

ICTR-98-44-T
21-10-2008
(38081-38067)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 21 October 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS ARCHIVES
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REPLY BRIEF:

JOSEPH NZIRORERA'S 19th NOTICE OF VIOLATION OF RULE 66
AND MOTION FOR REMEDIAL AND PUNITIVE MEASURES:
JEAN-MARIE VIANNEY MUDAHINYUKA

The Office of the Prosecutor:

Mr. Don Webster
Ms. Allayne Frankson-Wallace
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. We have yet another OTP disclosure scandal on our hands.
2. Joseph Nzirorera has moved for immediate disclosure of all information obtained from Jean-Marie Vianney Mudahinyuka, and for remedial and punitive sanctions for the non-disclosure.
3. On 20 October 2008, there was filed the *Prosecutor's Response to Joseph Nzirorera's Motion for Remedial and Punitive Measures – Rule 66(B) – Mudahinyuka*. Mr. Nzirorera now replies.
4. As of 23 January 2006, the prosecution knew that Jean Marie Vianney Mudahinyuka was a potential defence witness for Mr. Nzirorera by virtue of its receipt of *Joseph Nzirorera's Ex Parte Motion for Order for Interview of Defence Witness NZ1*. In an annex to that motion, the precise exculpatory information that the defence believed Mr. Mudahinyuka possessed was set out in detail.
5. On 30 January 2006, Mr. Nzirorera filed a *Motion for Order Concerning Unlawful Disclosure of Ex Parte Defence Filing and for Stay of Proceedings*. On 16 February 2006, the Trial Chamber ordered as follows:

“The Chamber denies Nzirorera's motion for a stay of proceedings, grants the Defence request that the ex parte annex be destroyed and deleted from any Prosecution file, and **orders the Prosecution to refrain from contacting Witness DNZ1, or his legal representative, until the Chamber has decided the merits of the motion.**”¹ (emphasis added)
6. As now revealed by the prosecution's *Prosecutor's Response to Joseph Nzirorera's Motion for Remedial and Punitive Measures – Rule 66(B) – Mudahinyuka* (20 October 2008), the prosecution flagrantly violated that order!
7. The mission report of OTP investigator Jacques Baillargeon attached to the *Response* demonstrates that he traveled to the United States and interviewed Jean Marie

¹ Transcript of 16 February 2006 @11

Vianney Mudahinyuka starting on 10 July 2006. Since he was met at the prison in Pennsylvania by the lawyers for Mudahinyuka, who travelled from Illinois, it must be presumed that OTP had contact with Mr. Mudahinyuka's legal representative even earlier than 10 July 2006.

8. At the time of these contacts and interview with Mudahinyuka, the stay ordered by the Trial Chamber remained in effect. The Trial Chamber did not issue its *Decision on Nzirorera's ex parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* until 12 July 2006. Ironically, at the time the stay was lifted, the investigators were merrily conducting their third full day of interviews with Mr. Mudahinyuka.

9. This is an outrageous breach of the Trial Chamber's order and demands a serious sanction.

10. But that is only the beginning.

11. In its decision on the merits, the Trial Chamber found that the information likely possessed by Mudahinyuka "could not be obtained through other means and therefore was necessary for the conduct and the fairness of this trial." However, it denied the motion for a subpoena to Mr. Mudahinyuka on the grounds that "it is unlikely that a subpoena will produce the degree of cooperation needed for Defence Counsel for Nzirorera to interview the witness."²

12. The prosecution knew immediately that this was not the case. During the week of 10 July 2006, Mr. Mudahinyuka spent four full days with its investigators discussing every aspect of the information for which the subpoena had been sought. Yet the prosecution never informed Mr. Nzirorera or the Trial Chamber that in fact Mr.

² *Decision*, at para. 12

Mudahinyuka had willingly given the very same information that the Trial Chamber found was “necessary for the conduct and the fairness of this trial”.

13. The failure of the prosecution to disclose the fact of its interviews with Mudahinyuka was prosecutorial misconduct. It had an affirmative duty, as an officer of the Court, to disclose that Mudahinyuka was in fact available to be subpoenaed and had provided the very information sought by the defence, and more.

14. Moreover, information from Mudahinyuka has been specifically requested by Mr. Nzirorera as far back as 13 July 2005.³ The prosecution was not ordered to produce such material based solely on its representation that it had not obtained any information from Mudahinyuka.⁴

15. As the Chamber now knows, the prosecution did not disclose the existence of these meetings with Mudahinyuka until counsel for Mr. Nzirorera finally caught up with Mudahinyuka in September 2008, more than two years after these interviews, and Mudahinyuka exposed the existence of the prosecution’s secret meetings.

16. This is a serious breach of prosecutorial ethics and demands a serious sanction.

17. But there is more.

18. The prosecution deliberately destroyed the evidence of these meetings.

19. The mission report of Investigator Jacques Baillargeon attached to the Response shows that the OTP investigators covered a huge amount of material in the four days which are directly relevant to Mr. Nzirorera’s trial, including:

--Creation of MRND Interahamwe in December 1991

³ *Joseph Nzirorera’s Second Motion to Compel Inspection and Disclosure.*

⁴ *Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records* (14 September 2005) at para. 16

- Relations with Georges Rutaganda
- political situation in Rwanda 1991-92
- MRND power in 1991-94
- Mathieu Ngirumpatse
- Joseph Nzirorera
- Opposition parties in 1992
- Creation of Interahamwe in Gitarama---1992
- Prefectural committee of Gitarama
- Phineas Ruhumuliza
- security in Kigali between 1990-94
- relations with Interahamwe national committee of Kigali 1992-94
- the popular meetings in Kigali and his participation
- relations between Robert Kajuga and Prefet Tharcisse Renzaho
- relations of Renzaho with Francois Karera, Jean Habyarimana, and
Bernard Maniragaba
- identification of the enemy by Renzaho
- Ephrem Setako and MRND relations

20. This corresponds very closely with the account of the meetings given by Mudahinyuka to counsel for Mr. Nzirorera. Mudahinyuka's information on these topics is highly exculpatory in that he indicates that the fact that the Interahamwe was never formed for the purpose of killing Tutsis, that the killing of Tutsis was never discussed in Interahamwe committee meetings, that he knew of no military training or distribution of weapons to Interahamwe prior to the death of President Habyarimana, that the

Interahamwe never compiled lists of Tutsis, that he had attended MRND rallies and never heard any of the accused call for the extermination of Tutsis, that Georges Rutaganda never distributed weapons and in fact saved many Tutsis after the death of the President, that he knew of no orders by the MRND to establish roadblocks or kill Tutsis, and that he had no contact with any of the accused after the death of the President.⁵

21. Therefore, unless Mr. Mudahinyuka told the OTP investigators the complete opposite of what he told counsel for Mr. Nzirorera, the information in the possession of the OTP as of July 2006 was exculpatory.

22. What did the Office of the Prosecutor do with this information? They certainly never disclosed it to the defence. Instead, their own accounts are conflicting. One of the investigators, Rejean Tremblay, claims “no statements or investigator’s notes were taken.” The other investigator, Jacques Baillargeon, says:

“The note taken were only taken as reference for completing our report who was officially given to our superiors and destroyed after completion of this one.”

23. Therefore, it appears that notes of the information provided over four days by Mr. Mudahinyuka covering a wide range of topics of direct relevance to this case were destroyed.

24. This non-disclosure and destruction of exculpatory material is extremely serious and requires a serious remedy and sanction from the Trial Chamber. Were it not for counsel’s dogged persistence of Mr. Mudahinyuka, this information never would have come to light.

⁵ *Joseph Nzirorera’s 19th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka* (6 October 2008) at para. 14. To avoid any question about the exculpatory content of Mr. Mudahinyuka’s information, Mr. Nzirorera attaches the pertinent excerpts from the report of his lead counsel’s interview with Mudahinyuka to this reply as Annex “A”.

25. In summary, the Mudahinyuka affair reveals that the prosecution (1) violated an express order of the Trial Chamber not to have contact with Mr. Mudahinyuka or his legal representative; (2) failed to inform the defence or Trial Chamber that Mr. Mudahinyuka was willing to provide information relevant to this case after the Trial Chamber declined to order a subpoena, believing efforts to convince Mudahinyuka to talk would be fruitless, and (3) violated Rules 66(B) and 68 by withholding material and exculpatory information received from Mudahinyuka.

26. The Trial Chamber is requested to take the following action:

First: Make an express finding that the prosecution violated the order that it have no contact with Mudahinyuka or his legal representative;

Second: Make a finding that the prosecution's conduct in withholding the information that it had met with Mudahinyuka and he was willing to discuss the events constituted conduct which obstructed the proceedings and is contrary to the interests of justice warranting sanctions pursuant to Rule 46(A).

Third: Make a finding that the prosecution violated Rule 66(B) by failing to timely disclose the information obtained from Mudahinyuka, which was material to the preparation of Mr. Nzirorera's defence.

Fourth: Make a finding that the prosecution violated Rule 68 by failing to disclose as soon as practicable exculpatory information obtained from Mudahinyuka. Should the Chamber be in any doubt as to the exculpatory nature of the information provided by Mudahinyuka, an oral hearing is requested at which Mudahinyuka and the two investigators would testify.

27. Based upon these findings, the Trial Chamber should take the following remedial and punitive measures:

First: Order a mistrial as a result of the pervasive and ongoing violations which have deprived Mr. Nzirorera of a fair trial, or, failing that, issue a stay of proceedings until it can be established that the prosecution has fulfilled its disclosure obligations by appointment of a special master to review the holdings of the prosecution; and;

Second: Order an investigation pursuant to Rule 77, to be conducted by an *amicus curiae*, into violation of the Trial Chamber's orders and obstruction of justice by members of the Office of the Prosecutor; or, failing that, sanction the individual members of the prosecution team pursuant to Rule 46(A) and

Third: Order whatever additional measures it believes are required for both remedial and punitive measures.

28. It need not be recalled to this Trial Chamber that this would be the 14th Rule 68 violation found in this case. When finding the 13th violation, this Trial Chamber said:

“Although the Chamber is not prepared to state that the Prosecution can no longer be relied upon to discharge its Rule 68 obligations in this case, it notes that the Prosecution's compliance with the rules of disclosure has been less than adequate thus far. In fact, the Chamber finds that the increasing number of disclosure violations by the Prosecution is quickly approaching the threshold for sanctions of a more serious nature than mere disclosure of the misconduct to an internal disciplinary body. The Chamber hereby warns the Prosecution that future disclosure violations will not be met with the same lenience that has been displayed to date.”⁶

29. The response to this motion from the prosecution fails to acknowledge any disclosure violation or omission on its part. In fact, it makes the same argument that the Trial Chamber explicitly rejected in its earlier decision—that its disclosure two years


⁶ *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 30

later when it has been caught red-handed constitutes compliance with its disclosure obligations. This argument was found to “strain credulity” by the Trial Chamber. Nevertheless, as a measure of how little the prosecution has learned and how much it regards the decisions of the Trial Chamber, the identical was repeated again here.⁷

30. These violations, and the prosecution’s attitude when caught, are a direct result of the impunity with which the prosecution has been allowed to operate in these proceedings, and which has made a shambles of Mr. Nzirorera’s right to a fair trial.

31. Mr. Nzirorera respectfully requests that the Trial Chamber grant the relief he has requested in this motion. While he has been disappointed and let down by the Trial Chamber at every turn, even after three years, hope springs eternal.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

⁷ Compare *Response* at para. 9 with *Decision on Joseph Nzirorera’s Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 17

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ANNEX "A"

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MEMORANDUM

To: Joseph Nzirorera

From: Peter Robinson

Re: Interview of Jean Marie Vianney Mudahinyuka

Date: 27 September 2008

JEAN MARIE VIANNEY MUDAHINYUKA, immigration number A78782984, was interviewed on 27 September 2008 by Peter Robinson at McHenry County Corrections Center, Woodstock, Illinois, USA.

MUDAHINYUKA first apologized for not responding to my letters and said he was happy to see me. He said that he had become a better person while in prison by studying the Bible and bringing God into his life.

MUDAHINYUKA said that he was still undergoing deportation proceedings to Rwanda, but that the immigration officer had found that he had a reasonable fear if deported. He was awaiting proceedings before an immigration judge.

MUDAHINYUKA advised that he had been interviewed in the past by representatives of the ICTR Office of the Prosecutor. The first occasion was when he was interviewed by Stephen Rapp while he was in the Metropolitan Corrections Center in Chicago (approximately 2004). Rapp asked him questions about the Rwanda events, but at the end of the interview told MUDAHINYUKA that his information was of no value to OTP.

MUDAHINYUKA advised that in 2007, while he was incarcerated at Allenwood Federal Correctional Institution in Pennsylvania, he was visited by two investigators of the ICTR Office of the Prosecutor. He did not recall their names, but believes they were Canadians. MUDAHINYUKA advised that he was interviewed over 2 days from 9 a.m. to 4 p.m. He was asked many questions about the Interahamwe and the Rwandan events.

He believes that the interviews were tape recorded. The investigators talked to him about pleading guilty and testifying against Nzirorera, Ngirumpatse, Renzaho and others in Arusha. MUDAHINYUKA said that he was asked during his interviews with OTP about Georges Rutaganda. The investigators said they would be back.

MUDAHINYUKA advised that about 3 months later, a group of four people came back to Allenwood from ICTR. The two investigators returned, as well as a lawyer named Jonathan, believed to be from New Zealand, and another person, who was possibly Somalian. They spent a few days interviewing MUDAHINYUKA. He believes the interviews were tape recorded. They said that if he admitted being responsible for killing at least one person and pled guilty, they could recommend a sentence for him at the ICTR of less than 10 years, to run concurrent with the time he had already served in the United States. They also said it might be possible to serve the remainder of his sentence in the United States and that he would not have to face any prosecution in Rwanda.

MUDAHINYUKA said they gave him overnight to think about it. When they returned, he told them that he had not killed anyone and could not plead guilty to crimes that he did not commit. He has had no contact with them since.

MUDAHINYUKA advised that he was indeed a member of the national committee of the Interahamwe. His involvement stemmed from his close friendship with Georges Rutaganda.

MUDAHINYUKA said that Georges Rutaganda was not really enthusiastic about the MRND. He joined because his father was recruited for MRND. MUDAHINYUKA joined for the same reason, as Rutaganda was his best friend.

MUDAHINYUKA said that President Habyarimana was a good guy and did not discriminate against Tutsis. He gave several examples of very big businessmen who were friends of President Habyarimana and profited greatly during his regime. He said that he met President Habyarimana on one occasion with the other members of the national committee of Interahamwe.

MUDAHINYUKA advised that the reason Georges Rutaganda joined the national committee of the Interahamwe was because he hoped to be a Minister someday. MUDAHINYUKA joined the national committee of the Interahamwe simply because Rutaganda asked him to.

MUDAHINYUKA said that in his long friendship with Georges Rutaganda, he never knew him to dislike Tutsis, and in fact, Rutaganda worked for and with Tutsis easily.

MUDAHINYUKA said that he had worked for the Ministry of Finance from 1984-89 and had been fired because he was from the south. Therefore, he was not inclined to support the MRND in the multi-party system and believed that the party was