



ICTR-98-42-T
18-06-04
(10331-10328)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 18 June 2004

ORIGINAL RECORDS
2004 JUN 18 P 1-15

The Prosecutor

v.

Elie NDAYAMBAJE (Case No. ICTR-96-8-T)

And

The Prosecutor

v.

Alphonse NTEZIRYAYO (Case No. ICTR-97-27-T)

**DECISION ON ELIE NDAYAMBAJE'S AND ALPHONSE NTEZIRYAYO'S
REQUEST FOR THE RECALL OF WITNESS FAG FOLLOWING THE
DISCLOSURE OF A NEW CONFESSONAL STATEMENT**

Office of the Prosecutor

Ms. Sylvana Arbia
Mr. Jonathan Moses
Ms. Adesola Adeboyejo
Ms. Adelaide Whest
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Counsel for Ndayambaje

Mr. Pierre Boulé
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Counsel for Nteziryayo

Mr. Frédéric Titinga Pacere
Mr. Richard Perras

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Balungi Solomy Bossa, (the "Chamber");

BEING SEIZED of the "*Requête d'Elie Ndayambaje aux fins de rappeler le témoin FAG suite à la communication d'une nouvelle déclaration d'aveu datée du 11 août 1998 et suite à l'ordonnance verbale rendue au procès à la date du 3 mars 2004,*" filed on 27 April 2004 (Ndayambaje's Motion) **AND** "*Requête aux fins de rappeler le témoin FAG pour fins de complément de contre-interrogatoire suite à la réception d'une déclaration communiquée antérieurement,*" filed on 29 April 2004 (Nteziryayo's Motion);

CONSIDERING the "Prosecutor's Joint Response to Elie Ndayambaje's Motion to Recall Witness FAG and Alphonse Nteziryayo's Motion to Recall Witness FAG," filed on 5 May 2004 (the "Prosecutor's Response") **AND** "*Réplique d'Elie Ndayambaje à la Réponse du Procureur de la Requête d'Elie Ndayambaje aux fins de rappeler le témoin FAG suite à la communication d'une nouvelle déclaration d'aveu datée du 11 août 1998 et suite à l'ordonnance verbale rendue au procès à la date du 3 mars 2004,*" filed on 11 May 2004 (Ndayambaje's Reply);

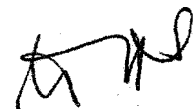
CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rule 90(G);

NOW DECIDES the Motion solely on the basis of the written briefs filed by the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

Ndayambaje's Motion

1. The Defence recalls that Prosecution Witness FAG testified on 1, 2 and 3 March 2004. On 14 April 2004, the Prosecution disclosed to the Defence the confessional statement Witness FAG made on 11 August 1998 (the "confessional statement of 11 August 1998"). The Defence submits that when it cross-examined the witness, it did not possess the said confessional statement but only the statements of 18 November 1999 and 20 March 2000.
2. The Defence submits that because the confessional statement of 11 August 1998 is the first statement made by Witness FAG, it is the closest account by the witness of the events of 1994. The Defence adds that the contents of the confessional statement of 11 August 1998 contradict the version of the events given by the witness in court. The Defence therefore argues that it is justified to cross-examine the witness with regard to the said confessional statement.
3. The Defence draws the attention of the Chamber to the Chamber's observations made on 2 and 3 March 2004 that the Prosecution should make efforts to obtain the confessional statement of 11 August 1998 and provide it to the Defence who will make of it whatever use it wishes and that if the Defence wishes to have the witness re-called for cross-examination, the Defence may make such a request to the Chamber.



Nteziryayo's Motion

4. In its Motion, the Defence of Nteziryayo endorses the arguments in Ndayambaje's Motion because Witness FAG also implicated Nteziryayo when he testified. The Defence of Nteziryayo therefore requests to be granted an opportunity to conclude the cross-examination of Witness FAG with regard to the confessional statement of 11 August 1998.

The Prosecution Submissions

5. In its joint response to both Motions by Ndayambaje and Nteziryayo, the Prosecution submits that it had initially disclosed to the Defence the confessional statement of Witness FAG dated 18 November 1999. When it discovered during his testimony that Witness FAG had made another confessional statement dated 11 August 1998, the Prosecution made efforts to obtain said confessional statement and disclosed it to the Defence on 13 April 2004.

6. With regard to the Defence request to recall Witness FAG, the Prosecution submits that the issues pointed out by the Defence do not merit the recall of Witness FAG. The Prosecution draws the attention of the Chamber to the fact that even during his testimony the witness testified that the confessions of 11 August 1998 and 18 November 1999 were essentially the same. The Prosecution argues that the discrepancies in the two confessions do not affect the issue of weight in the matter. The Prosecution submits that the Defence has adequately cross-examined Witness FAG.

7. The Prosecution thus submits that the Chamber's discretion to recall a witness must be exercised sparingly taking into consideration the interests of justice, financial considerations and the Accused's rights to a speedy and fair trial.

Ndayambaje's Reply

8. The Defence replies that the Prosecution investigators were negligent in not finding out whether Witness FAG had made a prior confession to the one he made on 18 November 1998.

HAVING DELIBERATED

9. The Chamber notes that there is no dispute that the confessional statement of 11 August 1998 was disclosed to the Defence after Witness FAG testified before the Chamber on 1, 2 and 3 March 2004. The Chamber further notes the Defence argument that their cross-examination of Witness FAG was limited because they did not have the opportunity to cross-examine him with regard to his accounts of the events as made in the confessional statement of 11 August 1998.

10. The Chamber also notes the Defence allegations that;

(1) Whereas in his testimony in court, Witness FAG testified that Josepha was killed immediately following speeches made by Nteziryayo and Ndayambaje during the ceremony for the re-installation of Ndayambaje as *bourgmestre* held at the end of May or the beginning of June, his confessional statement of 11 August 1994 states that the circumstances surrounding the death of Josepha appears to result from vengeance between Josepha and one Karangwa;

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(2) In the confessional statement of 11 August 1998, FAG recounts his participation in five significant events since 6 April 1994, including the killings of: Gratia, daughter of Onesphore; Theresa and two children; Dusabe and a boy named Jean Paul; Catherine and Susanah who were killed by Kanyenzi; and Isaias and Josepha and looting and destruction of the home of Antoine. The Defence alleges that during his testimony, Witness FAG never testified about his direct involvement in the above-mentioned killings, lootings and destruction; and

(3) whereas in the confessional statement of 11 August 1998, Witness FAG never mentioned his direct involvement in the massacres at Mugombwa Church, his testimony describes his personal involvement in the massacres at Mugombwa Church.

11. In the Chamber's view, Witness FAG may be recalled so that the Defence may cross-examine him exclusively on these alleged contradictions as found in his confessional statement of 11 August 1998.

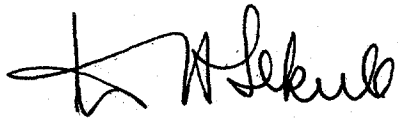
12. The Prosecution may also ask questions in re-examination arising from the said cross-examination, if it so wishes.

FOR THE ABOVE REASONS, THE TRIBUNAL


GRANTS the Motion; and

ORDERS the recall of Prosecution Witness FAG so that the Defence may cross-examine him exclusively on the alleged contradictions as found in his confessional statement of 11 August 1998.

Arusha, 18 June 2004



William H. Sekule
Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

