

INTRODUCTION

1. Between 5 and 19 April 2005, Fidele Uwizeye, former *Prefet* of Gitarama, testified in the present trial. According to the Defence for Justin Mugenzi, since Mr Uwizeye's original testimony before this Chamber, two matters have arisen that require Witness Uwizeye to be recalled for further cross-examination.¹ These two issues are (i) the recantation of testimony he gave in the instant proceedings; and (ii) the emergence of a document not disclosed by the Prosecution prior to his testimony in April 2005, which, according to the Defence, casts doubt on the reliability and veracity of the testimony he gave in the instant proceedings.² Mr Mugenzi's Motion is supported by the Defence teams for Mr Bizimungu³ and Mr Bicamumpaka,⁴ and opposed by the Prosecution.⁵

DISCUSSION

2. Pursuant to the jurisprudence of this Tribunal, a Trial Chamber will recall a witness for further cross-examination by the Defence to explore inconsistencies between the witness's testimony before this Chamber and any declarations obtained subsequently if the Defence can show that it would be prejudiced if it were not allowed to put these inconsistencies to the witness. If there is no need for the witness's explanation of the inconsistency, then the witness should not be recalled.⁶

Witness Uwizeye's Recantation of Testimony given in these Proceedings

3. On 12 April 2005, Mr Uwizeye denied that a recording of a radio broadcast demonstrating support for the Interim Government against the RPF contained his voice.⁷ In July 2007, Fidele Uwizeye testified before this Tribunal in the trial of *Karemura et al.* The same recording was put to him in cross-examination on 27 July 2007. On this occasion, he acknowledged that he was the speaker.⁸ The Defence for Mr Mugenzi submits that, as the result of Mr Uwizeye's denial in the proceedings before this Chamber, the Defence was prevented from further cross-examination on the contents of the radio broadcast.⁹

4. The Prosecution opposes Mr Mugenzi's Motion for the recall of Mr Uwizeye on the grounds that recall under these circumstances would be an affront to the need for

¹ Justin Mugenzi's Motion For the Recall of the Prosecution Witness Fidele Uwizeye for Further Cross Examination, filed 11 September 2007 ("Mugenzi Motion").

² Defence Motion, Annex II: Statement of Prosecution Investigator, dated 24 March 2001.

³ Requete de Casimir Bizimungu au Soutien de la Requete Initulee: Justin Mugenzi's Motion for the Recall of the Prosecution Witness Fidele Uwizeye for Further Cross Examination, filed 12 September 2007.

⁴ Bicamumpaka's Response Supporting Mugenzi's Motion for the Recall of the Prosecution Witness Fidele Uwizeye for Further Cross Examination, dated 17 September 2007 ("Bicamumpaka Submission").

⁵ Prosecutor's Response to Mr Justin Mugenzi's Motion for the Recall of Mr Fidele Uwizeye for Further Cross Examination, 14 September 2007 ("Prosecution Response").

⁶ *Prosecutor v. Bagorara et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 3.

⁷ T 12 April 2005, p. 39.

⁸ *Karemura et al.*, Case No. ICTR-98-44-T, T. 27 July 2007, p. 7.

⁹ Defence Motion, para 6

finality and closure of court proceedings, would "lead to complete procedural disorder and chaos", and is procedurally improper.¹⁰ The Prosecution submits that the proper course of action would be to enter the transcripts from the *Karemura et al* proceedings into evidence.¹¹

5. Neither the Prosecution nor Mr Uwizeye now dispute that it was Mr Uwizeye's voice on the recording of the radio broadcast that was played during his cross-examination in these proceedings on 13 April 2005.¹² Therefore, recalling Witness Uwizeye for the purpose of eliciting an admission to this effect would be a waste of judicial resources and would unnecessarily delay the proceedings. The Chamber notes, however, that the result of Mr Uwizeye's denial was to prevent the Defence from cross-examining him regarding discrepancies between the contents of the broadcast and his earlier testimony in these proceedings.

6. The Defence for Mr Mugenzi suggests several discrepancies between the contents of the recording and Mr Uwizeye's testimony to the Chamber, including: (i) in his testimony before this Chamber, Mr Uwizeye testified that he was removed from the office of *Prefet* of Gitarama on 10 May 1994, whereas, in the recording, he is repeatedly addressed and identified as the *Prefet* of Gitarama without raising a challenge; (ii) in his testimony before this Chamber, Mr Uwizeye expressed his disapproval of the activities of the Interim Government, whereas in the recording he praises the activities of the Interim Government.¹³ Rule 90 (G) of the Rules explicitly allows cross-examination on "matters affecting the credibility of [a] witness." The issues raised by the Defence for Mr Mugenzi may affect the credibility of Mr Uwizeye, and the Defence may therefore be prejudiced if it were not allowed to cross-examine him on these issues. Therefore, the Chamber will recall Witness Uwizeye in order to allow further cross-examination on the issues arising from Mr Uwizeye's denial in relation to the broadcast.

The Prosecution Investigator's Notes

7. The Defence also calls the Chamber's attention to notes made by an investigator working for the Office of the Prosecutor dated 24 March 2001. According to the Defence, these notes record remarks that demonstrate Mr Uwizeye's inability to distinguish between different dates and events, and to distinguish between events to which he was an eyewitness and those which he heard about from others. The document also records Mr Uwizeye's desire to gain favour with the Rwandan authorities by cooperating with the ICTR. The Defence submits that this document clearly impacts the credibility of Mr Uwizeye's evidence and, therefore, should have been disclosed pursuant to Rule 68 of the Rules of Procedure and Evidence. The Defence further submits that additional cross-examination on the contents of this statement is required.¹⁴

¹⁰ Prosecution Response, paras. 9.

¹¹ Prosecution Response, para 8.

¹² Prosecution Response, para 10.

¹³ Defence Motion, paras. 3-10.

¹⁴ Defence Motion, paras 11-14

8. The Prosecution submits that the investigator's notes merely reflect one investigator's opinion, that this investigator's opinion was not endorsed by the Prosecutor, and that the appropriate person to testify in relation to the notes would be the investigator who made them, not Mr Uwizeye.¹⁵ The Prosecution further submits that the investigator's notes on Mr Uwizeye are protected under Rule 70, and their disclosure in the *Karemera et al* matter amounts to a waiver which is strictly limited to that case.¹⁶

9. According to the Defence, Mr Uwizeye's credibility is at issue, the investigator's notes contain a record of statements made by Mr Uwizeye which call his credibility into question, and they must therefore be investigated on cross-examination.¹⁷

10. Regarding the Prosecution's assertion that the investigator's notes are protected under Rule 70, the Chamber notes that the Defence for Mr Mugenzi claims that the investigator's notes fall under Rule 68 as "material which in the actual knowledge of the Prosecutor ... may affect the credibility of Prosecution evidence." Rule 70 protections against disclosure do not extend to materials that fall under Rule 68.

11. The Chamber has reviewed the investigator's notes and disagrees with the Defence's characterization that the notes contain "an account of a number of utterances" made by Mr Uwizeye. With one relevant exception, the investigator's notes do not record any specific statements by Mr Uwizeye. Rather, they record the investigator's impression of Mr Uwizeye's state of mind and broadly characterize his answers as being unfocused. The relevant exception is the investigator's note that Mr Uwizeye expressed the opinion that the investigator should inform the Rwandan *Procureur Général* of his collaboration with the ICTR. The Chamber is of the view that this statement may affect the credibility of Mr Uwizeye's evidence.

12. Recalling Mr Uwizeye for cross-examination regarding an OTP investigator's impression of Mr Uwizeye's state of mind and the investigator's description that Mr Uwizeye's answers lacked focus would not yield evidence of significant probative value. The Chamber will, however, allow further cross-examination on the allegation that Mr Uwizeye wanted the investigator to convey the fact of his cooperation with the ICTR to the Rwandan *Procureur Général*.

Rule 68 Disclosure Issues Raised by Mr Bicamumpaka

13. The Defence for Mr Bicamumpaka submits that the Prosecution has failed in his ongoing disclosure obligations pursuant to Rule 68 by failing to disclose Mr Uwizeye's testimony from the *Karemera et al* proceedings and the investigator's note and requests that the Chamber order the Prosecution to disclose (i) "any exculpatory statements or will says relating to Mr Fidele Uwizeye in *Karemera et al*"; and (ii) "any exculpatory material

¹⁵ Prosecutor's Response, para 8.

¹⁶ Prosecutor's Response to Mr Jerome-Clement Bicamumpaka's Motion Supporting the Recall of MR Fidele Uwizeye for Further Cross Examination, filed 24 September 2007 ("Prosecution Response to Mr Bicamumpaka")

¹⁷ Justin Mugenzi's Reply to the Prosecutor's Response to Justin Mugenzi's Motion for the Recall of Fidele Uwizeye, filed 18 September 2007.



in the Rwandan judicial records pertaining to Mr Fidele Uwizeye's detention on 1 May 1998"; or, in the alternative, to certify that the "statements, will says, and judicial records, detailed above do not contain any exculpatory information relating to Mr Fidele Uwizeye."¹⁸

14. In its response to Mr Bicanumpaka, the Prosecution submits that all statements, will says and other material available to it *prior* to Mr Uwizeye's testimony in these proceedings was made available to the Defence.¹⁹

15. The Defence for Mr Bicanumpaka argues that the Prosecution's response mischaracterizes the Bicanumpaka Submission as a motion, and was filed out of time.²⁰ The Chamber notes that regardless of how the Bicanumpaka Submission is characterized, the Prosecution's response to it cannot be out of time.²¹

16. The Chamber reminds the Prosecution that, pursuant to Rule 68 (E), its obligation to disclose material which to its actual knowledge may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence is ongoing. As such, the Prosecution's disclosure obligations regarding Mr Uwizeye did not end after his testimony in these proceedings, and the Prosecution's assurance that it disclosed to the Defence all materials relevant to Mr Uwizeye that were available to it prior to his testimony is insufficient.

17. Where the Defence believes that the Prosecution has failed to disclose exculpatory material in its custody or control, it may request that the Chamber order disclosure. For its request to succeed, the Defence must sufficiently identify the material sought and make a *prima facie* showing that it is exculpatory.²² In this case, the Defence for Mr Bicanumpaka has sufficiently identified the materials sought. Given the nature of Mr Uwizeye's testimony in *Karemura et al.*, any statements or will says related to that testimony may tend to affect the credibility of Prosecution evidence. In addition, Rwandan judicial records relating to Mr Uwizeye's detention may also affect his credibility. These documents should be disclosed pursuant to Rule 68.

FOR THESE REASONS, the Chamber

¹⁸ See generally, Bicanumpaka's Response.

¹⁹ Prosecution Response to Mr Bicanumpaka, para. 6.

²⁰ Bicanumpaka Submissions in Reply to Prosecutor's Response to Bicanumpaka's Response Supporting Mugenzi's Motion for the Recall of the Prosecution Witness Fidele Uwizeye for Further Cross-Examination, filed 1 October 2007.

²¹ If the Bicanumpaka Submission is characterized as a motion, which is the more reasonable characterization given that the Defence for Mr Bicanumpaka seeks additional relief from the Chamber, then the Prosecution's response to it is timely pursuant to Rule 73 (E), which gives responding parties five days from the date on which Counsel received the motion. Where, as here, the fifth day falls on a non-working day, the response is due on the next working day. If the Bicanumpaka Submission is characterized as a response, then the Prosecution's answer to it is a reply, which is not governed by Rule 73 (E) or any other Rules. The Chamber notes that if the Defence for Mr Bicanumpaka's logic were to be followed, then its own reply to the Prosecution would also be out of time.

²² Decision on Prosper Mugiraneza's Motion for Records of all Payments Made Directly or Indirectly to Witness D (TC), 28 September 2006, para. 10.

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GRANTS the Defence Motion in part;

ORDERS the recall of Mr Fidele Uwizeye for further cross-examination strictly limited to issues arising from his recantation regarding the radio broadcast referenced above and the OTP investigator's allegation that Mr Uwizeye expressed the opinion that the investigator should share with the Rwandan *Procureur Général* the fact of Mr Uwizeye's cooperation with the ICTR;

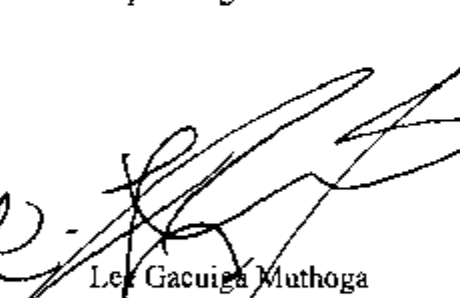
ORDERS the Prosecution, pursuant to Rule 68, to

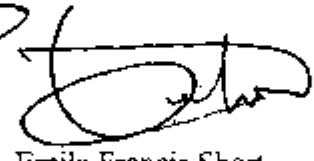
- (i) disclose to the Defence any exculpatory material relating to Mr Fidele Uwizeye that became available to it after Mr Fidele Uwizeye's testimony in these proceedings; or
- (ii) in the alternative, to certify that none of the materials relating to Mr Fidele Uwizeye that became available to the Prosecution after his testimony in these proceedings contains any exculpatory information relating to Mr Fidele Uwizeye;

DIRECTS the Registry to take the necessary steps for the recall of Mr Fidele Uwizeye after the close of the Defence for Prosper Mugiraneza.

Arusha, 9 October 2007


Khalida Rachid Khan
Presiding Judge


Le Gaciga Muthoga
Judge


Emile Francis Short
Judge

