

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Richard Lussick, Presiding Judge, Justice Teresa Doherty and Justice Julia Sebutinde;

SEISED of the Prosecution Motion for Relief in Respect of Violations of Rule 67, filed on 7 July 2006 ("Motion");

NOTING the Kanu Response to Prosecution Motion for Relief in Respect of Violations of Rule 67, filed on 12 July 2006 ("Kanu Response");

NOTING the Brima Response to Prosecution Motion for Relief in Respect of Violations of Rule 67, filed on 13 July 2006 ("Brima Response");

NOTING the Prosecution Reply to Defence Responses to Prosecution Motion for Relief in Respect of Violations of Rule 67, filed on 14 July 2006 (Reply);

NOTING that the second Accused Kamara did not file a Response;

CONSIDERING the Rules of Procedure and Evidence ("Rules"), in particular Rules 67(A), 67(B) and 73;

HEREBY DECIDES AS FOLLOWS based solely on the written submissions of the parties pursuant to Rule 73(A).

I. INTRODUCTON

1. The testimony of the first Defence witness, the First Accused Brima, was completed on 6 July 2006. During that testimony, the First Accused raised the defence of alibi in respect of certain times and places named in the Indictment in relation to himself and the Third Accused Kanu. The Prosecution claims that prior to the witness's testimony there had been no notification, formal or otherwise, of these alibi defences as required by Rule 67(A)(ii)(a) of the Rules.

II. PRELIMINARY MATTER

1. On 18 July 2006 the Prosecution filed a document entitled "Supplement to Prosecution Reply to Defence Responses to Prosecution Motion for Relief in Respect of Violations of Rule 67" ("Supplement"). Annex A and Annex B of the Supplement contain some authorities the Prosecution omitted to include in its Reply. Annex C of the Supplement is a copy of recent email correspondence between the Prosecution and the Defence for the Second Accused Kamara which is said to indicate that the Second Accused is relying on Rule 67(B). The Prosecution submits that this is a further reason why the order it seeks should also apply to the Second Accused.

2. The Prosecution seeks leave, if necessary, for the late filing. We hold that such leave is not necessary. The last Response by the Defence - that of the First Accused Brima - was filed on 13 July




26 July 2006



2006, so that the last day for the Prosecution to file its Reply was 18 July 2006. Thus the Supplement was not filed out of time. We therefore accept Annex A and Annex B of the Supplement.

3. However, we reject Annex C. We have stated in previous decisions¹ that it is not appropriate for a party to raise a new argument in a Reply, as the opposite party - having filed its Response - has no opportunity to answer a new submission. We accordingly reject Annex C and the submission made by the Prosecution in respect of it.

III. SUBMISSIONS OF THE PARTIES

Prosecution

4. The Prosecution submits that although the First Accused Brima filed a Pre-Trial Brief pleading alibi for the period February to July 1998, during which he claimed to be in the custody of the RUF, the brief did not specify where he claimed to have been during this period, nor were any witnesses or other evidence specified. Further, the Pre-Trial Brief did not plead an alibi for the period July to September 1998, for which the First Accused has now claimed an alibi in his oral testimony.

5. With respect to the Third Accused Kanu, the Prosecution submits that his Pre-Trial Brief offered a general alibi that he was not in any of the villages mentioned in the Indictment, but failed to specify where he had been, the names and addresses of any witnesses, or any other evidence relied upon to establish an alibi. Also, although the Pre-Trial Brief did not mention an alibi for the period of the 1999 Freetown invasion, the First Accused has now claimed an alibi for the Third Accused in his oral testimony.

6. Consequently, the Prosecution submits that the First Accused is in breach of Rule 67(A)(ii) of the Rules and, if the Third Accused intends to rely on the evidence of the First Accused for an alibi, then so is the Third Accused.

7. The Prosecution seeks an order that it be given formal notification in accordance with Rule 67(A)(ii)(a) of the Rules of:

- i. any alibi defence(s) the Defence intend to advance; and
- ii. the place or places at which the Accused claim to have been present at the time of the alleged crimes; and
- iii. the names and addresses of all witnesses upon whom the Accused intend to rely to establish any alibi; and
- iv. any other evidence upon which the Accused intend to rely to establish any alibi.

¹ *Prosecutor v. Brima et al.*, SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, dated 4 May 2005, para. 20; Decision on Objection to Question Put by Defence in Cross-Examination of Witness TFI-227, dated 15 June 2005, para. 28.

JAO.

8. The Prosecution also seeks an order that the Defence for all three Accused, if relying on alibi evidence, do not call witnesses to testify in that regard until the Prosecution has been given the required notice and has had sufficient time to fully investigate the alibi witnesses and evidence.

Defence

Kanu

9. The Kanu Defence submits that the Prosecution arguments are frivolous in that it cannot reasonably be held to be in breach of any of the Rules based merely on an assumption of the Prosecution, or on anticipated Defence conduct. Alternatively, the Kanu Defence states that it does not intend to rely on the particular portions of the evidence of the First Accused relating to Kanu's whereabouts at the time of the January 1999 Freetown invasion. The Kanu Defence asks the Trial Chamber to dismiss the Motion insofar as it alleges that the Accused Kanu is in breach of Rule 67.

Brima

10. The Brima Defence submits that it did not put forward the defence of alibi but merely asserted that Brima (and in some places the Third Accused) was not in a position to commit the crimes charged. This simply amounts to raising reasonable doubt in the evidence led against Brima. Further, it is submitted that Rule 67(A)(ii) clearly states that any information regarding alibi should be provided "as early as practicably possible" and that the Defence has been unable to comply with this because of problems gathering evidence and finding witnesses. Alternatively, the Brima Defence relies on Rule 67(B).

Prosecution Reply

11. As regards the First Accused Brima, the Prosecution submits that in parts of his testimony he claimed that he was somewhere other than where the Prosecution alleged him to be at the material time, and thus Rule 67(A)(ii) is clearly applicable. Further, the claim of the Brima Defence that Rule 67(A)(ii) only requires the notice to be given "as early as practicably possible" ignores the wording of the Rule that continues: "and in any event prior to the commencement of the trial".

12. The Prosecution points out that the Third Accused Kanu has not expressly stated that he will not seek to raise any alibi defence, or rely on any alibi evidence apart from that referred to by the Prosecution. In the absence of any such express statement, the Prosecution maintains its request for the orders sought.

13. Although the second Accused Kamara has not responded to the Motion, the Prosecution submits that the order it seeks should apply to the Defence for all three Accused.

IV. DELIBERATIONS

The Applicable Law:

14. The relevant provisions of Rule 67(A) and (B) state:

(A) *As early as reasonably practicable and in any event prior to the commencement of the trial:*

J19

(ii) The defence shall notify the Prosecutor of its intent to enter:

(a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

15. As was observed by the ICTR Appeals Chamber, Rule 67(A)(ii) relates to the reciprocal disclosure of evidence at the pre-trial stage of the case and places upon the Defence the obligation to notify the Prosecution of its intent to enter a defence of alibi and to specify the evidence upon which it intends to rely to establish the alibi. This allows the Prosecution to organise its evidence and to prepare its case prior to the commencement of the trial on the merits.²

16. The notification required by Rule 67(A)(ii) does not oblige the defence to produce the probative evidence to be used to establish the whereabouts of the accused at the time of commission of the offence. The requirements of the Rule are satisfied when the defence has notified the prosecution of the required particulars of the alibi, without necessarily producing the evidence.³ Moreover, Rule 67(A)(ii) does not require the defence to notify the Trial Chamber, in addition to the prosecutor, of its intent to enter an alibi.⁴

17. Nevertheless, the effect of Rule 67(B) is that failure by the defence to comply with Rule 67(A)(ii) does not preclude the defence from relying on the defence of alibi. We agree with the interpretation of the provision as stated by the ICTR Appeals Chamber that: "To ensure a good administration of justice and efficient judicial proceedings, any notice of alibi should be tendered in a timely manner, ideally before the commencement of the trial. However, were the defence to fail in this regard, Rule 67(B) provides that the defence may still rely on evidence in support of an alibi at trial. Consequently, the obligations laid down by Rule 67(A)(ii) must be read in conjunction with the caveat provided for by Rule 67(B)".⁵

18. However, if the defence deliberately ignores its obligations under Rule 67(A)(ii), it can expect to be sanctioned by the Trial Chamber. Failure to provide timely disclosure may impair the interests of fair trial proceedings and undermine the prosecution's ability to prepare its case and investigate the evidence on which the alibi defence rests.⁶ Therefore, failure by the defence to observe its obligations under Rule 67(A)(ii) will entitle the Trial Chamber to take such failure into account when weighing the credibility of the defence of alibi.⁷

19. Taking the applicable law into account, we turn now to consider whether any of the three Accused is in breach of Rule 67(A)(ii).

² *Rutaganda v. The Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para. 241. (Rule 67(A)(ii) of the ICTR Rules corresponds with Rule 67(A)(ii) of the Rules.)

³ *Ibid.*, para. 242.

⁴ *Ibid.*, para. 244.

⁵ *Ibid.*, para. 243.

⁶ *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Bicamumpaka's Notice of Alibi, 7 July 2005, para. 5.

⁷ *Prosecutor v. Kayishema and Ruzindana*, Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 237.



JTR.

J

The First Accused Brima

20. The obligations imposed by Rule 67(A)(ii) are clear and unambiguous. It is not open to the Brima Defence to claim that it was only obliged to give notice of an alibi defence "as early as practicably possible", since the Rule clearly states that in any event such notification must be prior to the commencement of the trial.

21. The Brima Defence claims that it did not put forward the defence of alibi. In paragraph 11 of the Defence Pre-Trial Brief for Tamba Alex Brima, filed on 17 February 2005, the Brima Defence submitted that "Mr. Brima was held in custody by the RUF between February and July 1998, Accordingly, it is submitted that he had an alibi for the period relating to the allegations". This notification did not, however, comply with Rule 67(A)(ii) in that the details required by the Rule were not provided.

22. Further, in his sworn evidence, the First Accused testified at various passages to having been at a different place to that alleged.⁸ In that respect, we accept the Prosecution's submission that no notification as required by Rule 67(A)(ii) has ever been provided.

23. We therefore do not accept the submission by the First Accused that he did not put forward the defence of alibi. He claimed that he was merely asserting that he was not in a position to commit the crimes charged. However, he went much further than merely putting the Prosecution to proof. In both his pre-trial brief and his sworn evidence he claimed to have been present at other places at the time of the alleged crimes. We therefore find that he has put forward alibi defences, but has not provided the notice required by Rule 67(A)(ii) and is therefore in breach of that Rule.

The Second Accused Kamara

24. The Prosecution does not allege that the Second Accused has put forward an alibi defence. Consequently, the Second Accused cannot be in breach of Rule 67(A)(ii).

The Third Accused Kanu

25. The Prosecution claims that the Third Accused, in his Pre-Trial Brief, offered a "general alibi that he was not in any of the villages mentioned within the indictment". This is not correct. The Third Accused merely denied being in the said villages at the relevant times.⁹ He did not allege that he had been at some other places. He was therefore simply putting the Prosecution to proof and was not offering an alibi defence.

⁸ Transcripts, 8 June 2006, page 41, 12 June 2006, pages 7,17,42,50, 15 June 2006, pages 27-31.

⁹ Kanu Defence Pre-Trial Brief and Notification of Defenses Pursuant to Rule 67(A)(ii)(a) and (b), filed on 22 March 2004, para. 28.





26. Although the First Accused testified that the Third Accused was present in another place during the January 1999 Freetown invasion, the Defence for the Third Accused has stated that it does not intend to rely on that particular evidence.

27. We therefore find that the Prosecution has failed to show that the Third Accused is in breach of Rule 67(A)(ii).

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

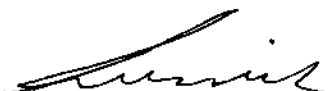
GRANTS THE MOTION IN PART

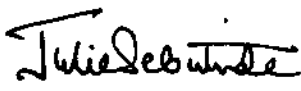
AND ORDERS:

- 1) That the Defence for the First Accused Brima make the necessary disclosures in accordance with Rule 67 (A)(ii) by 4 pm Monday, 31 July 2006.
- 2) That the Prosecution has leave to apply for an appropriate order should the Defence call an alibi witness before the Prosecution has had reasonable time to investigate the alibi.
- 3) That the orders sought against the Second Accused Kamara and Third Accused Kanu are denied

Done at Freetown, Sierra Leone, this 26th day of July, 2006.


Justice Teresa Doherty


Justice Richard Lussick


Justice Julia Sebutinde

Presiding Judge

