



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. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 25 June 2008

THE PROSECUTOR

v.

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

**DECISION ON PROSECUTOR'S APPLICATION TO CERTIFY AN APPEAL AND
JOSEPH NZIRORERA'S APPLICATION TO CERTIFY AN APPEAL AND/OR
RECONSIDER "DECISION ON THE PROSECUTION MOTION TO REOPEN ITS
CASE AND ON THE DEFENCE MOTION TO FILE ANOTHER RULE 98BIS
MOTION"**

Rules 73(B) and 54 of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 19 April 2008, the Chamber issued a decision denying the Prosecution's oral application for leave to call additional witnesses, and the Defence's oral application for leave to present a fresh Rule 98 *bis* motion, which were made as a result of the testimony of Prosecution Witness BTH between 10 to 17 April 2008.¹ In the Impugned Decision, the Chamber stated that the Prosecution case had closed on 25 January 2008 according to its scheduling orders.

2. The Prosecution moves to certify an interlocutory appeal of the Impugned Decision, and asserts that the Chamber erred when it held that the Prosecution case closed on 25 January 2008, and that an order re-opening it was not warranted.² Joseph Nzirorera also moves to certify an interlocutory appeal of the Impugned Decision, and also claims that the Chamber erred when it held that the Prosecution case closed on 25 January 2008; in the alternative, he moves the Chamber to reconsider the Impugned Decision.³

DELIBERATIONS

Standard for Certifying an Interlocutory Appeal

3. Rule 73(B) of the Rules of Procedure and Evidence ("Rules") provides that leave for an interlocutory appeal may be granted when the applicant demonstrates that the following two conditions are met: 1) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and 2) an immediate resolution by the Appeals Chamber – in the view of the Trial Chamber – may materially advance the proceedings. A Trial Chamber may grant certification to appeal a decision in its entirety or limit the certification to part of the decision or to one or more particular issues in the decision. Certification has been granted where a decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence.⁴ The Appeals Chamber has repeatedly emphasized the

¹ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, and Joseph Nzirorera, Case No. ICTR-98-44-T*, Decision on the Prosecution Motion to Reopen its Case and on the Defence Motion to File another Rule 98 *bis* Motion (TC), ("Impugned Decision"), 19 April 2008.

² Prosecutor's Application for Certification to Appeal "Decision on the Prosecution Motion to Reopen its Case and on the Defence Motion to File another Rule 98 *bis* Motion," filed on 23 April 2008.

³ Joseph Nzirorera's Application for Reconsideration and/or Certification of Decision on Closure of Prosecution Case and Rule 98 *bis* Submissions, filed on 25 April 2008.

⁴ *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerome-Clement Bicamumpaka, and Prosper Mugiraneza, Case No. ICTR-99-50-T*, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses (TC), 28 September 2005, para. 3.

primacy of Trial Chamber rulings involving an exercise of discretion, insisting that interlocutory appeals under Rule 73(B) are only warranted in exceptional circumstances.⁵

Prosecution's Motion for Certification of an Interlocutory Appeal

4. The Prosecution contends that the Impugned Decision affects the fair and expeditious conduct of the proceedings and/or the outcome of the trial because it precludes it from bringing sufficient evidence to prove the charges in the indictment. It argues that it cannot present sufficient evidence because the Chamber's decision that the Prosecution case closed on 25 January 2008 prevents it from varying its witness list to include witnesses that will rebut Witness BTH's unexpected recantation of his prior testimony. The Prosecution further claims that immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings because it would eliminate the possibility of a mistrial/retrial being called at a later date.

5. The Chamber recalls that the testimony of BTH was not pivotal to its conclusion that there was a *prima facie* case against the Accused.⁶ Therefore, whether the Prosecution is allowed to vary its witness list to rebut BTH's testimony does not affect the fair and expeditious conduct of the proceedings and/or the outcome of the trial. Furthermore, the witnesses that the Prosecution wishes to call to rebut BTH's recanted testimony were already on the Prosecution witness list, so it could not be argued that their evidence is new. Moreover, the Chamber observes that the Prosecution describes the nature of the testimony intended to be adduced as corroborating evidence that is already on the record, and notes that the Prosecution chose not to call those additional witnesses during its case.⁷ Accordingly, the Chamber considers that the Prosecution has not satisfied the first prong of the Rule 73(B) test, and denies the motion.

Joseph Nzirorera's Motion for Certification of an Interlocutory Appeal

6. Joseph Nzirorera argues that the Impugned Decision affects the fair and expeditious conduct of the proceedings and/or the outcome of the trial because its conclusion that the Prosecution case closed on 25 January 2008 deprives him of the opportunity to make a proper motion for judgement of acquittal that would include all of the new information elicited during BTH's recall, which took place after 25 January 2008. Joseph Nzirorera also maintains that the Impugned Decision raises the possibility that the Prosecution will be able to rebut evidence elicited in its own case after he presents his defence case. Finally, he

⁵ *Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, ("Bagosora et al.")* Decision on Kabiligi Application for Certification Concerning Defence Cross Examination after Prosecution Cross Examination (AC), 2 December 2005, para. 5.

⁶ Impugned Decision, para. 12.

⁷ *Ibid.*

claims that immediate resolution of the issue would materially advance the proceedings because it would be difficult to remedy the problems above in an appellate judgement.

7. The Chamber has already stated that the testimony of BTH was not pivotal to its conclusion that there was a *prima facie* case against the Accused in regard to all *counts* in the Indictment. Thus, whether a fresh motion for judgement of acquittal is filed that contains the new information elicited from BTH does not affect the fair and expeditious conduct of the proceedings and/or the outcome of the trial. Regarding Joseph Nzirorera's claim that the Prosecution might be able to rebut evidence elicited in its own case after he presents his defence case, the Chamber notes that Joseph Nzirorera can always move to vary his own witness list under Rule 73(E) to counter those witnesses, if it is in the interest of justice. Accordingly, the Chamber denies the motion because Joseph Nzirorera has not satisfied the first prong of the Rule 73(B) test.

Joseph Nzirorera's Motion for Reconsideration

8. 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.⁸ The Chamber recalls that it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.⁹

9. Joseph Nzirorera argues that the Chamber should reconsider the Impugned Decision because it erred in law when it stated that the Prosecution case closed on 25 January 2008, and not on 21 April 2008, at the end of Prosecution witness BDW's testimony.

10. The Chamber recalls that Rule 85 specifically allows it to direct the order in which evidence will be presented at trial, if it is in the interest of justice.¹⁰ On 5 December 2007, the Chamber stated that the Prosecution case would formally close upon the issuance of its decision on the Prosecution's motion to admit certain materials into evidence under Rule 89(C).¹¹ That decision was issued on 25 January 2008, and the Chamber maintains that it is in the interest of justice for the Prosecution case to have closed on that day, so as to avoid

⁸ *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, 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.

⁹ *Karemera et al.*, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions (TC), 8 November 2007.

¹⁰ Impugned Decision, para. 5.

¹¹ T. 5 December 2007, pg. 32.

unreasonable delay in the progression of this case. Moreover, the Chamber recalls that a Prosecution case may be formally closed even where, as here, a Prosecution witness being recalled by the Defence has not yet been heard.¹² The Chamber also recalls that the ICTR and ICTY jurisprudence allows for the reopening of a case only under "exceptional circumstances."¹³

11. Accordingly, the Chamber does not find that there is reason to believe that the Impugned 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.

FOR THESE REASONS, THE CHAMBER

I. DENIES the motions in their entirety.

Arusha, 25 June 2008, done in English.

Dennis C. M. Byron

Gberdao Gustave Kam

Vagn Joensen

Presiding Judge

Judge

Judge

[Seal of the Tribunal]

¹² *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98 bis of the Rules of Procedure and Evidence (TC), 20 August 2002, para. 16.

¹³ *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, Joint Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Motion for Disclosure of Documents under Rule 68 and for Re-opening of her Case (TC), 29 April 2008, para. 49.