

ICTR-98-44-T
29-5-2008
(35570-35505)

35570
-HM



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: 29 May 2008

JUDICIAL SECRETARIAT
RECEIVED

2008 MAY 29 P 4: 13
[Signature]

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR RECONSIDERATION OF
ORAL DECISION ON MOTION TO COMPEL FULL DISCLOSURE OF ICTR
PAYMENTS FOR THE BENEFIT OF WITNESSES G AND T AND MOTION FOR
ADMISSION OF EXHIBIT: PAYMENTS MADE FOR THE BENEFIT OF
WITNESS G**

Rules 89(C) and 54 of the Rules of Procedure and Evidence

The Prosecution:
Don Webster
Alayne Frankson-Wallace
Iain Morley
Gerda Visser
Saidou N'Dow
Sunkarie Ballah-Conteh
Takeh Sendze
Deo Mbutu

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

[Handwritten mark]

INTRODUCTION

1. On 25 February 2008, Joseph Nzirorera moved the Chamber to reconsider its Oral Decision of 23 May 2006¹ ("Oral Decision") denying his request to compel the Prosecution to fully disclose all payments made by the International Criminal Tribunal for Rwanda ("ICTR") to Witnesses G and T ("First Motion").² Joseph Nzirorera maintains that a decision of 18 February 2008 rendered in *Bizimungu, et al.* ("Bizimungu Decision"),³ which requires the Prosecution to disclose all past, present, and future payments for the benefit of Witness D in that case (who is Witness G in the *Karemura, et al.* case), constitutes a material change in circumstances not known to the Chamber at the time of its decision, and is evidence that the Oral Decision of 23 May 2006 was erroneous.

2. The Prosecution opposes the motion with respect to Witness T, but concedes that whatever was disclosed in *Bizimungu, et al.* concerning Witness G ought to be disclosed in this case.⁴ On 17 April 2008, the Prosecution made that disclosure to the Defence.

3. On 21 April 2008, Joseph Nzirorera moved for the admission of an exhibit showing the payments that have been made by the ICTR for the benefit of Witness G ("Second Motion"). The Prosecution also opposes that motion.⁵

DELIBERATIONS

Witness G

4. The First Motion is moot in relation to Witness G.

5. With respect to the Second Motion, the Chamber notes that the exhibit sought to be admitted is tendered for impeachment purposes. The admissibility of evidence, including documentary evidence, is governed by Rule 89(C), which states that the Chamber may admit

¹ T. 23 May 2006, pp. 1-2.

² Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T, filed 3 March 2008. See also Reply Brief, filed 3 March 2008.

³ *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, Prosper Mugiraneza*, Case No. ICTR-99-50-T ("*Bizimungu et al.*"), Decision on Prosper Mugiraneza's Motion for Records of all Payments Made Directly or Indirectly to Witness D (TC), 18 February 2008.

⁴ Prosecution Response to Joseph Nzirorera's Motion for Reconsideration of Oral Decision on to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T, filed confidential 29 February 2008 (re-filed as a public document on 25 April 2008).

⁵ Prosecutor's Response to Nzirorera's Motion for Admission of Exhibit: Payments Made for the Benefit of Witness G, filed on 28 April 2008.

any relevant evidence it deems to have probative value.⁶ It is sufficient for the moving party to establish the *prima facie* relevance and probative value of the evidence for admission under Rule 89(C).⁷ As the Appeals Chamber has repeatedly emphasized, "[a]dmissibility of evidence should not be confused with the assessment of weight to be accorded by the Chamber to that evidence at a later stage."⁸

6. As to evidence in the form of documents or witness statements tendered for to impeach a witness the Trial Chamber in *Bagosora et al.* has recently held that:

{D}ocuments [for impeachment] must be tendered in connection with the testimony of the witness whose evidence is sought to be discredited, either during his or her original testimony or following recall. Thus, the proper course of action here would have been for the Defence, upon discovery of the statements, to have moved to recall the witnesses who gave statements in order to examine them on any inconsistencies between their prior testimony and their written statements, or in the case of a witness who has not yet testified before the Tribunal, to have moved for variance of the Defence witness list to enable the witness to testify.⁹

7. The Prosecution relies on the *Bagosora* Decision to assert that Joseph Nzirorera's proposed exhibit lacks relevance and probative value. Because Nzirorera did not attempt to introduce the exhibit during G's testimony, and because he did not move to recall G, the Prosecution claims that the *Bagosora* Decision precludes him from having the exhibit admitted. The Prosecution further asserts that the proposed exhibit lacks relevance and probative value because Nzirorera has not shown that it contradicts an element of G's testimony, and because it does not tend to prove or disprove an issue in the case.

8. The Chamber notes that the *Bagosora* Decision is inapposite here because that decision specifically related to the use of prior inconsistent statements to impeach a witness. Here, the Defence intends to introduce an itemized description of payments made to G by the Prosecution. G, who himself knew the details of the payments, has already testified to the payments, and this very exhibit has already been admitted in the *Bizimungu et al.* case. Moreover, this Chamber has already found that payments made by the Prosecution to a

⁶ *Karemura, et al.*, Decision on the Prosecution Motion for Admission Into Evidence of UNAMIR Documents (TC), 20 October 2007, paras. 5-7.

⁷ *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva* ("*Bagosora et al.*"), Decision on Bagosora Motion to Exclude Photocopies of Agenda (TC), 11 April 2007, para. 4.

⁸ *The Prosecutor v. Ntahobali and Nyiramasuhuko*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15.

⁹ *Bagosora et al.*, Decision on Nsengiyumva Motion to Admit Documents as Exhibits (TC), 26 February 2007, para. 8.

witness are relevant and probative for assessing that witness's credibility because "[m]aterial or information within the Prosecutor's knowledge concerning any benefits paid to and/or promises made to witnesses and victims beyond that which is reasonably required . . . may affect the credibility of witnesses . . ."¹⁰

9. Accordingly, the Chamber admits the Prosecution's disclosure of payments to Witness G in the *Bizimungu et al.* case as an exhibit in this case.

10. Joseph Nzirorera requests that the exhibit be filed publicly. However, the Chamber will only admit the exhibit under seal because future informants might use details of the Prosecution's payments to witnesses as a bargaining tool if that information is made public.¹¹

Witness T

11. According to the established jurisprudence, the Chamber has an inherent power to exercise its discretion and reconsider its decisions, when: (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.¹² The Chamber recalls that it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.¹³

12. In its Oral Decision, the Chamber stated that the Prosecution was not required to disclose the exact amount of the benefits paid to G because the nature of the benefits had already been disclosed, and it was satisfied by the Prosecution's assertions that the benefits corresponded to the amounts set by the host countries, and that they were reasonably required for the proper management of these witnesses.

13. However, in the *Bizimungu* decision, the Trial Chamber reached a more expansive interpretation of Rule 68, and ordered the Prosecution to disclose the sum total and details of

¹⁰ *Karemera et al.*, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses (TC), 23 August 2005, para. 7.

¹¹ *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion for Records of all Payments Made Directly or Indirectly to Witness D (TC), 18 February 2008, para. 10.

¹² *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpaise, Joseph Nzirorera*, Case No. ICTR-98-44-PT ("Karemera et al."), Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8.

¹³ *Karemera et al.*, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions (TC), 8 November 2007.

all payments made to G (Witness D in that case), and to disclose future payments to that witness, if any, on an ongoing basis.¹⁴ Accordingly, the Chamber considers that the *Bizimungu* Decision constitutes a material change in circumstances that requires reconsideration of its Oral Decision. The Chamber will now reconsider that decision regarding T only.

14. The Prosecution contends that, while the *Bizimungu* Decision clearly applies to Witness G, it does not follow that it should make identical disclosures for Witness T. In support of this argument, the Prosecution attempts to distinguish G from T by highlighting the fact that they are in different countries, and that G is free while T is in jail.

15. The Chamber does not envision any way in which T's residence in a different country than G should preclude identical disclosures. The Prosecution's mere assertion that they live in different countries does not suffice. Although Witness T may not personally benefit from the payments in question because he is in prison, the Chamber finds that the payments towards the maintenance of his family may have the same effect on his credibility as the payments G personally receives for himself and his family.

16. However, the Chamber cannot make a definitive ruling on whether full disclosure of payments made to T is warranted because it must still review the details of all direct and indirect payments for that witness. The Chamber recalls that not all monies paid to a witness will fall within the category of material of an exculpatory nature, or material that may affect the credibility of prosecution evidence.¹⁵ The management of witnesses and victims necessarily implies expenditure including, but not limited to, costs for transportation connected with the investigation and/or hearings.¹⁶ Accordingly, the Chamber orders the Prosecution to file an *ex parte* disclosure of the sum total and details of *all* payments made to T so that it can evaluate for itself whether they include the type that may have had an effect on his credibility.

¹⁴ *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion for Records of all Payments Made Directly or Indirectly to Witness D (TC), 18 February 2008, para. 8.


¹⁵ *Karemera et al.*, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses (TC), 23 August 2005, para. 7.

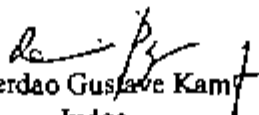
¹⁶ *Ibid.*

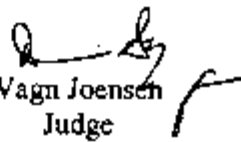
FOR THESE REASONS, THE CHAMBER

- I. **ORDERS** the Prosecution, pursuant to Rule 54, to provide the Chamber with a detailed statement of all expenses incurred on Witness T's behalf and on behalf of his family to be filed with the Chamber *ex parte* and strictly confidential;
- II. **RESERVES** its final decision on Joseph Nzirorera's First Motion in regard to witness T until the Chamber has had a chance to review the Prosecution's materials submitted pursuant to the above Order in regard to Witness T; and
- III. **ADMITS** the Prosecution's disclosure of payments to Witness G in the *Bizimungu et al.* Case as an exhibit in this case (under seal), noting that Witness G's pseudonym was "D" in that case, and requests that the Registry assign it an exhibit number in this case.

Arusha, 29 May 2008, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kamf
Judge
(Absent during signature)


Vagn Joensen
Judge
(Absent during signature)

[Seal of the Tribunal]

