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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Mr. Adama Dieng

Date: 15 December 2009

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-T

2009 DEC 15 P. 11: 58
JUDICIAL RECORDS/ARCHIVES
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DECISION ON DEFENCE MOTION TO ADMIT MFI/3 INTO EVIDENCE
PURSUANT TO RULE 89 (C) OF THE RULES OF PROCEDURE AND EVIDENCE

Office of the Prosecutor:

Richard Karegyesa
Adelaide Whest
Drew White
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Yasmine Chubin

For the Accused:

Marie-Pierre Poulain
Kate Gibson

[Signature]

INTRODUCTION

1. The trial in this case commenced on 20 October 2009.¹ The Prosecution closed its case on 16 November 2009 and the Defence case is scheduled to start on 1 March 2010.²
2. Prosecution Witness BVS testified on 22 October 2009 before the Chamber. The Defence introduced a copy of a *pro-justitia* statement ("Document") in the course of Witness BVS' cross-examination alleging that it was a statement signed by her. However, Witness BVS did not accept the signature as hers. The Chamber did not grant the Defence request to enter the Document into evidence, but marked it for identification purposes as MFI/3.³
3. On 30 October 2009, the Defence filed a Motion seeking to admit the Document into evidence as an exhibit.⁴
4. The Prosecution filed its Response on 2 November 2009 requesting that the Chamber deny the Defence Motion on the basis that the Chamber has already ruled on the issue and the Defence should have sought permission to file an interlocutory appeal of the Chamber's oral decision of 22 October 2009.⁵ The Defence replied on 9 November 2009.⁶

DISCUSSION

Preliminary Matter

5. The Prosecution submits that, on 21 and 22 October 2009, the Chamber allowed three documents introduced by the Defence to be marked as MFI/1, MFI/2 and MFI/3 under seal "with the understanding that unless the documents were later properly identified, they would not form part of the record of the case."⁷ The Prosecution submits that the Defence Motion should be dismissed for being inadmissible, as the Chamber already ruled on the issue and the appropriate avenue to seek relief would have been an application for certification to appeal.⁸
6. The Chamber recalls that it refused to admit the Document into evidence because Witness BVS denied that the signature on it was hers.⁹ However, the Chamber did not rule out the possibility of the Document being admitted later. Indeed the Chamber marked the Document for identification so that, should the Defence wish to have it admitted into evidence later, it has the opportunity to present evidence on its provenance and reliability. The Chamber considers that in light of the additional Defence arguments contained in the Motion, the Chamber can, pursuant to its broad discretion under Rule 89 (C) of the Rules of Procedure and Evidence ("Rules"), proceed to consider whether sufficient indicia of reliability have been shown for the purposes of admission.

¹ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-PT, Scheduling Order, 30 September 2009.

² Scheduling Order regarding Commencement of Defence Case, 19 November 2009.

³ T. 22 October 2009, p. 32.

⁴ Defence Motion to Admit MFI/3 into Evidence pursuant to Rule 89(C) of the Rule of Procedure and Evidence, 30 October 2009 ("Defence Motion").

⁵ Prosecutor's Response to Defence Motion to Admit MFI/3 into Evidence pursuant to Rule 89(C) of the Rule of Procedure and Evidence, 2 November 2009 ("Prosecution Response").

⁶ Reply to Prosecution Response to Defence Motion to Admit MFI/3 into Evidence, 9 November 2009 ("Defence Reply").

⁷ Prosecution Response, para. 3.

⁸ Prosecution Response, para. 7.

⁹ T. 22 October 2009, p. 32.



Applicable Law on Admissible Evidence

7. Rule 89 (C) of the Rules provides that a Chamber “may admit any relevant evidence which it deems to have probative value.” The Chamber therefore has a broad discretion when assessing the admissibility of evidence.¹⁰ For the purpose of admission pursuant to Rule 89 (C), a document will be considered relevant if it can be established that there is a connection between the evidence and one or more allegations against the accused in the indictment.¹¹ In order to be probative, evidence must tend to prove or disprove an issue and be sufficiently reliable.¹² The onus is on the moving party to demonstrate that the evidence which it seeks to admit is, *prima facie*, relevant and probative.¹³

8. At the admissibility stage, “only the beginning of proof that evidence is reliable, namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible”.¹⁴ Documents need not be recognized by a witness in order to have probative value.¹⁵ However, it has been held that “there must be some indication that the document is what the moving party says it is, and that its contents are reliable. The Rules impose no technical requirements for establishing the authenticity of a document, but a number of factors have been considered relevant”.¹⁶ These factors include the extent to which the document’s content is corroborated by other evidence, the place where it was obtained, whether it is an original or copy; and if a copy, whether it is registered or filed with an institutional authority; and whether it is signed, sealed, stamped, or certified in any way.¹⁷

9. At the admissibility stage, a Trial Chamber is not called upon to make a final determination on whether the document is what the party says it is, much less whether its contents are truthful or accurate.¹⁸ A Chamber’s decision to admit evidence is a different

¹⁰ *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu’s Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (Rule 89 (C)), 2 September 2005 (“*Bizimungu* Decision of 2 September 2005”), para. 10; *The Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness (AC), 21 July 2000 (“*Kordic* Appeals Decision”), para. 20; *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence (AC) 4 October 2004, (“*Nyiramasuhuko* Appeals Decision”), paras 6-7.

¹¹ *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion to Admit Documents Authored by Enoch Ruhigira, 26 March 2008 (“*Karemera* Decision of 26 March 2008”), para. 3 citing *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsene Shalom Ntahobali on the “Decision on Defence urgent Motion to Declare Part of the Evidence of Witnesses RV and ABZ Inadmissible” (AC), 2 July 2004.

¹² *Bizimungu et al.*, Decision on Jérôme Bicomumpaka’s Confidential and Amended Motion to Admit Rwandan Judicial Records into Evidence, Case No. ICTR-99-50-T, 10 June 2008, (“*Bizimungu* Decision of 10 June 2008”), para. 4; *Nyiramasuhuko* Appeals Decision, para. 7; *Kordic* Appeals Decision, para. 24.

¹³ *Bizimungu* Decision of 10 June 2008, para. 5; *Karemera* Decision of 26 March 2008, para. 3.

¹⁴ *Nyiramasuhuko* Appeals Decision, para. 7; *Bizimungu* Decision of 2 September 2005, para. 14.

¹⁵ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request to Admit United Nations Documents Into Evidence Under Rule 89(C), 25 May 2006, (“*Bagosora* Decision of 25 May 2006”), para. 4; *Karemera et al.*, Decision on the Prosecution Motion for Admission into Evidence of UNAMIR Documents , 30 October 2007, (“*Karemera* Decision of 30 October 2007”), para. 6.

¹⁶ *Bagosora* Decision of 25 May 2006, para. 4.

¹⁷ *Bagosora et al.*, Decision on Ntabakuze Motion to Deposit Certain United Nations Documents, 19 March 2007 (“*Bagosora* Decision of 19 March 2007”), para. 3. See also *Bagosora* Decision of 25 May 2006, para. 4.

¹⁸ *Bagosora* Decision of 25 May 2006, para. 4.

consideration from the weight to be attached to the evidence; the latter question must be determined at the close of the case and after considering the evidence as a whole.¹⁹

Has the Defence Established Sufficient Indicia of Reliability?

10. The Document, dated 28 July 1999, appears to be a *pro-justitia* statement (“PV d’audition du témoin”) taken by a person identified as an officer of the Kiramuruzi brigade, attached to the Kibungo gendarmerie.²⁰ The Document is signed by both the witness interviewed and the police officer who took the statement. The translation of the interview, provided in court by the English interpreter, shows that the testimony relates to the role of a certain Habarugira during the Kiziguro Parish massacre.²¹ The Chamber further notes that annexed to the Defence Motion is a “dossier judiciaire” from the “Parquet de la République Byumba” dated 31 January 2000 which provides a list of Prosecution witness statements taken in the proceedings against Habarugira. The name of Witness BVS appears at item 28 of this list. The Document bears number 28, suggesting that Witness BVS made the statement.

11. The Chamber recalls that, to enter a document as evidence, it is incumbent upon the moving party to first establish its provenance. The Chamber notes, however, that the Defence has not provided it with any information concerning the origin of the Document or the accompanying “dossier judiciaire”. Nor has it explained how these documents came into its possession. Furthermore, the Document is not stamped, sealed or certified in any way which would assist the Chamber in establishing its authenticity. Accordingly, despite the information on the face of the Document, the Chamber is not satisfied, given Witness BVS’ denial, that the Defence has provided sufficient indicia of reliability to warrant admitting the Document into evidence at this stage.

Is the Defence Motion an Abuse of Process?

12. The Prosecution submits that re-litigation of the same issue is “unnecessary and disruptive” to the court and constitutes an abuse of process under Rule 73 (F).²² For the reasons set out in paragraph 6 of this Decision, the Chamber considers that the Defence Motion is not an abuse of process under Rule 75 (F).

¹⁹ *The Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Decision on the Prosecution’s Motion to Admit Documents Tendered during the Cross-Examination of Defence Witness Augustin Ndindiliyimana, 28 February 2006, para. 12.

²⁰ The translation by the Kinyarwanda interpreter reads as follows: “Republic of Rwanda. MINADEF. National gendarmerie. Kibungo’s court. Kiramuruzi Brigade. Pro-Justitia. 1999, 28th day of July, I, Kabiligi, Innocent, criminal investigations officer with general jurisdiction in Mutara prefecture, Buyuma and Kibungo, serving in the Kiramuruzi Brigade, I have before me, and appearing as a witness to answer my questions in Kinyarwanda, the language of her choice, this person [...]”.

²¹ T. 22 October 2009, pp. 30-31. The Document relates to the account of events at Kiziguro Parish on 11 April 1994, which the Defence alleges differs from BVS’ testimony given before this Chamber on 22 October 2009 on the same events.

²² Prosecution Response, para. 12. Rule 73 (F) provides that in addition to sanctions envisaged by Rule 46, a Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.



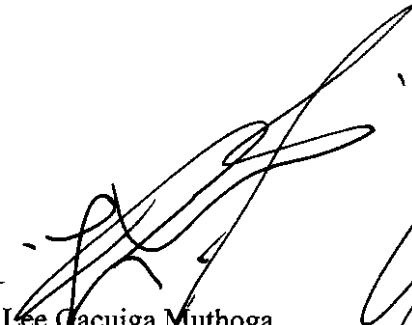
FOR THESE REASONS the Chamber,

DENIES the Defence Motion.


Arusha, 15 December 2009



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Aydin Sefa Akay
Judge

[Seal of the Tribunal]

