



ICTR-98-41-T
19-04-2007

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(34767-34760)

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TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 19 April 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

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**DECISION ON NSENGIYUMVA MOTIONS TO CALL
DOCTORS AND TO RECALL EIGHT WITNESSES**

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Kartik Murukutla

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
Marc Nerenberg
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Urgent Nsengiyumva Defence Motion Requesting for *Viva Voce* Evidence of Medical Doctors to Establish the State of the Accused and his Ability or Inability to Stand Trial", filed on 11 December 2006;

BEING SEIZED OF the Nsengiyumva "Confidential Defence Motion for the Recall of Witnesses", etc., filed on 23 January 2007;

CONSIDERING the Prosecution Response to the latter motion, filed on 29 January 2007;

HEREBY DECIDES the motions.

INTRODUCTION

1. On 7 November 2006, in the trial segment primarily devoted to the Kabiligi Defence case, the Nsengiyumva team noted their client's absence from court due to ill health.¹ The Defence filed a motion the following day requesting suspension of the trial on the grounds that the Accused's medical condition impaired his ability to attend court proceedings and to effectively assist in his defence.² After hearing arguments by the parties that same day, the Chamber requested the Registry to provide a report on the Accused's health.³ In the meantime, the Chamber decided to proceed with the examination-in-chief of the next witness, Witness ALL-42, because there was no suggestion that the information to be elicited from him would be directed against the Accused Nsengiyumva. Upon completion of the examination-in-chief on 9 November 2006, the Nsengiyumva Defence indicated that it was not in a position to decide whether to cross-examine the witness.⁴

2. The Chamber proceeded to hear other Kabiligi witnesses in the following days. The Nsengiyumva Defence repeatedly stated that it could not take a position as to cross-examination of these witnesses.⁵ To protect the rights of the Accused, the Chamber instructed the Registry to ensure that the witnesses should remain in Arusha, subject to possible recall by the Nsengiyumva Defence.⁶

3. In response to its request of Wednesday 8 November 2006, the Chamber received a medical report from the Tribunal Medical Officer, Dr. Epée Hernandez, on Monday 13 November 2006. It concluded that the Accused was recovering and would be able to attend trial proceedings as of 14 November 2006, after one week's rest, provided that he could elevate his leg while in court and could take a ten-minute break every two hours.⁷ The

¹ T. 7 November 2006, pp. 6-7.

² Urgent Nsengiyumva Defence Motion Requesting Suspension of Trial on Medical Grounds, filed on 8 November 2006, paras. 1-2.

³ T. 8 November 2006, pp. 1-3.

⁴ T. 9 November 2006, p. 29.

⁵ T. 9 November 2006, pp. 47, 75 (Witness YC-03); T. 10 November 2006 p. 5 (Witness LAX-02).

⁶ T. 9 November 2006, pp. 30 (Witness ALL-42), 75 (Witness YC-03), 87-88 (Witness LAX-02).

⁷ The Registrar's Submissions in Respect of "Urgent Nsengiyumva Defence Motion Requesting Suspension of Trial on Medical Grounds", 13 November 2006, entered as Exhibit D. NS 229A. A second medical report from

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Accused still complained of pain when he came back to court.⁸ He was then absent from proceedings from 15 to 17 November 2006. The Chamber issued a written decision denying the Defence motion to suspend trial on 17 November 2006, concluding that the Accused's absence from court had not been substantiated by a professional medical opinion. It remained open, however, to any further medical reports suggesting that the Accused's absence from court was justified.⁹ The Chamber noted that the case against the Accused had already closed; none of the witnesses appeared to be adverse to the Accused; measures had been taken to address all reasonable concerns raised by the Defence; there was no showing of the relevance to the Accused of any testimony heard in his absence; and the risk of losing witnesses due to an adjournment posed "a much greater threat of prejudice to the Accused Kabiligi than the speculative and remote prejudice to the Accused Nsengiyumva".¹⁰

4. The Accused was absent from proceedings for the remainder of the trial session, which ended on 12 December 2006. During that time and at the request of the Accused, a second examination was conducted by a surgical consultant from Selian Hospital, Dr. Kisanga.¹¹ Dr. Kisanga concurred with the medical conclusions and treatment plan established by Dr. Epée Hernandez.

5. On 4 December 2006, the Defence submitted a medical report from the Accused's family doctor, Dr. Adari. He agreed with most of the clinical findings and recommendations of Dr. Kisanga but noted that surgery might be necessary to remedy the condition afflicting the Accused.¹²

6. Following Dr. Adari's report, a panel of three medical doctors, consisting of Dr. Epée Hernandez, Dr. Kisanga, and Dr. Chamba, reviewed the Accused's case on 8 December 2006 and concluded that surgical intervention was not appropriate and that the Accused's "condition allows him to attend court sessions without impairing the healing process or damaging his health condition".¹³

7. However, on 11 December 2006, the Defence presented a new report from Dr. Adari which concluded that the Accused was "unfit to stand trial in his present form of physical and psychological distress". The Accused should receive "adequate rest and maintain limb elevation as his doctors regularly assess his progress until his wound satisfactorily heals before he returns to court to attend his trial".¹⁴

Dr. Epée Hernandez was tendered into evidence on 14 November 2006 as Exhibit D. NS 229B, confirming the earlier report and its medical recommendations.

⁸ T. 14 November 2006 p. 2.

⁹ *Bagosora et al.*, Decision on Nsengiyumva Motion for Adjournment Due to Illness of the Accused, 17 November 2006 (hereinafter the "Decision"), para. 8.

¹⁰ Decision, paras. 9-12.

¹¹ Interoffice Memorandum: A Second Opinion Medical Examination Request for Mr. A. Nsengiyumva from Dr. Epée to Judge Møse, dated 21 November 2006, admitted as Defence Exhibit D. NS 229C on 22 November 2006.

¹² Medical Report of Dr. George S. Adari, dated 30 November 2006, admitted as Defence Exhibit D. NS 229D on 4 December 2006.

¹³ Interoffice Memorandum: Anatole Nsengiyumva Medical Follow-Up from Dr. Epée to Judge Møse, dated 8 December 2006, admitted as Defence Exhibit D. NS 229E on 15 January 2007.

¹⁴ Supplementary Medical Report of Dr. George S. Adari, dated 10 December 2006, admitted as Defence Exhibit D. NS 229F on 15 January 2007. Subsequently, the Accused submitted two personal affidavits concerning his health, dated 11 and 12 December 2006, which were admitted into evidence as Defence Exhibits D. NS 229G and H on 15 January 2007.

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8. At that time, the Nsengiyumva Defence filed a motion requesting *viva voce* testimony from the four medical doctors as to the Accused's condition.¹⁵ The Chamber heard arguments by the parties that day.¹⁶ The following morning, the Chamber orally denied the motion and, at the Defence request, agreed to provide written reasons for its decision.¹⁷

9. The final segment of the trial resumed on 15 January 2007, after a recess of five weeks. On 11 January 2007, Dr. Epée Hernandez had submitted a report indicating that the Accused had "completely healed" and was "fit to appear before the court".¹⁸ Proceedings took place from 15 to 18 January 2007, during which time the Accused Nsengiyumva was present and testified concerning documents that the Defence sought to tender into evidence.¹⁹ Three Kabiligi witnesses also gave evidence by video-link.²⁰ The evidentiary phase of the trial concluded on 18 January 2007.

10. On 23 January 2007, the Nsengiyumva Defence moved to recall eight witnesses who testified during the Accused's absence on the grounds that the Chamber's decision to proceed with trial despite his inability to attend court deprived him of the opportunity to provide counsel with instructions concerning possible cross-examination for these witnesses and caused him material prejudice.²¹

DELIBERATIONS

(i) Motion to Hear Doctors

11. The Defence request for *viva voce* testimony was premised on the "apparent contradiction" among several medical reports concerning the Accused's state of health and ability to attend court proceedings in November and December 2006.²² In essence, the final report of Dr. Adari, Nsengiyumva's family doctor, conflicted with the reports of two Tribunal medical officers and a surgical consultant from Selian Hospital as to the Accused's fitness to stand trial. The Defence argued that testimony by the four doctors who reviewed the Accused's case would allow the parties to clarify any issues and "to put to rest any doubt that might linger either way with regard to the state of the [A]ccused throughout this trial session".²³ The Prosecution argued that there was no need to hear the doctors because any doubt among the doctors' medical opinions had been eliminated, given that the course of treatment undertaken by Dr. Epée Hernandez and her team appeared to be healing the Accused's condition.²⁴

¹⁵ *Bagosora et al.*, Urgent Nsengiyumva Defence Motion Requesting for *Viva Voce* Evidence of Medical Doctors to Establish the State of the Accused and his Ability or Inability to Stand Trial, filed on 11 December 2006 (hereinafter "*Viva Voce* Motion").

¹⁶ T. 11 December 2006 pp. 6-9.

¹⁷ T. 12 December 2006 pp. 7, 11.

¹⁸ Interoffice Memorandum: Mr. Anatole Nsengiyumva's Medical Condition from Dr. Epée to Judge Mese, dated 11 January 2007, admitted as Defence Exhibit D. NS 2291 on 15 January 2007.

¹⁹ The Accused Nsengiyumva testified on 15, 16, and 18 January 2007.

²⁰ Kabiligi Witnesses SX-1, VIP-1, and TT-02 testified on 16 and 18 January 2007.

²¹ *Bagosora et al.*, Nsengiyumva Confidential Defence Motion for the Recall of Witnesses ALL-42, LAX-02, FB-25, Bernard Lugan, Delta, Andrew Ntagerura, Luc Marchal and Duvivier, All Who Testified in the Session Beginning 10th November to 13th December 2006 in View of the Material Prejudice Arising in the Absence of the Accused During their Testimony", filed on 23 January 2007, paras. 1, 4, 7.

²² T. 11 December 2006 pp. 6-7.

²³ *Viva Voce* Motion, para. 7.

²⁴ T. 11 December 2006 p. 7.

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12. On 12 December 2006, the Chamber denied the Defence motion. In deciding to proceed with hearing witnesses throughout the last trial session, the Chamber relied on the medical reports summarizing the Accused's condition and outlining medical recommendations. Dr. Epée Hernandez's reports of 7 and 10 November 2006 concluded that the Accused required one week's rest and would then be able to return to trial under certain conditions. Dr. Kisanga's report of 20 November 2006, completed at the request of the Accused, confirmed the initial diagnosis and treatment plan. Even Dr. Adari's first report of 30 November 2006 largely agreed with Dr. Kisanga's medical findings and recommendations. A panel of three doctors - Dr. Epée Hernandez, Dr. Kisanga, and Dr. Chamba - thereafter reviewed the Accused's case and produced a report dated 8 December 2006, which concluded that the Accused's condition was improving and that he was able to attend court sessions. Only on 11 December 2006 was the Chamber first presented with a medical report (by Dr. Adari) suggesting that the Accused was unfit to stand trial.

13. The Chamber noted that the medical reports were detailed and self-explanatory. It did not see a need for additional evidence through live testimony. The Chamber weighed the differences in opinion between the three medical doctors engaged by the Tribunal, on the one hand, and the Accused's family doctor, on the other. It also took into consideration the fact that less than two days remained in the trial session.²⁵ On this basis, the Chamber decided to proceed with the conclusion of the trial session.

14. It should be added that the Accused's condition had completely healed by the resumption of proceedings in January 2007.

(ii) *Motion to Recall Witnesses*

15. The Defence requests the recall of eight witnesses heard by the Chamber in the Accused's absence, relying on Article 20 (4) of the ICTR Statute for its claim that the Accused had a right to be present during the testimony of these witnesses.²⁶ The Prosecution responds that: (i) the Accused voluntarily absented himself from the courtroom, forfeiting his rights under Article 20; (ii) counsel for the Accused was present, had the opportunity to question the witnesses, and simply chose not to do so; (iii) the proposed areas for questioning on recall relate to issues that were known by the Defence prior to the appearance of the witnesses and could have been prepared in advance with the Accused; and (iv) the Accused has demonstrated neither prejudice nor a persuasive reason to reopen the case.²⁷

16. The Chamber has previously enunciated the standard for recalling witnesses:

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 with[ou]t undue delay as well as concerns of judicial economy

²⁵ No witnesses were heard by the Chamber on either 11 or 12 December 2006. The trial session on 11 December lasted slightly more than an hour, while the trial session the following day lasted only forty minutes. The Chamber held a status conference on the afternoon of 12 December 2006.

²⁶ Motion to Recall Witnesses, para. 4.

²⁷ Prosecution Response, para. 3.

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demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature.²⁸

17. Requests for recall typically occur when the cross-examining party finds an inconsistency between a witness' testimony before the Tribunal and some later disclosure, such as a subsequent written statement by the witness or newly discovered evidence that contradicts the witness' testimony.²⁹ The present motion is founded on a different basis, namely that the Accused was not able to be present during the testimony of several witnesses and was unable to participate in their examination.

18. An accused's right to be present during trial and to examine, or have examined, witnesses against him or her is enshrined in Article 20 (4) (d) and (e) of the ICTR Statute. The Appeals Chamber has held that they are qualified, and not absolute, rights.³⁰ It has also established that these rights are subject to "the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective".³¹ Waiver of the right to be present at trial will not be found where an accused shows good cause, such as the existence of a medical condition that prevents the accused from attending proceedings.³² In order to substantiate a request for an adjournment, a medical report is required.³³ Where the report concludes that an accused's condition does not prevent him or her from attending trial, the Chamber may proceed in the absence of the accused.³⁴

19. In its decision of 17 November 2006, the Chamber denied the Nsengiyumva Defence request for an adjournment of proceedings.³⁵ It is recalled that the medical reports submitted to the Chamber at that time concerning the Accused's condition concluded that the Accused

²⁸ *Bagosora et al.*, Decision on the Prosecution Motion to Recall Witness Nyanjwa (TC), 29 September 2004, para. 6; *Bagosora et al.*, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 2; *Bagosora et al.*, Decision on Bagosora Defence Motion to Recall Witness Frank Claeys for Additional Cross-Examination (TC), 19 February 2007, para. 3. See also *Simba*, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination (TC), 28 October 2004, para. 5.

²⁹ *Bagosora et al.*, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 3; *Bagosora et al.*, Decision on the Prosecution Motion to Recall Witness Nyanjwa (TC), 29 September 2004, para. 7.

³⁰ *Milosevic*, Decision on Interlocutory Appeal of The Trial Chamber's Decision on the Assignment of Defence Counsel (AC), 1 November 2004, para. 12; *Zigiranyirazo*, Decision on Interlocutory Appeal (AC), 30 October 2006, para. 14.

³¹ *Zigiranyirazo*, Decision on Interlocutory Appeal (AC), 30 October 2006, para. 14. See, e.g. Rule 82 bis (authorizing trial to proceed in the absence of an accused so long as he has made an initial appearance, has been notified that he is required to be present, persists in refusing to attend proceedings, and is represented by counsel); *Barayagwiza*, Decision on Defence Counsel Motion to Withdraw (TC), 2 November 2000, paras. 6-8; *Ndindiliyimana et al.*, Decision on Defence Motions for Stay of Proceedings and for Adjournment of the Trial, Including Reasons in Support of the Chamber's Oral Ruling Delivered on Monday 20 September 2004 (TC), 24 September 2004, paras. 27, 29.

³² *Milosevic*, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel (TC), 4 April 2003, para. 41; *Krstic*, Decision Adjourning the Trial (TC), 15 January 2001; *Kajelijeli*, T. 2 October 2001 p. 33; *Karemura*, T. 22 February 2006 p. 3.

³³ *Krstic*, Decision Adjourning the Trial (TC), 15 January 2001 (granting an adjournment on the basis of a report advising that "the medical condition of the accused is incompatible with his attendance at the hearings").

³⁴ *Kajelijeli*, T. 2 October 2001 p. 33 (denying an adjournment where the report ordered by the Chamber concluded that "there is no medical condition detected that would prevent the detainee from appearing before the Court"); *Karemura*, T. 22 February 2006 (allowing trial proceedings to continue in the absence of the accused where the medical report found that the accused's medical condition did not prevent him from attending court so long as certain medical recommendations were followed in the courtroom).

³⁵ Decision, paras. 9-12.

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was able to attend court as of 14 November 2006, subject to the conditions mentioned above (para. 3). The Accused still chose not to attend proceedings. Consequently, the Chamber decided to proceed with hearing witnesses and took precautions to ensure that his rights to a fair trial were not infringed. It was not until 11 December 2006 that the Chamber was first presented with a medical report suggesting that the Accused was unfit to stand trial. At that time, as detailed previously, the Chamber weighed the differences in medical opinion and decided to proceed with the conclusion of the trial session since less than two days remained.

20. The issue now before the Chamber is whether the Nsengiyumva Defence has established good cause to justify the recall of the eight witnesses. Assessing good cause involves a two-part analysis. First, the Chamber must consider the purpose of the proposed testimony. Second, the Chamber must look to the party's justification for not raising the evidence during the witness' original testimony.

21. The Chamber's review of the Defence motion suggests that the principal purpose of the proposed testimony is to impeach particular Prosecution witnesses or to corroborate certain testimony by Defence witnesses, including the Accused. As the Chamber noted in its earlier decision, the Accused's case had already closed by the time these witnesses testified and none was deemed adverse to him.³⁶ Moreover, the witnesses heard in his absence were called by the other Defence teams and had limited significance to the Accused's case. Nothing in the Defence motion leads the Chamber to a different finding.

22. While the information to be elicited may be relevant to the Defence, the Chamber finds that the topics were sufficiently general and well-known in the case that Defence counsel could have raised them on their own initiative or prepared for cross-examination in consultation with the Accused. Many of the matters had already been raised in relation to other witnesses and thus would have been repetitive or duplicative. In addition, the Chamber's deferral of cross-examination for several witnesses afforded counsel additional time to review the transcripts with the Accused and to determine any areas for questioning. The medical reports provide no basis for the Chamber to find that the pain described by the Accused prevented him from communicating with counsel. In the Chamber's view, none of the topics specified in the motion raised new or surprising issues which could not have been dealt with at the time of cross-examination. Thus, the Chamber finds good cause to be lacking and sees no reason to recall these witnesses.

³⁶ Decision, para. 9.

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FOR THE ABOVE REASONS, THE CHAMBER

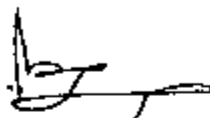
DENIES the motion to hear the doctors for the reasons explained in this decision;

DENIES the motion to recall eight witnesses.

Arusha, 19 April 2007



Erik Mose
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Igorov
Judge

[Seal of the Tribunal]



