



ICTR-04-81-I
25-05-2009
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
(6515-6511)

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1094

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 25 May 2009

THE PROSECUTOR

v.

Ephrem SETAKO

Case No. ICTR-04-81-I

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DECISION ON DEFENCE MOTION TO VARY ITS WITNESS LIST

The Prosecution
Ifeoma Ojemeni-Okali
Simba Mawere
Christiana Fomenky

The Defence
Lennox Hinds
Cainnech Lussia-Berdou

lh

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the Defence motion for variation of its witness list, filed on 8 May 2009;

CONSIDERING the Prosecution response, filed on 18 May 2009; and the Defence reply, filed on 22 May 2009;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Defence filed its Pre-Defence Brief on 6 April 2009. Its annexes contained a list of 72 potential witnesses.¹ On 4 May 2009, the day on which the Defence commenced its case, it provided an update of its annexes, including 78 witnesses.² The following day, the Chamber advised the Defence to file a motion to vary its witness list.³

2. The Defence seeks to replace Witness NCA by his wife and to add Witnesses AL, KEQ, Assiel Ndisetse, Jean Damascène Niyoyita, Canisius Fashaho and the Director of Ruhengeri Prison. These changes mirror the updates in its revised witness list of 4 May 2009. It also takes the opportunity to add Witnesses KER and KXX. According to the Defence, these testimonies will be of probative value, neither repetitive nor prejudicial to the Prosecution, and not likely to affect the duration of its case. It also withdraws sixteen of its witnesses.⁴

3. The Prosecution submits that, considering this is a single accused case with precise allegations in the Indictment, the additional testimonies will be duplicative, a waste of time and therefore not in the interests of justice. Adding these witnesses will unduly delay the proceedings and prejudice the Prosecution because of insufficient time to conduct investigations which are necessary to prepare effective cross-examination. It does not object to the withdrawal of Defence witnesses.⁵

DELIBERATIONS

4. Rule 73 *bis* (E) of the Rules of Procedure and Evidence states that after the commencement of trial, the Defence may, if it considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called. According to case law, the Chamber may grant such a motion where it considers it to be in the interests of justice, and where there is "good cause"

¹ Setako Defence Pre-Defence Brief, filed on 6 April 2009.

² Update of Annexures to Setako Defence Pre-Defence Brief, filed on 4 May 2009.

³ T. 5 May 2009 pp. 14-17.

⁴ "Strictly Confidential Defence Motion to Vary its Witness List", etc., filed on 8 May 2009; "Confidential Defence Reply to the Prosecutor's Response to Defence Motion to Vary its Witness List", filed on 22 May 2009. The Defence withdraws Witnesses BIF, KAJ, KAK, KAP, MAH, MAJ, NBQ, NDV, NEH and the President of the Gacaca Court of Gataraga (Motion, para. 13) as well as Witnesses KAH, MBZ, NBK, NBP, NBZ and NDJ (Reply, para. 25).

⁵ "Confidential Prosecution Response to Defence Motion to Vary its Witness List", filed on 18 May 2009.

to do so, considering factors such as the materiality of the testimony, the complexity of the case, prejudice to the Prosecution, including elements of surprise, on-going investigations, replacements and corroboration of evidence.⁶

5. These considerations require a close analysis of each witness, including the sufficiency and time of disclosure of witness information to the Prosecution; the probative value of the proposed testimony in relation to existing witnesses and allegation in the indictment; the ability of the Prosecution to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered for the late addition of the witnesses.⁷

6. The Defence requests that Witness NCA be substituted by his wife, appearing under the same pseudonym. They lived in Mukamira Military Camp during the events in 1994. The purpose is to rebut allegations against Ephrem Setako in connection with purported killings of Tutsis in the camp. The witness will testify about the same facts as her husband, of which the Prosecution was notified already on 6 April 2009.⁸ The Chamber finds that this replacement is in the interest of justice. It is true that some other Defence witnesses have given evidence about the camp but they were not Tutsis.⁹

7. Witness AL testified for the Prosecution in the *Bagosora et al.* case about the death of one Augustin Maharangari and members of his family.¹⁰ Setako is alleged to have handed over Maharangari's two daughters to an *Interahamwe* named "Fidèle" at a roadblock called *La Péage* in Kigali in May 1994.¹¹ Prosecution Witness SQY gave evidence about this event. The Defence wants to add Witness AL to its list as he will testify that Maharangari was shot on 7 April 1994 and that his family members were taken to a nearby convent and killed.¹²

8. In the Chamber's view, the Defence explanation why Witness AL was sought added only on 4 May 2009 is not entirely convincing.¹³ His testimony and the evaluation of it in the *Bagosora et al.* judgement was known well before the Defence filed its Pre-Defence Brief of 6 April 2009. On the other hand, this potential testimony is relevant to the Defence case and may have probative value. The Prosecution is not prejudiced. Its office already knows this witness from the *Bagosora et al.* case, and his potential testimony will only be heard towards the end of the Defence case, in the second half of June. The Chamber has noted that it is

⁶ *Prosecutor v. Nahimana et al.*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, paras. 19-20.

⁷ *Prosecutor v. Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 June 2003, para. 14; *Prosecutor v. Nahimana et al.*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001; *Prosecutor v. Nindiliyimana et al.*, Decision on Prosecution Motion to Vary its List of Witnesses: Rule 73 Bis (E) of the Rules (TC), 11 February 2005; *Prosecutor v. Zigiranyirazo*, Decision on the Defence Motion to Vary the Defence Witness List to Add M. Gaspard Masabyimana (TC), 13 April 2007.

⁸ Defence Motion, para. 16-22.

⁹ On 22 May 2009, the Chamber made an advance oral ruling to replace the husband with his wife, as she had already travelled to the seat of the Tribunal to testify. T. 22 May 2009.

¹⁰ *Prosecutor v. Bagosora et al.*, T. 29 April 2004; Prosecution Exhibit 217 (personal identification sheet of Witness AL); Judgement and Sentence (TC), 18 December 2008, filed on 9 February 2009, paras. 940-944, 960-962, 2245 (finding Bagosora responsible under Article 6 (1) of the Statute for the killing of Maharangari). The case is now before the Appeals Chamber.

¹¹ Amended Indictment, 23 June 2008, para. 42.

¹² Defence Motion, paras. 23-28.

¹³ Motion, para. 27 ("[Witness AL's] late addition to the list is the result of legal analysis, the conclusion of which was that it would be difficult to adduce his evidence in the present case through the other procedural means included in the Rules of Procedure and Evidence").

presently uncertain whether the witness will be available to testify but does not find that this prevents his insertion on the witness list at this stage. It is recalled that the trial is scheduled to conclude no later than 26 June 2009.¹⁴

9. According to the Defence, Witness KEQ was inadvertently omitted from its list of 6 April 2009. He will testify that he lived near the roadblock close to the *Sopecya* petrol station in Kigali, explain how it was established and manned, and describe the events occurring there, including how weapons were obtained and whether Setako visited the roadblock. The purpose is to contradict allegations made by Prosecution Witness SON about Setako's alleged role in connection with killings there.¹⁵

10. The Chamber accepts that Witness KEQ's testimony is material. It has noted that it may appear to overlap with that of Witness KDS, but also that Witness KEQ is anticipated to address a wider time frame because he lived in the area.¹⁶ The Prosecution will not be prejudiced since he will testify during the last two weeks of June 2009, more than one month after it was notified. Consequently, the Chamber finds that it is in the interests of justice to add Witness KEQ to the witness list.

11. Witness KER will present testimony intended to refute evidence regarding Setako's role in the alleged killings of three young Tutsi girls at the home of one Jeannine in the Kiyovu area of Kigali. The Defence explains that this witness was only identified as recently as on 7 May 2009, partly because of investigations in Rwanda the week before.¹⁷ The Prosecution responds that the Defence should have completed investigations regarding this charge earlier. It will also suffer prejudice as insufficient particulars were provided for it to conduct the necessary investigations.¹⁸

12. The Chamber accepts that the Defence investigations between end of April and early May 2009 led to the discovery of Witness KER. It is satisfied that his evidence is material to the Defence case. The Defence reply of 21 May 2009 contained the missing identifying particulars for the witness.¹⁹ The Prosecution will not be prejudiced in its preparations for cross-examination, provided that the witness only appears after 21 June 2009, which corresponds to the usual one-month period for investigations. Based on this assumption, the Chamber grants the Defence request.

13. Witness KXX is expected to testify about Setako's alleged role as a liaison between the Ministry of Defence or Joseph Nzirorera and the *Interahamwe* in Kigali under Bernard Maniragaba. The purpose is to contradict the testimony of Witness 006, who gave evidence as the last Prosecution witness from 20 to 22 April 2009. In the Chamber's view, this explains why Witness KXX is added late. His evidence is material to the Defence case. According to the Defence submissions, which have not been contradicted by the Prosecution, the witness has testified for the Office of the Prosecutor in other cases before the Tribunal.²⁰ His addition to the witness list would therefore not be prejudicial as he is already known to

¹⁴ A related issue concerning Witness AL has been considered in *Prosecutor v. Setako*, Decision on Defence Motion for Disclosure of Closed Session Testimony (TC), 25 May 2009.

¹⁵ Defence Motion, paras. 29-33.

¹⁶ Defence Reply, para. 6.

¹⁷ Defence Motion, para. 50-53.

¹⁸ Prosecution Response, paras. 10-11.

¹⁹ Defence Reply, para. 21.

²⁰ Defence Motion, paras. 45-49.

the Prosecution. The Chamber notes that it has not been confirmed that Witness KXX will appear and reiterates that the Defence case is expected to conclude no later than 26 June 2009.

14. The Defence also seeks to add Witnesses Ndisetse, Niyoyita, Fashaho and the Director of Ruhengeri Prison as Rule 92 *bis* witnesses. Its aim is to introduce their affidavits, in lieu of oral testimony. It is argued that their evidence is highly relevant and probative. The purpose is to impeach the credibility of Prosecution witnesses SAA and SAM who alleged that Defence Counsel had tried to get in touch with them in prison or were present during gacaca proceedings.²¹

15. The Chamber notes that the evidence of these four witnesses does not relate to allegations against Setako but to the credibility of certain aspects of the testimony of the two Prosecution witnesses concerning the Defence team. Their assertions have been rejected by Lead Counsel, who is an officer of the court.²² Under these circumstances, the Chamber finds no need for evidence from these Defence witnesses. A propensity to lie about these matters will not necessarily lead to a rejection of the entire testimony of these Prosecution witnesses. It will be for the Chamber to assess their credibility at the end of the trial, in light of all available evidence.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence leave to vary its witness list by replacing Witness NCA with his wife and to add Witnesses AL, KEQ, KER and KXX.

DENIES the Defence motion in respect of Witnesses Assiel Ndisetse, Jean Damascène Niyoyita, Canisius Fashaho and the Director of Ruhengeri Prison.

NOTES that the Defence has withdrawn sixteen of its witnesses.

Arusha, 25 May 2009


Erik Møse
Presiding Judge


Sergei Alekseevich Egorov
Judge


Florence Rita Arrey
Judge

[Seal of the Tribunal]



²¹ Defence Motion, paras. 34-44; Reply, paras. 8-12; T. 28 August 2008 p. 28 (Witness SAA); T. 12 September 2008 pp. 9-12; T. 16 September 2008 p. 21 (Witness SAM).

²² T. 28 August 2008 pp. 29-30 (in relation to Witness SAA); T. 12 September 2008 pp. 10-11 (with respect to Witness SAM).