ICTR-04-81-T
01-09-2009
7648
Juan

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(7648 - 7645)

ORIGINAL: ENGLISH

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 31 August 2009

THE PROSECUTOR

v.

Ephrem SETAKO

Case No. ICTR-04-81-I

DECISION ON DEFENCE REQUEST TO CALL TWO WITNESSES

The Prosecution
Ifeoma Ojemeni-Okali
Simba Mawere
Christiana Fomenky

The Defence
Lennox Hinds
Cainnech Lussiaà-Berdou

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 a Defence motion to call two further witnesses, filed on 6 July 2009;

CONSIDERING the Prosecution response, filed on 13 July 2009; and the Defence reply, filed on 21 July 2009;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Defence presented 35 witnesses from 4 to 29 May and from 15 to 26 June 2009, in accordance with a schedule confirmed during the status conferences of 24 February and 22 April 2009. It closed its case on 26 June 2009, subject, *inter alia*, to an application to call Witnesses AL and CAA. At the end of the proceedings, the Chamber requested written submissions regarding the circumstances surrounding the Defence's inability to secure the appearance of the two witnesses. Having received such explanations, the Chamber will now render its decision as to whether these two witnesses shall be called.

2. The Prosecution opposes the Defence request. Referring to Rule 89 (C) of the Rules of Procedure and Evidence, it submits that the Chamber should not exercise its discretionary powers. The Defence is attempting to reopen its case to adduce additional evidence. Allowing evidence previously deemed unnecessary would give the Defence an unfair advantage. There is no good cause to call the two witnesses, and, at this advanced stage of the trial, the ensuing delay would not be justified.

DELIBERATIONS

3. The Defence closed its case subject to resolution of its requests to present further evidence. Case law relating to the reopening of the case is therefore not directly applicable. The Chamber will, rather, assess whether calling Witnesses AL and CAA would be in the interests of justice. It notes that the trial is at a very advanced stage. Any delay must be balanced against the probative value of the evidence and Setako's right to a fair trial.[1]

4. On 25 May 2009, the Chamber granted the Defence request for the closed session testimony of Witness AL from the trial of *Prosecutor v. Bagosora et al.* as well as the Defence application to add him to its witness list.[2] The Defence filed a motion with the Registry on 2 June 2009 requesting that the Chamber order the Witnesses and Victims Security Section to contact Witness AL and ask him if he would be willing to testify. Due to an administrative error, the motion did not reach the Chamber until 23 June 2009. Although this delay cannot be attributed to the Defence, the Chamber notes that, despite not receiving the usual receipt confirmation, the Defence did not seek to clarify the situation until about 22 June 2009, or only four days before it was due to complete its case. In the Chamber's view, the Defence could have acted with more diligence.

---

[1] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Defence Motion for the Admission of Additional Evidence (TC), 22 October 2008, para. 7.

[2] Decision on Defence Motion for Disclosure of Closed Session Testimony, 25 May 2009; Decision on Defence Motion to Vary its Witness List, 25 May 2009.

5. The Defence submits that Witness AL would contradict Prosecution Witness SQY's testimony that, in May 1994, Setako handed over Augustin Maharangari's two daughters to an *Interahamwe* at a roadblock in Kiyovu. Witness AL is expected to testify that Maharangari and his family members were killed on a different date and in another place. The Chamber recalls that it has already heard Defence evidence on the issue of whether Setako handed the two girls to the *Interahamwe*. Furthermore, Witness SQY stated that he personally did not know the identities of the two girls but was told that they were the daughters of Maharangari. Therefore, the proposed evidence would tend only to show whether the person or persons from whom Witness SQY received the information were mistaken.[3]

6. Finally, it has not been established when, or even if, Witness AL would be able to testify. In view of the considerations above, the Chamber does not consider that calling him will be in the interests of justice.

7. Witness CAA was included on the Defence witness list that was filed on 6 April 2009. He was initially scheduled to testify during the trial session of 15 to 26 June 2009. In an email of 29 May 2009, he informed the Defence that, due to family and professional obligations, he would not be able to come to Arusha between 12 and 19 June 2009. However, if he received adequate warning, he would consider any alternative dates, implying that he needed more than two weeks' notice. Upon learning that he was unavailable, the Defence made no attempt to secure his attendance for the following week, even though it could have done so with at least three weeks' notice at that stage and still remained within the end date of 26 June 2009.[4]

8. According to the Defence, Witness CAA would testify that Setako arrived in Kinshasa on 12 April 1994 with Casimir Bizimungu; that they went to G'Badolite a few days later; and that Setako returned from G'Badolite the same day and left around 21 April to return to Rwanda. The Defence asserts that this witness only became necessary in view of the Prosecution's cross-examination of Setako concerning whether he remained in Kinshasa until 21 April 1994. The Prosecution points out that the Defence could have predicted that these issues would arise and planned accordingly. In the Chamber's view, the Defence has not demonstrated how the situation changed, such that the testimony of Witness CAA regarding Setako's alibi is now more important than previously.[5] In any case, the Defence has presented other evidence in support of the alibi. The Chamber considers the additional probative value of Witness CAA's evidence limited and finds that it does not outweigh the need to ensure the expeditious completion of the proceedings.

---

[3] Para. 42 of the Indictment does not identify the two Tutsi girls that Setako allegedly brought to the roadblock in Kiyovu. However, Witness SQY stated: "I already told you that I did not know these girls, and I repeat, I did not know these girls. I only saw them after their abduction, so I only know about the existence of these girls after their abduction, since it was being said that the daughters of Maharangari had been abducted." T. 18 February 2009 p. 13.

[4] As pointed out by the Prosecution, Witness CAA did not appear on the Defence's first or second notice of the order of its witnesses for the second session, communicated by Co-counsel via emails of 15 and 18 June 2009. The Chamber is therefore not entirely convinced by the Defence submission that it "had absolutely no control on the availability of Witness CAA during the trial session of 15-26 June 2009" (Motion para. 19).

[5] Motion para. 21 ("In view of the suggestions made by the Prosecution during Colonel Setako's testimony, the Setako Defence now feels it is necessary, in order for the Accused to exercise his right to full answer and defence, to put Witness CAA on the stand.").

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion.

Arusha, 31 August 2009

Erik Møse
Presiding Judge

Sergei Alekseevich Egorov
Judge

Florence Rita Arrey
Judge

[Seal of the Tribunal]