



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: 12 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 EMERGENCY MOTION
TO VARY WITNESS LIST**

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

Office of the Prosecutor:

Mr. Paul Ng'arua	Mr. Shyamlal Rajapaksa
Mr. Ibukunolu Babajide	Mr. Olivier De Schutter
Mr. Justus Bwonwonga	Mr. Kartik Murukutla
Mr. Elvis Bazawule	Ms. Marie Ka

Counsel for the Defence:

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 Bicamumpaka**
Mr. Tom Moran and Ms. Cynthia Cline for **Prosper Mugiraneza**

INTRODUCTION

1. On 10 June 2008, the Defence for Prosper Mugiraneza (“Defence”) filed a confidential Motion to vary its Witness List by adding 2 witnesses: (i) the “custodian of records” of the Tribunal; and (ii) the Defence investigator, Mr. Innocent Niyonsenga.¹

2. On 9 June 2008, Defence Witness RWV testified before the Chamber. During the Witness’ cross-examination, he stated that he did not refuse to travel to Arusha to testify and was not forced to appear before the Chamber. The Witness further stated that anyone who said he had made demands for video-link testimony would be “lying.”² The Defence submits that the Motion is necessary in light of the Witness’ testimony. In support of the Defence position, annexed to the Motion is email correspondence between the Tribunal’s Witness and Victims Support Section and Counsel for the Defence, which shows that the Witness was unwilling to travel to Arusha to testify, that he instead wished to testify via video-link from Kigali, and that a subpoena for the Witness was transmitted to the Office of the Prosecutor General in Rwanda.³

3. The Defence submits that it is necessary to add, to its Witness List, the Tribunal’s “custodian of records” in order to authenticate the email correspondence annexed to the Motion. The Defence seeks to add Mr. Innocent Niyonsenga to testify as to: (i) prior statements made by the Witness regarding his reluctance to appear before the Tribunal; and (ii) prior statements which are consistent with parts of the Witness’ testimony which the Prosecution sought to impeach during cross-examination.

DISCUSSION

4. Rule 73 *ter* (E) of the Rules of Procedure and Evidence (“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

5. 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

¹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Prosper Mugiraneza’s Emergency Motion to Vary Witness List, 10 June 2008 (“Motion”). The Motion seeks to vary the Defence’s Third Amended Witness List, *See Bizimungu et al.*, “(Confidential) Third Amended Pre-Defence Witness List and Summary of Anticipated Testimony of Prosper Mugiraneza’s Defence Witnesses”, filed on 13 May 2008.

² *Bizimungu et al.*, T. 9 June 2008, pp. 50 – 52.

³ Motion, Exhibit A, “E-mails Sought to Be Authenticated.”

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 *Bizimungu et al.*, Decision on Casimir Bizimungu’s Motion to vary Witness List; and to Admit Evidence of Witnesses in Written Form in Lieu of Oral Testimony (TC), 1 May 2008, para. 13; *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. 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. *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.

and allegations in the Indictment, the complexity of the case, prejudice to the opposing party, justifications for the late addition of witnesses, and delays in the proceedings.⁶

6. The Chamber shall consider the two witnesses, which the Defence seeks to add to its Witness List, in light of the aforementioned factors.

The custodian of records at the Tribunal

7. The Defence submits that it is necessary to add the Tribunal's "custodian of records" as a witness in order to authenticate the email correspondence annexed to the Motion so that it can be used to rebut Witness RWV's testimony that he had not refused to appear before the Tribunal to testify and had not requested that he be allowed to testify via video-link.

8. The Chamber considers that the Defence has failed to show good cause, or that it would be in the interests of justice for the "custodian of records" to be added to the Witness List. In particular, the Defence has failed to demonstrate how the email correspondence is material, or of probative value, in relation to the evidence of RWV, or to charges against the Accused as contained in the Indictment. Rather, as the email correspondence clearly contradicts RWV's testimony it would tend to go towards undermining his credibility.

Mr. Innocent Niyonsenga

9. The Defence seeks to add Mr. Niyonsenga to the Witness List on the basis that he can (i) testify as to RWV's reluctance to appear before the Tribunal; and (ii) testify that RWV made prior statements that are consistent with his testimony before this Chamber, which the Prosecution sought to impeach.⁷

10. With regard to the first Defence submission, for the same reasons that the Chamber does not find that the Defence has shown good cause, or that it is in the interests of justice to call the "custodian of records", the Chamber does not consider it to be in the interests of justice to amend the Witness List so that Mr. Niyonsenga can testify as to RWV's reluctance to appear before the Tribunal.

11. With regard to the second Defence submission, the Chamber again considers that the Defence has failed to show good cause, or that it would be in the interests of justice, for Mr. Niyonsenga to be added to the Witness List. In particular, the Chamber considers that Mr. Niyonsenga's hearsay evidence regarding RWV's prior consistent statements would be unnecessary and without value as the Chamber has already heard directly from RWV.

12. Accordingly, the Chamber does not consider that the Defence has shown good cause, nor would it be in the interests of justice, to vary the Witness List. Rather, the Chamber notes

⁶ *Bizimungu et al.*, Decision on Casimir Bizimungu's Motion to vary Witness List; and to Admit Evidence of Witnesses in Written Form in Lieu of Oral Testimony, 1 May 2008, para. 13; *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 In particular, the Defence submits that Mr. Niyonsenga can provide testimony on the Witness' prior statements regarding the Accused's movements between the French Embassy, and Hotel des Diplomates between 8 and 12 April 1004. Further, that Mr. Niyonsenga can testify on the Witness' prior statements as to the actions of the Accused when they were both at the Murambi complex.

with concern that the Defence seemingly would request to vary its Witness List so as to both impeach the credibility of Witness RWV, as well as attempt to bolster his testimony through introducing hearsay evidence at this stage of the proceedings. Indeed, it would appear to the Chamber that the Defence has had no consideration for the principle of “interests of justice” as required under Rule 73 *ter* (E), nor the need to demonstrate good cause. For these reasons, the Chamber considers that the request lacks merit to such an extent that it is frivolous, and has unnecessarily expended judicial time and resources.⁸ Accordingly, the Chamber deems it appropriate in these circumstances to direct the Registrar, pursuant to Rule 73 (F), to deny costs associated with this matter.⁹

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Motion in its entirety.

DIRECTS the Registry to withhold payment of costs associated with the filing of “Prosper Mugiraneza’s Emergency Motion to Vary Witness List” filed on 10 June 2008.

Arusha, 12 June 2008

Khalida Rachid Khan
Presiding Judge

Lee Gacuiga Muthoga
Judge

Emile Francis Short
Judge

[Seal of the Tribunal]

⁸ See *Bizimungu et al.*, Decision on Prosper Mugiraneza’s Motion for Appropriate Relief for Violation of Rule 66, 4 February 2005, para. 13, where this Chamber found that the Defence Motion lacked merit to such an extent that it was frivolous and that its filing constituted an abuse of process. See also *Nahimana et al., v The Prosecutor*, Case No. ICTR-99-52-A, Decision on Hassan Ngeze’s Motion Appealing the Registrar’s Denial of Marriage Facilities (AC), 20 January 2005, on the failure to follow procedures as set out in the Rules and making a request before the inappropriate forum.

⁹ Rule 73 (F) states that “a Chamber may impose sanctions against Counsel if Counsel brings a motion ... that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.”