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SCSL-2003-10-PT
(679 - 683)

THE SPECIAL COURT FOR SIERRA LEONE

Before: Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date Filed:

THE PROSECUTOR

V.

BRIMA BAZZY KAMARA also known as
IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA

Case No. SCSL-2003-10-PT

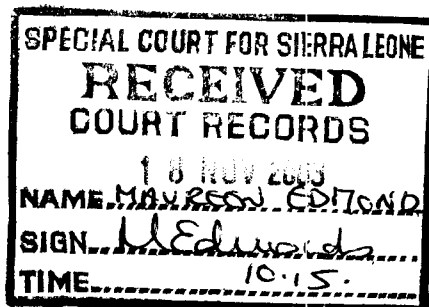
RESPONSE TO PROSECUTION MOTION FOR JOINDER

Office of the Prosecutor:

Mr Luc Côté
Ms Brenda J. Hollis
Mr Robert Petit
Ms Boi-Tia Stevens

Defence Counsel:

Mr Ken Fleming Q.C.



1. The time has not yet elapsed for the purposes of lodging motions in respect of jurisdiction and defects in the form of indictment. The copied material pursuant to disclosure arrived in Brisbane at midday the 17th November 2003, and, at the time of preparation of this response, had not been examined. Further, detailed instructions in respect of the disclosed material was only started to be taken from Mr Kamara by a Legal Assistant in Sierra Leone.
2. Accordingly, in our respectful submission, it is inappropriate to examine the question of joinder until such times as the learned Trial Chamber has heard matters in respect of jurisdiction and defects in the form of indictment.
3. In respect of the Prosecution's Motion for Joinder, we accept that the propositions of law and facts stated in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 19 and 20 accurately reflect the present state of the law. We do not accept, necessarily, that that law is correct.
4. In addition, the Accused, Mr Karama, accepts the following propositions:
 - (a) The summary of the *Nyiramahasuhuko* case set out in paragraph 21 is an accurate summary of that case;
 - (b) The summary of the facts alleged in the indictment and contained in paragraph 22 is accurate, although we do not accept that the facts are true;
 - (c) The *Prosecutor v. Kayishema* is properly summarised in paragraph 23;
 - (d) The situation alluded to in paragraph 24 is a possibility;
 - (e) The interest of witnesses, and the protection of witnesses, is an issue that should be taken into account when determining the question of joinder;
 - (f) As suggested in paragraph 31, a separate trial would "almost certainly delay the trial of some of these accused for an extended period of time"; and

- (g) The trial will be held before professional Judges who are jurists rather than jurors.
5. However, the whole of the Prosecutor's case depends entirely upon the averments contained in the indictment and within the argument. (In respect of the latter, see paragraphs 26 and 27 as to the intention of the Prosecutor to lead evidence from the same witnesses).
 6. Having stated that we accept the propositions set out above in respect of the authorities, we repeat paragraph 17 of the Prosecution's submission that the Special Court must develop its own jurisprudence, "free from the slavish and uncritical emulation of the principles and doctrines of ad hoc tribunals".
 7. The problem with the jurisprudence of the ad hoc tribunals, with the greatest respect, lies principally in accepting the averments of the Prosecution for the purposes of creating the circumstances in which joinder can be effected.
 8. We accept that the material provided with the indictment has been examined by a Judge of this honourable Trial Chamber, but it has never been tested as it would have been tested in the normal common law system, by way of a committal proceeding or preliminary hearing.
 9. Further, there is nothing to say that, given arguments that may follow in respect of defects in the form of the indictment, the Prosecutor will maintain the position he now alleges.
 10. Accordingly, the Prosecutor has not been put to proof in any way in respect of the material upon which he relies for the purposes of joinder. He does not even attempt to establish the facts upon the balance of probabilities. The Prosecutor needs only to aver a fact and it is accepted as fact, according to the jurisprudence of the ad hoc tribunals.

11. This weakness is highlighted by reference to the indictment. For example, without particularising, in any way whatsoever, it is stated baldly that Mr Kamara “was a senior member of the AFRC, Junta and AFRC/RUF Forces”. Accordingly, the Prosecutor wishes to make an averment without particularity in the indictment, and then aver in this application that this is the fact that he intends to establish, in common with the other accused.
12. Further, paragraph 20 avers that Mr Kamara “was a commander of AFRC/RUF Forces ...”. In paragraph 21, without reference to any particularity, it is averred that Mr Kamara “individually, or in concert with [various others] ... exercised authority, command and control over all subordinate members of the AFRC, Junta and AFRC/RUF Forces”.
13. A short examination of the indictment, in our submission, exposes two weaknesses in what the Prosecutor is attempting to do in joining the indictments.
14. First, there has not yet been a challenge to the indictment. Second, there is no standard or proof required, on the authorities, to which the Prosecution must attain, in order to succeed in this application.
15. The Rule as to motions, Rule 73, does not mention evidence, let alone a standard of proof in respect of facts upon which a motion may be determined. Rule 73 appears to be directed more to issues of law, whereas the general provision in respect of evidence, Rule 89, in our submission, must control the use of evidence, if evidence is necessary for the purposes of the motion.
16. In our respectful submission, Rule 89(B) is the appropriate rule in respect of evidence to be used upon motions. It is necessary therefore that “a Chamber ... apply rules of evidence which will best favour a fair determination of the matter before it and are consistent with the spirit of the statute and the general principles of law”.

17. The fundamental principle of law is that the Accused is innocent until proven guilty. Therefore, the material being adduced is against an innocent person who has not had the opportunity to test any of averments in either the indictment or the motion.
18. As a matter of law and fairness, the Prosecutor must establish by some measurable standard of proof:
 - (a) That the facts alleged in the indictment have credibility;
 - (b) That the facts alleged in the Motion for Joinder have credibility.
19. Because the Prosecutor has failed to prove these facts to any level of proof, the Motion for Joinder must fail.



K.C. FLEMING Q.C.

18 November 2003