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NATIONS UNIES

ICTR-07-91-T
1-7-2009
(4325-4317)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

4325
Zurij

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 1 July 2009

THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-T

ICTR-07-91-T
01/07/2009
6003

**DECISION ON DEFENCE MOTION TO ADMIT THE STATEMENT OF DEFENCE
WITNESS STRATON NYARWAYA INTO EVIDENCE; AND FOR OTHER RELIEF**

Rules 46, 54, 66, 67, 68, 73 and 89 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Paul Ng'arua
Abdoulaye Seye
Dennis Mabura
Florida Kabisanga

For the Accused:

Allison Turner

INTRODUCTION

1. On 27 March 2009, the Prosecution filed submissions regarding the late discovery and disclosure of a written statement of Defence Witness Straton Nyarwaya which was given to investigators of the Office of the Prosecutor ("OTP") on 15 March 2006 ("Nyarwaya's Statement").¹ The statement was attached to the submissions as Annexure A.
2. On 7 May 2009, the Defence filed a Motion requesting: (a) a finding that the Prosecution violated its disclosure obligations by failing to disclose Nyarwaya's Statement, as well as by failing to promptly notify the Defence and the Trial Chamber of the existence of this statement upon its discovery;² (b) the admission of Nyarwaya's Statement as a Defence exhibit; (c) an order to the Prosecution to permit the Defence to inspect all documents found in the container in which Nyarwaya's Statement was located;³ (d) imposition of sanctions upon the Prosecution for the aforementioned alleged violations; and (e) an order that the Prosecution file the report from the OTP inquiry into the failure to process Nyarwaya's Statement.⁴
3. The Prosecution did not respond to the Motion. However, in its submissions of 27 March 2009, the Prosecution admitted to the non-disclosure of the statement, but submitted that it had not caused any prejudice to the Accused.

BACKGROUND

4. On 20 March 2009, Defence Witness Nyarwaya testified that he had been interviewed by OTP investigators and that a statement had been taken from him.⁵ Prosecution Counsel indicated to the Chamber that, according to the Prosecution's records, the Witness had not been interviewed by OTP investigators,⁶ but that he would confirm this by calling Kigali during the court break. He subsequently confirmed that the aforementioned statement did not exist.⁷
5. On 25 March 2009, the Defence presented a scanned copy of the said statement to the Trial Chamber. Immediately following this, Prosecution Counsel stated that, pursuant to a search in Kigali, the relevant document had been found in a carton containing other documents not previously submitted to the OTP for entry into its electronic database and for

¹ *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, "Prosecutor's Submissions Regarding Defence Witness Straton Nyarwaya's Statement to the Office of the Prosecutor Dated 15 March 2006", filed on 27 March 2009 ("Prosecutor's Submissions").

² Pursuant to Rules 68 and 67 (D) of the Rules of Procedure and Evidence ("Rules").

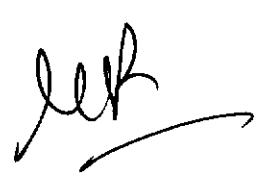
³ Pursuant to Rule 66 (B) of the Rules.

⁴ *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, "Defence Motion to Admit into Evidence 15 March 2006 OTP Statement Taken from Defence Witness Straton Nyarwaya, for Access to Documents Contained in a 'Carton' found in Kigali in which the Nyarwaya Statement was Found, to Sanction the Prosecutor for Withholding Exculpatory Evidence and to Order the Prosecution to File a Report on the Inquiry into the Unprocessed OTP Evidence Found in Kigali", filed on 7 May 2009 ("Motion").

⁵ T. 20 March 2009, p. 23.

⁶ T. 20 March 2009, p. 25.

⁷ T. 20 March 2009, p. 35.



disclosure.⁸ This was further confirmed by the Prosecution's written submissions of 27 March 2009, wherein the Prosecution explained that the original signed statement was found in Kigali and was submitted to the OTP Evidence Unit in Kigali for transfer to Arusha for electronic processing⁹.

DISCUSSION

6. The Defence submits that the Prosecution violated Rule 68 of the Rules by failing to disclose Nyarwaya's Statement; and Rule 67 (D) by failing to promptly notify the Defence and the Trial Chamber of its existence, upon its discovery.

The Prosecution's Disclosure Obligations

7. Rule 68 of the Rules requires the Prosecution to "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."

8. Where the defence asserts that the Prosecution has violated its disclosure obligations under Rule 68 (A), 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.¹⁰

9. Materials are exculpatory only if they tend to disprove a material fact alleged against the accused, or if they undermine the credibility of evidence intended to prove those allegations.¹¹

10. The duty to disclose exculpatory material under Rule 68 (A) is a positive and continuing obligation,¹² regardless of the public or confidential character of the material.¹³ As the Prosecution's obligation to disclose exculpatory material is crucial to a fair trial, the Prosecution must actively review the material in its possession, and, at a minimum, inform the

⁸ T. 25 March 2009, p. 45.

⁹ Prosecutor's Submissions, paras. 5-6.

¹⁰ *Prosecutor v. Augustin Ndingiriyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008 para. 13 (citations omitted); *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Request for Disclosure Order, 23 July 2008, para. 7 (citations omitted); *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 13.

¹¹ *Bizimungu et al.*, Decision on Justin Mugenzi's Request for Disclosure Order, 23 July 2008, para. 7 (citing *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, para. 4; and *Karemera et al.*, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions against the Prosecution, 19 October 2006, para. 6; *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI, 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).

¹² Rule 68 (E).

¹³ *Ndingiriyimana et al.*, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 9.



accused of the existence of any exculpatory material.¹⁴ The Prosecution is presumed to be acting in good faith unless the moving party adduces *prima facie* evidence to the contrary.¹⁵

11. Rule 67 (D) provides that if either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party must promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

(i) Has the Prosecution Violated its Disclosure Obligation under Rule 68?

12. The Chamber notes that the Defence now has a copy of Nyarwaya's Statement in its possession, such that the Chamber need not make any order for the disclosure of the document. Rather, the Chamber need only determine whether there has been a breach of the Prosecution's disclosure obligations under Rule 68, as submitted by the Defence.

13. There is no dispute between the Parties that the material exists, and that it was in the custody and control of the Prosecution. The Chamber will therefore proceed to consider whether the material is exculpatory.

14. Nyarwaya's Statement attests to a number of facts concerning an alleged witness syndicate to give false testimony against Kamuhanda. According to the Defence "any and all evidence pertaining to a plot to fabricate false testimonies against Kamuhanda is not only highly probative but also exculpatory in the case at bar".¹⁶

15. The Chamber recalls the finding in its Decision on Defence Motions for Disclosure under Rules 66 and 68 of the Rules that:

"Mr. Kamuhanda has already been tried and convicted. The purpose of these proceedings is not to re-open that case, but rather, to determine whether the Accused committed the offences for which he stands charged under the Indictment. The guilt or innocence of Mr. Kamuhanda has no bearing on the issue of whether the Accused engaged in the activities which gave rise to the charges against him. The Chamber is therefore not satisfied that the Defence has demonstrated that Witness GEX's statement is, *prima facie*, exculpatory for the Accused".¹⁷


16. For similar reasons in line with its previous decision, in relation to Nyarwaya's Statement, the Chamber is not satisfied that the Defence has demonstrated a *prima facie* case that it is exculpatory, or potentially exculpatory, pursuant to Rule 68 (A).

¹⁴ *Karemera et al.*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, paras. 9-10.

¹⁵ *N dindiliyimana et al.*, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 12; *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 17; *Prosecutor v. André Rwamakuba et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Disclosure, 15 January 2004, para. 3 (citing the Appeals Chamber in *Prosecutor v. Blaskić*, 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, 26 September 2000, para. 45).

¹⁶ Defence Motion, para. 21.

¹⁷ *Nshogoza*, Decision on Defence Motions for Disclosure under Rules 66 and 68 of the Rules of Procedure and Evidence, 22 December 2008, para. 50.



(ii) Has the Prosecution Violated its Disclosure Obligation under Rule 66 (B)?

17. In view of the Defence request for Nyarwaya's Statement during the trial proceedings on 20 March 2009, and the Prosecution's admission that there was "a failure to disclose the statement in a timely manner [...] occasioned by the failure of the investigators to submit said statement to the OTP evidence repository",¹⁸ and that "indeed the Defence Counsel inspected the Database on 27 February 2009 and the statement was not there",¹⁹ the Chamber considers it appropriate, in the interests of justice, to consider, *proprio motu*, whether the Prosecution had an obligation to disclose Nyarwaya's Statement pursuant to Rule 66 (B).

18. Rule 66 (B) provides, in relevant part, that subject to certain exceptions, the Prosecution must allow the defence, upon request, to inspect any "books, documents, photographs, and tangible objects in his custody or control, which are material to the preparation of the defence, or intended for use by the Prosecution as evidence at trial...."

19. Documents are material to the preparation of the defence if they are relevant to the preparation of the defence case, including preparation for cross-examination of a witness; preparation being a broad concept which is not limited to material that could counter the Prosecution's evidence.²⁰ The materiality of the information sought can also be determined by reference to the indictment.²¹

20. A request under Rule 66 (B) is one of the methods available to the defence in carrying out its investigation. The defence is not required to make independent efforts to obtain the material prior to requesting disclosure under Rule 66 (B).²² However, Rule 66 (B) does not create a broad obligation on the Prosecution to disclose any and all documents which may be relevant to its cross examination. The Prosecution's obligation under Rule 66 (B) is only triggered by a sufficiently specific request from the defence.²³

21. The Chamber considers Nyarwaya's Statement to have been material to the preparation of the defence, as it may have assisted the Defence in making its credibility determination of Nyarwaya, prior to calling him to testify. As regards the requirement of a sufficiently specific request from the Defence in order to trigger the Prosecution's obligation under Rule 66 (B), the Chamber cannot be satisfied as to when this obligation arose. There is evidence that the Defence "inspected" the OTP's database; but there is no information before the Chamber concerning the request which resulted in that inspection. Nonetheless, in light of the Defence's oral request of 20 March 2009, as well as the Prosecution's admission that it failed to disclose the Statement in a timely manner, through the failure of its staff members to

¹⁸ Prosecutor's Submissions, para 8.

¹⁹ Prosecutor's Submissions, para 8.

²⁰ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, para. 9; *Karemera et al.*, Decision on Defence Motions for Disclosure of Information Obtained from Juvénal Uwilingiyimana, 27 April 2006, para. 15.

²¹ *Karemera et al.*, Decision on Defence Motions for Disclosure of Information Obtained from Juvénal Uwilingiyimana, 27 April 2006, para. 15.

²² *Bagosora et al.*, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, para. 11.

²³ *Bagosora et al.*, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, para. 10; *Prosecutor v. Zigiranyirazo*, Case No. ICTR01-73-T, Decision on Defence Motion for Disclosure under Rule 66 (B) of the Rules, 21 February 2007, para. 5.



enter the Statement into the OTP database, the Chamber finds the Prosecution in violation of its disclosure obligations under Rule 66 (B) as of 20 March 2009, if not before.

(iii) Has the Prosecution Violated its Obligation under Rule 67(D)?

22. The Defence claims that the Prosecution's conduct, between 20 and 25 March 2009, is in violation of Rule 67 (D) as the Prosecution did not promptly notify the Defence of the existence of Nyarwaya's Statement.

23. The Chamber recalls that the obligation of prompt notification of additional evidence, pursuant to Rule 67 (D), arises only in relation to the discovery of additional evidence for which a disclosure obligation *already existed under the Rules*.²⁴ The Chamber has found that the Prosecution had a Rule 66 (B) disclosure obligation in relation to Nyarwaya's Statement.

24. According to the Prosecution's Submissions, the original statement of Nyarwaya was found in Kigali on Monday 23 March 2009 and it was received and processed in Arusha on 25 March 2009.²⁵

25. The Defence observes that the Prosecution made no mention of the discovery on 23 March 2009, nor made representations on the matter on 24 March 2009. On 25 March 2009, only after the Defence had informed the Trial Chamber that it had received a copy of the said statement from the Witness himself, did Prosecution Counsel state that the 2006 statement had been found in Kigali and that he had been informed of this the previous day.²⁶

26. The Chamber considers that the Prosecution might have been more attentive in its notification of the existence of Nyarwaya's Statement, and that it might have done so prior to being prompted by the Defence. However, considering that the document was only found in Kigali on 23 March 2009 and that the Prosecution informed the Trial Chamber and the Defence on 25 March 2009, the Chamber finds that the lapse of time between the discovery of the document, and the notification of same by the Prosecution, is reasonable in the circumstances and does not amount to a violation by the Prosecution of its additional obligation of prompt notification under Rule 67 (D).

Should Nyarwaya's Statement be Admitted into Evidence?

27. The Defence seeks admission of Nyarwaya's Statement, although it appears to focus on the admission as a remedy to the alleged material prejudice suffered by the Accused.

28. The Chamber recalls that pursuant to Rule 89 (C), it may admit any relevant evidence which it deems to have probative value. Therefore, the Chamber has a broad discretion to admit any evidence it deems to be relevant and probative.

29. The Defence requests the admission of Nyarwaya's Statement into evidence on the basis that it is highly corroborative of Nyarwaya's testimony.²⁷ In support, the Defence argues that the "prior consistent statement of Witness Nyarwaya reinforces his credibility and

²⁴ Emphasis added.

²⁵ Prosecutor's Submissions, para 6-7.

²⁶ T. 25 March 2009, p. 48.

²⁷ Defence Motion, para. 4.



is highly probative to critical issues at bar, for example, regarding whether GAA lied when he testified against Kamuhanda.²⁸

30. The Chamber sees no justification for admitting the statement, particularly as the Witness has already given evidence and has been subject to cross-examination in this trial. Generally speaking, an opposing party might seek to use a prior *inconsistent* statement of a witness for the purposes of impeaching that witness' credibility. However, in relation to the calling party, the Chamber does not consider that a prior *consistent* statement is probative of the issues before it. In relation to the issue of corroboration of a witness' testimony, the Chamber considers that other evidence in the case – whether oral testimony, or documentary exhibits – might be probative, but not a prior consistent statement of the same witness. In the specific case of Witness Nyarwaya, the Chamber considers his statement to lack probative value in relation to his *viva voce* testimony. On this basis, the Chamber, finds the statement inadmissible.

The Defence Request to Inspect all Documents Contained in the "carton" where Nyarwaya's Statement was found

31. The Defence submits that the fact that Nyarwaya's Statement was found in a carton containing other documents not processed by the OTP Evidence Unit, leads it to believe that other documents from the same container might be relevant to the Defence case, and possibly exculpatory.²⁹ The Defence requests the Trial Chamber to order the Prosecution to provide the Defence with access to the other documents contained in the carton pursuant to both Rule 66 (B) and Rule 68.

32. The Chamber recalls that when a motion for inspection of documents is filed under Rule 66 (B), or for disclosure under Rule 68 of the Rules, the Defence request must be sufficiently specific to trigger the Prosecution's obligation. The Chamber considers that the Defence request to inspect "all documents contained in the same container as Nyarwaya's statement", or for Rule 68 disclosure of them, does not satisfy this requirement, and rather amounts to a fishing expedition. Accordingly this part of the Defence request is denied.

Should the Chamber Order any Remedial Measures and/or Sanction the Prosecution for Violation of its Disclosure Obligations?

33. The Defence submits that it has suffered prejudice as a result of the Prosecution's violation of its disclosure obligations and seeks appropriate relief from the Chamber, including sanctions against the Prosecution.

34. The Chamber recalls that the fact that disclosure has not occurred in a timely manner, does not *per se* result in prejudice to an accused. Rather, an accused must demonstrate that he has suffered material prejudice as a result of the late disclosure in order for remedial measures to be warranted.³⁰

²⁸ Defence Motion, para. 19.

²⁹ Defence Motion, paras. 5.

³⁰ *Karemera et al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 21.



35. The Defence submits that the Accused suffered material prejudice to the extent that the Defence did not have the opportunity to investigate the contents of the statement. The Defence also argues that it was forced to allocate its scarce resources to obtaining and filing Nyarwaya's Statement, and, finally, that it was prevented from exploiting this document with other relevant witnesses. Further, the Defence submits, "the exclusion of a document *enhancing* the credibility of a witness would cause material prejudice to the defence."³¹

36. The Chamber is not satisfied that the Defence has demonstrated material prejudice as a result of the non-disclosure of Nyarwaya's Statement. First, the Chamber notes that the late disclosure of the statement did not prevent the Defence from questioning its witnesses about the alleged plot to inculcate Kamuhanda, and to which Nyarwaya's Statement refers. An ample amount of the Defence case was devoted to calling evidence on this issue, including through the admission of Rule 92bis written statements. Second, the Chamber considers that the allocation of resources by the Defence to obtain a scanned copy of a statement from its own witness cannot amount to material prejudice for the purposes of the Chamber's evaluation. Third, and as noted in paragraph 30 above, the Chamber does not consider that a prior consistent statement of a witness who testifies before it serves to enhance that witness' credibility.

37. Consequently, the Chamber finds that no remedial measures are warranted in the circumstances.

38. However, in consideration of the importance attributed by this Tribunal to disclosure obligations, the Trial Chamber, having found the Prosecution in violation of such obligations, will now determine whether sanctions should be imposed upon the Prosecution.

39. Rule 46 (A) of the Rules allows the Chamber, after a warning, to 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." This provision is applicable *mutatis mutandis* to Counsel for the Prosecution.

40. While the Chamber has found a breach of the Prosecution's disclosure obligation under Rule 66 (B), it does not consider that the Prosecution's conduct demonstrates a deliberate breach or pattern of continuous lack of diligence, such as to obstruct the proceedings or be contrary to the interests of justice.³² In this respect, the Chamber recalls its findings, notably that: (i) the material is not exculpatory in nature; (ii) the Chamber can only be satisfied that the Defence made a Rule 66 (B) request of the requisite specificity on 20 March 2009; (iii) although the Prosecution violated its disclosure obligation, the Accused did not show that he had suffered material prejudice as a result of that violation; (iv) the material in question is not probative of the issues in this case, and therefore inadmissible under Rule 89

³¹ Defence Motion, paras. 18-22 (emphasis in original); the Defence uses the examples of Witnesses GAA, Aicha Conde, A7, Cyrien Hakizimana, and the Accused himself.

³² See for example, *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgement (AC), 19 April 2004, paras. 153 and 214 in which the Appeals Chamber did not impose sanctions for the Prosecution's late disclosure on the grounds that no material prejudice had been shown and it was not established that the Prosecution had deliberately breached its obligations; and *Karemera et. al., Decision on Joseph Nzirorera's Notices of Rule 68 Violations and Motions for Remedial and Punitive Measures* (TC), 25 October 2007, para. 26, where the Trial Chamber held that sanctions can be imposed where there is a pattern of continuous lack of diligence in the exercise of the Prosecution's disclosure obligations which amounts to obstructing the proceedings or is contrary to the interests of justice.



(C); (v) there is nothing to suggest that the Prosecution did not act in good faith and the Chamber accepts that it was not aware of the existence of the document prior to its late discovery. Furthermore, the Prosecution has expressed its concern about the circumstances which resulted in the late discovery of the document and has ordered an internal inquiry in this regard.

41. Accordingly, the Chamber finds that the Prosecution's lack of diligence in this matter is not sufficient to warrant the issuance of a warning to the Prosecution pursuant to Rule 46 (A) of the Rules. The Chamber, however, reminds the Prosecution of the importance of its disclosure obligations to these, and all, proceedings before the Tribunal.

Should the Chamber Order the Prosecution to File a Report Publicly on the Investigations into the Circumstances of the Late Discovery of the Unprocessed Witness's Statement?

42. The Chamber considers that the inquiry ordered by the OTP into the circumstances under which Nyarwaya's Statement was not processed and submitted to the OTP Evidence Unit – with a view to taking administrative or disciplinary action against any staff member found to be at fault – is a matter purely internal to the OTP. Accordingly, the Chamber denies this relief.

FOR THESE REASONS, the Chamber

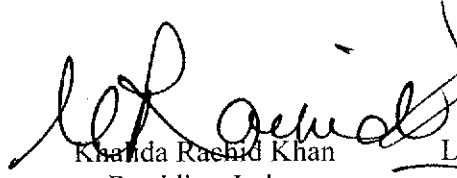
GRANTS the Defence Motion in part; and,

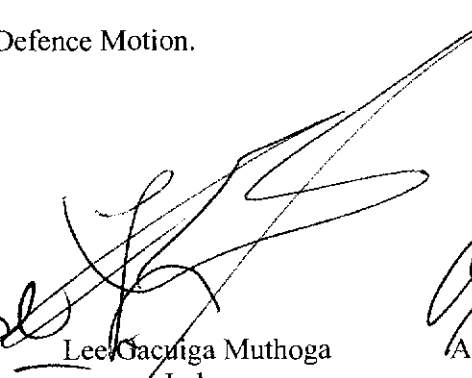
FINDS the Prosecution in violation of its Rule 66 (B) disclosure obligations in respect of Nyarwaya's Statement; and accordingly,

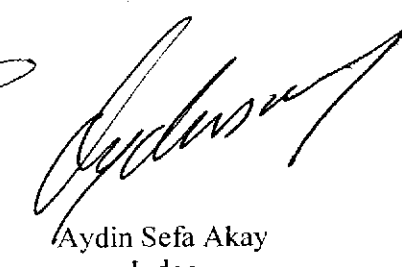
REMINDS the Prosecution of the utmost importance of its disclosure obligations under the Rules; and

DENIES the remainder of the Defence Motion.

Arusha, 1 July 2009


Khadija Rashid Khan
Presiding Judge


Lee Gacunga Muthoga
Judge


Aydin Sefa Akay
Judge

[Seal of the Tribunal]