

UNITED
NATIONS

MICT-13-33
10-09-2015
(581 - 577)

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Mechanism for International Criminal Tribunals

Case No: MICT-13-33

Date: 10 September 2015

Original: English

THE PRESIDENT

Before: Judge Theodor Meron,

Registrar: Mr. John Hocking

The Prosecutor

v.

Jean de Dieu Kamuhanda

**PROSECUTION RESPONSE TO MOTION FOR ACCESS TO
CONFIDENTIAL *INTER PARTES* MATERIAL FROM THE
NSHOGOZA CASE**

Office of the Prosecutor
Hassan Bubacar Jallow
Richard Karegyesa
Sunkarie Ballah-Conteh

Jean de Dieu Kamuhanda
Peter Robinson, Counsel

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Mechanism for International Criminal Tribunals
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I. INTRODUCTION

1. On 31 August 2015, Jean De Dieu Kamuhanda filed his “Motion for Access to Confidential *Inter Partes* Material from the *Nshogoza* case”. In his application Kamuhanda requests, pursuant to Rule 86 of the MICT Rules of Procedure and Evidence (The Rules), access to “all confidential material” from the case of *Prosecutor v. Nshogoza*.

2. Kamuhanda submits that several of the witnesses who testified in the *Nshogoza* case also testified in his own case, and that the events at Gikomero Parish for which Kamuhanda stands convicted were a central feature of the *Nshogoza* trial. He submits that there is a geographical, temporal and material overlap between his own case and the *Nshogoza* case; therefore, there is a good chance that access to the confidential evidence will materially assist in preparing his case.¹

3. The Prosecutor hereby opposes the application.

II. SUBMISSIONS

4. Where a party requests access to confidential material from another case, such material must be identified or described by its general nature and a legitimate forensic purpose for the access must be demonstrated.² In determining whether this standard has been met a chamber must consider the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the applicant’s case and the case from which the material is sought.³ Such a factual nexus may be established if the cases stem from events alleged to have occurred in the same geographic area, at the same time, although this may not always be

¹*The Prosecutor v. Jean De Dieu Kamuhanda*, Case No. MICT-13-33, Motion for Access to Confidential *Inter Partes* Material from the *Nshogoza* Case, 31 August 2015, paras. 6-7.

²*Prosecutor v. Nyiramasuhuko et. al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere’s Motion for Access to Confidential Material, 17 May 2012, para. 17; *Mugenzi et al. v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Jacques Mungwarere’s Motion for Access to Confidential Material, 24 May 2012, para. 9; *Ndindiliyimana v. Prosecutor*, Case No. ICTR-00-56-A, Decision on Jacques Mungwarere’s Motion for Access to Confidential Material, 24 May 2012, para. 9; *Karemera et al. v. Prosecutor*, Case No. ICTR-98-44-A, Decision on Jacques Mungwarere’s Motion for Access to Confidential Material, 31 May 2012, para. 10.

³*Ibid*

sufficient. A case specific analysis is required each time.⁴ The applicant must further establish that the material sought is likely to assist the case materially or at least that there is a good chance that it would.”⁵

5. Kamuhanda’s motion for access to *all* confidential *inter partes* material from the *Nshogoza* case should be dismissed as he has failed to identify a legitimate forensic purpose for access to all of the confidential material from that case. The Prosecutor submits that although there may be some similarities between Mr. Kamuhanda’s case and the *Nshogoza* case, this overlap alone is not sufficient to justify Kamuhanda’s access to *all* the material from the *Nshogoza* case.

6. The *Nshogoza* trial mainly concerned *Nshogoza’s* contemptuous disregard of witness protection orders during the Kamuhanda trial,⁶ and did not touch upon criminal liability for crimes committed during the genocide. In addition, as Kamuhanda himself admits in his application, not all of the witnesses who testified in the *Nshogoza* case testified in his own case. There is therefore, undoubtedly, confidential material in the *Nshogoza* case that has no relevance to Kamuhanda’s case and which is not likely to materially assist his case in any way.

7. Furthermore, Kamuhanda refers to only two witnesses, who testified in his own case and in the *Nshogoza* case, witnesses GAA and GAF. The mere fact that both cases may share common witnesses is, without further information, insufficient to establish a link between the Applicant’s case and the *Nshogoza* case that would warrant disclosure of all the material from the *Nshogoza* case to Kamuhanda.

8. Despite having access to open session material from the *Nshogoza* case, which forms most of the record and confidential material previously disclosed, the Applicant has made no attempt to identify or describe any particular witnesses, whose closed session testimony or indeed sealed exhibits may be relevant to his case. Most of the witnesses in *Nshogoza* testified in open session with very short closed session testimony, including witnesses GAA and GAF, it was feasible for Kamuhanda to review the record and narrow the scope of his request.

⁴*Rutaganda v. the Prosecutor*, Case No. ICTR96-3-R, Decision on Rutaganda’s Appeal Concerning Access to Confidential Material in the Karemera et al. Case, 10 July 2009, para. 13.

⁵*Ibid*

⁶*Prosecutor v. Leonidas Nshogoza*, Case No. ICTR-07-91-T, Judgment, 7 July 2009, para. 3.

9. Jurisprudence from the Appeals Chamber has established that where the requesting party seeks access to *all* confidential material in a case, but can show a nexus only for part of it, the request will be rejected.⁷

10. The Prosecutor submits that Kamuhanda's request in its current form is impermissibly vague. He does not demonstrate any legitimate forensic purpose for accessing the broad scope of material requested. Merely stating that there is a geographical, temporal and material relationship between his case and the *Nshogoza* case without specifying the link and identifying the witnesses and material that is likely to materially assist his case is insufficient to establish a legitimate forensic purpose for the disclosure. He is in a position to identify, on the basis of public material, with greater particularity, the witnesses and exhibits related to the points of overlap between his case and the *Nshogoza* case.

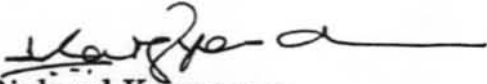
11. To the extent that Kamuhanda does identify relevant material, the Prosecutor would oppose the disclosure of the confidential material without the consent of the witnesses concerned. The Appeals Chamber has repeatedly underscored the importance of the protected witness's consent to the disclosure of confidential material.⁸ Even where it is determined that confidential material from another case may materially assist the applicant, it is within the Chamber's discretionary power to strike a balance between the rights of the requesting party to have access to material to prepare its case, and guaranteeing the protection and integrity of confidential information.⁹ In this regard, Kamuhanda has failed to identify any exigent circumstances that would warrant disclosure of the requested material without the witnesses' consent, or indeed that a miscarriage of justice would occur otherwise.

⁷*Prosecutor v. Protais Zigiranyirazo*, case no. ICTR-01-73-A, Decision on Michel Bagaragaza's Motion for Access to Confidential Material, 14 May 2009, para. 8.

⁸*The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 18; *Mugenzi et al. v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Karemera et al. v. Prosecutor*, Case No. ICTR-98-44-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 31 May 2012, para. 10.

⁹*Rutaganda v. the Prosecutor*, Case No. ICTR96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Material in the Karemera et al. Case, 10 July 2009, para. 14.

Dated at Arusha this 10th day of September 2015

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Richard Karegyesa
Senior Legal Officer

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