



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before:

Judge William H. Sekule, Presiding
Judge Arlette Ramarosan
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 6 May 2004

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO

Case No. ICTR-97-21-T

**DECISION ON DEFENCE MOTION FOR RECALL OF WITNESSES TA, QJ,
TK, SJ, SU, SS, QBP, RE, FAP, SD AND QY OR, IN DEFAULT, A DISJUNCTION
OF TRIAL OR A STAY OF PROCEEDINGS AGAINST NYIRAMASUHUKO**

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

BEING SEISED of the “Defence Motion Requesting the Recall of Prosecution Witnesses TA, QJ, TK, SJ, SU, SS, QBP, RE, FAP, SD and QY to Be Heard Again on Events that Allegedly Occurred at the Prefectural Offices and Related to Charges Against Pauline Nyiramasuhuko Pleaded in the Indictment, or, in the Alternative, to Order a Separate Trial or a Stay of the Proceedings Against Pauline Nyiramasuhuko” (the “Motion”), filed on 8 April 2004;

CONSIDERING the “Comments of Sylvain Nsabimana on the Motion of Accused Pauline Nyiramasuhuko Requesting the Recall of Some Prosecution Witnesses, and, Should the Occasion Arise, for a Separate Trial or a Stay of the Proceedings”(“Nsabimana’s Comments”), filed on 13 April 2004;

CONSIDERING the “Reply to Sylvain Nsabimana’s Comments on the Motion of Accused Pauline Nyiramasuhuko Requesting the Recall of Some Prosecution Witnesses, and, Should the Occasion Arise, for a Separate Trial or a Stay of the Proceedings”(the “Reply to Nsabimana’s Comments”), filed on 14 April 2004;

CONSIDERING the “Prosecutor’s Response to Nyiramasuhuko’s Motion Requesting the Recall of Witnesses TA, QJ, TK, SJ, SU, SS, QBP, RE, FAP, SD and QY, who Gave Evidence of the Prefecture Office Which Concerns the Accused Pauline Nyiramasuhuko and in the Alternative to Order a Separate Trial for Pauline Nyiramasuhuko” (the “Response”), filed on 19 April 2003;

CONSIDERING the “Reply to Prosecutor’s Response on the Motion Requesting the Recall Prosecution Witnesses TA, QJ, TK, SJ, SU, SS, QBP, RE, FAP, SD and QY to Be Heard Again on Events that Allegedly Occurred at Prefecture’s Offices and Related to Charges Against the Pauline Nyiramasuhuko Pleaded in the Indictment, or, in the Alternative, to Order a Separate Trial or a Stay of the Proceedings Against Pauline Nyiramasuhuko” (the “Reply to the Prosecutor”), filed on 27 April 2004

NOTING the “Decision in the Matter of Proceedings Under Rule 15 bis (D)” issued by Trial Chamber II on 15 July 2003 (the “Trial Chamber Decision”) and the “Decision in the Matter of Proceedings Under Rule 15 bis (D)” (the “Appeals Chamber Decision”) issued by a full bench of the Appeals Chamber on 24 September 2003;

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the matter, pursuant to Rule 73 (B), on the basis of the written submissions of the Parties.

SUBMISSIONS OF THE PARTIES

Defence Motion

1. The Defence submits that the evidence against Pauline Nyiramasuhuko is essentially related to events which allegedly occurred at the Préfectoral office. This evidence relies only on twelve witnesses' testimonies, namely Witness TA, QJ, TK, SJ, SU, SS, QBP, RE, FAP, SD, QY and QBQ. Witness QBQ was the last Prosecution witness against Nyiramasuhuko, completing the Prosecution's case against her. Witness QBQ is also the only witness against Nyiramasuhuko who testified before the recomposed bench. The Defence submits that this is a new situation which makes the trial against Nyiramasuhuko unfair. Thus, the Defence requests the Chamber, as a remedy, to recall the witnesses to the events that allegedly occurred at the Préfectoral office.

2. The Defence stresses the importance of the witness' demeanour to the assessment of his credibility. According to the Defence, the mere reading of the transcripts is insufficient for Judge Bossa to determine the witness' demeanour as transcripts do not shed light on the witness' hesitation, laughter, tears, outbursts of temper, aggressiveness, tone of voice and other kinds of demeanour.

3. The Defence cites several ICTR and ICTY cases where witnesses' demeanour was a factor in assessing credibility. The Defence submits that, as Judge Bossa could not evaluate the demeanour of witnesses, she is prevented, in the new circumstances, from fully assessing their credibility.

4. The Defence recalls the Appeals Chamber Decision's ruling that the recomposed Trial Chamber may recall a witness on a particular issue which in the view of the Trial Chamber involves a matter of credibility which the substitute judge may need to assess in light of the witness's demeanour.

5. The Defence submits that the discretion in recalling witnesses granted by the Appeals Chamber does not apply where the evidence against an accused is almost complete when the substitute Judge joins the bench. In such a case, the Defence contends that the Trial Chamber must, and not may, recall the witnesses.

6. The Defence recalls that when the Trial Chamber Decision and the Appeals Chamber Decision were rendered, the Prosecution estimated that there were about sixty remaining witnesses. It reiterates the Trial Chamber's observation on this issue, in paragraph 33 of the Trial Chamber Decision:

“that any substitute judge assigned to the case at this point in the evidence would then be in a position to observe for himself or herself the larger bulk of the witnesses for the Prosecution”.

7. The Defence submits that the right of the Accused to a fair trial outweighs any inconvenience of the recall of witnesses.

8. The Defence submits that, pursuant to Article 11(2) of the Statute, the Trial Chamber is composed of a bench of three Judges. Therefore, the Defence argues that it is the Accused's right that each witness testifying against her be heard by the three judges. This

is, according to the Defence, a condition of Judge Bossa's independence. If this was not the case, the Defence contends that Judge Bossa should rely on Judge Sekule and Judge Ramaroson's assessment of the witnesses' credibility.

9. Therefore, the Defence requests the Chamber to recall the eleven witnesses to be heard on the events at the Préfectoral office. If the recall of the witnesses is not granted, the Defence argues that the Chamber could decide to disjoin the proceedings against Nyiramasuhuko or decide a stay of the proceedings against her.

Nsabimana's Comments

10. Defence for Nsabimana submits that Judge Bossa's appointment and declaration of familiarization with the record of the proceedings was consistent with Rule 15bis and that all subsequent motions by Nyiramasuhuko related to the composition of the bench, and her applications for certification of appeal, were denied.

11. It is the view of Defence for Nsabimana that the Motion is an attempt to relitigate former decisions by the Chamber. It contends that, pursuant to Rule 120, such a motion is inadmissible.

12. Defence for Nsabimana submits that the recall of eleven Prosecution Witnesses would considerably extend the length of the proceedings and would affect Nsabimana's right to be tried as quickly as possible.

13. Therefore, Defence for Nsabimana requests that the Chamber dismiss Nyiramasuhuko's Motion.

Reply to Nsabimana's Comments

14. The Defence submits that Nsabimana does not take into account the Accused Nyiramasuhuko's particular circumstances, namely the completion of the Prosecution's case against her with Judge Bossa having heard only one witness against her.

15. The Defence submits that the Motion is not an attempt to relitigate former decisions, but is intended only to ensure Nyiramasuhuko's right to a fair trial.

Prosecution's Response

16. The Prosecution notes that the present Motion is similar to the requests made in the previous Motions for the recall of witnesses QAR and TO filed by Accused Ndayambaje. For purpose of judicial economy, the Prosecution seeks to adopt all submissions made in its Response to Ndayambaje's previous Motions and makes the following specific submissions in respect of this Motion.

17. The Prosecution submits that the Motion is frivolous, a waste of judicial time and resources and pursuant to Rule 73 (F), the Defence should be denied payment of fees

associated with the Motion.

18. The Prosecution submits that although Rule 90 states that witnesses shall in principle be heard directly by the Chamber, exceptions are allowed in Rules 71 and 15bis.

19. The Prosecution submits that the Kayishema/Ruzindana Appeals Judgement, cited by the Defence, does not support the proposition that the Trial Judge must always consider the witness' demeanour. Also, the Prosecution submits that two of the Judges have had the opportunity to address the issues of credibility raised by the Defence during cross-examination. The Prosecution further argues that the Defence has not submitted any particular reason why the witnesses should be recalled or why it was not sufficient for Judge Bossa to read the records of proceedings.

20. The Prosecution submits that, furthermore, the proceedings of the court are audio-taped, thus allowing to Judge Bossa the opportunity to hear the witnesses as they gave evidence, with all their attendant expressions, if she considered it to be necessary.

21. The Prosecution recalls the findings in paragraphs 25 and 34 of the Appeals Chamber Decision. It contends that the Chamber intended a case-by-case consideration and that the Defence has not shown how in this case, on these facts, the fact that the substituted judge has not heard most of the evidence against Nyiramasuhuko will render the trial against her unfair.

22. The Prosecution submits that the discretion to recall a witness must be exercised sparingly, taking into consideration the interest of justice, financial requirements, the length of the trial and its complexities and the right to a speedy and fair trial.

23. The Prosecution concludes that recalling the witnesses would unnecessarily prolong the trial and would not be in the interest of justice. The alternative application of Nyiramasuhuko for a separate trial would, according to the Prosecution, obviate the procedures prescribed by the Rules and entail all the inherent difficulties involved in starting the trial de novo.

24. Therefore, the Prosecution requests the Chamber that the Motion, negating the spirit and principle of the Appeals Chamber Decision, not be granted.

Defence Reply to the Prosecution

25. In response to the Prosecution's submissions, the Defence submits that the Motion is different from Ndayambaje's Motions to Recall TO and QAR. According to the Defence, the main issue raised in the Motion is the impossibility for Judge Bossa to assess the credibility of witnesses on the events that occurred at the Préfectoral office; as of the twelve Prosecution Witnesses heard on those events, Judge Bossa only heard Witness QBQ in court.

26. The Defence submits that the Prosecution omits that before the ICTR, the Accused is judged by a three judges bench, and Prosecution's Witnesses against Nyiramasuhuko have been heard by only two Judges. According to the Defence, when the judgement will be rendered, a possible dissident opinion on this issue would make the judgement invalid and oblige the Chamber to restart the trial against the Accused. The Defence submits that, even without any dissenting opinion, the Accused may rightly wonder if she was fairly tried when the whole evidence against her was not heard by the three judges.

27. The Defence contends that it does not seek relitigation of the Rule 15bis Decisions, but only a decision based on the fact that both the Trial Chamber and the Appeal Chamber were not aware, at the time of their decisions, that the Prosecution's case against Nyiramasuhuko was complete.

28. The Defence emphasizes that the alternatives - a separate trial or stay of proceedings - are only subsidiary remedies. The Defence argues that, while it is obvious that a restart of the trial is undesirable, particularly with regard to the time frame, a restart would be better than an unfair trial.

29. With regard to the financial issue, the Defence submits that the Appeals Chamber decided that, although this issue can be addressed, it could not justify an unfair trial.

DELIBERATION

30. At the outset, the Chamber recalls the Decision of the Appeals Chamber on the question of recall of witnesses:

“If the judge assigned by the President certifies ‘that he or she has familiarized himself or herself with the record of the proceedings’ (which, as mentioned above, does not in this case include video-recordings) and thereafter accordingly joins the bench of the Trial Chamber, the recomposed Trial Chamber may, on a motion by a party or proprio motu, recall a witness on a particular issue which in the view of the Trial Chamber involves a matter of credibility which the substitute judge may need to assess in the light of the witness’ demeanour.”

31. Accordingly, for a witness to be recalled, the moving Party shall identify a particular issue which involves a matter of credibility which the substitute judge may need to assess in the light of the witness’ demeanour. The witness may then be recalled to be heard again on this specific issue. The other issues of credibility, which are related, for example, to the substance of the evidence, do not justify the recall of a witness. Such issues have already been addressed by the Defence during the cross-examination of witness and can only be raised again at the end of the proceedings, in particular in the closing briefs.

32. In the instant case, the Chamber finds that the Defence does not raise or demonstrate any particular issue which in the view of the Trial Chamber involves a matter of

credibility which the substitute judge may need to assess in the light of the witness' demeanour. Rather, the Defence seeks a complete re-hearing of the specified witnesses.

33. The Chamber notes that the Defence contends that because the substitute Judge has not heard the bulk of the evidence against the Accused, the Chamber would not have applied its discretion to decide to continue the case against the Accused. Nonetheless, the Chamber underscores the fact that a decision to continue the trial has already been made – and upheld by the Appeals Chamber -. In any case, the decision to proceed was based on an evaluation of the totality of the circumstances, including but not limited to the number of witnesses remaining to be heard, that appeared to be pertinent. Therefore, the Chamber finds no merit in engaging itself, at this stage of the trial, in an assessment of the evidence against each Accused person in the case. Furthermore, the Chamber recalls the Appeals Chamber reasoning in its Decision:

“The Appeals Chamber does not consider it useful to lay down a hard and fast relationship between the proportion of witnesses who have already testified and the exercise of the power to order a continuation of the trial with a substitute judge. [...] The stage reached in each case need not always be the same. The Appeals Chamber sees no error in the balance made by the Trial Chamber of the various interests of justice in the trial as it relates to each of the Appellants.”

34. The Chamber notes that in considering whether to recall a witness, it must be born in mind that the substitute judge has certified that she has familiarized herself with the records of the proceedings. Those records include audio-recordings in which the substitute Judge can assess the credibility of the witnesses in the light of their demeanour when giving evidence in court.

35. The Chamber therefore finds that no case has been made by the Defence for the rehearing of the witnesses as a whole in the manner specified by the applicant.

36. Accordingly, the Chamber finds no merit in the Motion and denies the Defence request to recall witnesses TA, QJ, TK, SJ, SU, SS, QBP, RE, FAP, SD and QY.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 6 May 2004

William H. Sekule	Arlette Ramarosan	Solomy Balungi Bossa
Presiding Judge	Judge	Judge

[Seal of the Tribunal]