



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-99-50-T

19-05-2009

(32898-32894)

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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: 19 May 2009

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

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Case No. ICTR-99-50-T

**DECISION ON JÉRÔME-CLÉMENT BICAMUMPAKA'S SUBMISSIONS FOR
STAY OF PROCEEDINGS
AND MOTION FOR DISCLOSURE CONCERNING WITNESS GKB**

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. Prosecution Witness GKB testified in this case between 8 and 15 December 2003. He subsequently testified, under the pseudonym SAM, in the trial of *Prosecutor v. Ephrem Setako* between 11 and 16 September 2008.
2. The Defence moves the Chamber to order the Prosecutor to disclose "all the evidence (statements exhibits, etc.) which it has not yet disclosed regarding Witness GKB", and to sanction the Prosecution for failure to disclose evidence material to the Defence.¹ Alternatively, the Defence seeks a permanent stay of proceedings in this case on the basis of alleged fabrication of evidence, and the repeated failures of the Prosecution to meet its disclosure obligations.²
3. By Memorandum dated 25 February 2009, the Prosecution disclosed open and closed session transcripts of Witness GKB/ SAM's evidence in the *Setako* case, as well as the exhibits tendered during his testimony.³

DISCUSSION

Disclosure of "all the evidence" of Witness GKB not yet disclosed

4. Pursuant to Rule 68 (A) of the Rules, 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."⁴ The determination as to whether material has to be disclosed under Rule 68 "is primarily a facts-based judgement, falling within the responsibility of the Prosecution,"⁵ which is presumed to discharge its obligation in good faith.⁶ The Prosecution's disclosure obligations under this Rule are continuing.⁷

¹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, "Bicamumpaka's Further Submissions in Support of Stay of Proceedings and Motion for Disclosure Concerning Witness GKB", filed on 9 February 2009 ("Defence Motion"). See para. 12 of the Motion, and Prayer.

² Defence Motion, paras. 15-16, and Prayer.

³ *Bizimungu et al.*, "(Confidential) Interoffice Memorandum" from Prosecution to Defence, entitled "Disclosure of Transcripts (Open and Closed Session) and Exhibits Filed During Testimony of Witness GKB in the *Prosecutor v. Setako* (Under Pseudonym of SAM) in the *Prosecutor v. Casimir Bizimungu et al.*" filed with the Registry on 25 February 2009 (pages 32164-31788).

⁴ Rule 68 (A) of the Rules of Procedure and Evidence.

⁵ *Karempera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16; *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 264.

⁶ *Karempera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17; *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Judgement (AC), para. 183.

⁷ Rule 68 (E) of the Rules of Procedure and Evidence; *The Prosecutor v. Tihomir Blaškić*, 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.



5. 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: (i) sufficiently identify the material sought; (ii) show that it is in the Prosecution's custody or control; and (iii) make a *prima facie* showing that it is exculpatory.⁸ Information will be exculpatory if it tends to disprove a material fact alleged against the accused, or if it undermines the credibility of evidence intended to prove material facts.⁹

6. With regard to that part of the Defence Motion which seeks an order that the Prosecutor "disclose all the evidence" regarding Witness GKB which it has not yet disclosed, the Chamber notes that the Defence has entirely failed to support its request with any argumentation or citation to the Statute, the Rules, or the Tribunal's jurisprudence. The Defence for Bicomumpaka has made no attempt to satisfy the Rule 68 criteria for a disclosure order from this Chamber. Furthermore, the Chamber considers that a request for "all the evidence" of a witness is insufficiently precise with reference to the first criterion established by the jurisprudence, which requires the moving party to properly identify the material sought, and as such amounts to a fishing expedition.

7. As specifically concerns the paragraphs of the Defence Motion which complain about non-disclosure of specific material concerning Witness GKB – namely, his evidence given as Witness SAM in the case of *Setako* – the Chamber considers this request to have been rendered moot by the Prosecution's disclosure of 25 February 2009, referred to at paragraph 3 above.

Whether to sanction the Prosecution for its alleged failure to disclose the materials in question

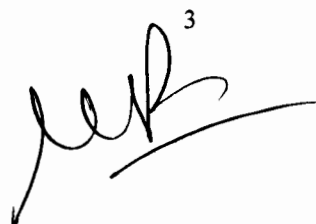
8. Pursuant to Rule 46 (A) of the Rules, a Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. In some cases, Trial Chambers of this Tribunal have imposed sanctions upon the Prosecution, pursuant to Rule 46 (A), for breach of its disclosure obligations.¹⁰

9. The Chamber notes that the Defence has failed to show that the Prosecution breached its disclosure obligations with respect to Witness GKB, with reference to Rule 68 of the Rules, or otherwise. Having failed to establish that the Prosecution breached its disclosure obligations, the Chamber need not consider whether sanctioning counsel, as a remedy, is warranted.

⁸ *Bizimungu et al.*, GFA Recall Decision, para. 9; *Bizimungu et al.*, Decision on Bicomumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files) (TC), 17 November 2004, para. 14.

⁹ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files (TC), 6 October 2006, para. 4 ("*Bagosora* Decision of 6 October 2006").

¹⁰ See, for example, *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, 19 October 2006.

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Whether the Chamber should enter a permanent stay of proceedings

10. The International Criminal Court ('ICC') has found that the power to stay proceedings flows from the obligation on the court to protect the human rights of the accused.¹¹ This requires that where an accused's rights have been so seriously violated that it is not possible for the Chamber to provide a fair trial, the Chamber has a duty to stay proceedings, either temporarily - until the violations are rectified; or permanently - if a fair trial is made entirely impossible.¹²

11. Similarly, the ICTR Appeals Chamber has concluded that the fair trial rights of the accused, and their right to be presumed innocent until proven guilty, enable the Chamber to order the release of the accused and the dismissal of charges if there is egregious violation of their rights.¹³

12. In its Motion, the Defence seeks a permanent stay of proceedings in this case on two distinct bases: first, the alleged fabrication of evidence; and second, the repeated failures of the Prosecution to meet its disclosure obligations.

13. With regard to the first basis for the relief sought, the Chamber dealt with this specific request in its Decision of 27 February 2009, in which it stated that it would reserve making any finding on the Defence submissions regarding the alleged fabrication of evidence until the final judgement.¹⁴ As such, the Chamber denied the Defence request for a permanent stay of proceedings on this basis. As the Defence Motion raises no new material which has not already been considered by the Chamber in its Decision of 27 February 2009, the Chamber considers this matter to be *res judicata*.

14. With regard to the second basis for the relief sought, the Chamber recalls that the Defence has failed to show that the Prosecution has breached its disclosure obligations, whether on the basis of Rule 68 or otherwise, such that the Chamber need not consider whether a stay of proceedings is warranted in the circumstances.

15. Finally, and with reference to the Defence's failure to support its Motion with reference to the specific legal provisions dealing with disclosure, the Chamber considers that the Defence Motion is frivolous such that the Registry should be directed to withhold payment of any fees associated with it.

FOR THESE REASONS, the Chamber

¹¹ *The Prosecutor v. Lubanga* – ICC-01/04-01/06 (OA4), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, para. 36.

¹² *The Prosecutor v. Lubanga* – ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 93.

¹³ *Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Decision, 3 November 1999, para. 106.

¹⁴ *Bizimungu et al.*, Decision on Jérôme-Clément Bicomumpaka's Motion Seeking Permanent Stay of Proceedings, 27 February 2009, paras. 37-39.

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DECLARES moot that part of the Defence Motion which seeks disclosure of specific material concerning Witness GKB – namely, his evidence given as Witness SAM in the case of *Setako* - by virtue of the Prosecution's disclosure of 25 February 2009; and

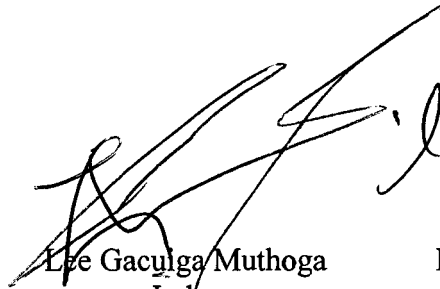
DENIES the remainder of the Defence Motion; and

DIRECTS the Registry to withhold payment of any fees to the Defence in connection with its Motion of 9 February 2009.

Arusha, 19 May 2009



Khalida Rachid Khan
Presiding Judge



Lee Gaculga Muthoga
Judge



With the consent
and on behalf of
Emile Francis Short
Judge

[Seal of the Tribunal]

