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(9323 -9328)

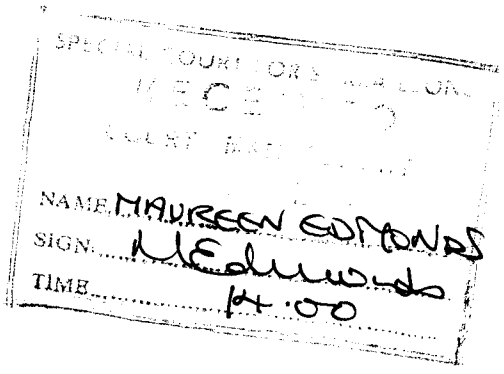
SPECIAL COURT FOR
SIERRA LEONE

Case No. SCSL-2004-16-T

Before: Justice Teresa Doherty, Presiding
Justice Julia Sebutinde
Justice Richard Lussick

Registrar: Robin Vincent

Date filed: 2 June 2005



THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

JOINT DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION PERTAINING TO OBJECTIONS TO THE NATURE OF THE TESTIMONY-IN-CHIEF OF WITNESS TF1-150

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Mohamed Pa-Momo Fofanah

I INTRODUCTION

1. On 27 May 2005, the Defence filed its "Joint Defence Motion Pertaining to Objections to the Nature of the Testimony in Chief of Witness TF1-150" ("**Motion**"). On 31 May 2005, the Prosecution filed its "Prosecution Response to Joint Defence Motion Pertaining to Objections to the Nature of the Testimony in Chief of Witness TF1-150" ("**Response**"). The Defence herewith files its "Defence Reply to Prosecution Response to Defence Motion Pertaining to Objections to the Nature of the Testimony in Chief of Witness TF1-150" ("**Reply**").

II LEGAL ARGUMENT

Complaint is about the admissibility of the evidence

2. The Prosecution states, amongst others in para. 6 of the Response, that all the matters submitted by the Defence in its Motion go to the issue of weight of the evidence of Witness TF1-150, rather than the admissibility thereof. In this context the Prosecution cites parts of the separate concurring opinion of Justice Robertson in the recent Fofana Judicial Notice Decision, in which the honorable justice indicates that "the proof of reliability is not a condition of admission."[1]

3. However, the use of the term "reliability" in the Defence Motion is not in any way related to the proof of reliability of evidence, but refers to the criterion the Witness TF1-150 itself has applied in drafting his report (see paras. 17 and 18). In this context the Defence holds the view that Witness TF1-150, being a lay witness and not an expert witness, can not make a proper assessment on the reliability of primary or secondary sources on this specific area, and in addition can not assess the relevance of certain information in view of a certain indictment before the

[1] Separate Opinion of Justice Robertson to the Decision on appeal against 'Decision on Prosecution's motion for Judicial Notice and Admission of Evidence' of 16 May 2005, case no. SCSL-2004-14-AR73.

Special Court. Accordingly, in this specific instance, the wording "reliability" goes directly to the admissibility of the evidence to be given by Witness TF1-150.

4. As a consequence, portions of the report written by Witness TF1-150 therefore clearly fall outside his personal competence as being a lay witness, which capacity is not disputed by the Prosecution. Because of this Witness TF1-150 should not be allowed to testify on those portions of the report not deriving from the direct knowledge of said witness.

5. Conclusively, the arguments raised by the Defence in the Motion clearly concern the issue of admissibility of evidence instead of the reliability of the evidence.

Complaint does not relate to hearsay evidence

6. Additionally, the Prosecution specifies the issue of weight which the Defence allegedly is complaining of, arguing that the Defence Motion in fact objects against the introduction of hearsay evidence. However, the Defence respectfully submits that the objections as set out in the Motion and relating to the evidence of Witness TF1-150 have little to do with hearsay evidence, but rather object against the admissibility of certain (primary and secondary) sources underlying this witness's report, which sources do not fall within the own personal knowledge and/or competence of this specific witness.

7. While hearsay evidence is, *in principle*, admitted before the Special Court, the objections raised in the Defence Motion are therefore of a different nature. Again the Defence emphasizes, as the Prosecution apparently interprets otherwise, that these objections against the admission of certain primary and secondary sources, on which the witness relies, pertain to: (a) lack of foundation, (b) opinion evidence given by a lay witness, and (c) relevance of certain information adduced by said witness in the report in view of the generality of this information.

Nature of Defence objection in view of Prosecution Response

8. In para. 13 of the Response, the Prosecution indicates that "[t]he reports to be discussed are the results of his own monitoring, and based on the reports he received from his team and other organizations whose reporters and methodology the witness had familiarity with and confidence in." It is exactly this latter part of this observation by the Prosecutor, to which the Defence objections relate.

9. This paragraph 13 of the Prosecutor's Response clearly indicates that, except for the evidence based on the witness's own monitoring, the witness derives his knowledge from other mentioned sources, pertaining to information which does not derive from the witness's own personal knowledge or experience, but bases his information on reports from which he is not the author. The Prosecution indicates that this lay witness had "confidence" in the reports he bases his own report on. However, the Defence respectfully submits that the fact that the lay witness has "confidence" in certain sources, and not in other sources, is insufficient to justify the used sources of the witness's report. In addition to this, the word "confidence" is not substantiated, but rather relates to a subjective perception of the witness, which should not be admitted by an internationalized criminal court.

10. It is for this reason that the Defence submits that the Prosecution should not be allowed to have this witness testify on the basis of said reports and documents. The task of selecting evidence to base one's testimony on is reserved for independent expert witnesses, and not for lay witnesses, who cannot be assumed to have the knowledge and experience to make such selection, simply on the assumption that this lay witness had "confidence" in certain sources or was able to select the sources in view of the indictment in the AFRC case.

Similarity with the Kordic Decision

11. As to the Response of the Prosecution to the Defence reference to the Kordic decision in the initial Motion (see paras. 11-15 of the Prosecution Response), it is to be observed that the similarity between the situation at hand in the instant case and that in the Kordic case relates to the fact that the Trial Chamber in the Kordic case in fact did not accept the testimony of the OTP investigator because he was not a "contemporary witness of fact" and that this person "only (had) recently collated statements and other materials for the purpose of this application."[2] Accordingly, the Trial Chamber gave weight to the fact that this OTP witness could not testify about facts and materials in the dossier which arose from his own personal knowledge and his own investigation. Hence, the analogy with the intended testimony of Witness TF1-150 seems justified.

12. Interestingly, the ICTY Trial Chamber in the Kordic case did not allow the OTP investigator to testify in court, holding that his testimony would not have any sufficient probative value. Accordingly, this case is a clear example that the (anticipated) absence of probative value can play a role in assessing the admissibility of the testimony of a certain witness. This is clearly evidenced by the ruling of the ICTY in said Kordic Decision holding in para. 20 that "the Report therefore is of little or no probative value and will not be admitted into evidence."

III RELIEF SOUGHT

13. For the reasons set out above the Defence prays the honorable Trial Chamber to grant the objections of the Defence raised in this motion as to both the admissibility of the nature of the evidence in chief to be adduced by Witness TF1-150, as well as the tendering of the specific documents referred to in this motion,

[2] See para. 20 of the Kordic Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence of 29 July 1999.

particularly the reliance on the UNAMSIL reports of which he was not the exclusive author and all those documents of which he had no part in writing.

14. In addition the Defence prays the honorable Trial Chamber not to allow the Prosecution to examine Witness TF1-150 with respect to the mentioned UNAMSIL reports of which he was not the exclusive author and all those documents of which he had no part in writing.

Respectfully submitted,
On 2 June 2005

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pp. Glenna Thompson

Mohamed Pa-Momo Fofanah