

ICTR-98-44-T  
23-3-2007  
(28595-28592)

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INTERNATIONAL  
CRIMINAL TRIBUNAL

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
*sitting pursuant to Rule 15 bis (F) of the Rules of Procedure and Evidence*

**Registrar:** Adama Dieng

**Date:** 23 March 2007

**THE PROSECUTOR**

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA  
Case No. ICTR-98-44-T

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**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL  
DECISION ON FALSE TESTIMONY**

*Rule 73(B) of the Rules of Procedure and Evidence*

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Peter Robinson and Patrick Nimy Mayidika Ngimbi

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## INTRODUCTION

1. The trial in this case started on 19 September 2005. On 29 December 2006, the Trial Chamber, composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam, denied a motion made by the Defence for Nzirorera, joined by the Defence for Ngirumpatse, requesting, pursuant to Rule 91(B) of the Rules of Procedure and Evidence that an *amicus curiae* be appointed to investigate the false testimony of Prosecution Witness Ahmed Mbonyunkiza.<sup>1</sup> The Defence for Nzirorera applied to the Chamber for certification to appeal that Decision. The Prosecution opposed the Motion.<sup>2</sup>

2. On 19 January 2007, Judge Short decided to withdraw from the case. In accordance with Rule 15 *bis* (D) of the Rules, the remaining Judges decided on the continuation of the proceedings with a substitute judge.<sup>3</sup> The President also authorized the Trial Chamber, composed of Judges Byron and Kam, to conduct routine matters, such as the delivery of decisions, in the absence of the substitute judge.<sup>4</sup>

## DISCUSSION

3. Rule 73(B) of the Rules provides that Decisions rendered under Rule 73 motions are without interlocutory appeal. However, the Rule confers a discretion on the Chamber to grant certification to appeal when certain clearly delimited conditions are fulfilled: the applicant must show (i) how the impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an "immediate resolution by the Appeals Chamber may materially advance the proceedings".

4. The moving party must demonstrate that both requirements of Rule 73(B) are satisfied, and even then, certification to appeal must remain exceptional.<sup>5</sup> Certification is not determined on the merits of the appeal against the impugned decision.<sup>6</sup>

<sup>1</sup> *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al"). Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony (TC), 29 December 2006 ("Impugned Decision").

<sup>2</sup> Defence for Nzirorera, Application for Certification to Appeal Decision on False Testimony, 4 January 2007 ("Nzirorera's Application"); Prosecutor's Response to Nzirorera's Motion for Certification to Appeal Decision on False Testimony, 9 January 2007 ("Prosecutor's Response").

<sup>3</sup> *Karemera et al.*, Decision on Continuation of the Proceedings (TC), 6 March 2007 ("Decision on Continuation of the Proceedings").

<sup>4</sup> See Rules of Procedure and Evidence, Rule 15 *bis* (F); and Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007.

<sup>5</sup> *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible' (TC), 18 March 2004, at para. 15.

5. The Defence submits that the issue of false testimony bearing on material issues is one which significantly affects the fair conduct of the proceedings as well could affect the outcome of the trial if such testimony was believed by the Chamber.<sup>7</sup> The Defence further argues that certification is appropriate in relation to issues which go to obtaining evidence relating to the credibility of witnesses<sup>8</sup> and cites a number of decisions in support of this claim.<sup>9</sup> The Defence submits that the second requirement for granting certification is also met because a ruling on this issue would serve as a deterrent to other witnesses from giving false testimony.<sup>10</sup> Referring to decisions where the criterion of materially advancing the proceedings was found to be met when an issue affected testimony in the trial from multiple witnesses as well as problems that were likely to recur,<sup>11</sup> the Defence points out that in the present case, the punishment and deterrence of false testimony during the Prosecution's case would improve the quality of the evidence heard during the remainder of the trial.<sup>12</sup>

6. In the Chamber's opinion, the issue in the Impugned Decision is not false testimony, but rather the initiation of separate proceedings to prosecute a witness for the crime of perjury. This issue relates to additional proceedings which are ancillary and do not affect the fairness, expeditious or outcome of this trial. Indeed, the Chamber will assess issues relating to the credibility and probative value of witnesses during the judgement phase and in doing so, it will not be bound by the findings of a differently constituted judicial authority.

7. The Chamber holds the view that the decisions cited by the Defence where certification was granted with respect to issues which pertained to obtaining evidence relating to the credibility of witnesses are distinguishable from the present case. The issues raised in these decisions related to the admissibility of contradictory evidence and had to be dealt with in the course of proceedings. In the present case, the initiation of ancillary proceedings serve

*Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, at para. 10.

<sup>6</sup> *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE (TC), 7 June 2006, at para. 5.

<sup>7</sup> *Ibid.*, at para. 9.

<sup>8</sup> *Ibid.*, at para. 10.

<sup>9</sup> *Karemera et al.*, Oral Decision on Certification of the Oral Decision of 16 February 2006 for Stay of Proceedings (JC), 26 February 2006; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (JC), 21 July 2005; *Ibid.*, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements (TC), 22 May 2005.

<sup>10</sup> Nzirorera's Application, at para. 12.

<sup>11</sup> *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyibashi's Request to Cross-Examine Ntahobali's 1997 Custodial Interviews (TC), 1 June 2006, at para. 27; *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements, 22 May 2006, at para. 6.

<sup>12</sup> Nzirorera's Application, at para. 13.

a different purpose which is not relevant to the current trial proceedings. Moreover, these decisions involved issues which related to a broad category of documents<sup>13</sup> as well as a large number of defence witnesses,<sup>14</sup> which is not the case in the present instance.

8. The Chamber, therefore, does not find that the first requirement for granting certification is met in the present case.

9. Furthermore, the Chamber is not satisfied that the Defence has shown that the Impugned Decision involves an issue for which an immediate resolution by the Appeals Chamber would materially advance the proceedings. The issue as to whether the witness committed perjury might only become relevant if the Chamber makes a finding in respect of this evidence. This assessment will take place at the end of the trial, after hearing the evidence as a whole.<sup>15</sup> An appeal would therefore more properly be made from the final judgment in this case.

**FOR THOSE REASONS, THE CHAMBER DENIES** the Defence Motion.

Arusha, 23 March 2007, done in English.

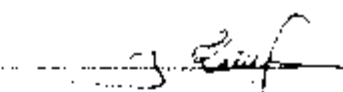


Dennis C. M. Byron

Presiding Judge



[Seal of the Tribunal]



Gberdao Gustave Kam

Judge

<sup>13</sup> *Prosecutor v. Bagosora et al.*, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements (TC), 22 May 2005.

<sup>14</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005.

<sup>15</sup> *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Decision on the Request of the Defence for the Chamber to Direct the Prosecution to Investigate a Matter with a View to the Preparation and Submission of an Indictment for False Testimony (TC), 11 July 2000, at para. 7; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R" (TC), 9 March 1998 ("Akayesu Decision"); *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO (TC), 3 October 2003, at para. 9; *Prosecutor v. Niyamasuhuko et al.*, Case No. ICTR-97-21-T and ICTR-98-42-T, Decision on Arsène Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated (TC), 23 September 2005.



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- Mathieu NGRUMPATSE
- Edouard KAREMERA

Case No / Affaire No.: ICTR-98-44-T

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A:

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Judge F. R. Arrey (Karera)
SLO
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Lead Counsel / Conseil Principal: P. Robinson, C. Hounkpatin & D. Diagne
In / à Arusha Arusha
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