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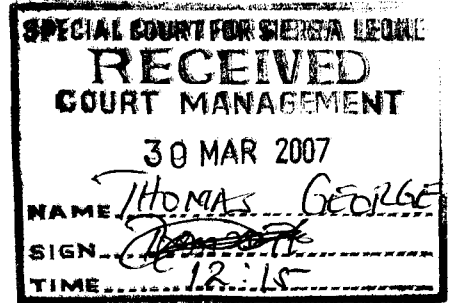
SCSL-04-15-T
(27002 - 27008)

27002

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown - Sierra Leone

Before: Hon. Justice Bankole Thompson, Presiding
Hon. Justice Benjamin Itoe
Hon. Justice Pierre Boutet

Acting Registrar: Mr. Herman Von Hebel
Date filed: 30 March, 2007



THE PROSECUTOR

Against

Issa Hassan Sesay

Morris Kallon

Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

PROSECUTION MOTION THAT THE SECOND ACCUSED COMPLY WITH RULE 67

Office of the Prosecutor:
Pete Harrison
Penelope-Ann Mamattah

Court Appointed Defence Counsel for Sesay
Mr Wayne Jordash
Ms Sareta Ashraph

Court Appointed Defence Counsel for Kallon
Mr Shekou Touray
Mr Charles Taku

Court Appointed Defence Counsel for Gbao
Mr Andreas O'Shea
Mr John Cammegh

I. INTRODUCTION

1. On 28 March, 2007, the Prosecution received a copy of a notification from the Kallon Defence to the Trial Chamber entitled "Correction of Statement made at Pre-Defence Conference, 20 March 2007" (attached as Appendix A to this Motion).
2. The notification states:

At the RUF Pre-Defence Conference on 20th March 2007, it was stated that the defence for Morris Kallon would not be relying on any special defences or alibi pursuant to Rule 67(A) of the Rules of Procedure and Evidence.¹

The Defence for Morris Kallon wish to correct this statement. The Defence for Morris Kallon will not be relying on any special defences but will be relying on the defence of alibi and other non-special defences.

II. ALIBI AND RULE 67

3. Rule 67 of the Rules of Procedure and Evidence states, in part, as follows

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

...
(ii) The Defence shall notify the Prosecutor of its intent to enter:

(a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi.

...
(B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

4. Although Rule 67(B) states that a failure on the part of the defence to provide notice of alibi shall not limit the right of the accused to rely on that defence, where notice is given then the wording of Rule 67(ii)(a) is mandatory. In *Delalić et al*, the trial chamber held:

11. The provisions of Sub-rule 67(A)(ii) impose a clear and unambiguous obligation on the Defence to disclose the names and addresses of all witnesses which they intend to call to testify in relation to the defence of alibi and any special defence, such as diminished or lack

¹ RUF Trial Transcript, 20th March 2007, page 84, lines 6-8

of mental responsibility. Where the language of a Rule is unequivocal, it is not open to either of the parties to challenge their duties thereunder.²

5. Notice of an alibi defence was forwarded to the Prosecution and the Trial Chamber, and the Second Accused is thereby required to comply with Rule 67, which makes clear that "...the notification **shall** specify the place or places" where the accused claims to have been "and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence." [bolding added]
6. The logic behind the Rule is that the alibi defence, to be given the greatest weight, must be disclosed in advance so that the Prosecution can investigate the alibi,³ and where it is sound permit the Prosecution to take appropriate measures. Where an accused seeks to rely on Rule 67(B) and not give notice of an alibi defence, the accused remains entitled to rely upon the defence, however, the court can take the failure to give notice into account. In *Kupreskic et al*, the Trial Chamber held that although no notice had been given of an alibi defence the accused could still raise it, but the evidence of other witnesses corroborating the defence was liable to be excluded by the Trial Chamber.⁴ Similar events arose in *Kayishema and Razindana*, and there the Trial Chamber said that it was entitled to weigh the failure to give alibi notice when assessing the credibility of the alibi defence.⁵
7. Having given notice of an alibi defence the Second Accused is required to comply with Rule 67. He cannot have it both ways. An accused cannot give an inadequate and

² *Prosecutor v. Delalić et al*, IT-96-21, "Decision on the Motion to Compel the Disclosure of the Addresses of the Witnesses," 13 June 1997, para. 11. The wording of Rule 67(A)(ii) at the ICTY is the same as the Rule at the Special Court for Sierra Leone. See also *Prosecutor v. Ndamyambaje et al*, ICTR-96-8-T "Decision on the Confidential prosecutor's Motion to be Served with Particulars of Alibi Pursuant to Rule 67(A)(ii)(a), 1 March 2005, para. 27, where the Trial Chamber said: "The Defence is required to, as early as reasonably practicable and in any event prior to the commencement of the trial, notify the Prosecution of its intention to enter the defence of alibi, and in that notice, the Defence is obliged to specify the names and addresses of witnesses on which the accused intends to rely to establish the alibi."

³ *Prosecutor v. Bizimungu et al*, ICTR-99-50-T, "Decision on Jerome Bicomupaka's Notice of Alibi," 7 July 2005, para. 3.

⁴ *Prosecutor v. Kupreskic et al*, IT-95-16, "Decision," 11 January 1999, Order (v).

⁵ *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, "Judgement," 21 May 1999, para. 237. This proposition was applied in *Brima*, where Trial Chamber II held: "Failure to provide timely disclosure may impair the interests of fair trial proceedings and undermine the prosecution's ability to prepare its case and investigate the evidence on which the alibi rests. Therefore, failure by the defence to observe its obligations under Rule 67(A)(ii) will entitle the Trial Chamber to take such failure into account when weighing the credibility of the defence of alibi", *Prosecutor v. Brima et al*, SCSL-04-16-T-521, "Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67," 26 July 2006, para. 18.

incomplete alibi notice and then expect that the alibi evidence would be treated similar to alibi evidence where the notice was filed in compliance with Rule 67(a)(ii).

III. ORDER SOUGHT

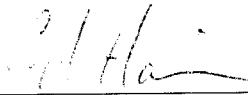
8. The Prosecution applies for an Order that on or before 30 April 2007 or such other appropriate date as determined by the Trial Chamber, the Second Accused must deliver to the Prosecution a notice of alibi that complies with Rule 67 containing the following information:

- a) the place or places at which the Second Accused claims to have been present at the time of the alleged crimes;
- b) the names and addresses of witnesses who the Second Accused intends to call in support of the alibi; and
- c) any other evidence upon which the Second Accused intends to rely to establish the alibi.

Filed in Freetown,

30 March 2007

For the Prosecution,



Pete Harrison

List of Authorities

Decisions and Judgements

Prosecutor v. Bizimungu et al, ICTR-99-50-T, “Decision on Jerome Bicomumpaka’s Notice of Alibi,” 7 July 2005.

<http://69.94.11.53/default.htm>

Prosecutor v. Brima et al, SCSL-04-16-T-521, “Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67,” 26 July 2006.

Prosecutor v. Delalić et al, IT-96-21, “Decision on the Motion to Compel the Disclosure of the Addresses of the Witnesses,” 13 June 1997.

www.un.org/icty/celebici/trialc2/decision-e/70613DE2.htm

Prosecutor v. Kupreskic et al, IT-95-16, “Decision,” 11 January 1999.

www.un.org/icty/kupreskic/trialc2/decion-e/90111EV24959.htm

Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T, “Judgement,” 21 May 1999.

<http://69.94.11.53/ENGLISH/cases/KayRuz/judgement/index.htm>

Prosecutor v. Ndamyambaje et al, ICTR-96-8-T “Decision on the Confidential prosecutor’s Motion to be Served with Particulars of Alibi Pursuant to Rule 67(A)(ii)(a),” 1 March 2005.

<http://69.94.11.53/default.htm>

Appendix A

Letter from counsel for the Third Accused dated 28 March 2007

27007

Appendix A

27008



SPECIAL COURT FOR SIERRA LEONE
DEFENCE TEAM FOR MORRIS KALLON
OFFICE OF THE PRINCIPAL DEFENDER

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EMAIL: defence-kallon@un.org

28 March 2007

To the Honourable Justices of Trial Chamber I

Correction of Statement made at Pre-Defence Conference, 20 March 2007

At the RUF Pre-Defence Conference on 20 March 2007, it was stated that the Defence for Morris Kallon would not be relying on any special defences or alibi pursuant to Rule 67(A) of the Rules of Procedure and Evidence.¹

The Defence for Morris Kallon wish to correct this statement. The Defence for Morris Kallon will not be relying on any special defences but will be relying on the defence of alibi and other non-special defences.

Regards,

pp Melron Nicol-Wilson
Co-Counsel & Case Manager

cc.

Mr P Harrison, Senior Trial Attorney, Office of the Prosecutor, RUF Trial Team
Mr W Jordash, Lead Counsel, Defence for Issa Sesay
Mr A O'Shea, Lead Counsel, Court Appointed Counsel for Augustine Gbao

¹ RUF Trial Transcript, 20 March 2007, page 84, lines 6 - 8