

ICTR-98-44-T
29-5-2008
(35515-35571)

35515
-1111



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byton, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 29 May 2008

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T

JUDICIAL RECORDS SECTION
RECEIVED

2008 MAY 29 10:41:13
[Signature]

**DECISION ON JOSEPH NZIRORERA'S SECOND MOTION FOR SUBPOENA TO
LÉON MUGESERA**

Rule 54 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
Deo Mbuto

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

[Signature]

INTRODUCTION

1. On 19 February 2008, the Chamber denied Joseph Nzirorera's request to issue a subpoena to Léon Mugesera so that he could testify by video-link ("First Decision").¹ The Chamber stated that it was not satisfied that he had adequately shown that all reasonable steps had been taken to obtain the voluntary cooperation of the witness.

2. On 3 March 2008 Joseph Nzirorera again requested the Chamber to issue a subpoena for Léon Mugesera to testify by videolink.² He attached a copy of an e-mail to Mugesera where he requested him to agree to testify, and to which he had received no reply. Though not opposing the motion *per se*, the Prosecution raised concerns about the reasonableness of Joseph Nzirorera's demonstrated steps, and whether the witness's testimony was necessary and appropriate for the conduct and fairness of the trial.³

3. On 8 April 2008, the Chamber requested the Registry to make all reasonable efforts to contact Léon Mugesera, and enquire about his willingness to testify in Joseph Nzirorera's case either in Arusha or by video-link, and to submit a report on these efforts ("Preliminary Order"). On 30 April 2008, the Registry submitted a report on its contacts with Mugesera and his counsel ("Registry's Report").

DELIBERATIONS

Applicable Law

4. For the Chamber to issue a subpoena pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules") for Léon Mugesera to testify, be it in Arusha or via video-link, Joseph Nzirorera must demonstrate that: (1) reasonable attempts to obtain the voluntary cooperation of the witness have been made; (2) the witness has information which can materially assist the applicant in respect of clearly identified issues relevant to the trial; and (3) the witness's testimony is necessary and appropriate for the conduct and fairness of the trial.⁴

¹ Joseph Nzirorera's Motion for Subpoena to Léon Mugesera, filed 25 January 2008.

² Joseph Nzirorera's Second Motion for Subpoena to Léon Mugesera ("Nzirorera's Second Mugesera Motion"), filed on 3 March 2008; Reply Brief: Joseph Nzirorera's Second Motion for Subpoena to Léon Mugesera ("Nzirorera's Reply to Second Mugesera Motion"), filed on 10 March 2008.

³ Prosecutor's Response to Joseph Nzirorera's Second Motion for Subpoena to Léon Mugesera ("Prosecutor's Response to Nzirorera's Second Mugesera Motion"), filed on 6 March 2008.

⁴ *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on the Defence Motion for Issuance of Subpoena to Witness T (TC) 8 February 2006, para. 4; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for a Subpoena for Witness SHB (TC), 7 February 2005, para. 3; *The Prosecutor v. Théoneste Bagosora, Gratten*

827

5. Further, the Chamber notes that testimony by video-link is an exception to the general principle, articulated in Rule 90 (A), which states that witnesses "shall, in principle, be heard directly by the Chambers." The Chamber, however, may authorize testimony by video-link under Rule 54 where it is in the interests of justice, based on a consideration of: (1) the importance of the testimony; (2) the inability or unwillingness of the witness to attend; and (3) a good reason adduced for the witness's inability or unwillingness to attend the trial proceeding.⁵ If the witness is unwilling to attend, the refusal must be genuine and well-founded, and give the Chamber reason to believe that the testimony will not be heard unless the video-link is authorized.

Léon Mugesera's willingness to testify.

6. It is common knowledge that Léon Mugesera is the subject of deportation proceedings in Canada pursuant to the Supreme Court of Canada Decision of 28 June 2005, and it appears from his counsel's statement to the Registry that his present status does not allow him to leave Canada if he wants to re-enter that country. The Chamber is therefore satisfied that Mugesera, for the time being, has good reason not to attend proceedings in Arusha, and that his testimony, while he is still in Canada, will not be heard unless the video-link is authorized.

7. As to his willingness to testify by video-link, it appears from the Registry's Report that he declines to state, whether or not he will testify, unless the Tribunal meets certain financial requests.

8. Since the previous attempts made by Joseph Nzirorera to persuade Léon Mugesera to testify have been unsuccessful, and as Mugesera has set conditions even to respond to the Registry's inquiry, the Chamber is satisfied that it has been demonstrated that it will be necessary to issue a subpoena, if he is to testify.

Whether Léon Mugesera's testimony is sufficiently relevant and important to justify that he be subpoenaed to testify by video-link

Kabiligi, Aloys Ntabakuze, Anatole Nzeziyumva ("Bagarara et al."), Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

⁵ *Karemera et al.*, Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T (TC), 14 September 2005.

9. The Prosecutor submits that Léon Mugesera's testimony *may* be necessary and appropriate for the conduct and fairness of the trial,⁶ but that a final assessment cannot be made without knowing which other witnesses Joseph Nzirorera intends to call to testify about the same issues, and that Joseph Nzirorera has not yet complied with the Chamber's orders pursuant to Rule 73 *ter* to submit the list of the witnesses he intends to call.

10. The Chamber recalls that in its First Decision it stated that it "is satisfied that the testimony of Léon Mugesera could materially assist Joseph Nzirorera in the presentation of his defence in connection with the issues set out in his Motion."⁷ Further, although other witnesses may testify as to what Mugesera stated in his speech at the Kabaya Rally on 22 November 1992,⁸ the Chamber is satisfied that it will be necessary for Mugesera to testify in order for the Defence to rebut the testimony of Prosecution witnesses that the MRND leadership condoned his speech, and helped him to flee the country. The Chamber is satisfied that this constitutes a sufficiently important reason to justify the issuance of a subpoena and to authorize testimony by video-link.

Léon Mugesera's financial requests.

11. According to the Registry Report, Léon Mugesera requests that the Tribunal pay a fee to: (1) himself for the time he has spent being interviewed by Counsel for Nzirorera; and 2) his counsel for assisting him at that interview, advising him whether or not to testify voluntarily, and assisting him during his testimony, if he agrees to testify.

12. The Chamber finds no basis for ordering the Registry to pay fees related to the voluntary interview, which Joseph Nzirorera's Counsel had with Léon Mugesera. Further, because Léon Mugesera is not the subject of any known criminal proceedings, and because the Canada Supreme Court has already issued a final decision on the relevance of his conduct in Rwanda, in particular his speech at the Kabaya Rally on 22 November 1992, to his deportation from Canada, the Chamber finds no reason why he should be assisted by counsel when testifying before the Tribunal. The Chamber therefore rejects his demands.

⁶ Prosecutor's Response to Nzirorera's Second Mugesera Motion.

⁷ Joseph Nzirorera explains that he expects Léon Mugesera's testimony to directly contradict the testimony of Prosecution Witnesses ZF, UB, AWD, and GOB on the following issues: an alleged meeting with Léon Mugesera, Joseph Nzirorera, and others at Butotori camp to plan the Tutsi extermination; Léon Mugesera's speeches and attendance at MRND meetings and rallies; whether MRND officials helped Léon Mugesera hide and flee Rwanda; Léon Mugesera's alleged membership of a secret organization; Léon Mugesera's participation to a plan to exterminate the Tutsi.

⁸ Prosecution Pre-Trial Brief, para. 39.

FOR THESE REASONS, THE CHAMBER

- I. **GRANTS** Joseph Nzirorera's motion that Léon Mugesera be subpoenaed to testify;
- II. **AUTHORIZES** that the testimony be made by video-link, if Léon Mugesera is still in Canada when the testimony is scheduled; and
- III. **REQUESTS** the Registry to undertake the necessary logistics for Léon Mugesera's video-link testimony.

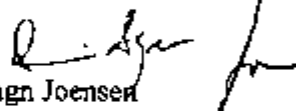
Arusha, 29 May 2008, done in English.


Dennis C. M. Byron

Presiding Judge


Gberdao Gustave Kam

Judge
(Absent during signature)


Vagn Joensen

Judge
(Absent during signature)

[Seal of the Tribunal]

