



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: Adama Dieng

Date: 5 June 2008

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

Case No. ICTR-99-50-T

**DECISION ON PROSPER MUGIRANEZA'S MOTION TO
VARY HIS WITNESS LIST; AND DECISION ON MOTION TO DROP ONE
WITNESS AND REQUIRE ONE 92 *BIS* WITNESS TO TESTIFY IN PERSON**

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

Office of the Prosecutor:

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Ms. Michelyne C. St. Laurent for **Casimir Bizimungu**
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**
Mr. Michel Croteau and Mr. Philippe Larochelle for **Jérôme-Clément Bicomumpaka**
Mr. Tom Moran and Ms. Cynthia Cline for **Prosper Mugiraneza**

INTRODUCTION

1. The Trial Chamber in this case is currently hearing the defence case for the fourth co-Accused, Prosper Mugiraneza, having already heard the defence cases for Justin Mugenzi, Casimir Bizimungu, and Jérôme-Clément Bicamumpaka, subject to certain outstanding matters. With respect to the Defence for Prosper Mugiraneza (“Defence”), the Chamber has so far heard some 46 witnesses in his defence.

2. This Decision deals with two related Motions brought by the Defence for leave to make changes to its Witness List. First, the Defence moves the Chamber to add four witnesses to its Witness List, submitting that several witnesses have been dropped from its original witness list, and that the proposed changes, if allowed, would not change the total estimate of time required for the presentation of Mugiraneza’s defence.¹

3. Second, the Defence seeks to drop Witness RRN from its list; and for the Chamber to grant it leave to move Witness BGM from the list of those witnesses who are proposed to testify by written statement, so that he instead appears to testify in person.²

4. The Prosecution does not oppose either Defence Motion.³ The Prosecution requests, however, that if the Chamber grants the first Defence Motion, it: (i) order the Defence to immediately provide full personal particulars of the additional witnesses to be called in order to facilitate investigations; and (ii) allow the Prosecution two weeks from the date of any decision to investigate and prepare for the additional witnesses’ testimonies.

DELIBERATIONS

5. Rule 73 *ter* (E) of the Rules permits the Defence to move the Trial Chamber for leave to vary its witness list, after the commencement of its case, if it considers it to be in the interests of justice.⁴

6. Trial Chambers have allowed either party to vary its witness list upon a showing of good cause and where the requested variance is in the interests of justice.⁵ Relevant factors include the materiality and probative value of the testimony in relation to existing witnesses and allegations in the indictment; the complexity of the case; prejudice to the opposing party;

¹ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, “Prosper Mugiraneza’s Motion to Vary his Witness List (Confidential)”, filed on 7 May 2008. The Defence seeks the addition of Witnesses MWA, RXX, RXXZ, and RWY-A to its list.

² *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, “Prosper Mugiraneza’s Motion to Amend Witness List by Dropping One Witness and Moving Another from Rule 92 bis to Witness to Appear”, filed on 13 May 2008.

³ See “Prosecutor Response to Prosper Mugiraneza’s Motion for Leave to Vary List of Witnesses”, filed on 12 May 2008, and “Prosecutor’s Response to Prosper Mugiraneza’s Motion to Amend Witness List by Dropping One Witness and Moving Another from Rule 92 bis to Witness to Appear”, filed on 19 May 2008.

⁴ Rule 73 *ter* (E) of the Rules: “After commencement of the Defence 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.”

⁵ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecutor’s Motion to Vary its Witness List (TC), 2 October 2006, para. 3; *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Decision on the Prosecutor’s Request for Leave to Call Six New Witnesses (TC), 20 April 1999, paras. 4, 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 13.

the substance of particular justifications for the late addition of witnesses; and delays in the proceedings.⁶

Motion to Add Four Witnesses to Witness List

Witness MWA

7. The Defence submits that Witness MWA was inadvertently dropped from the witness list. The Defence advises that the Witness will testify to an incident during which Mugiraneza flew to his home *cellule* in a helicopter. He will also testify about gatherings at Mugiraneza's home, and that Mugiraneza's brother-in-law was usually master of ceremonies. He will testify that he saw no signs of military training before 6 April 1994.

8. The Chamber considers that the Defence has failed to provide sufficient information such that it would be in the interests of justice to grant this part of its request. The Defence has failed to specify how this Witness' anticipated testimony is material and of probative value in relation to existing witnesses and allegations in the Indictment. The Defence has also failed to demonstrate how this Witness' testimony is different to that given by a number of witnesses already heard by the Chamber. Furthermore, the fact that Witness MWA was "inadvertently dropped" from the witness list is not sufficient justification for the late addition of the witness. Considering all of these factors, the Chamber considers that it is not in the interests of justice to permit the Defence to add this Witness to its list at this late stage in the proceedings.

Witness RXX

9. The Defence advises that Witness RXX will testify about meetings at 'Rwatoro's house' in April 1994. She will testify that Prosper Mugiraneza was not present at any of those meetings.

10. The Chamber notes that it has already heard a significant number of witnesses on the issue of whether Prosper Mugiraneza was present at meetings allegedly held at 'Rwatoro's house'.⁷ The Chamber has also heard from a number of additional witnesses on the related issue of whether Prosper Mugiraneza was in the vicinity of Rwatoro's house, or in neighbouring areas, during the relevant period. While the testimony of Witness RXX may be relevant and probative in relation to the allegations in the Indictment, the Chamber notes that no justification has been given for the late addition of this Witness. In this regard, the Chamber notes that Prosper Mugiraneza is the fourth and final Accused to present his defence before it, such that the Defence has had several years to prepare its defence, and finalise its list of witnesses, including to make decisions about which witnesses to call in relation to particular issues.⁸ In light of all of these circumstances, the Chamber considers that it is not in the interests of justice to permit the Defence to add this Witness to its list.

⁶ *Bagosora et al.*, Decision On Bagosora Motion To Present Additional Witnesses And Vary Its Witness List, 17 November 2006, para. 2; *Prosecutor v. Mpambara*, Case No. ICTR-2001-65-T, Decision on the Prosecution's Request to Add Witness AHY (TC), 27 September 2005, para. 4.

⁷ On this issue, for example, the Chamber has heard Witnesses RDG (by deposition), RDH, RDI, RDZ, KNE.

⁸ The Chamber also notes that this Motion was filed on 7 May 2008, well into the Defence case.

Witness RXZ

11. The Defence states that Witness RXZ will testify “about planning meetings. He will further testify that Prosper Mugiraneza was not present on or after 6 April 1994.”⁹

12. The Chamber considers that the Defence has presented insufficient information to justify the addition of Witness RXZ to its Witness List. The information provided to justify the addition of Witness RXZ is vague and inadequate to show that the Chamber has not already heard evidence from a number of other witnesses on this issue. Furthermore, the Defence has failed to advance any reason at all for the late addition of this witness to its list. Accordingly, the Chamber does not consider it to be in the interests of justice to grant the Defence leave to add Witness RXZ to its list.

Witness RWY-A

13. The Defence advises that Witness RWY-A will testify that the road between Kigali and Kibungo could not be used after 7 April 1994. The Defence anticipates that the Witness will testify for less than two hours.

14. The Chamber notes that Defence Witness RWY-A (originally referred to by the pseudonym RWY) already appears on the Defence Witness List of 12 February 2008 as Witness number 43 on that list. The Chamber has never ordered the removal of witness number 43 from the Defence Witness List.

15. Accordingly, the Chamber considers that the Witness is already on the Defence Witness List and, therefore, that there is no need for any order from the Chamber to the effect that he be added. The Chamber notes that some confusion had arisen due to the fact that two Defence witnesses (numbers 43 and 83 on the Defence Witness List, respectively) had been assigned the same pseudonym. However, this appears to have been rectified by the allocation of the pseudonym ‘RWY-A’ to one of those two witnesses. It is finally noteworthy that Witness RWY-A is the only witness who is presently proposed to testify orally on the subject matter in question, namely road access to Kibungo at the relevant time.

Motion to Drop Witness RRN and have Witness BGM Testify in Person

16. The Defence submits that Witness RRN can no longer be contacted and his whereabouts are unknown.

17. The Chamber notes that Witness RRN does not appear on the Defence Witness List of 12 February 2008, nor on the most recently filed Third Amended Witness List. The Chamber therefore finds no need for it to grant the Defence request to remove Witness RRN from its Witness List.

18. With regard to Witness BGM (number 76 on the Third Amended Witness List), the Witness is presently proposed to testify by written statement admitted pursuant to Rule 92 *bis* of the Rules, yet the Defence now seeks for the Witness to testify orally instead. The subject matter of the Witness’ testimony is road access to Kibungo between 7 and 12 April 1994.

⁹ Defence Motion, para. IV.

19. The Chamber notes that, by virtue of this Decision, Witness RWY-A will be appearing before it to testify orally on this subject matter. Furthermore, the Defence has not advanced any reason as to why it now wishes for the Chamber to hear Witness BGM in person. The Chamber also notes that the Defence's application for the admission of this Witness' written statement – pursuant to Rule 92 *bis* of the Rules – is currently pending before it. Additionally, granting the Defence request is likely to delay the proceedings which are now reaching the final stages of evidence. As such, the Chamber does not consider it to be in the interests of justice to grant the Defence leave to have Witness BGM testify orally.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Motions of 7 and 13 May 2008 in their entirety; and

REMINDS the Registry to ensure the appearance of Witness RWY-A before the Chamber for the purposes of testifying in this case, as soon as practicable.

Arusha, 5 June 2008

Khalida Rachid Khan
Presiding Judge

Lee Gacuiga Muthoga
Judge

Emile Francis Short
Judge

[Seal of the Tribunal]