

MICT-12-15  
16-11-2017  
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UNITED  
NATIONS



Mechanism for International Criminal Tribunals

Case No: MICT-12-15

Date: 16 November 2017

Original: English

THE SINGLE JUDGE

Before: Judge Prisca Matimba Nyambe, Single Judge

Registrar: Mr. Olufemi Elias

THE PROSECUTOR

v.

ALFRED MUSEMA

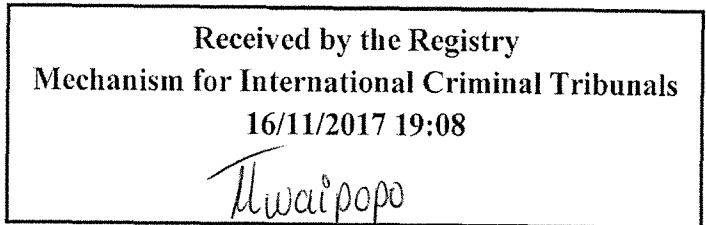
PROSECUTION'S RESPONSE TO MOTION TO REQUEST  
AN ORDER COMPELLING THE PROSECUTION TO  
CONDUCT A COMPREHENSIVE EXCULPATORY  
SEARCH FOR EVIDENCE PURSUANT TO RULE 73 IN  
THE CASE OF ALFRED MUSEMA

The Office of the Prosecutor:

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Sunkarie Ballah-Conteh

Counsel for Alfred Musema:

Steven Kay QC  
Gillian Higgins



PROSECUTION'S RESPONSE TO MOTION TO REQUEST AN ORDER  
 COMPELLING THE PROSECUTION TO CONDUCT A COMPREHENSIVE  
 EXCULPATORY SEARCH FOR EVIDENCE PURSUANT TO RULE 73  
 IN THE CASE OF ALFRED MUSEMA

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I. Introduction

1. Alfred Musema's request for an order compelling the Prosecution to conduct a comprehensive search for exculpatory evidence should be dismissed. The Defence makes no showing that the Prosecution has failed to comply with its disclosure obligations. The Prosecution has already conducted the search for exculpatory information in its database as it is obliged by Rule 73 of the Mechanism Rules of Procedure and Evidence (the Rules). The Defence is not entitled to information regarding the Prosecution's internal policies and methodologies for searching its evidence collection for exculpatory information, especially when there is no showing of any breach in the Prosecution's disclosure obligations in this case. In sum, the request is a fishing expedition. The Prosecution is not in breach of its disclosure obligations as required by law.

II. The Prosecution has fully complied with its disclosure obligations

2. The Prosecution continues to conduct thorough searches for exculpatory information in accordance with its disclosure obligations. The Prosecution is not obliged, under Rule 73, to provide the Defence with information on the manner in which it conducts or implements its disclosure obligations. Musema's request for information on "how and pursuant to which search criteria" the Prosecution searches its database, whether Prosecution "reviews are automated or conducted by individuals", of the "nature, frequency and scope of the searches"; and on the "type of material reviewed" is unrealistic and unjustified.

3. The determination of what materials are subject to disclosure is a fact-based inquiry undertaken by the Prosecution<sup>1</sup> which does not require consultation with the accused.<sup>2</sup> Accordingly, the Single Judge "will not intervene in the exercise of the Prosecution's discretion, unless it is shown that the Prosecution abused it and, where there is no evidence to the contrary, will assume that the Prosecution is acting in good

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<sup>1</sup> *Prosecutor v Eliézer Niyitegeka*, Case No. MICT-12-16-R, Decision on Appeals of Decisions Rendered by a Single Judge, 9 August 2027, para. 18; *Augustin Ngirabatware v The Prosecutor*, Case No. MICT-12-29-A, Decision on Ngirabatware's Motions for Relief for Rule 73 Violations and Admission of Additional Evidence on Appeal, 21 November 2014, para. 15; *Justin Mugenzi and Prosper Mugiranza v The Prosecutor*, Case No. ICTR-99-50-A, Decision on Motions for Relief for Rule 68 Violations, 24 September 2012, para. 7; *Kordić and Čerkez Appeal Judgement*, para. 183; *Augustin Ngirabatware v The Prosecutor*, Case No. MICT-12-29-A, Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for an Order for Disclosure, 15 April 2014, para. 12.

<sup>2</sup> *Kordić and Čerkez Appeal Judgement*, para. 183.

faith.”<sup>3</sup> Similarly, where the Prosecution states that the requested material is not in its custody or possession, the assumption is that the representation is made in good faith.<sup>4</sup>

4. In the exercise of its continuous obligation to disclose exculpatory material, the Prosecution continues to review material in its possession in order to determine whether such material is exculpatory under Rule 73 of the Rules, and make the necessary disclosures. Indeed, the ICTR Prosecution conducted several reviews of its database for exculpatory material in the Musema case. A review completed before the closure of the ICTR in 2015 included material in the possession of the Prosecution after the 18 May 2001 Rule 68 disclosures. The 2015 review did not reveal any additional material considered to be exculpatory. The Prosecution continues to conduct routine searches of its database for exculpatory material which have up to date not revealed any material considered to be exculpatory to the Musema’s case.

5. The Prosecution has fully complied with its disclosure obligations. In fact as Musema acknowledges, the Prosecution conducted yet another search and informed the Defence on 2 February 2017, that a search of the Prosecution database had not revealed any additional material which was considered to be exculpatory.<sup>5</sup> As the Prosecution has already indicated, its review for exculpatory information encompassed all material within its possession.<sup>6</sup> The Prosecution is not obliged, under Rule 73, to provide the Defence with information on the policies, practices and procedures that it has put in place to enable it to fulfill its disclosure obligations. Musema’s application for the Single Judge to order the Prosecution to provide details of the manner in which it conducts its searches suggests that the Prosecution is not properly implementing its obligations, and is tantamount seeking to manage the work of the Prosecution.

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<sup>3</sup> *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, paras. 14 and 18 (citing *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence Pursuant to Rule 115, 8 December 2006, para. 34); *see also Karemera v. Prosecutor*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera’s Appeal from Decision of Alleged Rule 66 Violation, 17 May 2010, para. 18 (decision under Rule 66(B)); *Mugenzi et al. v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Motions for Relief for Rule 68 Violations, 24 September 2012, para. 7 (“[t]he Appeals Chamber will not intervene in the exercise of the Prosecutor’s discretion unless it is shown that the Prosecution abused it and, where there is no evidence to the contrary, will assume that the Prosecution is acting in good faith”).

<sup>4</sup> *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, paras. 27, 29, 42; *see also Karemera v. Prosecutor*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera’s Appeal from Decision of Alleged Rule 66 Violation, 17 May 2010, para. 18 (decision under Rule 66(B)).

<sup>5</sup> The Motion, paras. 7, 13.


<sup>6</sup> OTP email dated 2 February 2017; Motion, para.7(c).

III. Conclusion

6. For all the foregoing reasons, the Prosecution requests that Musema's motion should be dismissed in its entirety.

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Dated at Arusha on 16 November 2017

  
Veronic Wright  
Senior Legal Officer



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