ICTR-01-72-A
9-7-2009
(641/A - 633/A)

641/A

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IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, *President*
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: Adama Dieng

Filed on: 9 July 2009

Simon BIKINDI

v.

The Prosecutor

Case No. ICTR-I-72-A

PROSECUTOR'S RESPONSE
To "Defence Motion to Admit Additional Evidence on Bikindi's Presence in Germany"

Office of the Prosecutor

Hassan Bubacar Jallow
Alex Obote-Odora
Dior Fall

Counsel for the Appellant

Andreas O'Shea

A – Nature of the Filing and Prosecutor's position

1. The Prosecutor hereby responds to the Appellant Bikindi's *Defence Motion to Admit Additional Evidence on Bikindi's Presence in Germany*, filed on 11 June 2009 ["The Motion"].

2. In the extant motion, the Appellant seeks leave to call 5 witnesses and the admission of several items of additional evidence pursuant to Rule 115 of the Rules of Evidence and Procedure ["The Rules"]:

- In Annexure A, a handwritten statement of purported witness Gerlinde Rahm, excerpts from a diary and what appears to be articles from newspapers in a language that is not one of the two working languages of the Tribunal[1];
- In Annexure B, a handwritten statement of purported witness Annick Steither, barely legible, accompanied by invisible copies of what appears to be photographs;
- In Annexure C, a purported handwritten statement of purported witness Sylvain Nsengigureru (*sic*)[2];
- As annexure D, a letter from purported witness Helmut Shelf and accompanying documents that are not in one of the working language of the Tribunal; and
- As annexure E, an undated letter from the Appellant himself to an unidentified recipient.

3. The Motion lacks merit and should be dismissed in its entirety. Most of the documents the Appellant seeks to have admitted as additional evidence on appeal are not legible or are not in one of the official working languages of the Tribunal. More importantly, the proposed evidence does not qualify for admission under Rule 115. It was manifestly available at trial and the Appellant does not make any cogent arguments to show how it is relevant to findings material to his conviction or sentence, and how it *would*, or even *could* have had any impact on the verdict.

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[1] The Appellant's proposed "Unofficial translation of the diary entries into English" is not helpful as the original of the translated portion is illegible and a large part of the Annexure is not translated.

[2] The Appellant refers to one Sylvain Nsengingureru at paragraph 15c of the Motion. However, the name on the letter, although of poor quality, seems to read Nsengiyumva.

B. — Responses to Issues in the Appellant's Motion

(i) Illegible documents and document in language other than the official languages of the Tribunal should be rejected forthwith

4. The documents and photographs the Appellant seeks to have admitted as additional evidence on appeal, through 5 potential witnesses, are, for the most part illegible. The Appellant also fails to submit most of his documents in one of the official working languages of the Tribunal, French or English, or propose any official translation of the same.

5. For example, in Annexure A: the handwritten statement of purported witness Gerlinde Rahm is of a poor quality; the excerpts from a diary, at page 376/H of the Motion, are illegible; and what appears to be articles from newspapers are in a language that is not one of the two working languages of the Tribunal. In Annexure B, the handwritten statement of purported witness Annick Steither is also of a poor quality and the content which appears to be photographs is invisible. In Annexure C, the purported handwritten statement of purported witness Sylvain Nsengigureru (*sic*) is also of a poor quality. In annexure D, while the Appellant appears to propose a translation into English of a letter from purported witness Helmut Shelf, the accompanying documents are not in one of the working language of the Tribunal and the image in photograph is invisible.

6. It should be recalled that Article 33 of the Statute of the ICTR states that "The working languages of the Tribunal shall be English and French." Rule 3(A) of the Rules also provides that "The working languages of the Tribunal shall be English and French." In addition, as a basic requirement under Rule 115, if a party intends to rely on a document, it is under the legal obligation to produce legible copies of the document. The Appeals Chamber already instructed the Appellant to ensure that annexures to another Rule 115 application he ought to re-file "be in a legible form."[3] The Appellant fails to comply with his obligation to ensure that all annexures to his application are in a legible and exploitable form. Consequently, the Prosecutor is not in a position to make any meaningful argument, if necessary, about the documents and photographs mentioned above.

[3] *Order on the Appellant's Motions to Admit Additional Evidence on Events in Kivumu*, 30 June 2009, p. 4.

7. The Appeals Chamber should not consider or admit these documents that are not exploitable because they are illegible or because they are not in one of the official working languages of the Tribunal and the Appellant failed to propose any translation and summary of their content. Such documents and photographs should be excluded and the Appellant's arguments relying on them, if any, dismissed forthwith.

(ii) The proposed evidence was available at trial

8. A preliminary threshold for the admission of additional evidence on appeal requires the moving party to demonstrate that the proposed evidence was not available at trial in any form whatsoever.[4] In this regard, the moving party must explain how and when it became aware of the proffered evidence and whether it could have been discovered through the exercise of due diligence, including the steps taken by Counsel to obtain it during trial.[5] This, the Appellant fails to do.

9. The Appellant's arguments display a misunderstanding of the availability threshold under Rule 115. He claims that "except for testimony from the Appellant, this evidence was unavailable at trial."[6] He notes that "the appellant himself gave evidence with regard to his tour in Germany."[7] He also submits that the "additional evidence now available to the appellant has been the result of diligent investigating (*sic*) that should have been carried out at the pre-trial stage."[8]

10. These submissions should be fatal to the Motion. They amount to an admission that the proposed additional evidence was available at trial and was even adduced through the

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[4] *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9; *Prosecutor v. Nahamina et al.*, ICTR-99-52-A, *Confidential* Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006, paras. 7 to 9 ["*Decision Ngeze 6 Motions*"].

[5] *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Order for the Defence to File a Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence, 4 May 2004, p. 3; *Prosecutor v. Kupreskic*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 60.

[6] Motion, para. 28.

[7] Motion, para. 31. See also Motion paras. 31, 32.

[8] Motion, para. 35.

Appellant's own testimony. Whether the Appellant made a mistake as to the date of the alleged tour and wishes to "correct this simple error on appeal"[9] is irrelevant in this regard.

11. Furthermore, the fact that there were at least three missions to Germany, including one executed by "co-Counsel shortly after the present lead counsel's appointment to the case"[10], shows that investigative resources were not limited or remiss.[11] The missions to Germany suggest, as the Appellant appears to submit at paragraph 30 of the Motion, that the Appellant's defence took steps to obtain *more* or "other evidence of the same point".[12] The contention that those missions to Germany failed to collect *more* of the same sort of evidence during trial is irrelevant and unsupported by any evidence.[13] Similarly, the alleged ineffectiveness of former defence counsel is unfounded and the Prosecutor relies on his submissions in response to ground 5 of the Appellant's appeal.[14] In fact, the argument, at paragraph 34 of the Motion, regarding the alleged ineffective assistance of counsel is of no assistance to the Appellant; at best, it supports the position that the proposed evidence was either available or could have been obtained with due diligence.

12. The trial record shows that Appellant's defence duly cross-examined both Witness AKK and AKJ on the 1993 Kivumu incident.[15] More importantly, an informed decision was made to call the Appellant, who was best placed to know about his alleged trip to Germany in 1993, to testify on the matter. Since the Appellant testified at trial about his alleged tour of the *Irindiro ballet*, the Motion amounts to an impermissible and frivolous attempt to adduce on appeal more evidence of the same sort he adduced at trial, including evidence and an undated letter from the Appellant himself.

13. The proposed additional evidence was therefore available at trial. Rule 115 does not allow a trial *de novo* or provide an opportunity for the moving party to "correct", on appeal,

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[9] Motion, para. 33.
[10] Motion, para. 29.
[11] Motion, paras. 28, 35.
[12] Motion, para. 33.
[13] Motion, paras. 33, 35.
[14] Prosecutor's Respondent's Brief, paras. 97-131.
[15] AKK, Transcript ["T."], 22 September 2006, page 7; AKJ, T., 21 September 2006, page 15.

an alleged error it made at trial[16], or remedy any other failing or oversight during the pre-trial or trial phase.[17] The Motion should be dismissed on these grounds.

(ii) The proposed evidence is irrelevant under the ambit of Rule 115 and would not have had any impact on the verdict under appeal

14. The Appellant's speculative contention that the proposed evidence "addresses the *likelihood* that the appellant attended a political meeting at Kivumu in 1993 as alleged by witnesses AKK and AKJ proffered"[18] is utterly insufficient to meet the requisite test for relevance or show any possible impact the proposed evidence may have on the verdict under appeal.

15. With regard to relevance, the Appellant fails to show that the proposed evidence "relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence."[19] The evidence before the Trial Chamber was that prosecution witnesses AKK and AKJ had seen and heard the Appellant during a rally in Kivumu in 1993. None of them was certain as to the exact date. Witness AKK testified that he saw and heard statements made by the Appellant at an MRND/CDR rally in Kivumu in 1993 and witness AKJ stated first that he remembered the year of the rally as 1993, but didn't remember the date.[20] In cross-examination, AKJ stated that the Kivumu rally was around 15 May 1994.[21]

16. The proffered evidence does not support the Appellant's contention that he could not have been at the Kivumu rally sometime around 15 May 1993. His argument rest on unsupported assertions. He merely contends that evidence of a tour in Germany in June 1994 shows that he would have *likely* been busy preparing for such a tour at the relevant

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[16] Motion, para. 33.
[17] *Decision Ngeze 6 Motions*, para. 5; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Decision on Appellant Hassan Ngeze's Motion for the Approval of Investigation at the Appeal Stage, 3 May 2005, p. 3; *Prosecutor v. Akayesu*, ICTR-96-4-A, Appeal Judgement, 1 June 2001, para. 177.
[18] Motion, para. 19 [emphasis added].
[19] *Prosecutor v. Mrksic and Sljivancanin*, Case No. IT-95-13/l-A, Decision on Mile Mrksic's Second Rule 115 Motion, 13 February 2009, para. 7; *Prosecutor v. Krajisnik*, Case No. IT-00-39-A, Decision on Appellant Momcilo Krajisnik's Motion to Call Radovan Karadic Pursuant to Rule 115, 16 October 2008, para. 5; *Prosecutor v. Stanisic and Simatovic*, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008, para, 7.
[20] AKK, T. 22 September 2006, p. 3-4, AKJ, T. 20 September 2006, p. 47, lines 11-13.
[21] AKJ, T. 21 September 2006, p. 15, lines 30-34.

time, in May 1194. Even if it was accepted that the Appellant was involved on a tour in Germany in June 1993, the proposed evidence does not preclude and cannot undermine the evidence, properly accepted by the Trial Chamber, of his participation to a rally held at Kivumu, sometime around 15 May 1994.

17. The proposed evidence is also irrelevant to the findings material to his conviction or sentence. The findings concerning the 1993 Kivumu rally are not, in any way, *crucial* or *instrumental* to the Appellant's conviction or sentence for the crime he committed on the Kivumu-Kayove road, in June 1994. The Appellant's speculative assertion that *more* evidence of a tour in Germany in June 1993 makes it *likely* that he was busy preparing for his tour at the time of the Kivumu rally sometime around 15 May 1993, is manifestly irrelevant and insufficient to show any possible impact on the Trial Chamber's findings and his conviction for direct and public incitement to commit genocide.

18. The Appellant fails to make any cogent argument to show that the proffered additional evidence, considered in the context of the evidence given at trial, *would*, or even *could*, show that his conviction was unsafe, such that its exclusion would amount to a miscarriage of justice.[22] First, the Chamber accepted Prosecution Witnesses AKJ and AKK's "reliable accounts" that the Appellant attended an MRND political rally at a football field in Kivumu in 1993, where he addressed the audience advocating the killing of Tutsi and that his music was played.[23] However, even if the Trial Chamber referred to the 1993 Kivumu rally and the Appellant's encouragement to kill of Tutsi before 1994, "The Prosecution has not proven [...] that this meeting led to anti-Tutsi violence immediately thereafter."[24] The Appellant was therefore not convicted for what he did at the 1993 Kivumu rally, which, notably, occurred at a period that falls outside the scope of the Tribunal's temporal jurisdiction.

19. Second, the Appellant's conviction for direct and public incitement to commit genocide is squarely based on the June 1994 incident on the Kivumu-Kayove road that is

[22] *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions For Leave to Present Additional Evidence Pursuant to Rule 115, 12 January 2007, para. 8.
[23] Judgement ["J."], paras. 141, 183.
[24] J. para. 183. See also J. para. 142.

about one year after his alleged tour in Germany.[25] In this regard, evidence of a tour in Germany in June 1994 cannot affect the Trial Chamber's finding that the Appellant's "direct and public address on the Kivumu-Kayove road [in June 1994] leaves no doubt as to his genocidal intent at the time."[26] Similarly, the proposed evidence *would*, or even *could* not have had any impact on the Trial Chamber's conclusions that:

> *[T]owards the end of June 1994*, in Gisenyi *prefecture*, the Appellant travelled on the *main road between Kivumu and Kayove* in a convoy of *Interahamwe* and broadcast songs, including his own, using a vehicle outfitted with a public address system. When heading towards Kayove, the Appellant used the public address system to state that the majority population, the Hutu, should rise up to exterminate the minority, the Tutsi. On his way back, the Appellant used the same system to ask if people had been killing Tutsi, who were referred to as snakes.[27]

20. Third, even if the Chamber had declined to accept AKJ and AKK's evidence on the 1993 Kivumu rally, it was still open to it to accept their other evidence regarding the Appellant's direct and public address on the Kivumu-Kayove road, one year later, in June 1994. Such evidence was supported by "Witness AKK's first-hand and articulate evidence on Bikindi's exhortation to kill Tutsi on his way to Kayove"[28] in June 1994, which is corroborated by the testimony of Witness AKJ "on key points."[29] It is trite law that a Trial Chamber has "the discretion to accept only part of the witnesses' evidence".[30]

21. In these circumstances, the proposed additional evidence neither *would*, nor even *could* have affected the outcome of the trial at first instance.

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[25] J. para. 426.
[26] J. para.425
[27] J. paras.281 & 422 [emphases added].
[28] J. para. 272.
[29] J. para. 276.
[30] See i.e. *François Karera v. The Prosecutor*, *Case No. ICTR-01-74-A*, 2 February 2009, Appeal Judgement, para. 127.

C. — Relief Sought

22. On the basis of the foregoing reasons, the Prosecutor requests the Appeals Chamber to dismiss the Motion in its entirety.

Respectfully submitted this 9 July 2009, in Arusha, Tanzania.

WORD COUNT: 2689

Alex Obote- Odora
Chief, Appeals and Legal Advisory Division

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