



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-44-T
15-6-2007
(29092 - 29086)

29092
Jury

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 15 June 2007

ICTR 07/15 P 12/50
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THE PROSECUTOR

v.

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

**DECISION ON JOSEPH NZIRORERA'S MOTION TO EXCLUDE THE
TESTIMONY OF WITNESS AMM**

Rules 66(A)(ii) and 73 of the Rules of Procedure and Evidence

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Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

337

29091

INTRODUCTION

1. The trial in this case started on 19 September 2005 before Trial Chamber III composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam. The fourth trial session concluded on 13 December 2006.
2. As a result of Judge Short's withdrawal from the case in January 2007, the remaining Judges decided on the continuation of the proceedings with a substitute judge.¹ On 20 April 2007, the Appeals Chamber affirmed this 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 case³ and joined the bench on 8 June 2007 after certifying that he had familiarised himself with the record of the proceedings.⁴
4. On 4 June 2007, Joseph Nzirorera filed a Motion moving the Chamber to exclude the testimony of Prosecution Witness AMM.⁵ The Prosecution opposes the Motion.⁶

DISCUSSION

5. Joseph Nzirorera recalls the Prosecution's obligation to disclose copies of the statements of all witnesses it intends to call to testify at trial no later than 60 days before the date set for trial, as prescribed under Rule 66 (A) (ii) of the Rules of Procedure and Evidence. He submits that the Prosecution has, however, failed to comply with its disclosure obligations concerning Witness AMM. He notes that one statement made by Witness AMM to the Swiss Army on 17 June 1995 and his testimony in the *Niyitegeka* trial on 15 and 16 August 2002

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.

² *Karemera et al.* Case No. ICTR-98-44-AR15bis.3, Decision on Appeals Pursuant to Rule 15 bis (D), (AC) 20 April 2007.

³ Judge Joensen was sworn in on 2 May 2007.

⁴ See Rules of Procedure and Evidence, Rule 15bis (D): "(f, 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". See *Karemera et al.*, Certification of the Familiarization with the Record of the Proceedings (Judge Joensen), 8 June 2007.

⁵ Joseph Nzirorera's Motion to Exclude Testimony of Witness AMM filed on 4 June 2007; and Reply Brief: Joseph Nzirorera's Motion to Exclude Testimony of Witness AMM, filed on 8 June 2007.

⁶ Prosecutor's Response to Nzirorera's motion of 4 June 2007 to Exclude the Testimony of AMM, filed on 5 June 2007.

1,307

were not disclosed until 19 September 2006, while they were due by 20 July 2005 since the trial date was set for the 19 September 2005.⁷

6. Joseph Nzirorera also points out that the Prosecution has already been criticized by the Trial Chamber and Appeals Chamber for its consistent violations of the disclosure rules and Trial Chamber orders,⁸ and that it was even subject to a mild sanction pursuant to Rule 46 (A) of the Rules.⁹ He therefore requests the exclusion of AMM's testimony as a sanction against the Prosecution for the repeated violation of the rules of disclosure and states in the absence of any sanction, there is no incentive for any party to obey the disclosure rules.

7. The Chamber notes that pursuant to the provisions of Rule 66(A)(ii), the Prosecution is obliged to disclose to the Defence:

"[n]o later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time".

8. In the present case, the Prosecution does not dispute that AMM's statement to the Swiss Army as well as his testimony in the *Niyitegeka* case are prior statements falling under its disclosure obligations and that they were lately disclosed. Rather, the Prosecution submits that these are "two minor pieces of material" and that Joseph Nzirorera fails to show what prejudice he suffered. The Prosecution submits that disclosure takes place as and when materials are found when such searches are conducted.

9. The Chamber is concerned about the explanation given by the Prosecution for the late disclosure of the prior statements of the witness. Deficiencies faced in research of documents are not satisfactory explanations. The Chamber had already strongly recommended that the Prosecution improve its management of disclosure in its case.¹⁰

10. The Chamber is, however, not satisfied that at this stage, the Defence has showed such a prejudice warranting an extreme remedy such as the exclusion of the evidence of the

⁷ Transcripts of testimony are "statements" within the meaning of rule 66(A). *Prosecutor v Mpambara*, No. ICTR-2001-65-1, Decision: Defence Motion for Disclosure of Documents and Objections Regarding the legality of Procedures (28 February 2002) at para. 23; *Prosecutor v Kajelijeli*, No. ICTR-99-44A-T, Decision on Joseph Nzirorera's Motion for disclosure of Closed Session Testimony and Exhibits Received Under Seal (7 October 2003) at para. 13; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, decision on Prosper Mugirineza's Motion to Require Strict Compliance with Rule 66(A)(ii) (5 May 2004) at para. 8.

⁸ *Karemera et al.*, Oral Decision on Motion to Exclude Testimony of Alison Des Forges, Transcript of 3 October 2005, p. 18; *Karemera et al.*, Oral Decision on Motion for Stay of Proceedings, Transcript of 24 May, p. 36; *Karemera et al.*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (TC), 30 June 2006, at fn. 31.

⁹ *Karemera et al.*, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution (TC), 19 October 2006.

¹⁰ *Karemera et al.*, Oral Decision on Stay of Proceedings (TC), 16 February 2006, p. 8.


witness.¹¹ In that respect, the Chamber notes that the Defence was disclosed with other prior statements of the witness, including testimonics in other case, in 2004.¹²

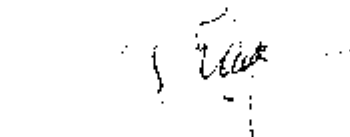
11. The Chamber also stresses that about 9 months have elapsed since the disclosure of the said material to the Defence. In the Chamber's view, the Defence has had enough time to investigate the statements and the testimony of Witness AMM in *Niyitegeka case* in order to prepare its cross-examination. The Defence should be able to move forward at this stage without infringing the right of the Accused to a fair trial.

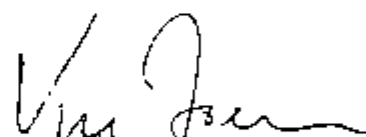
FOR THOSE REASONS, THE CHAMBER

DENIES Joseph Nzirorera's Motion to exclude the testimony of Prosecution Witness AMM.

Arusha, 15 June 2007, done in English.


Dennis M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vaughn Joensen
Judge



¹¹ *Karemura et al.*, Decision on Defence Motion to Exclude Testimony of Professeur Guichoua (TC), 20 April 2006.

¹² Prosecutor's Response to Nzirorera's motion of 4 June 2007 to Exclude the Testimony of AMM, filed on 5 June 2007, para. 2.