

ICTR-98-42-T

27.02.2002

(6325 — 6320)

6325

*unlogi*



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding  
Judge Winston C. Matanzima Maqutu  
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 27 February 2002

2002 FEB 27 A 10: 27  
*M. Dieng*

The PROSECUTOR v. Élie NDAYAMBAJE  
(Case No. ICTR-96-8-T)

The PROSECUTOR v. Joseph KANYABASHI  
(Case No. ICTR-96-15-T)

The PROSECUTOR v. Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI  
(Case No. ICTR-97-21-T)

The PROSECUTOR v. Sylvain NSABIMANA & Alphonse NTEZIRYAYO  
(Case No. ICTR-97-29-T)

Case No. ICTR-98-42-T

DECISION ON THE PROSECUTOR'S MOTION TO MODIFY THE SEQUENCE  
OF APPEARANCE OF WITNESSES ON HER WITNESS LIST

Office of the Prosecutor

Silvana Arbia  
Japhet Mono  
Jonathan Moses  
Gregory Townsend  
Adesola Adebeyejo  
Manuel Bouwknecht

Defense Counsel for Ndayambaje

Pierre Boulé  
Isabelle Lavoie

Defense Counsel for Kanyabashi:

Michel Marchand  
Michel Boyer

Defense Counsel for Nviramasuhuko:

Nicole Bergevin  
Guy Pourpart

Defense Counsel for Ntahobali

Duncan Mwanyumba  
Normand Marquis

Defense Counsel for Nsabimana

Josette Kadji  
Charles Patie Tchacounte

Defense Counsel for Nteziryayo

Titinga Frédéric Pacere

*M. Dieng*

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the “Tribunal”),

**SITTING** as Trial Chamber II composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson, (the “Chamber”);

**BEING SEIZED** of:

- (i) the “Prosecutor’s Motion to Modify the Sequence of Appearance of Witnesses on her Witness List for Trial Session Scheduled from 4 March 2002 to 4 April 2002,” filed on 29 January 2002 (the “Motion”);
- (ii) “Réponse de Sylvain Nsabimana, à la requête déposée le 29 janvier 2002 par le Procureur aux fins de modifier l’ordre de comparution des témoins à charge, lors des audiences devant se tenir du 4 mars au 4 avril 2002,” filed 4 February 2002 (“Nsabimana’s Response”);
- (iii) “Réponse à la “Requête du Procureur aux fins de modifier des témoins pour la session débutant le 4 mars 2002 et se terminant le 4 avril 2002,” filed 5 February 2002 (“Kanyabashi’s Response”);
- (iv) “Réponse à la “Requête du Procureur aux fins de modifier des témoins pour la session du Tribunal devant débuter le 4 mars 2002 et se terminer le 4 avril 2002,” filed on 14 February 2002 (“Ndayambaje’s Response”);
- (v) the “Prosecutor’s Reply on the Motion to Modify the Sequence of Appearance of Witnesses,” filed on 14 February 2002 (the “Prosecutor’s Reply”);
- (vi) “Réponse de Pauline Nyiramasuhuko à la “Requête du Procureur aux fins de modifier des témoins pour la session débutant le 4 mars 2002 et se terminant le 4 avril 2002,”” filed on 19 February 2002 (“Nyiramasuhuko’s Response”);
- (vii) “Réponse de Arsène Shalom Ntahobali à la “Requête du Procureur aux fins de modifier des témoins pour la session débutant le 4 mars 2002 et se terminant le 4 avril 2002,” filed on 20 February 2002 (“Ntahobali’s Response”);
- (viii) “Réplique de Alphonse Nteziryayo à la “Requête du Procureur en modification de l’ordre de comparution des témoins à charge à la session courant du 4 mars 2002 et se terminant le 4 avril 2002,” filed on 20 February 2002 (“Nteziryayo’s Response”);
- (ix) the “Prosecutor’s Supplemental Reply on the Motion to Modify the Sequence of Appearance of Witnesses.” Filed on 21 February 2002 (the “Prosecutor’s Supplemental Reply”);

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”) in particular Rules 54, 73, 73*bis*(E);

**CONSIDERING** that pursuant to Rule 73 of the Rules, the Motion will be decided on the basis of the written briefs, as filed by the Parties.

**SUBMISSION OF THE PARTIES**

*Prosecutor’s Submissions*

1. The Prosecutor requests leave of the Chamber, pursuant to Rules 54 and 73 of the Rules to modify the sequence of appearance of witnesses for the next trial session scheduled for 4 March 2002 to 4 April 2002 (the “March to April trial session”).

2. The Prosecutor requests that witnesses QBV, FAM and QCB present their evidence immediately following witness TO, who is the first witness scheduled during the March to April trial session. Furthermore, the Prosecutor requests that witness TK be the first witness called at the next session after the March to April trial session. Therefore the sequence of witnesses for the March to April trial session will be: TO, QBV, FAM, QCB, SJ, TN, QAQ, QP and QR.

3. The Prosecutor argues that witnesses QBV, FAM and QCB are detained witnesses who have been in Arusha since they were transferred from Rwanda to the Tribunal's Detention Facility (the "UNDF") on 25 October 2001. Since then, they have not seen their families. The said witnesses were to have testified during the previous trial session of 22 October to 22 November 2001 (the "October to November trial session"), but their turn to testify was not reached. The Prosecutor suggests that they testify early during the March to April trial session so that they do not remain in the UNDF for a further three months. As regards witness TK, the Prosecutor submits that she should be heard during the session following the March to April trial session because of her present personal circumstances.

4. The Prosecutor maintains that such a course of action would assist the witnesses as well as those responsible for the running of the UNDF and the Witness and Victims Support Section (the "WVSS"). The Prosecutor submits that there is no prejudice caused to the Defense, and that it is in the interests of justice and of a smooth administration of the Tribunal to grant the request.

#### *Defense Submissions*

5. All the Defense Teams in the Butare Trial comprised of the Accused Kanyabashi, Nsabimana, Nyiramasuhuko, Ndayambaje, Ntahobali and Nteziryayo object to the Prosecutor's Motion and request that the sequence of appearance of witnesses for the March to April trial session should follow the order transmitted on 18 September 2001<sup>1</sup>.

6. In their response, the Defense for Kanyabashi and Nyiramasuhuko submit that the Prosecutor has not provided sufficient justification for such modification. They submit that, unlike the Accused, who is innocent until proven guilty, according to the disclosures provided by the Prosecutor, witnesses QBV, FAM and QCB have entered a guilty plea to the crimes committed in Rwanda in April to July 1994 and so their detention is justified.

7. Moreover, Nteziryayo's and Kanyabashi's Defense question why the Prosecutor seeks to call witness QBV before witness FAM, whereas in the sequence presented on 18 September 2001, witness FAM preceded witness QBV. The Defense for Kanyabashi submits that this sequence should be maintained during the March to April trial session. (i.e., witness FAM followed by witness QBV and then witness QCB)

8. Kanyabashi's Defense argues that the Accused will suffer prejudice if the Prosecutor's Motion is granted because the Defense has prioritized its work. The Defense submits that investigations used in the cross-examination of QCB will not have been completed if he is called amongst the first witnesses in the March to April trial session.

<sup>1</sup> See the Interoffice Memorandum dated 18 September 2001 for the "List of Witnesses for the 22 October 2001 to 22 November 2001 session in the Butare Case," as: QAM, TA, QJ, QAR, TO, FAM, TK, SJ, TN, QAQ, QBV, QP, QR, QW, SQ, QCB and FAJ.

9. In its response, Ndayambaje's Defense argues that Rules 54 and 73 of the Rules are of a general nature. The said Defense team and that of Nyiramasuhuko submit that Rule 73bis(E) of the Rules, which provides for the modification of the list of witnesses on the grounds of the interest of justice, applies. The Defense argues that none of the reasons provided by the Prosecutor for the modification of her list of witnesses demonstrate the interests of justice. (emphasis by Ndayambaje's Defense)

10. Kanyabashi, Ndayambaje and Nyiramasuhuko's Defense teams argue that the request is not timely brought as the Prosecutor could and should have given an indication that she intended to change the sequence of appearance of her witnesses when she requested, on 20 November 2001, that the said witnesses remain at the UNDF until they are called to testify. Nteziryayo's Defense additionally argues that the sequence of calling witnesses in a criminal trial is a strategic move for both Parties. Therefore, if either Party changes strategies without giving sufficient notice to the other Party, it will adversely affect that Party.

11. As regards witness TK, the Defense submits that as she is the third witness to be called, according to the memorandum provided on 18 September 2001, she could testify during the March to April Trial session. The Defense argues that the reasons the Prosecutor provides for seeking that witness TK be called first at the trial session following the March to April trial session are vague.

12. Nsabimana's Defense submits that, pursuant to Rule 73bis(E) of the Rules, the only reasons that could justify a modification of the list of witnesses are (1) if it is in the interest of justice and (2) if the said modification reduces the number of witnesses that were on the list provided at the Pre-Trial Conference. The Defense maintains that none of these conditions has been met by the Prosecutor.

13. The Defense for Nteziryayo, in its response, maintains that a strict interpretation of Rule 73bis(E) of the Rules must be made because this is a criminal matter. The Defense maintains that the said Rule does not provide for a modification of the order of calling witnesses. Accordingly, the Defense argues that the Motion has no basis in law.

14. Nteziryayo's Defense further argues that Article 20 of the Statute provides for the rights the Accused and the Prosecutor and not for those of third parties such as the UNDF and the WVSS. The Defense maintains that instead of safeguarding the rights of the Accused and the Prosecutor, the Motion seeks to safeguard the rights of the witnesses, the UNDF and the WVSS.

*Prosecutor's Reply*

15. In her reply, the Prosecutor argues that the Defense cannot claim not to have had ample time to prepare because all these witnesses were listed to testify during the October to November trial session. The Prosecutor disclosed to the six Accused persons the non-redacted copies of all witness statements of FAM, QBV and QCB in both languages by 25 October 2001.

16. The Prosecutor also argues that, by her letter of 18 September 2001, she listed the witnesses to be called only during the October to November trial session. She further submits that on 20 November 2001 she clearly stated her intention to call the three detained witnesses in the next trial session, i.e., the March to April trial session. She further submits that in

order to avoid back-to-back examination by one prosecution counsel, witness QBV should be heard before witness FAM. (emphasis hers)

17. As regards witness TK, the Prosecutor submits that there is a greater degree of certainty for witness TK to testify if she is to be called at the trial session following the March to April session than if she is called during the March to April trial session.

18. In her Supplemental Reply, the Prosecutor argues further that Rule 73bisB of the Rules on the provision of a list of witnesses the Prosecutor intends to call is not mandatory, rather it is discretionary. The Prosecutor further submits that the said Rule is silent as to whether such a list should necessarily be written in order of appearance.

#### HAVING DELIBERATED

19. The Chamber notes that the Prosecutor brings her Motion pursuant to Rules 54 and 73 of the Rules. Rule 54 of the Rules, a general Rule, provides that “[a]t the request of either party or *proprio motu*, a Judge or a 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.” Rule 73 of the Rules provides *inter alia* that “[a]ny party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the Accused.”

20. It is the Trial Chamber’s opinion that the Prosecutor’s Motion, which is brought pursuant to Rules 54 and 73 of the Rules, and which seeks an appropriate ruling on the modification of the sequence of appearance of witnesses, is properly made thereunder.

21. The Chamber notes that the Prosecutor makes her request, pursuant to Rule 73bis(E) of the Rules, according to which, “[a]fter commencement of trial, the Prosecutor, if he considers it to be in the interest of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called”.

22. Regarding the request to call witnesses FAM, QBV and QCB immediately after witness TO, the Chamber notes that indeed the said witnesses were scheduled to testify during the October to November trial session and that the Defense teams have had the unredacted witness statements of the said witnesses, in both languages, since 25 October 2001. The Chamber further notes that the Prosecutor represented that she would call the said witnesses during the next trial session on 20 November 2001. Accordingly, when ruling on 21 November 2001 that the three witnesses should remain temporarily detained at the Tribunal’s Detention Facilities in Arusha, the Chamber considered thus; “[t]hat these three witnesses [FAM, QBV, and QCB] have not yet appeared before the Chamber, and the Prosecutor submits that she intends to call them in the next trial session scheduled from 4 March to 4 April 2002.” The Chamber also notes that the said witnesses have been in the custody of the UNDF since their transfer to Arusha on 25 October 2001.

23. The Chamber notes the Defense submissions that it will suffer prejudice if the witnesses FAM, QBV and QCB are called at the beginning of the March to April trial session as it would not have had enough time to prepare since it has been relying on the sequence of calling witnesses provided on 18 September 2001. The Chamber is not convinced by the Defense in so far as the said witnesses were listed to testify at the October to November trial session. If they had been called, the Defense would have had to cross-examine them during

that session. The Chamber finds that the Defense teams have had sufficient time to prepare for the cross-examination of Witnesses FAM, QBV and QCB.

24. The Chamber is of the opinion that it is in the interest of justice and judicial economy to allow the said witnesses to be heard at the beginning of the March to April trial session so that they may be released from custody at the UNDF and returned to Rwanda. However, the Chamber is not convinced by the Prosecutor's submissions that witness QBV should be heard before witness FAM in order to avoid back-to-back examination by a single prosecution staff. Accordingly, the Chamber finds the witness sequence communicated to the Defense on 18 September 2001 should stand and Witness FAM should be heard before Witness QBV.

25. As regards the Prosecutor's request that Witness TK be the first witness to be heard at the next trial session immediately following the March to April session because of her special circumstances, the Chamber notes that the Defense have not indicated that any prejudice will have been caused them if this request is granted. Accordingly, the Chamber grants the Prosecutor's request to move the testimony of witness TK from the trial session scheduled for 4 March to 4 April 2002 so that she is the first witness called at the next trial session.

26. The Chamber further notes that the Prosecutor's Motion fails to explain its omission of Witnesses QW, SQ and FAJ during the March to April trial session. In this regard, the Chamber finds that the said witnesses shall remain on the list of witnesses to be called to testify during this trial session.

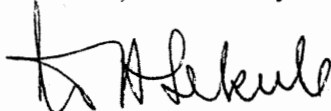
27. Therefore, the Chamber grants the Prosecutor's Motion and directs her to call her witnesses during the trial session of 4 March to 4 April 2002 in this sequence: TO, FAM, QBV, QCB, SJ, TN, QAQ, QP, QR, QW, SQ and FAJ.

**FOR THE ABOVE REASONS, THE TRIBUNAL;**

**GRANTS** the Prosecutor's Motion to modify the sequence of calling witnesses; and

**DIRECTS** the Prosecutor to call her witnesses during the trial session of 4 March to 4 April 2002 in this sequence: TO, FAM, QBV, QCB, SJ, TN, QAQ, QP, QR, QW, SQ and FAJ.

Arusha, 27 February 2002



William H. Sekule  
Presiding Judge



Winston C. Matanzima Maqutu  
Judge



Arlette Ramaroson  
Judge

