UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 02 July 2008

THE PROSECUTOR

v.

Hormisdas NSENGIMANA

Case No. ICTR-2001-69-I

ORAL DECISION ON THE DEFENCE REQUEST TO USE A DOCUMENT DURING THE TESTIMONY OF DEFENSE WITNESS MARIE GORETTI UWINGABIRE

Rules 89 and 92*bis *of the Rules of Procedure and Evidence

The Prosecution
Wallace Kapaya
Sylver Ntukamazina
Charity Kagwi-Ndungu
Brian Wallace
Iskandar Ismail
Jane Mukangira

The Defence
Emmanuel Altit
David Hooper

Transcripts pp. 14-16

MR. PRESIDENT:

During the examination-in-chief of Defence witness Marie Goretti Uwingabire, on Monday, the 30th of June 2008, the Defence wanted to use a document. The Prosecution objected to its admission. After an initial discussion, this Chamber postponed that part of her testimony pending further submissions from the parties. The following day, on the 1st of July, the parties addressed the Chamber with references to case law. The Chamber will now render an oral ruling.

The document is a written declaration by the witness's father, Augustin Nyamulinda, who, in 1994, was director of *École primaire normale* in Nyanza. He knew Father Nsengimana. The declaration was taken in the presence of *Maître* Emmanuel Altit and defence investigator, Rémy Mazas, as well as the witness.

According to the Defence, the witness took down the dictation of her father in handwriting, but the text of the manuscript was typed by the investigator and then presented to Nyamulinda, who signed it in Kibuye on 25th September 2004. Nyamulinda is later deceased.

There is also a video of the interview which the Defence has offered to make available to the Chamber. The Defence refers to Rule 89(C) and Rule 92 *bis* of the Rules of Procedure and Evidence. According to the Defence, these provisions are complementary, should be read together, and interpreted in light of the statutory right to a fair trial. Admission of the document will be in conformity with the spirit of these rules and contribute to the establishment of the truth. The present situation is, according to the Defence, distinguishable from case law cited by the Prosecution.

The Prosecution, referring to case law, submits that Rule 92 *bis* exclusively regulates the admission of written statements from deceased persons. As the document goes to the acts and conduct of the accused, it is inadmissible already for that reason. The formal requirements in Rule 92 *bis* have also not been complied with. The document was not listed as a Defence exhibit under Rule 73 *ter.*

The Defence has not asked the witness any questions about the document. And the Chamber will now, at this stage, discuss the situation it is presently faced with based on the rules referred to and based on the following reasoning provided by *Maître* Altit yesterday:

"This is the testimony of the father of the witness, and his testimony is particularly important because the father was an eyewitness to all the events that happened at that time. It is even more important to -- because, to my knowledge, this was the first and the last time that the father gave a declaration. So the clarifications that he can bring are important. Lastly, this testimony was captured on videotape, and there is a written statement which confirms what the witness has told us during her examination-in-chief. So she, herself, took down in her own handwriting the statement of her father."

And then some portions are skipped, and the quote continues: "The witness is, unfortunately, deceased. And I believe he can provide clarification on all that happened because he was an eyewitness. And he actually confirms what his daughter has told us during her examination-in-chief."

According to Rule 89(C), the Chamber may admit any relevant evidence. Rule 90(A) provides that witnesses shall, in principle, be heard directly by the Chamber, unless it has ordered a deposition as provided for in Rule 71. Rule 92 *bis* allows for the admission of written statements of witnesses instead of oral testimony, provided that such evidence goes to a matter other than the act and conduct of the accused. Rule 92 *bis* (C) contains a specific provision regulating the procedure of declarations from deceased witnesses

The Chamber has previously addressed the relationship between these provisions, in particular in two decisions dated 19th January 2005 and 14th February 2007, rendered during the Bagosora et al trial, which both related to statements of deceased witnesses. These decisions were commented upon by the parties during their submissions.

The Chamber has held that testimonial statements can be admitted into evidence only through Rule 92 *bis*. This approach is based on jurisprudence by the Appeals Chamber which has clarified that the party cannot tender a written statement given by a prospective witness to an investigator under the general Rule 89(C) in order to avoid the stringency of the special provision in Rule 92 *bis.*

The question has been raised whether the present situation can be distinguished from the Chamber's case law. One argument has been that the rules are complementary, and that it is important to establish the truth. This does not add anything in relation to the previous case law. And another argument has been that Rule 92 *bis* gives a margin of manoeuvre. Again, the Chamber finds that previous case law solves this issue.

And when it comes particularly to the formulation quoted by the Defence in Rule 92(C), it does not change the situation either. The formulation is "subject to any order to the contrary." But this formulation is only the beginning of 92(C) which relates to the procedural requirement within that provision.

And when it comes to the videotape argument, we cannot see that that changes the situation either. It would actually be a way to get the written declaration in through the back door by a different medium.

So it follows from this and from the previous case law that the entire statement goes to the act and conduct of the accused, if that is the case, it cannot be admitted as testimonial statement under
Rule 92 *bis* or, alternatively, under Rule 89(C). And this statement does go to the conduct -- the act and conduct of the accused. So we cannot admit this statement as the testimony of the father.

This said, this does not prevent the Defence from asking the witness about what her father told her in 1994 about Father Nsengimana's acts. The Defence has already done that during its examination-in-chief.

And, secondly, the Defence may also ask this witness about what the father said when the statement was taken in her presence in September 2004.

Thirdly, the Prosecution may cross-examine the witness about what she heard her father say, not only in 1994, but also in 2004, should it so wish.

The situation now is then that we will ask the witness to take her place in the witness box again,

and we will invite the Defence to ask the witness the question the Defence wants to ask, including possible questions about the 2004 events. And based on these questions, we will see how the situation develops.