

MICT-13-33
09-11-2015
(711 - 706)

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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-33

THE SINGLE JUDGE

Before: Judge Vagn Joensen

Registrar: Mr. John Hocking

Date Filed: 9 November 2015

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

Public

REPLY BRIEF:
MOTION TO COMPEL DISCLOSURE OF
WITNESS GEK EXCULPATORY MATERIAL

Office of the Prosecutor:

Mr. Hassan Jallow

Mr. Richard Karegyesa

Jean de dieu Kamuhanda:

Mr. Peter Robinson

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1. On 8 October 2015, Jean de dieu Kamuhanda requested an order directing the prosecution to disclose exculpatory information pertaining to Prosecution Witness GEK.

2. On 19 October 2015, there was filed the *Prosecution Response to Motion to Compel Disclosure of Witness GEK Exculpatory Material*.

3. Having obtained leave,¹ Mr. Kamuhanda now replies.

4. The prosecution does not dispute that Mr. Kamuhanda has specifically identified the material sought, and proven that the material requested is in the custody or under the control of the prosecution. However, it disputes that information obtained from a Tribunal employee that directly refutes the testimony of Witness GEK that the employee attempted to corruptly influence her to recant her testimony in favor of Mr. Kamuhanda is of an exculpatory nature.

5. The prosecution contends that the information from the Tribunal employee is not exculpatory within the meaning of Rule 73 because the Appeals Chamber declined to call the Tribunal employee to testify at the Appeals Hearing. The prosecution reasoned that:

The ICTR Appeals Chamber has therefore already determined that statements from the Tribunal employees denying their involvement in attempting to bribe GEK, such as those sought by Kamuhanda, do not mitigate guilt or affect the credibility of prosecution evidence, and consequently do not fall within Rule 68 of the ICTR Rules and Rule 73 of the MICT Rules.²

6. This position is erroneous for a number of reasons.

7. First, the Appeals Chamber's decision not to call the Tribunal employees to testify at the Rule 115 hearing was not a determination that such evidence would not effect the credibility of the testimony of Witness GEK at Mr. Kamuhanda's trial.

8. In denying the request to call the Tribunal employees at the hearing the Appeals Chamber provided two reasons. The first involved judicial economy:

First, this is a Rule 115 hearing, which is intended to be a sharply delimited proceeding for entering discrete, specific evidence into the record; it is not intended to be a trial within a trial that opens the door to the exploration of every issue that might be raised during the hearing. Presenting these two witnesses would be a rejoinder to a rebuttal to the Defence's original Rule

¹ *Order on Request for Leave to Reply* (9 November 2015)

² *Response* at paras. 4-5

115 evidence, and there is no guarantee that it would end there.³

9. The second reason involved the limited purpose for which Witness GEK had been called at the hearing:

Second, the Appeals Chamber is not convinced that the witness's testimony will make a material difference to the Defence's case. The Appeals Chamber simply does not believe that such evidence on the record would be at all helpful in assessing the credibility of the Prosecution's rebuttal witnesses. The Appeals Chamber does not foreclose the possibility that if sufficiently compelling or unexpected evidence surfaces during a Rule 115 hearing, it might be required in the interests of justice to expand the hearing beyond its original scope. But under the circumstances of this case the Appellant has failed to convince the Chamber that such truly exceptional circumstances exist.⁴

10. Indeed, in its judgement, the Appeals Chamber decided that it did not need to assess the credibility of the prosecution's rebuttal witnesses, including Witness GEK, when denying the motion for admission of additional evidence under ICTR Rule 115.⁵

11. Therefore, the Appeals Chamber decision not to call the Tribunal employee at the Rule 115 hearing did not mean that his information was irrelevant to the credibility of Witness GEK in the main case.

12. Indeed, instead of litigating the extremely serious allegations made by Witness GEK at the Rule 115 hearing on the fly, the Appeals Chamber preferred to have those allegations investigated by the prosecution. What would be the point of the investigation if the allegations were not material to Mr. Kamuhanda's case?

13. MICT Rule 73 provides in pertinent part that "the Prosecutor shall, as soon as practicable, disclose to the Defence any material that in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or **affect the credibility of Prosecution evidence.**" (emphasis added)

14. The information from the Tribunal employee clearly affects the credibility of Witness GEK's evidence at Mr. Kamuhanda's trial. If she was willing to fabricate such an allegation, it makes it more likely that she would have fabricated the allegations she made against Mr. Kamuhanda that led to his conviction.

³ Transcript of 19 May 2005 at pp 49-50

⁴ Transcript of 19 May 2005 at pp 49-50

⁵ *Judgement* (19 September 2005) at para. 227

15. Examples of information which has been held to affect the credibility of prosecution evidence include interview notes of a prosecution witness which appear to contradict the witness' testimony on a certain point,⁶ statements or will-say filings related to testimony in subsequent trial that was inconsistent with the witness' trial testimony,⁷ a witness' criminal record, guilty plea, confession to crimes, or inconsistent statements,⁸ evidence that a prosecution witness recruited a witness who falsely testified at his own trial,⁹ and post-conflict information related to credibility.¹⁰

16. In the *Karemera* case, the Trial Chamber held that information contradicting the testimony of a prosecution witness, even if that testimony was later excluded, was required to be disclosed because it nevertheless affects the credibility of the prosecution witness.¹¹ Therefore, it is of no moment that the Appeals Chamber declined to hear the testimony of the Tribunal employee when the substance of his information in the possession of the prosecution affects the credibility of a prosecution witness.

17. Material to be disclosed under Rule 68 is not restricted to material that is in a form which would be admissible in evidence. Rather, it includes all information that in any way tends to suggest the innocence or mitigate the guilt of an accused or may affect the credibility of prosecution evidence, as well as material that may put an accused on notice that such material exists.¹²

⁶ *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for an Order of Disclosure* (15 April 2014) at para. 15

⁷ *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007) at para. 17

⁸ *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Urgent Motion for Disclosure of Exculpatory Material* (9 February 2009) at paras. 9-10; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion for Disclosure Under Rule 68* (1 March 2004) at fn. 5;

Prosecutor v Karemera, No. ICTR-98-44-T, *Scheduling Order* (30 March 2006) at para. 6-7

⁹ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2000 Interviews With Witness AT* (23 May 2003) at para. 26

¹⁰ *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninety-Fifth Disclosure Violation Motion* (5 December 2014) at para. 10

¹¹ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 8

¹² *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 178; *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 6; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2000 Interviews With Witness AT* (23 May 2003) at para. 24

18. The Appeals Chamber has held that ICTR Rule 68, and hence MICT Rule 73 is applicable where there is any *possibility* that the material could be relevant to the defence of the accused.¹³

19. The Appeals Chamber has also held that the stage of a proceeding is not a factor to be considered when discharging the prosecution's disclosure obligations.¹⁴ Indeed Rule 73 provides that "notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other Party any material referred to in paragraph (A) above."

20. In any event, newly discovered information related to witness credibility may amount to a new fact for the purposes of review proceedings.¹⁵

21. The Appeals Chamber has emphasized that the prosecution's obligation to disclose exculpatory material is essential to a fair trial and that the obligation to disclose it is as important as the obligation to prosecute.¹⁶ It has held that the disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal, and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached.¹⁷

22. The Appeals Chamber has emphasized that the prosecution's obligation to disclose exculpatory material has always been interpreted broadly.¹⁸ It has reminded the

¹³ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.13, *Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion* (14 May 2008) at para. 12; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 14

¹⁴ *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Motion Seeking Disclosure of Rule 68 Material* (7 September 2012) at para. 12

¹⁵ *Ntabakuze v Prosecutor*, No. MICT-14-77-R, *Decision on Ntabakuze's Pro Se Motion for Assignment of an Investigator and Counsel in Anticipation of his Request for Review* (19 January 2015) at fn. 43

¹⁶ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 183, 242; *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004); *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 72; *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Decision on Motions for Relief for Rule 68 Violations* (24 September 2012) at para. 40

¹⁷ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 188; *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 172

¹⁸ *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for an Order of Disclosure* (15 April 2014) at para. 12; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 13; *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Decision on Motions for Relief for Rule 68 Violations* (24 September 2012) at para. 7; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the*

prosecution of the paramount importance of its disclosure obligations and re-iterated its expectation that the prosecution to take the necessary steps to prevent disclosure violations from occurring in the future.¹⁹

24. The prosecution's position in this case that the material is not exculpatory is not in keeping with the jurisprudence or its disclosure obligations. The material should be ordered disclosed forthwith.

Word count: 1974

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Peter Robinson', written in a cursive style.

PETER ROBINSON
Counsel for Jean de dieu Kamuhanda

Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (30 June 2006) at para. 9

¹⁹ *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 23; *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2013) at para. 63