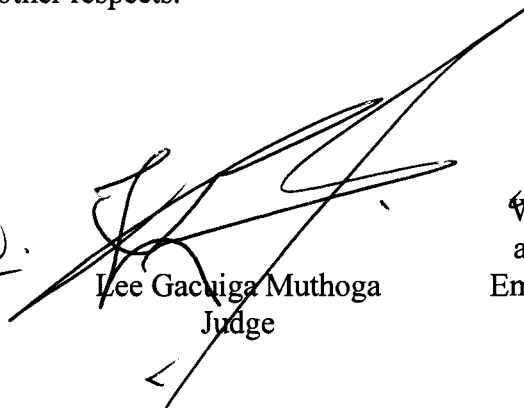
- (i) closed session transcripts of Witness GTA's testimony in the *Prosecutor v. Nchamihigo* on 17 and 18 January 2007, where he testified under the pseudonym LAG;
- (ii) all exhibits filed in relation to Witness GTA's testimony in the *Prosecutor v. Nchamihigo*;

DENIES the Motion in all other respects.

Arusha, 9 February 2009

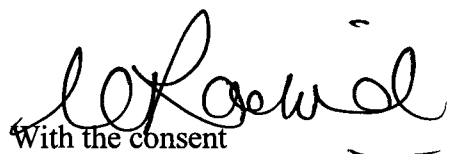


Khalida Rachid Khan
Presiding Judge



Lee Gacigira Muthoga
Judge

[Seal of the Tribunal]



With the consent
and on behalf of
Emile Francis Short
Judge