

ICTR-98-44-T
8-6-2007
(28002-28998)

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UNITED NATIONS
NATIONS UNIES

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
Vagn Joensen

Registrar: Adama Dieng

Date: 8 June 2007

THE PROSECUTOR

v.

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

JUDICIAL SECTION
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DECISION ON JOSEPH NZIRORERA'S SUBMISSION TO SUBSTITUTE JUDGE

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INTRODUCTION

1. The trial in this case started on 19 September 2005 before a bench of the Trial Chamber composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam. On 19 January 2007, Judge Short decided to withdraw from the case.
2. Under Rule 15 *bis* (D) of the Rules of Procedure and Evidence ("Rules"), the remaining Judges decided on the continuation of the proceedings with a substitute Judge.¹ On 20 April 2007, the Appeals Chamber affirmed that Decision.²
3. Judge Vagn Joensen was then appointed by the Secretary-General as an *ad litem* Judge to form part of the bench in the present case.³ This appointment was subject to his familiarisation with the record of the proceedings in accordance with Rule 15 *bis* (D) of the Rules. On 8 June 2007, Judge Joensen certified that he has familiarised himself with the record of the proceedings.⁴ He therefore joined the bench in the current matter.
4. Meanwhile, on 24 April 2007, the Defence for Nzirorera filed a submission to be transmitted to the substitute Judge requesting him (i) to review some specific material in view of the familiarisation process and (ii) to detail the specific steps taken to familiarise himself with the proceedings.⁵ Not only did the Prosecution request that the Chamber deny the Motion in its entirety but also that costs be disallowed in respect of this filing.⁶

DISCUSSION

5. In the present motion, the Defence for Nzirorera requests that the substitute Judge carefully review the video-tapes of the testimony of each of the 13 prosecution witnesses on direct and cross examination. It also requests that when viewing the video tapes of the testimony, the substitute Judge consult the exhibits in the same way in which he would have been consulting them had he been hearing the testimony in real time. The substitute Judge is further invited to consult a Procedural History compiled by the Defence. Furthermore, the Defence requests that when making the certification, the substitute Judge detail the specific steps taken to familiarize himself with the proceedings "so that there are no questions or

¹ *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatswe, Joseph Nzirorera* ("Karemera et al."), Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (TC), 6 March 2007 ("Decision on Continuation").

² *Karemera et al.*, Decision on Appeals Pursuant to Rule 15 *bis* (D) (AC), 20 April 2007 ("Rule 15 *bis* Appeals Chamber Decision").

³ Judge Joensen was sworn in on 2 May 2007.

⁴ Certification under Rule 15 *bis* (D) of the Rules of Procedure and Evidence, filed on 8 June 2007.

⁵ Joseph Nzirorera's Submission to Substitute Judge, filed on 24 April 2007 ("Defence Motion").

⁶ Prosecutor's Response to Joseph Nzirorera's Submission to Substitute Judge, filed on 25 April 2007.

lingering doubts that the substitute Judge has viewed the video recordings of all of the testimony and otherwise properly carried out the expectations of the remaining Judges, Appeals Chamber, and the parties”.

6. Rule 15 bis (D) of the Rules of Procedure and Evidence prescribes as follows:

If, in the circumstances mentioned in the last sentence of paragraph (C), the accused withholds his consent, the remaining Judges may nonetheless decide to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken or the Appeals Chamber affirms the decision of the Trial Chamber, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made.”⁷

7. There is no discussion, as previously stated, that the fact that the substitute Judge will be able to familiarise himself with the record of the proceedings is a core element when determining that it would be in the interests of justice to continue the proceedings.⁸ This is one of the safeguards to ensure that fair trials rights are not compromised.⁹

8. The Rules, however, neither describe how a substitute Judge is expected to familiarise himself with the record of the proceedings nor require that the substitute Judge provides details as to how he familiarised himself with the record. According to the jurisprudence of the Tribunal, this familiarisation process can be done through different methods and means such as relying upon transcripts, audio and video-records of the testimonies, exhibits and decisions.¹⁰ The length of the familiarisation process will depend on the particularities of each case and on each Judge who is expected to familiarise himself or herself with the record.¹¹ There is no mathematical or standard rule as how this familiarisation process should

⁷ Emphasis added.

⁸ Decision on Continuation, para. 70. *Karemera et al.*, Case No. ICTR-98-44-AR15bis.2, Reasons For Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004, paras. 57-58; *Karemera et al.*, Case No. ICTR-98-44-AR15bis.3, Decision on Appeals pursuant to Rule 15bis (D) (AC), 20 April 2007, para. 43.

⁹ Rule 15 bis Appeals Chamber Decision, para. 43.

¹⁰ *Karemera et al.*, Case No. ICTR-98-44-AR15bis.2, Reasons For Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004, paras. 57-58.

¹¹ In the *Nyiramasuhuko et al.* case, Judge Solomy Balungi Bossa was assigned to Trial Chamber II by the President on 20 October 2003. Judge Bossa certified that she had familiarized herself with the record of the proceedings less than two months after her assignment to the Tribunal and while 23 witnesses had already been heard by Trial Chamber II over 107 trial days (*Prosecutor v. Nyiramasuhuko et al.*, Joint Case No. ICTR-98-42-T, Certification in the Matter of Proceedings under Rule 15 bis (D), 5 December 2003). In the *Bizimungu et al.* case, Judge Emile Francis Short was assigned to Trial Chamber II by the President on 18 May 2004. Judge Short certified that he had familiarized himself with the record of the proceedings less than 15 days after his assignment to the Tribunal and while 28 witnesses had been heard by Trial Chamber II over 112 trial days (*Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Certification in the Matter of Proceedings under Rule 15 bis (D), 3 June 2004).

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take place. The Appeals Chamber has never considered that there is only one method or standard rule for such a process.¹²

9. Contrary to what the Defence seems to suggest,¹³ the familiarisation process should not be confused with the assessment of the credibility and reliability of a witness. The Chamber agrees with the Defence that the assessment of the credibility of a witness, including through the observation of his or her demeanour in court, is a major issue.¹⁴ However, the probative value to be attached to testimony, including the credibility and reliability of the witness, is to be determined at a later stage, when considering the evidence adduced by each party as a whole.¹⁵

10. The Chamber takes note of the suggestions made by the Defence for Nzirorera in view of assisting the substitute Judge in his familiarisation with the record of the proceedings. The Chamber, however, does not find appropriate that the substitute Judge provides detail as to the specific steps taken to familiarise himself with the record of the proceedings.

11. The judges are appointed to the Tribunal on the basis of their high moral character, impartiality and integrity and professional experience at the highest judicial offices.¹⁶ It should be expected that each Judge, as a professional Judge, has his own method when seeking to familiarise himself with the proceedings. Requesting a Judge to detail how he prepares for and masters a case would not only be offensive and challenge his capacities as a Judge, but also intrudes upon his judicial function. The Defence request therefore falls to be rejected.

¹² The Appeals Chamber explicitly made reference to the Decision on Continuation of the Proceedings noting: "In the present case, the remaining Judges took into consideration that the substitute Judge will need to review the "records of the proceedings, including the transcripts, audio and video-recordings, to observe the demeanour of the witness" in determining that it would be in the interests of justice to continue the proceedings with a substitute Judge". (para. 43)

¹³ Defence Motion, para. 5.

¹⁴ *Ibidem*.

¹⁵ *Prosecution v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15; *Prosecutor v. Georges Anderson Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), para. 33; *Prosecutor v. Delalic and Delic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998.

¹⁶ Statute, Art. 12: "The permanent and *ad litem* Judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the Judges in criminal law, international law, including international humanitarian law and human rights law."

12. Although the Defence indeed should refrain from filing frivolous motions,¹⁷ the Chamber does not find that sanctions against the Defence Counsel are warranted, as per requested by the Prosecution.

FOR THOSE REASONS, THE CHAMBER

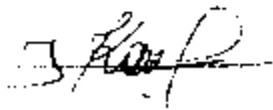
- I. DENIES** the Defence Motion in its entirety;
- II. DENIES** the Prosecution request that the costs of the Motion be disallowed.

Arusha, 8 June 2007, done in English.

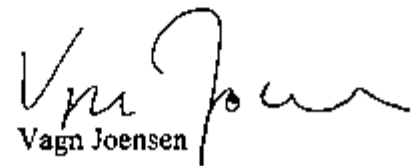


Dennis C. M. Byron

Presiding Judge



Gberdao Gustave Kam



Vagn Joensen

Judge



¹⁷ See Rule 73 (F) of the Rules: "In addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof".