



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

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 4 June 2008

The PROSECUTOR v. Élie NDAYAMBAJE

Case No. ICTR-96-8-T

Joint Case No. ICTR-98-42-T

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

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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 “*Requête d’Élie Ndayambaje en modification de sa liste de témoins*”, filed on 22 May 2008 (the “Motion”);

CONSIDERING the “Prosecutor’s response to the ‘*Requête d’Élie Ndayambaje en modification de sa liste de témoins*’”, filed on 27 May 2008 (the “Prosecution Response”)

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”) in particular Rule 73 *ter*;

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

INTRODUCTION

1. As a preliminary matter, the Chamber observes that the Prosecution response is time barred as it was filed outside the prescribed deadline of three days issued on 23 May 2008. Furthermore, the Prosecution has not shown any good cause to justify this belatedness. As a result, the Chamber will not consider the Prosecution Response while adjudicating the Motion.

2. 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 23 January 2006, the Defence removed some witnesses from its list including Witness MARVA in response to the Scheduling Order of 14 December 2005.

3. On 21 April 2008, the Defence for Ndayambaje filed the list and appearance order of the 30 witnesses it intends to call for trial as well as the identification sheets and will-say of its first 10 witnesses, in compliance with the Decision of 15 April 2008.¹ That list included Witness COMET who is sought to be removed in the current Motion.

4. On 12 May 2008, the Chamber ordered the Defence for Ndayambaje to be ready to begin the presentation of its case on 2 June 2008.

The Defence

5. The Defence moves the Chamber to withdraw Witness COMET from its list and to reinstate Witness MARVA.

6. The Defence submits that Witnesses PIANO, JAMES, BOZAN and MAJIK’s expected testimony sufficiently address the Mugombwa Church events, on which Witness COMET was expected to testify as well. Therefore, calling Witness COMET is unnecessary.

¹ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ndayambaje’s motion to vary his list of witnesses, 15 April 2008.

7. The Defence alleges that it had removed Witness MARVA from its list because the Witness had disappeared without a trace. Recently, the Defence was able to contact Witness MARVA who is still willing to testify before the Chamber. The Defence asserts that Witness MARVA's expected testimony is important to its case as it addresses, among others, the alibi evidence.

8. The Defence submits that it has amended MARVA's will-say and reduced the length of the expected examination-in-chief from five to three hours.

DELIBERATIONS

Rule 73 ter (E) Principles

9. Rule 73 *ter* (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".

10. The Chamber recalls its jurisprudence concerning Rule 73 *ter* requests. It is usual practice to evaluate such requests in terms of: the materiality of the testimony; the complexity of the case; the prejudice to the Parties, including elements of surprise, on-going investigations, replacements and corroboration of evidence; 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

11. Further, the Chamber recalls the need to closely analyse each proposed witness, including the sufficiency and time of disclosure of witness 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 witnesses.³ Other factors to be considered include the stage the proceedings have reached, and the reasons for the late discovery of the witnesses.⁴

12. 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 the modification of witnesses 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.⁵ The Chamber further recalls

² *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, citing *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, paras. 14-22; *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; *Nyiramasuhuko et al.*, Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses (TC), 24 July 2001.

³ *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. 32, citing *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, paras. 14-22.

⁴ *Idem.*

⁵ *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; *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 73 *ter*, 15 February 2008, para. 32.

that at this stage of the proceedings, a variation may only be justified if the Defence has shown good cause for its request and if there is no material prejudice to the other Parties.⁶

Removal of Witness COMET

13. The Chamber notes the Defence submissions that Witness COMET's expected testimony is sufficiently covered by other Defence witnesses warranting his removal from the list. The Chamber considers that this variation is unlikely to prejudice any Party and could expedite the proceedings and enhance judicial economy. Therefore, the Chamber grants the request to remove Witness COMET from the witness list.

Reinstatement of Witness MARVA

14. Witness MARVA is expected to controvert Prosecution Witnesses QAR, QAQ and EV on secret meetings allegedly held in Ndayambaje's home between 1990 and 1994.

15. Witness MARVA is also expected to testify that Ndayambaje and his family went to a house in Kibayi on 23 April 1994, where they stayed for one week without any interruption. The Witness is alleged to corroborate the expected testimony of Witness BIDI and controvert Prosecution Witnesses EV, QAQ, TP and TW who alleged that Ndayambaje was present at Kabuye or Mugombwa parish during that time.

16. Finally, Witness MARVA is expected to testify that Ndayambaje accommodated two Tutsi girls in his house, including Prosecution Witness QAQ's daughter, from May until Ndayambaje's flight in July 1994 and that Ndayambaje treated them well, like his own children.

17. The Chamber considers that Witness MARVA's expected testimony may be relevant to Ndayambaje's defence and may have probative value and that hearing this Witness is unlikely to prejudice any of the Parties. The Chamber also takes into account that Witness MARVA's examination-in-chief is expected to last three hours.

18. For these reasons, the Chamber grants the Defence's request to call Witness MARVA to testify on the items set out in his will-say.

19. The Chamber notes that the expected testimony of Witness MARVA appears to partially address alibi evidence. It further observes that the Defence has already notified the Prosecution of its intent to enter defence of alibi pursuant to Rule 67 (A)(ii)(a). Therefore, the Chamber expects the Defence to disclose Witness MARVA's address in 1994 immediately as already undertaken in a correspondence of 26 May 2008.⁷

⁶ *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 73 *ter*, 15 February 2008, para. 34.

⁷ In compliance with the "Decision on the Prosecution Motion for further particulars on Élie Ndayambaje's alibi pursuant to Rule 67 (A)(ii)(a)" dated 23 May 2008, the Defence disclosed on 26 May 2008, the addresses of its alibi Witnesses GABON, BIDI and KEPIR in 1994. In paragraph 5 of the said correspondence, the Defence indicated that Witness MARVA will also adduce alibi evidence and that it will disclose the Witness' address in 1994 if the request for his reinstatement on the witness list is granted.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Motion;

DIRECTS the Defence for Ndayambaje to remove Witnesses COMET from the witness list;

DIRECTS the Defence for Ndayambaje to reinstate Witness MARVA on the witness list;

DIRECTS the Defence to disclose to the Prosecution, Witness MARVA's address in 1994 within the meaning of Rule 67(A)(ii)(a).

Arusha, 4 June 2008

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]