



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:** 25 September 2007

**THE PROSECUTOR**

v.

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

**DECISION ON JOSEPH NZIRORERA'S MOTION TO RECALL PROSECUTION  
WITNESS AHMED MBONYUNKIZA**

**Office of the Prosecutor:**

Don Webster  
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Dior Diagne Mbaye and Félix Sow

**Defence Counsel for Mathieu Ngirumpatse**  
Chantal Hounkpatin and Frédéric Weyl

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

## INTRODUCTION

1. The trial in this case started on 19 September 2005 before Trial Chamber composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam. On 19 January 2007, Judge Short withdrew from the case. On 8 June 2007 Judge Vagn Joensen joined the bench as substitute Judge.<sup>1</sup>

2. Meanwhile Ahmed Mbonnyunkiza, as the Prosecution's first witness in the case, testified from 20 September 2005 through 28 October 2005. During his testimony, the witness made several statements about events that had transpired at an MRND rally on 28 May 1992 in front of the Prime Minister's office. Subsequently, on 25 April 2007, the Prosecutor announced he had come into possession of a videotape of this MRND rally. The videotape was admitted into evidence during the testimony of Witness Jean Bosco Twahirwa on 25 June 2007.

3. On 26 June 2007, Defence Counsel for Joseph Nzirorera filed a motion to recall Mr. Mbonnyunkiza for additional cross-examination<sup>2</sup> due to alleged inconsistencies between the testimony of Mr. Mbonnyunkiza and the videotape of the MRND rally he described at trial.<sup>3</sup> The Prosecutor opposes the motion.<sup>4</sup>

## DELIBERATIONS

*Is there good cause for recalling the witness?*

4. The Defence points out that Mr. Mbonnyunkiza testified that Édouard Karemera was present at the 28 May 1992 MRND rally, whereas Mr. Karemera is not visible on the tape and contends that he was not present at the rally. The Defence also makes comparisons between Mr. Mbonnyunkiza's testimony on alleged utterances made by Mr. Mathieu Ndirumpatse during the said meeting and utterances as videotaped, and points out discrepancies between some of those. The Defence wishes to confront Mr. Mbonnyunkiza with the videotape and ask him to explain or recant his previous testimony in light of these discrepancies.

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<sup>1</sup> *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera* ("Karemera et al."), Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (TC), 6 March 2007; *Karemera et al.*, Decision on Appeals Pursuant to Rule 15 bis (D) (AC), 20 April 2007.

<sup>2</sup> *Joseph Nzirorera's Motion to Recall Prosecution Witness Ahmed Mbonnyunkiza*, filed 26 June 2007 ("Nzirorera's Motion"), para. 8.

<sup>3</sup> Nzirorera's Motion, para. 4.

<sup>4</sup> *Prosecutor's Response to Nzirorera's Motion to Recall Mbonnyunkiza Ahmed*, filed 2 July 2007 ("The Prosecutor's Response").

5. According to the established jurisprudence of the Tribunal, the party seeking to recall a witness must demonstrate good cause.<sup>5</sup> Assessing good cause requires fulfilling a two-pronged analysis: (1) considering the purpose for which the witness will testify; and (2) the reasons why the witness was not questioned earlier on those matters.

6. The Defence's reason under the latter prong is that the evidence was not available at the time Mr. Mbonnyunkiza gave his original testimony.<sup>6</sup> The Defence is justified on this point. However, the Defence's purpose to recall the witness is not compelling. The fact that Mr. Karemera is not visible on the tape and the discrepancies put forth by the Defence are self-evident and do not require the witness's explanation.<sup>7</sup> The Chamber will consider all the evidence at the conclusion of the trial, at which point it will make its own assessment of Mr. Mbonnyunkiza's credibility. Moreover, the Defence will have the opportunity to draw the Chamber's attention to these discrepancies during closing arguments.

*Is there cause to recall the witness for the benefit of the substitute Judge?*

7. The Defence submits that additional cause exists for recalling Mr. Mbonnyunkiza because his testimony was not observed in person by the substitute Judge. The Defence relies on an Appeals Chamber Decision which held that a Trial Chamber may recall a witness if it is otherwise impossible for the substitute Judge to evaluate the witness's credibility on a point of demeanour.<sup>8</sup> The Defence's position in the present case is that Judge Joensen can only fully appreciate the Mr. Mbonnyunkiza's demeanour by seeing it live.

8. The Appeals Chamber Decision is distinguishable in that video-recordings of the witness's live testimony were not available. While there is a preference for live testimony to be heard by each and every Judge, this is not an unbending requirement. A substitute Judge has various ways by which to overcome any disadvantages in assessing a witness's credibility on a point of demeanour. On 8 June 2007, Judge Joensen certified that he had familiarised

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<sup>5</sup>*Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumve* ("Bagosora et al."), Case No. ICTR-98-41-T, 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; *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination (TC), 28 October 2004, para. 5.

<sup>6</sup>Nzirorera's Motion, para. 7.

<sup>7</sup>*Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 8.

<sup>8</sup>*Prosecutor v. Nyiramasuhuko et al.*, Joint Case No. ICTR-98-41-A15bis, Decision in the Matter of Proceedings Under Rule 15 bis (D) (AC), 24 September 2003, paras. 30, 35.

himself with the record of the proceedings.<sup>9</sup> Given that the record includes video-recordings of Mr. Mbonnyunkiza's testimony and cross-examination, the Chamber deems it unnecessary to recall the witness for live testimony in this case.

**FOR THESE REASONS, THE CHAMBER  
DENIES** the Defence's Motion.

Arusha, 25 September 2007, done in English.

Dennis C. M. Byron

Gberdao Gustave Kam

Vagn Joensen

Presiding Judge

Judge

Judge

[Seal of the Tribunal]

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<sup>9</sup> *Certification under Rule 15 bis (D) of the Rules of Procedure and Evidence*, filed on 8 June 2007.