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UNITED NATIONS
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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: 4 March 2008

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S SECOND MOTION TO EXCLUDE
TESTIMONY OF WITNESS AXA AND EDOUARD KAREMERA'S MOTION TO
RECALL THE WITNESS**

Rules 54 and 98 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Alayne Frankson-Wallace
Iain Morley
Saidou N'Dow
Gerda Visser
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
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

Deo Mbuto

INTRODUCTION

1. The seventh trial session in this case is scheduled to resume on 10 March 2008.¹ During the last trial session, the Chamber ruled on several Defence motions seeking the exclusion of the testimony of Prosecution Witnesses AXA and BDW. Although the Prosecution closed its case on 4 December 2007, the Chamber decided to postpone the cross-examination of Witness BDW, which had been necessitated by the late disclosure to the Defence of his Rwandan judicial records, until the next trial session.

2. The Chamber is now seized with motions from Joseph Nzirorera and Edouard Karemera, both pertaining to the exclusion of AXA's testimony, and an alternative motion from Edouard Karemera requesting that AXA be recalled for further cross-examination.

JOSEPH NZIRORERA'S MOTION

Introduction

3. On 14 September 2005, the Chamber required the Prosecution to use its best efforts to obtain Rwandan records on several Prosecution witnesses and disclose them to the Defence.²

4. On 11 June 2007, Joseph Nzirorera moved the Chamber to exclude Prosecution Witness AXA's testimony.³ He contended that the Prosecution had not complied with the Chamber's Order of 14 September 2005 because it had not disclosed any of AXA's Rwandan judicial records, including prior statements. The Chamber denied the motion, but requested that the Prosecution continue to use its best efforts to obtain and disclose AXA's Rwandan judicial records to the Defence.⁴

5. Prior to AXA's examination-in-chief, the Prosecution disclosed AXA's judicial records from Kibuye (Rwanda) to the Defence. However, during his cross-examination, it became apparent that AXA had been interviewed twice by the investigators of the Office of the Prosecutor ("OTP"), and that the first interview had not been disclosed to the Defence. Moreover, AXA testified that he had attempted to appeal his sentence to the Ruhengeri Court

¹ *Prosecutor v. Edouard Karemera, Mathieu Ndirumputse and Joseph Nzirorera (Karemera et al.)*, Case No. ICTR-98-44-T, Decision sur la Troisième Requête d'Edouard Karemera Visant au Report du Commencement de la Présentation de sa Preuve et Ordonnance Portant Calendrier (TC), 28 February 2008.

² *Karemera, et al.*, Decision on the Motions to Compel Inspection and Disclosure and to Direct Witness to Bring Judicial Immigration Records (TC), 14 September 2005, para. 11.

³ Joseph Nzirorera's Motion to Exclude Testimony of Witness AXA, 11 June 2007.

⁴ *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Witness AXA (TC), 11 July 2007.

of Appeals (Rwanda), and that he had made a statement to this Court in 1998, as well as written several letters to it, none of which had been disclosed.

6. On 7 December 2007, the Prosecutor disclosed an investigator's note concerning AXA's first interview. Joseph Nzirorera then moved the Chamber to exclude the testimony of AXA, submitting that the Prosecutor had violated Rule 66(A)(ii) of the Rules of Procedure and Evidence ("Rules"). The Chamber denied the request to exclude AXA's testimony, although it did find that the Prosecution had violated Rule 66(A)(ii).

7. On 13 February 2008, Joseph Nzirorera informed the Chamber that his Counsel had obtained the missing records from the Ruhengeri Court of Appeals without any difficulty, and again moved the Chamber to exclude AXA's testimony.⁵ He contends that the Prosecution has not complied with the Chamber's Decision of 11 July 2007 requesting it to use its best efforts to obtain and disclose AXA's judicial records to the Defence. The Prosecution opposes the motion in its entirety,⁶ and Joseph Nzirorera filed a reply.⁷

8. On 21 February 2008, the Prosecution filed a rejoinder to Joseph Nzirorera's reply.⁸ Joseph Nzirorera then filed a motion to strike the rejoinder, and for sanctions.⁹ The Prosecution opposes this motion, and requests that all fees associated with it be withheld.¹⁰

DELIBERATIONS

PRELIMINARY ISSUE

Joseph Nzirorera's Motion to Strike "Rejoinder" and for Sanctions

9. Joseph Nzirorera submits that the Rules do not permit the opposing party to file a rejoinder without leave, and that doing so amounts to an abuse of process that merits sanctions. The Prosecution counters that the Rules do not expressly permit the moving party to file a reply either.

⁵ Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA, 13 February 2008 ("Joseph Nzirorera's Second Motion").

⁶ Prosecutor's Response to Joseph Nzirorera's Second Motion to Exclude the Testimony of Witness AXA, 18 February 2008 ("Prosecutor's Response").

⁷ Reply Brief: Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA, 20 February 2008 ("Joseph Nzirorera's Reply").

⁸ Prosecutor's Rejoinder to Joseph Nzirorera's Reply: Second Motion to Exclude the Testimony of Witness AXA, 21 February 2008 ("Prosecutor's Rejoinder").

⁹ Motion to Strike "Rejoinder" and for Sanctions, 22 February 2008 ("Joseph Nzirorera's Motion to Strike Rejoinder").

¹⁰ Prosecutor's Response to Joseph Nzirorera's Motion to Strike "Rejoinder" and for Sanctions, 22 February 2008 ("Prosecutor's Response to Motion to Strike Rejoinder").

10. In the Chamber's view, a moving party is not allowed to introduce new requests or issues of facts in its reply. If the moving party does introduce new facts in his reply, the opposing party should have the right to respond in the interests of justice.

11. The Chamber notes that the Prosecutor's rejoinder refutes Joseph Nzirorera's assertion that the Prosecution has easier access to Rwandan records than the Defence. Because this issue is not decisive for the Chamber's decision on Joseph Nzirorera's second motion to exclude the testimony of AXA, the Chamber will disregard the Parties' submissions on this matter, and finds no reason to impose sanctions on either party.

ON THE MERITS

12. Joseph Nzirorera contends that the ease with which his Counsel located AXA's records at the Ruhengeri Court of Appeals on 13 February 2008 demonstrates that the OTP has not used its best efforts to obtain and disclose these records to the Defence.¹¹

13. The Prosecution asserts that it has vigorously attempted to obtain AXA's complete Rwandan judicial records through extensive correspondence between the trial team in Arusha and the OTP Liaison Officer and investigators in Kigali.¹² In its response, the Prosecution details this correspondence, which began on 30 October 2007, as including seven emails, numerous telephone calls, three inter-office memoranda, a letter from the Prosecution to the Rwandan Prosecutor General, and numerous letters from the Liaison Officer to the Rwandan Prosecutor General and the National Gacaca Coordinator.¹³ The Prosecution further asserts that it gave its investigator, Hamadi Quedraogo, a list of four sets of AXA's documents to be retrieved from Kibuye and the Ruhengeri Court of Appeals. Finally, the Prosecution claims that, when Joseph Nzirorera filed the instant motion on 13 February 2008, Prosecution investigator Quedraogo was still returning from Kibuye and simply had not visited the Ruhengeri Court of Appeals yet.¹⁴

14. The Chamber acknowledges that the Prosecution has shown best efforts to obtain and disclose AXA's Rwandan judicial records as of October 2007. However, the Prosecution only began its efforts three and a half months after the Chamber issued its Decision of 11 July 2007. In that Decision, the Chamber ruled that: "in order to comply with an order to use its

¹¹ Joseph Nzirorera's Second Motion, paras. 5-7.

¹² Prosecutor's Response, para. 6.

¹³ *Id.* at footnote 7.

¹⁴ Prosecutor's Response, para. 6.

best efforts to obtain information about prior witness statements and/or judicial records from Rwandan authorities, the Prosecution must in a timely manner conduct systematic interviews of the witnesses in order to elicit as detailed information as possible as to when, where and by which authority they have been interviewed, examined and/or tried and make inquiries to the Rwandan authorities with reference to the information thus elicited.¹⁵ Consequently, the Chamber is not satisfied that the Prosecution has used its best efforts to obtain these records in a timely manner.

15. Joseph Nzirorera submits that he suffered prejudice because he was unable to confront AXA during cross-examination with AXA's own previous inconsistent statements contained in the documents at issue.¹⁶

16. The Chamber recalls that the fact that material has not been timely disclosed does not *per se* create a prejudice to the accused.¹⁷ The accused must demonstrate that he has suffered material prejudice as a result of the late disclosure.¹⁸

17. The Chamber recalls that the right to cross-examine a witness with previous inconsistent statements is fundamental because it may demonstrate a contradiction by the witness, which is material for assessing his credibility and reliability.¹⁹

18. There is an apparent contradiction between AXA's testimony and his statements in the records at issue. On 20 November 2007, AXA testified that he had mentioned Edouard Karemera's name several times in a letter to the Ruhengeri Court of Appeals;²⁰ however, none of the letters at issue from AXA to the Ruhengeri Court of Appeals mention that

¹⁵ *Karemera, et al.*, Decision on the Motions to Compel Inspection and Disclosure and to Direct Witness to Bring Judicial Immigration Records (TC), 14 September 2005, para. 6.

¹⁶ According to Joseph Nzirorera, "These letters contradict the testimony of Witness AXA that he specifically mentioned Edouard Karemera in his letters to the Court of Appeal. In addition, in his 1999 statement, he falsely denied participation in the killings in Bwakira commune, which is inconsistent with his testimony at Mr. Nzirorera's trial." Joseph Nzirorera's Second Motion, para. 7. Additionally, Joseph Nzirorera states: "Witness AXA could have been confronted with the fact that none of his letters to the Ruhengeri Court of Appeals contained any reference to Karemera, as he had claimed. He could also have been confronted with his 1998 (sic) statement, found in the file, in which he denied any involvement in the events in his commune. Joseph Nzirorera's Reply, para. 11.

¹⁷ *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262 ("If the Defence satisfies the Tribunal that the Prosecution has failed to comply with its Rule 68 obligations, then the Tribunal must examine whether the Defence has been prejudiced by that failure before considering whether a remedy is appropriate."); *Niyitegeka Appeals Chamber Decision*, p. 7.

¹⁸ *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262 ("If the Defence satisfies the Tribunal that the Prosecution has failed to comply with its Rule 68 obligations, then the Tribunal must examine whether the Defence has been prejudiced by that failure before considering whether a remedy is appropriate."); *Niyitegeka Appeals Chamber Decision*, p. 7.

¹⁹ Rule 90(G)(ii) states: "In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness."

²⁰ T. 20 Nov. 2007, p. 62

name.²¹ Furthermore, on 22 November 2007, AXA testified that he had confessed to participating in the killings at Bwakira,²² but his 1998 statement to the Ruhengeri Court of Appeals denies any involvement in these killings.²³ Accordingly, the Chamber concludes that the Prosecution's untimely use of its best efforts to obtain and disclose the documents has caused the Defence material prejudice.

19. Nonetheless, exclusion of evidence is at the extreme end of a scale of measures available to the Chamber in addressing the prejudice caused to an accused in the preparation of his defence.²⁴ Here, although Joseph Nzirorera has shown that he suffered some prejudice as a result of the apparent contradictions, he has not shown that he suffered a degree of prejudice that would justify the extreme remedy of excluding AXA's testimony. A reasonable remedy would be to recall AXA; however, Edouard Karemera has already moved to have AXA recalled, and the Chamber will address this request below. Joseph Nzirorera's request for exclusion of AXA's testimony therefore falls to be rejected.

EDOUARD KAREMERA'S MOTION

Introduction

20. At the conclusion of AXA's testimony, the UN Chief Medical Officer informed the Chamber that AXA had developed an adverse psychiatric condition while still at the UN Detention Facility²⁵ ("UNDF"). On 11 December 2007, after receiving a report by the UN Chief Medical Officer on AXA's mental state, Edouard Karemera moved the Chamber to exclude AXA's testimony.²⁶

21. Edouard Karemera submitted that AXA had been unfit to testify. He further contended that the report proved AXA's receipt of information from a cellmate, which would indicate that AXA colluded with BDW to falsely accuse him. The Chamber denied the

²¹ Official UN English translations of Annexes A-D to Nzirorera's Second Motion.

²² T. 22 Nov. 2007, p. 10.

²³ Official UN English translations of Annexes A-D to Nzirorera's Second Motion.

²⁴ *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony, and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemera et al.*, Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8; *Karemera et al.*, Decision on the Defence Oral Motions for Exclusion of XDM's Testimony, for Sanctions against the Prosecution and Exclusion of Evidence outside the Scope of the Indictment (TC), 19 October 2006, para. 6.

²⁵ Dr. Epée Hernandez, « Rapport médical concernant le témoin AXA : Né en 1977 », dated 29 November 2007, para. 1.

²⁶ Requête aux fins de l'exclusion de la déposition du témoin AXA sur la base du rapport médical communiqué aux parties le 4 décembre 2007, 11 December 2007.

motion, but requested that it be informed of the results of AXA's psychiatric evaluation and any further information as to the identity of the cellmate.²⁷

22. On 20 January 2008, following the Chamber's Order of 18 January 2008, the UN Chief Medical Officer communicated a further report on the medical situation of AXA, which was then disclosed to all Parties in the case. As a result, Edouard Karemera now moves the Chamber to: (1) reconsider its Decision of 18 January 2008 and exclude the testimony of AXA or, alternatively; (2) recall AXA for further cross-examination; and (3) order that AXA's actual mental state be evaluated. The Prosecutor has filed no response to the motion.

23. In its Decision of 18 January 2008, the Chamber addressed two issues pertaining to the possible exclusion of AXA's testimony: (1) whether he had been mentally fit to testify; and (2) whether it had been demonstrated that he colluded with BDW to falsely accuse Edouard Karemera. The Chamber based its findings on a report by the UN Chief Medical Officer that was prepared with the assistance of the UNDF consultant.

24. According to the established jurisprudence of the Tribunal, a Chamber has the inherent power to reconsider its decisions. In order for a motion for reconsideration to succeed, the moving party must demonstrate that: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made its original decision; or (3) there is reason to believe that its original decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice thereby warranting the exceptional remedy of reconsideration.²⁸

25. By her Memorandum of 20 January 2008, the UN Chief Medical Officer informed the Chamber that the UN Clinic had not registered the identity of AXA's cellmate. She further provided the Chamber and the Parties with a Psychiatric Report dated 13 December 2007 by Rwandan psychiatrist and psychotherapist, Dr. Naasson Munyendamutsa. According to the report, AXA was hospitalized for a week in a psychiatric hospital in Rwanda as of 30 November 2007, for observation and psychiatric follow-up.

26. The Chamber finds that the psychiatric report dated 13 December 2007 is a new fact that would warrant a reconsideration of the Chamber's Decision, provided that the findings of

²⁷ *Karemera, et al.*, Decision on Joseph Nzirorera's Motion for Unsealing *Ex Parte* Submissions and for Disclosure of Withheld Materials (TC), 18 January 2008.

²⁸ *Karemera, et al.*, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions (TC), 8 November 2008, para. 6.

34157

Dr. Naasson Munyandamutsa would support another conclusion than that of the Decision of 18 January 2008. Nonetheless, Dr. Naasson Munyandamutsa's findings do not support the conclusion that AXA's mental state on the witness stand would make his testimony unreliable for psychiatric reasons.

27. As to Edouard Karemera's alternative request that an evaluation of AXA's actual mental state be performed, the Chamber finds that it has not been demonstrated that a new evaluation is likely to affect the foregoing conclusions on AXA's mental state during this past testimony, or on the advisability of recalling him as a witness.

28. Taking into account Dr. Naasson Munyandamutsa's observations on the possible recall of AXA for further cross-examination, the Chamber further finds that it should be possible for the Registry, in consultation with the medical experts, to establish the modalities for a further cross-examination of AXA that would avoid him undue stress while fully respecting the rights of the Defence.

29. Edouard Karemera's requests for the exclusion of AXA's testimony or, in the alternative, that his actual mental state be evaluated therefore fall to be rejected.

30. Regarding Edouard Karemera's other alternative request that AXA be recalled for further cross-examination, the Chamber recalls inviting the Defence at the trial conference on 5 December 2007 to request that Prosecution Witnesses be recalled for further cross-examination if the late disclosure of judicial records and prior statements, due to no fault of the Defence, made it necessary. The Chamber further notes that the following may give ground for further cross-examination: (1) the late disclosure of an OTP investigator's note concerning an interview with BDW, in which BDW refers to AXA; (2) the reference in the UN Chief Medical Officer's report to AXA's cellmate; and (3) the recently obtained documents from the Ruhengeri Court of Appeals.

31. The Chamber therefore grants Edouard Karemera's alternative request that AXA be recalled for further cross-examination, the modalities of which are to be established by the Registry in consultation with the medical experts.


FOR THESE REASONS, THE CHAMBER

- I. **GRANTS** Joseph Nzirorera and Edouard Karemera's motions in part, asserting that the Prosecution has not used its best efforts in a timely manner to obtain and disclose to the Defence certain judicial records pertaining to Prosecution Witness

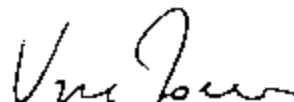
AXA, and allowing that Prosecution Witness AXA be recalled for further cross-examination, to be conducted on the modalities established by the Registry in consultation with medical experts; and

- **II. DENIES** the remaining requests in Joseph Nzirorera and Edouard Karemera's motions.


Arusha, 4 March 2008, done in English.


Dennis C. M. Byron

Presiding Judge
(Absent during signature)


Gberdao Gustave Kam

Judge
(Absent during signature)


Vagn Joensen

Judge

[Seal of the Tribunal]

