



ICTR-99-54-T
(01-03-2011
102401 - 102397)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

102401
Mwema

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 1 April 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL PROCEEDINGS ARCHIVE
2011 APR - 1 P 1:51

**DECISION ON DEFENCE ORAL MOTION FOR DISCLOSURE OF THE
AUDIOTAPE OF A RADIO RWANDA BROADCAST OF 4 MARCH 1994**

Office of the Prosecutor

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Ms. Véronique Ethier
Ms. Michelle Théberge

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa and Mparany Rajohnson (the “Chamber”);

BEING SEIZED of the Defence Oral Motion for the Disclosure of the Audiotape of a Radio Rwanda Broadcast of 4 March 1994, pursuant to Rule 68 of the Rules of Procedure and Evidence, proffered on 24 November 2010;¹

CONSIDERING the Prosecution Oral Response and the Defence Oral Reply, proffered on 24 November 2010;²

CONSIDERING also the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Defence Motion pursuant to Rule 68 of the Rules.

SUBMISSIONS OF THE PARTIES

Defence Submissions

1. The Defence prays the Chamber to direct the Prosecution to disclose the audiotape of a Radio Rwanda broadcast of 4 March 1994. The Defence has specifically identified the material, the Prosecution has admitted custody, and the material may be exculpatory.³

2. According to the Defence, Prosecution Witnesses ANAN and ANAT alleged that, after the assassination of Martin Bucyana—which the Defence places on 22 February 1994—and of Felicien Gatabazi, the Accused made a hate speech to 150 to 200 persons in Gisenyi. A few days later, on 4 March 1994, security issues were raised at a Cabinet meeting. The Radio Rwanda broadcast summarized this Cabinet meeting and addressed violent incidents after Bucyana’s and Gatabazi’s death in various prefectures, but it made no mention of any hate speech in Gisenyi prefecture. This broadcast, therefore, could impact the credibility of Prosecution evidence or mitigate the guilt of the Accused, and is thus potentially exculpatory.⁴

¹ T. 24 November 2010, pp. 2-6.

² For the Prosecution Oral Response, see *id.*, pp. 6-8. For the Defence Oral Reply, see *id.*, pp. 8-9.

³ *Id.*, pp. 2-6, 8-9.

⁴ *Id.*, pp. 4-6, 8.

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Prosecution Submissions

3. The Prosecution acknowledges that it possesses the audiotape, but submits that the Defence has failed to present a *prima facie* showing of the broadcast's probable exculpatory nature.⁵

4. In the Prosecution's view, the Defence has failed to establish that the requested material is exculpatory. No basis has been laid showing that Radio Rwanda would have reported on alleged hate speech, had a duty to do so, or that the Accused played any role in the station's editorial decisions. The audiotape is therefore irrelevant. More importantly, the Prosecution witnesses never confirmed that any events occurred on 4 March 1994, but only that events took place around then.⁶

DELIBERATIONS

5. Rule 68 (A) states that: "The Prosecutor shall, 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 Prosecution evidence." The Prosecution's obligation to comply with this Rule "is as important as the obligation to prosecute" and is essential to a fair trial.⁷

6. In order to show a Prosecution breach of its disclosure obligations under Rule 68 (A), the Defence must: (1) specifically identify the material sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material requested is in the custody or control of the Prosecution.⁸

7. From the Parties' submissions, it does not appear that the first and third criteria are in dispute. The Defence has identified the material sought—the audiotape of the Radio Rwanda broadcast of 4 March 1994—and the Chamber considers that this is sufficiently specific. The Chamber also notes the Prosecution acknowledgement that it possesses the requested material. Therefore, the Chamber is satisfied that these two criteria have been fulfilled.⁹

⁵ *Id.*, pp. 6-8.

⁶ *Id.*, pp. 6-7.

⁷ *Emmanuel Ndingabizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007, para. 72; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004, para. 242. See also *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement (AC), 20 October 2010 ("Kalimanzira Appeals Judgement"), para. 18; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, para. 9; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 264.

⁸ *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents (AC), 19 February 2010, para. 16; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008 ("Karemera et al. Appeals Decision of 14 May 2008"), para. 9

⁹ See T. 24 November 2010, pp. 2-3, 7-8.

8. Turning to the second criterion, the Chamber recalls that the *Kalimanzira* Appeals Judgment confirmed that the Prosecution's obligation to disclose exculpatory material is to be interpreted broadly. The Appeals Chamber also emphasized that a Trial Chamber must assess only whether the requested material is "potentially", instead of actually, exculpatory.¹⁰

9. The Chamber notes that at least two Prosecution witnesses—Witnesses ANAN and ANAT—have testified that the Accused incited others at a demonstration to kill Tutsis, shortly after the death of Martin Bucyana in February 1994.¹¹

10. The Accused, during his evidence, denied these allegations. He also testified that, after Bucyana's and Gatabazi's assassinations, insecurity was rife in Kigali town, Cyangugu and Butare. He stated that, on 4 March 1994, he attended a Cabinet meeting in Kigali, where the participants discussed security issues and the budget, and where he joined the Minister of Finance in presenting a report concerning the budget.¹²

11. According to the Accused, he later listened to the Radio Rwanda broadcast of that day, and observed that it discussed the violence in Kigali, Cyangugu and Butare. He also said that the broadcast reported on the substance of the Cabinet meeting of 4 March 1994, and although it did not mention him by name, the broadcast spoke of "the Minister of Planning".¹³

12. The Chamber takes note of the significant period of time between the alleged gatherings after Bucyana's death on 22 February 1994,¹⁴ and the Radio Rwanda broadcast of 4 March 1994. Moreover, the subjects that would have been addressed in the broadcast remain unclear to the Chamber. Under these circumstances, the Chamber cannot conclude that the broadcast's alleged omission of any reference to incidents in Gisenyi may affect the credibility of Prosecution witnesses or may suggest the innocence or mitigate the guilt of the Accused, and therefore be potentially exculpatory.

13. Thus, the second criterion necessary to show a Prosecution breach of its disclosure obligations under Rule 68(A) of the Rules has not been met. The Chamber therefore denies the Defence Motion.

¹⁰ *Kalimanzira* Appeals Judgment, paras. 18-20. See also *Karempera et al.* Appeals Decision of 14 May 2008, paras. 12-14.

¹¹ Witness ANAN, T. 1 February 2010, pp. 32-37; Witness ANAT, T. 16 March 2010, pp. 67-68.

¹² Augustin Ngirabatware, T. 23 November 2010, pp. 33-35, 38-39, 43; T. 23 November 2010, p. 40 (French).

¹³ Augustin Ngirabatware, T. 23 November 2010, pp. 33-35, 43.

¹⁴ The Accused testified that Martin Bucyana was murdered on 22 February 1994. T. 22 November 2010, p. 67. The Chamber provides this date solely for reference, and adds that no finding has been made concerning the date of Bucyana's alleged killing.

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FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

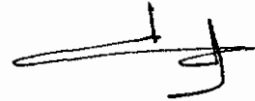
Arusha, 1 April 2011



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

