



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, Presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 21 April 2008

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

**DECISION ON JÉRÔME-CLÉMENT BICAMUMPAKA'S MOTION REQUESTING
RECALL OF PROSECUTION WITNESS GFA; DISCLOSURE OF EXULPATORY
MATERIAL; AND TO MEET WITH WITNESS GFA**

Rules 54, 66, and 75 of the Rules of Procedure and Evidence

Office of the Prosecutor:

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Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**
Mr. Michel Croteau and Mr. Philippe Larochelle for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Cynthia Cline for **Prosper Mugiraneza**

INTRODUCTION

1. The Trial Chamber heard the testimony of Prosecution Witness GFA in this case from 11 to 13 October 2004. On 5 December 2007, the Chamber made an order allowing the Defence for Jérôme-Clément Bicamumpaka (“Defence”) to meet with and interview Witness GFA.¹ The interview was conducted on 8 February 2008 in the presence of representatives of the Witness and Victims Support Section (“WVSS”) and the Office of the Prosecutor.
2. On 4 April 2008, the Defence filed a Motion² requesting the following:
 - (i) Pursuant to Rule 54 of the Rules of Procedure and Evidence (“Rules”), the recall of Witness GFA on the ground that the interview of 8 February 2008 discloses that the Witness gave a false testimony before this Chamber;³
 - (ii) Pursuant to Rule 68 (A), the Defence requests an order for disclosure by the Prosecutor of exculpatory material, namely: (a) open and closed session transcripts of Witness GFA’s testimony in the cases of *Prosecutor v. Eduoard Karemera et al*⁴ and the *Prosecutor v. Augustin Ndindiliyimana et al*;⁵ (b) exhibits tendered into evidence during Witness GFA’s testimony in those cases; and (c) all statements made by Witness GFA which have not yet been disclosed to the Defence;⁶
 - (iii) That the Defence be permitted to meet with Witness GFA prior to recall, for the purposes of preparing for further cross-examination.⁷
3. Witness GFA is currently in Arusha for the purposes of appearing before Trial Chamber III in the *Karemera et al.* case pursuant to an order of that Chamber recalling the Witness for further cross-examination on the issue of his alleged false testimony.⁸
4. Trial in this case resumed on 14 April 2008. The Defence therefore requests that arrangements be made for Witness GFA to remain in Arusha for the purposes of further cross-examination during the current trial session of this case.⁹

¹ Decision on Jerome-Clement Bicamumpaka’s Motion to Meet with Prosecution Witnesses GFA and GKB, 5 December 2007.

² Bicamumpaka’s Motion for the Recall of Witness GFA, for Disclosure of Exculpatory Material and for Meetings with GFA, filed 4 April 2008 (“Motion”).

³ Motion, paras. 1, 8 and 9 and Annex “A” of the Motion which is a transcript of the 8 February 2008 interview which show that Witness GFA gave false testimonies.

⁴ *The Prosecutor v. Edouard Karemera et. al.*, Case No. ICTR-98-44-T. Witness GFA testified in *Karemera et al* from 8 to 20 June 2006.

⁵ *Prosecutor v. Augustin Ndindiliyimana et. al.*, Case No. ICTR-00-56-T. Witness GFA testified *Ndindiliyimana* on 30 and 31 January and 1 and 2 February 2006.

⁶ Motion, paras. 10 to 13.

⁷ Motion, para. 18.

⁸ *Karemera et al.*, Decision on Joseph Nzirorera’s Motion to Recall Prosecution Witness BTH, 12 March 2008 (“*Karemera* Recall Decision of 12 March 2008”). Further cross-examination, pursuant to recall, of Witness GFA in *Karemera et al* has been completed.

5. The Prosecution did not respond to the Motion.

DISCUSSION

Recall of Witness GFA

6. Neither the Statute nor the Rules expressly provide for the recall of a witness. However, pursuant to the Tribunal's jurisprudence, a Chamber may order recall where good cause is demonstrated by the moving party. In assessing whether good cause has been shown, Trial Chambers consider: (i) the purpose for which the witness will testify; and (ii) the reasons why the witness was not questioned earlier on those matters.¹⁰

7. The Defence submits that the interview of 8 February 2008 discloses that Witness GFA gave a false testimony to this Chamber. A partial transcript of the interview, in support of this submission, is annexed to the Motion.¹¹ The transcript shows that during the interview, Witness GFA said: "In the evidence I gave, I lied in so many instances..."¹² Specifically in relation to Mr. Bicumupaka, he further states that while in "solidarity camp," he was given a list of people and "compelled" to say something about them because he "really wanted to get released."¹³ The Chamber therefore finds the Defence has shown good cause for recalling Witness GFA for further cross-examination.¹⁴

8. The Chamber considers it appropriate that WVSS make arrangements for Witness GFA's continued presence in Arusha for the purposes of further cross-examination during the current trial session which commenced on 14 April 2008. These arrangements will of course be subject to the particular requirements of other witnesses already scheduled to testify in this case.

Request for Disclosure

9. Rule 68 (A) of the Rules requires the Prosecutor to disclose "any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence." According to the Tribunal's jurisprudence, the Defence is expected to identify specifically the material sought under Rule 68 (A) and to show the exculpatory or potentially exculpatory character of the materials requested.¹⁵

⁹ Motion, para. 18.

¹⁰ *Prosecutor v. Théoneste Bagosora 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. 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; *Karemera et. al.*, Decision on Joseph Nzirorera's Motion to Recall Ahmed Mbonnyunkiza, 25 September 2007, para. 5.

¹¹ Motion, Annex "A."

¹² Motion, Annex "A", p. 31.

¹³ Motion, Annex "A", p. 35.

¹⁴ See also *Karemera et al.* Recall Decision of 12 March 2008, para. 6.

¹⁵ *Prosecutor v. Bagosora et. al.*, Case No. ICTR-98-41-T, Decision on Motion for Disclosure under Rule 68 (TC), 1 March 2004, para. 5; *Prosecutor v. Casimir Bizimungu et. al.*, Case No. ICTR-99-50-T,

10. Further, pursuant to Rule 66 (A) (ii), the Prosecutor must disclose, no 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.”

11. In cases where protective measures are in place, Rule 75 (F) (ii) provides that once such measures have been ordered in any proceedings, they “shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules.” Sub-Rule (F) (ii) therefore prohibits the Prosecution from using the terms of a witness protection order in another case as an excuse for failing to comply with its disclosure obligations.¹⁶ The Chamber recalls that according to the jurisprudence of the Tribunal, this Sub-Rule is intended to create a mechanism for the routine disclosure of closed session testimony without the need for the Parties to make individualised applications to the Trial Chamber who granted a protective order.¹⁷

12. The Defence requests disclosure of open and closed session transcripts of all GFA’s prior testimony before this Tribunal, all exhibits used during his prior testimony, and any statements made by GFA in the possession of the Prosecutor that have not been disclosed to the Defence.¹⁸ The Chamber considers that the correct basis for the Defence request is Rule 66 (A) (ii) which places an obligation on the Prosecutor to disclose all statements of a witness which it intends to call. This obligation extends to statements made in court by a witness as part of his or her testimony.¹⁹ The Prosecution is therefore required to disclose the prior closed session testimonies of Witness GFA, as well as exhibits admitted in evidence as part of the said testimonies, in accordance with Rule 66 (A)(ii).²⁰ For similar reasons, any other statements made by Witness GFA, which have

Decision on Prosper Mugiraneza’s Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI (TC), 14 September 2004, para. 11 and Decision on Prosper Mugiraneza’s Motion for Records of all Payments Made Directly or Indirectly to Witness D, 18 February 2008, para. 4; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262, *Karemera case* Decision on Joseph Nzirorera’s Motion to Compel Inspection and Disclosure, 5 July 2005, para. 14.

¹⁶ See also the Tribunal’s jurisprudence. For example, Decision on Casimir Bizimungu, Justin Mugenzi and Jerome Bicumupaka’s on Written Submissions Concerning Issues Raised at the Hearing of 31 March 2006 in Relation to the Cross-Examination of Witness Augustin Kayinamura, 1 November 2006, para. 7, *Prosecutor v. Bizimungu*, Decision on the Prosecution Appeal of Witness Protection Measures (AC), 16 November 2005, para. 4, *Prosecutor v. Bagasora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, para. 44.

¹⁷ *Prosecutor v. Nahimana et al.* Case No. ICTR-99-52-T, Decision on Disclosure of Transcripts and exhibits of Witness X,” (TC) 3 June 2004 paras. 4 and 5; *Prosecutor v. Nyiramasuhuko et al.* Case No. ICTR-98-42-T, Decision on the Prosecutor’s ex-parte and Extremely Urgent Motion to Access Closed Session Transcripts in Case No. ICTR-96-3-A to Disclose to Case No. ICTR-98-42-T” (TC) of 23 September 2004; and Decision on the Prosecutor’s Motion for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to rules 69 and 75; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Disclosure on the Prosecutor’s Request for an Order for Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence, 2 February 2005, para. 6.

¹⁸ Motion, paras. 10 to 13.

¹⁹ For example, see *Prosecutor v Nahimana et al.*, Case No. ICTR-99-52-T, Decision on Disclosure of Transcripts and Exhibits of Witness X, 3 June 2004.

²⁰ *Ibid*, para. 4.

been taken by the Prosecutor, would fall within the ambit of Rule 66 (A) (ii).²¹ The Prosecutor must therefore disclose any such statement if he has not already done so, in accordance with his continuing duty under Rule 66.

13. However, the Chamber reminds the Defence that protective measures from the cases of *Karemera et al* and *Ndindiliyimana et al* continue to have effect. Accordingly, Witness GFA is still a protected Prosecution witness within the meaning of the Statute and Rules of the Tribunal and continues to be so in accordance with Rule 75 (F) (i).²²

Meetings with Witness GFA

14. The jurisprudence of the Tribunal establishes the right of each party to interview a potential witness. Particularly, it recognises that the Defence may have a legitimate interest in interviewing a Prosecution witness in order to prepare its case. In assessing the Defence request, the Chamber must consider whether the moving party has articulated good reason. When considering requests by the Defence to meet with Prosecution witnesses, the Chamber must ensure that there is no interference with the course of justice.²³

15. The Defence submits it is necessary to interview Witness GFA prior to recall in order to address: (i) the Witness' admission that he lied during his testimony against Mr. Bicamumpaka; and (ii) that he did so in close cooperation with other witnesses and/or detainees under the guidance of Rwandan authorities.²⁴ In light of the transcript, annexed to the Motion, showing that Witness GFA gave false testimony regarding Mr. Bicamumpaka, the Chamber considers the Defence has a legitimate interest in interviewing Witness GFA in preparation for further cross-examination.²⁵

16. However, as Witness GFA is still a protected Prosecution witness within the meaning of the Statute and Rules of the Tribunal, it is appropriate that any meetings between Witness GFA and the Defence take place in the presence of a representative of both the Prosecutor and WVSS. By ordering the taking of such measures, the Chamber is satisfied that it can ensure that there is no interference with the course of justice.

²¹ For example, the Defence submits that during the interview with Witness GFA on 8 February 2008, the Witness indicated that he had given written testimony against Colonel Ephrem Setako. *See* Motion, para. 10.

²² Rule 75 (F) (i) provides that protective measures "shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule"

²³ *Prosecutor v Mile Mrksic*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003; *Prosecutor v Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet with Prosecution Witness GAP (TC), 26 October 2007, para. 3, *Prosecutor v. Casimir Bizimungu et. al.*, Case No. ICTR-99-50-T, Decision on Jerome Clement Bicamumpaka's Motions to Meet with Prosecution Witnesses GFA and GKB, 5 December 2007, para. 5.

²⁴ Motion, para. 14.

²⁵ The Chamber also recalls its Decision on Jerome-Clement Bicamumpaka's Motion to Meet with Prosecution Witnesses GFA and GKB, 5 December 2007.

FOR THESE REASONS, THE CHAMBER

GRANTS the Motion;

ORDERS the recall of Prosecution Witness GFA before the Chamber for further cross-examination on the issue of his false testimony;

DIRECTS the Registry to take all the necessary steps for Witness GFA to be brought before this Chamber during the current trial session;

DIRECTS WVSS to approach Witness GFA to arrange a meeting or meetings with the Defence prior to his appearance before this Chamber for further cross-examination;

ORDERS that any meeting which takes place pursuant to this Decision, do so in the presence of both a representative of the Prosecutor and a representative of WVSS;

ORDERS disclosure by the Prosecutor of the following materials as soon as possible and in any event, prior to the recall of Witness GFA:

- (i) closed session transcripts of Witness GFA's testimony in other cases;
- (ii) sealed exhibits filed in relation to Witness GFA's testimony in other cases; and
- (iii) any other statements of Witness GFA, if such statements exist and have not already been disclosed by the Prosecutor.

DECLARES that the Defence and any persons under its instruction or authorisation shall be bound, *mutatis mutatis*, by the terms of witness protection orders made in these and any other proceedings with regard to Witness GFA.

Arusha, 21 April 2008

Khalida Rachid Khan
Presiding Judge

Lee Gacuiga Muthoga
Judge

Emile Francis Short
Judge

[Seal of the Tribunal]