

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

SEISED of the Joint Defence Motion for Leave to Recall Witness TF1-023 filed on 28 September 2005 ("Motion");

NOTING the Prosecution Response to Joint Defence Motion for Leave to Recall Witness TF1-023 filed on 30 September 2005 ("Response");

NOTING the Defence filed no Reply to the Prosecution Response;

DECIDES the Motion based solely on the written submissions of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Special Court (" Rules").

I. SUBMISSIONS OF THE PARTIES

Motion

1. The Defence recall that on 10 March 2005, witness TF1-023 in the course of examination-in-chief alleged that she had been threatened by members of the families of the accused. Following submissions of the parties, the Trial Chamber ordered, *inter alia*, the suspension of an investigator retained by the Defence team of the 1st Accused Alex Tamba Brima.
2. Defence Counsel did not cross-examine witness TF1-023 and now apply to do so relying on Rule 54 of the Rules of Evidence and Procedure.
3. The Defence submit that the allegations against the Investigator, Mr. Samura, were sufficiently serious to cast doubt on the information he had provided to the Brima Defence and shared with the Joint Defence.¹ They add that finding a suitable replacement for Mr. Samura took some time.
4. They needed to "validate the information of the investigator under suspicion" and to "cross check" for "quality and veracity".
5. The Defence submit that witness TF1-023 testified using names which the Prosecution say are names ascribed to Brima and Kanu and the Defence require to cross-examine that evidence.
6. As the behaviour of investigator Samura was not in any way condoned by the Defence, the Defence believe that any impediments to the cross-examination of the witness will violate the rights of the accused and impair the fairness of the trial.²

¹ "Motion", para.5.

² "Motion", paras.8-9.

Response

1. The Prosecution refers to Rules 85(A) and 90(F) of the Rules as applicable to this issue.³ It also cites as relevant jurisprudence from the ad hoc international tribunals including *The Prosecutor v. Bagasora*.⁴ In that case, the Prosecution sought leave to recall its own witnesses. It was held:

A party seeking to recall a witness must demonstrate good cause, which previous jurisprudence has defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act. In assessing good cause, the Chamber must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness originally testified. The right to be tried without undue delay as well as the concerns of judicial economy demand that recall should be granted only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature. For example, the Chamber has intimated in this case that the recall of a witness might be appropriate where a party demonstrates prejudice from an inability to put significant inconsistencies to a witness which arise from previously unavailable Rwandan Judicial documents.

2. This approach was followed by the Trial Chambers in *Prosecutor v. Simba*⁵ and *Prosecutor v. Brdjanin*⁶:

3. The Prosecution argues that the Joint Defence Motion has failed to demonstrate good cause why witness TF1-023 should be recalled for cross-examination. It further submits that, notwithstanding that the arguments made in the Joint Defence Motion are done so jointly, it is incumbent upon the Trial Chamber to consider whether or not each accused has individually demonstrated good cause, as each Defence Counsel made a choice on behalf of his client to decline to cross-examine the witness.⁷

4. The Prosecution argues that the allegation against Mr. Samura was that he illegally disclosed the identity of a witness, and not that he had discharged his information gathering function improperly or ineptly. Thus, the Defence has not adequately explained the need to review the investigator's entire investigations.⁸ Indeed, the Prosecution notes that on 10 March 2005 the allegations against the investigator "produced a spirited defence" of Mr. Samura by the then Counsel for Brima.

5. The Prosecution notes that Defence Counsel have stated on numerous occasions, that they share information and confer with each other. It remarks that the Defence has not suggested that information acquired by other Joint Defence investigators required validation.⁹ The Prosecution also contends that material used in a cross-examination derives from various sources.¹⁰

³ "Response" para. 10.

⁴ "Response" para. 11 citing *Prosecutor v. Bagasora et al.*, ICTR-98-41-T, Decision on the Prosecution Motion to recall Witness Nyanjwa, 29 September 2004, para.6.

⁵ "Response" para. 12, citing *Prosecutor v. Simba*, ICTR-01-76-T, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004, para.5

⁶ "Response" para. 13, citing *Prosecutor v. Brdjanin*, IT-99-36-T, Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be imposed pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be resolved, 30 October 2002, para. 26.

⁷ "Response", para. 14.

⁸ "Response", para. 16.

⁹ "Response", para. 18.

¹⁰ "Response", para. 19.

6. Moreover, the Prosecution argues that any arguments by the Brima team regarding investigator Samura do not hold for the other two defence teams.¹¹ Notably, Counsel for Kanu has not explained how “paralysation (sic) of an investigator for one Defence Counsel also affects the ability of other Defence Counsel to cross examine effectively.”¹²

7. The Prosecution argues that the alleged behaviour of the investigator did not prejudice the accused. The fact that Witness TF1-023 has not been cross-examined was a forensic choice made by each Defence Counsel¹³ and other options could have been pursued by Counsel.

8. The Prosecution contends that the Kamara Defence has no grounds for having refused to cross-examine the witness since the accused Kamara was not mentioned in any way by the witness.¹⁴

9. The Prosecution further submits that the issue of identification of the accused Brima and Kanu was an issue raised by Defence Counsel in their pre-trial briefs. It is “to be expected that Counsel for the first and third accused would challenge all such identification evidence”. In any event, there is no evidence about “anyone named Santigie Kanu”. The Prosecution submits that the motion should be dismissed.

II. DELIBERATIONS

10. The Defence rely on Rule 54 which provides:

At the request of either party or its own motion, a Judge or Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

11. They do not specify which of the “purposes” referred to in Rule 54 is applicable. They state:

The Defendants are entitled to a fair trial and the cross examination of all witnesses particularly those whose evidence touches and concerns particular accused persons.

12. They do not refer to any law or precedent to support this submission nor do they address on the matters the Trial Chamber must consider in its deliberations.

13. The Prosecution rely on *Prosecutor v. Bagosora* and the citation quoted above and submit:

*it is incumbent upon the Trial Chamber to consider whether or not each accused has individually demonstrated good cause, as each Defence Counsel made a choice on behalf of his client to decline to cross examine the witness.*¹⁵

¹¹ “Reponse”, para. 20.

¹² “Response”, para. 21.

¹³ “Response”, para. 24.

¹⁴ “Response”, paras. 28-29.

¹⁵ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Prosecution Motion to recall Witness Nyanjwa, 29 September 2004.

14. The ICTR decision shows that a party must demonstrate “a substantial reason amounting in law to a legal excuse for failing to perform a required act.”¹⁶

15. A Chamber must consider:

- a. the purpose of the proposed testimony;
- b. the party’s justification for not offering the evidence (in the instant case for not cross-examining) when the witness originally testified;
- c. the right of the accused to be tried without undue delay;
- d. judicial economy.

16. We agree with the proposition in *Prosecutor v. Bagosora* that leave should only be granted in the most compelling circumstances.¹⁷

17. It is clear from Defence submissions that the purpose of recalling the witness is to challenge identification evidence and we agree with the Prosecution that the Defence were aware that identification of the accused was an issue both during examination-in-chief of witness TF1-023 and at the pre-trial brief stage.

18. The Defence justify their decision not to cross-examine the witness stating that they first needed to verify and cross-check the information provided to them by their investigator. However, this applies only to the first accused and, to a lesser extent the second accused, but not the third accused. We consider that the defence argument that they needed to verify and cross-check information is a weak one particularly when seen in the lapse of some seven months since they formed the view that such verification was necessary.

19. As Defence is making this application, it must be taken to have accepted any delay that could result from such an application. However, such an acceptance does not relieve the Trial Chamber from its duty to ensure that the Trial is conducted without undue delay and with judicial economy.

20. We consider there is merit in the Prosecution submission that the Defence has failed to show good cause and that Counsel erred when they refused to cross-examine the witness when they were accorded an opportunity to do so, in accordance with Rule 85 (B) at the end of examination-in-chief.

21. However, we consider that there is a further aspect that arises from Counsel’s decision not to cross-examine the witness. We ask ourselves if the decision and failure to cross-examine prevents the accused from having a fair trial.

22. The attitude of Courts to errors by Counsel has varied. In cases such as *Boodran v. the State* the Privy Council spoke of “failure of so fundamental a nature” that the trial was not fair.¹⁸

¹⁶ *Ibid.*, para. 6.

¹⁷ *Ibid.*

¹⁸ *Boodram v. The State*, Privy Council, 1 Cr. App. R. 12, 10 April 2001.

23. In the European Court of Human Rights Case *Daud v. Portugal*, the test applied was whether failure of Counsel was such that it prevented the accused from having a fair trial. In that case the ECHR went further imposing a duty upon courts to “[inquire] into the manner in which the lawyer was fulfilling his duty ...”, when alerted to possible deficiencies, and stated that “the Court should not have remained passive.”¹⁹

24. We consider Article 17(2) and 17(4)(e) of the Statute which provide as follows:

17(2) *The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses”.*

17 (4) *In the determination of any charge against the accused, pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality”;*

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

17. We are of the opinion that Counsels’ failure to cross-examine the witness has prejudiced the rights of the accused enshrined in these provisions.

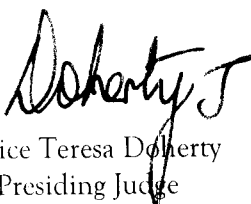
18. We are also mindful of the duty imposed on the Trial chamber by Rule 26bis to conduct the hearing with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

19. For this restricted reason, and taking into account the exceptional circumstances that led to Counsel’s failure to cross-examine, we grant the motion.

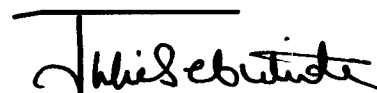
Done at Freetown, Sierra Leone, this 25th day of October 2005.



Justice Richard Lussick

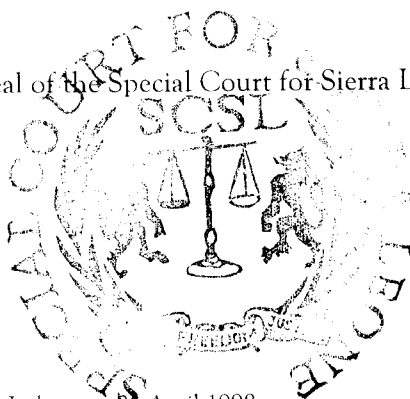


Justice Teresa Doherty
Presiding Judge



Justice Julia Sebutinde

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¹⁹ *Daud v. Portugal*, 11/1997/795/997, Judgment, 21 April 1998.