



ICTR-98-41-T
29-09-2004
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
(21977 - 21974)

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TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 29 September 2004

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

2004 SEP 29 P 5:16
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DECISION ON THE PROSECUTION MOTION TO RECALL WITNESS NYANJWA

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution's oral request to recall Mr. Antipas Nyanjwa as an expert witness, made on 9 September 2004;

CONSIDERING the oral arguments of the Bagosora Defence, made on 9 September 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Prosecution motion presents the issue of whether good cause exists to recall Mr. Antipas Nyanjwa, a handwriting expert, who previously testified before the Chamber on 21 and 22 June 2004. At that time, the Chamber admitted as Prosecution Exhibit 278 the witness' expert report on the authorship of certain disputed documents based on his comparison of known writing samples with other documents allegedly written by the Accused. During cross-examination, the Defence raised questions concerning the size of the expert's sample as well as his use of copies of documents, rather than originals.

2. After his testimony, the Prosecution provided the expert with four additional documents to be used as part of the sample of known handwriting as well as with the originals or better copies of the documents that he had previously reviewed. On 27 July 2004, the Prosecution disclosed a supplementary expert report based on his review which "confirms" and "re-emphasizes" the conclusions made in the initial report.¹ In this disclosure and during the status conference of 13 July 2004, the Prosecution indicated its intention to recall the witness during the week of 6 September 2004.

3. The Bagosora and Ntabakuze Defences filed a motion challenging in part the supplementary report arguing that three of the four new documents used as part of the sample of known handwriting were privileged. The Defence also asserted that the Prosecution had not sought nor been granted leave to recall the witness. In an oral decision on 10 September 2004, the Chamber ruled that the Prosecution must seek leave to recall Mr. Nyanjwa and that all other issues pertaining to the supplementary report were therefore premature. The Prosecution then made an oral motion to recall the expert, adopting its written submissions filed on 8 September 2004.

SUBMISSIONS

4. In its written submissions, the Prosecution states that it has no reason to doubt Mr. Nyanjwa's initial assessment, which was based on the use of copies and a somewhat smaller sample of known handwriting, before his testimony and has no reason to doubt that assessment now.² Nonetheless, the Prosecution argues that good cause exists to recall the expert because cross-examination has raised questions concerning the sufficiency and quality of the copies of the documents that he reviewed. According to the Prosecution, it did not have an opportunity to address the challenges to the methodology the expert used in the preparation of the first report because they arose *ex improviso* during cross-examination, and

¹ Supplementary Expert Report, Registry Numbers 21420, 21421, L 0027335-36.

² Prosecutor's Written Submissions Regarding Certain Issues Raised by Bagosora and Nabakuze Defence Motions Concerning Prosecution Expert Witness Nyanjwa's Supplementary Expert Report, 8 September 2004, para. 28.

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it ought to reasonably be permitted to address the arguments by producing new evidence. Though in its possession, the Prosecution notes that it could not show the expert, who was in Kenya, the originals and better copies of the documents prior to his arrival in Arusha for his testimony. In addition, it is argued that the four new documents reviewed by the expert as part of the sample of known handwriting are "fresh evidence", not previously known to the Prosecution, and therefore also could not have been discovered and shown to the witness prior to his testimony.

5. The Bagosora Defence argues that good cause does not exist for recalling Mr. Nyanjwa given that the Prosecution has not adequately demonstrated why the documents, which were in its possession or the Registry's, were not previously shown to the expert.

DELIBERATIONS

6. A party seeking to recall a witness must demonstrate good cause, which previous jurisprudence has defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act.³ In assessing good cause, the Chamber must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness originally testified.⁴ The right to be tried with undue delay as well as concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature.⁵ For example, the Chamber has intimated in this case that the recall of a witness might be appropriate where a party demonstrates prejudice from an inability to put significant inconsistencies to a witness which arise from previously unavailable Rwandan judicial documents.⁶

7. The Chamber does not find that the Prosecution has demonstrated good cause for recalling Mr. Nyanjwa and admitting his supplementary report. The expert's additional evidence appears to be aimed solely at addressing questions posed by the Defence during cross-examination, and not evidence, about the quality and quantity of the documents reviewed by the expert. Both the expert and the Prosecution remain confident in and convinced by the earlier assessment even in the face of these questions.⁷ As of yet, no evidence has been tendered to support the contention that Mr. Nyanjwa's original methodology was flawed. Given this, Mr. Nyanjwa's proposed supplementary evidence does not materially or significantly advance any aspect of the Prosecution's case beyond his initial assessment. At this stage of the proceedings, the evidence would therefore be cumulative as

³ *Kayishema and Ruzindana*, Decision on the Defence Motion for the Re-Examination of Defence Witness DE (TC), 19 August 1998, para. 14.

⁴ A similar inquiry is relevant in determining whether a party demonstrates good cause to add witnesses or to call rebuttal evidence. See *Bagosora et al*, Decision on Prosecutor's Motion for Leave to Vary the Witness List pursuant to Rule 73bis (E) (TC), 21 May 2004, paras. 8-10 (setting forth factors used in determining if there is "good cause" to vary the witness list); *Nahimana et al*, Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses as Corrected according to the Order of 13 May 2003 (TC), 13 May 2003, paras. 41-55 (setting forth relevant legal considerations in determining whether to allow rebuttal evidence).

⁵ *Nahimana et al*, Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses as Corrected according to the Order of 13 May 2003 (TC), 13 May 2003, paras. 44-45.

⁶ *Bagosora et al*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, paras. 7-8. See also *Kajelijeli*, Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO (TC), 2 November 2001, para. 12.

⁷ See Prosecutor's Written Submissions, para. 28. At trial, Mr. Nyanjwa explained that he could work with either originals or photocopies, if the copies were of good quality. T. 21 June 2004 pp. 11-13. The expert testified that he was provided with a normal sample of documents and that the quality of the copies were good. See, e.g., T. 21 June 2004 pp. 22-23, 48, 56, 57, 63. Based on his analysis of this sample, the expert stated that his findings were one hundred percent conclusive and further noted that there was nothing to criticize in his report. T. 21 June 2004 pp. 23, 74.

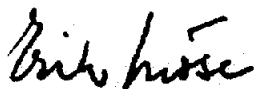
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the report does not respond to any new defence evidence and simply “confirms” and “re-emphasizes” the expert’s previous conclusions.⁸

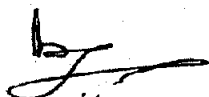
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecution’s motion.


Arusha, 29 September 2004



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



⁸ Supplementary Expert Report, Registry Numbers 21420, 21421, L 0027335-36