



ICTR-98-42
15-04-2008
(12397-12393)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramarson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 15 April 2008

The PROSECUTOR v. **Élie NDAYAMBAJE**

Case No. ICTR-96-8-T

Joint Case No. ICTR-98-42-T

JUDICIAL RECORDS ARCHIVES
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DECISION ON NDAYAMBAJE'S MOTION TO VARY HIS LIST OF WITNESSES

Rule 73ter (E) of the Rules of Procedure and Evidence

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the confidential "*Requête d'Élie Ndayambaje en modification de sa liste des témoins*," filed by the Defence for *Élie Ndayambaje* on 17 March 2008 (the "Motion");

CONSIDERING the "Prosecutor's Response to the '*Requête d'Élie Ndayambaje en modification de sa liste des témoins*,'" filed on 18 March 2008 ("Prosecution's Response");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. On 23 December 2004, the Defence for *Ndayambaje* filed its Pre-Defence Brief, pursuant to Rule 73*ter* of the Rules. The brief contained the list of witnesses the Defence intended to call. On 5 April 2007, the Defence filed an amended witness list containing 30 witnesses in compliance with the Trial Chamber's Decision of 21 March 2007.¹

2. On 17 March 2008, the Defence for *Ndayambaje* filed the current motion to remove and add two witnesses to its current list, attaching the respective will-says of the proposed witnesses and indicating the estimated duration of each witness's examination-in-chief. The Prosecution is the only party to have responded to the Motion.

SUBMISSIONS OF THE PARTIES

3. The Defence for *Ndayambaje* requests the removal of Witnesses MAREK and PICKA from its witness list of 5 April 2007. It contends that both witnesses have changed their addresses and are currently untraceable. The Defence further requests the addition of Witnesses BIDI and LINE. Both witnesses have been located last month and their testimony is important for *Ndayambaje*'s case.

4. The Defence submits that Witness BIDI will testify that *Ndayambaje* and his family stayed at a certain location in Kibayi between approximately 23 and 30 April 1994 without interruption. The Witness will contradict Prosecution Witnesses EV, QAQ, TQ and TP who alleged that *Ndayambaje* stayed in or around Kabuye after he had fled to Kibayi. The Defence states that BIDI would replace Witness PICKA who was scheduled to testify about the same aspect, and that BIDI would be the only witness to testify about that element.

5. The Defence submits that Witness LINE will testify that *Ndayambaje* did not possess any political ambitions in 1994 but focused on economic affairs.

¹ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Joseph Kanyabashi's Motions for Modification of his Witness List, the Defence Responses to the Scheduling Order of 13 December 2006 and *Ndayambaje*'s Request for Extension of Time within which to Respond to the Scheduling Order of 13 December 2006, 21 March 2007, para. 38.

- 6. The Defence contends that it would still remain within the 30 witnesses limit authorised by the Chamber, if it were to call these additional witnesses.
- 7. The Prosecution does not oppose Ndayambaje's Motion.

DELIBERATIONS

Rule 73ter (E) Principles

- 8. Rule 73ter (E) provides that "[a]fter commencement of [its] case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called."
- 9. The Chamber recalls its practice concerning Rule 73ter requests. The Chamber evaluates such requests in terms of: the materiality of the testimony, the complexity of the case, the prejudice to the Parties and the presentation of the best available evidence. This must be balanced against the right of the accused to have adequate time and facilities to prepare their defence and their right to be tried without undue delay.²
- 10. Each proposed witness must be closely analysed, including the sufficiency and timing of disclosure of the witness's information, the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments and the justification offered for the addition of the witness. Other factors to be considered include the stage the proceedings have reached, and the reasons for the late discovery of the witness.³
- 11. Recalling its Decisions of 30 March 2004, 26 August 2006 and 15 February 2008, the Chamber reiterates that it is vested with the ultimate authority to rule on requests for variation of witness lists and that the final decision as to whether it is in the interests of justice to allow the defence to vary its list of witnesses rests with the Chamber.⁴


Request to Remove Two Witnesses from the Witness List

- 12. The Defence submits that Witnesses MAREK and PICKA are currently untraceable. The Chamber considers this to be a valid reason to justify their removal from the witness list in the interests of justice. No party has opposed the removal and it is unlikely to prejudice

² *The Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion to Vary his List of Witnesses Pursuant to Rule 73ter, 15 February 2008, para. 30; *The Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR-98-42-T, Decision on Alphonse Nteziryayo's Motion to Modify his Witness List, 14 July 2006 para 27; *The Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR-98-42-T, Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, 26 August 2005, para. 31.

³ *The Prosecutor v. Nyiramasuhuko, et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion to Vary his List of Witnesses Pursuant to Rule 73ter, 15 February 2008, para. 31; *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, 26 August 2005, paras. 31, 32, citing *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E) (FC), 26 June 2003, paras. 14-22.

⁴ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion to Vary his List of Witnesses Pursuant to Rule 73ter, 15 February 2008; para. 32; *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion to Drop and Add Witnesses, 30 March 2004, para. 28; *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, 26 August 2005, para. 33.

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anyone and could expedite the proceedings and enhance judicial economy. Therefore, the Chamber grants the request to remove MAREK and PICKA.

Request to Add Two Witnesses to the Witness List

13. Witness BIDI is expected to contradict Prosecution Witnesses EV, QAQ, TQ and TP's testimony relating to Ndayambaje's stay in Kibayi around 23 April 1994 and the following days. The Chamber considers that the expected testimony may be relevant to Ndayambaje's case and may have probative value.

14. The Chamber notes that according to Ndayambaje's Pre-Defence Brief, Witness PICKA was scheduled to testify on the same element and it appears that Witness BIDI would be the only witness to testify on that fact.⁵ Furthermore, the information relating to Witness BIDI was disclosed on 17 March 2008 whereas Ndayambaje's Defence case is not expected to start before May 2008; hearing this witness on the said element is unlikely to prejudice any of the Parties. The Chamber also takes into account that Witness BIDI's examination-in-chief is expected to last two hours while Witness PICKA's examination-in-chief was scheduled for three hours.

15. For these reasons, the Chamber grants the Defence's request to call Witness BIDI to testify on Ndayambaje's stay in Kibayi at the end of April 1994.

16. The Chamber notes that the expected testimony of Witness BIDI appears to address alibi evidence. Therefore, the Chamber recalls the provision under Rule 67 (A)(ii)(a) obliging the Defence to notify the Prosecution of its intent to enter defence of alibi.⁶ At the same time, the Chamber notes that the failure of the Defence to provide such notice shall not limit the right of the accused to rely on the defence of alibi under Rule 67 (B).

17. Witness LINE is expected to testify on Ndayambaje's focus on economic rather than political affairs in Butare in 1994. The Chamber considers that the expected testimony may be relevant to Ndayambaje's case and may have probative value.

18. The Chamber notes that according to Ndayambaje's Pre-Defence Brief, it appears that Witness LINE would be the only witness to testify about that element. The information relating to Witness LINE was disclosed on 17 March 2008 whereas Ndayambaje's Defence case is not expected to start before May 2008; hearing this witness on the said element is unlikely to prejudice any of the Parties. The Chamber also takes into account that Witness LINE's examination-in-chief is expected to last 45 minutes.

19. For these reasons, the Chamber grants the Defence's request to call Witness LINE to testify on Ndayambaje's economic activities in 1994.

⁵ Ndayambaje's Pre-Defence Brief, 23 December 2004, p. 26.

⁶ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the confidential Prosecutor's Motion to be Served with Particulars of Alibi pursuant to Rule 67(A)(ii)(a), 1 March 2005, para. 27: "The Chamber finds that if the Defence wishes to rely on the defence of alibi, it must make the necessary disclosures immediately, in accordance with the provisions of Rule 67. The Chamber notes that the obligations prescribed under the Rule are clear and unambiguous that the Defence is required to, as early as reasonably practicable and in any event prior to the commencement of the trial, notify the Prosecution of its intention to enter the defence of alibi, and in that notice, the Defence is obliged to specify the names and addresses of witnesses on which the accused intends to rely to establish the alibi."

FOR THE ABOVE REASONS, THE TRIBUNAL

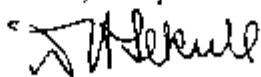
GRANTS the Motion;

DIRECTS the Defence for Ndayambaje to remove Witnesses MAJEK and PICKA from the witness list;

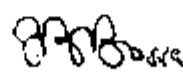
DIRECTS the Defence for Ndayambaje to add Witnesses BIDI and LINE to the witness list;

DIRECTS the Defence for Ndayambaje to file a new list of witnesses indicating the witnesses' order of appearance, no later than 21 April 2008.

Ausha, 15 April 2008


William H. Sekule
Presiding Judge




Solomy Balungi Bossa
Judge

[Seal of the Tribunal]