



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: 15 July 2008

THE PROSECUTOR

v.

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

**DECISION ON JOSEPH NZIRORERA'S MOTION TO VACATE ADJUDICATED
FACT NO. 13**

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INTRODUCTION

1. On 11 December 2006¹ the Chamber took judicial notice of the following fact from the Trial Chamber Judgement of the *Musema* case:

“Within the area of Gisovu Tea Factory, Twumba Cellule, Gisovu Commune, Musema ordered the rape of Annunciata Mujawayeze, a Tutsi woman, and the cutting off of her breast to be fed to her son. She was in fact killed.” (“Fact No. 13”)²

2. Joseph Nzirorera now moves the Chamber to reconsider its decision, and to order that this fact be vacated.³ He submits that all of the criteria for reconsideration are met in the present instance, in particular, that: 1) there are new material facts justifying reconsideration; and 2) the Chamber erred in taking judicial notice of Fact No.13, on the basis that: i) the Chamber relied on a fact presented by the Prosecution which was taken out of context from the judgement; and ii) in taking judicial notice of a fact which was determined in favour of the accused and which could not be challenged on appeal, the Chamber frustrated the requirement that judicial notice may only be taken of facts which have been adjudicated on appeal, or not appealed.

3. The Prosecution responds that Fact No. 13 was fully litigated and the evidence establishing this fact was verified by the Trial Chamber in the *Musema* case and the conditions prescribed by this Chamber for the admission of an adjudicated fact were met. However, the Prosecution concedes that Fact No. 13 was not verified or accepted by the Appeals Chamber, and leaves it to the Chamber's discretion to determine the issue.⁴

DELIBERATIONS

4. The Chamber recalls that it has the inherent power to 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

¹ *The Prosecutor v. Édouard Karemera, Mathieu Ndirumapatse, and Joseph Nzirorera*, (“*Karemera et al.*”) Case No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (TC), (“Decision”) pp. 17-18 and Adjudicated Fact No. 13 cited therein; See also *Karemera et al.*, *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (AC), 16 June 2005 (“*Appeals Chamber Decision*”) and *Karemera et al.*, *Decision on Prosecution Motion for Judicial Notice* (TC), 9 November 2005.

² See *Prosecutor v. Musema*, (“*Musema*”) No. ICTR-96-13-T, *Judgement and Sentence* (TC), 27 January 2000, para. 828 (“*Musema case*”); see also *Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement* (AC), 16 November 2001 (“*Musema Appeals Judgement*”)

³ Joseph Nzirorera's Motion to Vacate Adjudicated Fact No. 13, filed on 1 May 2008.

⁴ Prosecution's Response to Joseph Nzirorera's Motion to Vacate Adjudicated Fact No. 13, filed on 6 May 2008.

original decision; and (3) there is reason to believe that its original decision was erroneous, or constituted an abuse of power that resulted in an injustice.⁵ The Chamber recalls that the burden is on the party seeking reconsideration to demonstrate that these special circumstances exist.

Are there "new facts" warranting reconsideration?

5. The Chamber does not consider that Joseph Nzirorera sufficiently identifies the "new fact" which would justify reconsideration of this decision. Nzirorera may be referring to either his submission that Fact No. 13 was not finally adjudicated upon appeal, or that Fact No. 13 was taken out of context, or both. In any event, the Chamber recalls that the Trial and Appeals judgements in the *Musema* case were issued on 27 January 2000 and 16 November 2001, respectively. The Chamber's Decision to take judicial notice of this fact was rendered on 11 December 2006. However, Nzirorera's Motion was not filed until 1 May 2008, more than a year after the Chamber issued its Decision. It is therefore difficult for the Chamber to accept that the findings in the *Musema* Trial and Appeals judgements concerning Fact No. 13 constitute a "new fact" or "material change in circumstance". Nzirorera's submissions on this point therefore fall to be rejected.

Was Fact No. 13 taken out of context?

6. In submitting that the Chamber erred in relying upon a fact which the Prosecution presented out of context, Joseph Nzirorera submits that, in the following paragraph of that judgement (paragraph 829), the Trial Chamber held that, even if there was evidence that *Musema* ordered the rape, there was no conclusive evidence that the rape referred to in Fact No. 13 actually took place. Consequently, he points out, *Musema* was not convicted for ordering this rape. He notes that the Appeals Chamber subsequently denied *Musema*'s request to appeal the Trial Chamber's finding that he ordered this rape because *Musema* was not convicted of this rape. Joseph Nzirorera submits that it is therefore unfair and misleading for the Chamber to take judicial notice of Fact No. 13.

7. In its Appeal Decision in this case, the Appeals Chamber emphasized that a Trial Chamber "can and indeed must decline to take judicial notice of facts if it considers that the way they are formulated – abstracted from the context in the judgement from which they came – is misleading, or inconsistent with the facts actually adjudicated in the cases in

⁵ *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8.

question".⁶ Moreover, the Trial Chamber will not evaluate the clarity and accuracy of a given fact in isolation: rather, it will have regard to the surrounding proposed adjudicated facts to determine whether the fact in question is unclear or misleading in that context, or whether it will become unclear because one or more surrounding purported judicial facts will be denied judicial notice.⁷

8. The Chamber recalls the context of the Trial Chamber's reasoning in *Musema* concerning the events described in Fact No. 13:

827. The Chamber has considered the testimony of Musema in light of the pre-trial statements he made to Swiss authorities which differ not only from his testimony but from each other in material respects. ... In light of these gross inconsistencies, for which Musema does not have any reasonable explanation, the Chamber concludes that the only reasonable explanation for the inconsistencies is that he is not being truthful.

828. Having considered the evidence, as set forth above, the Chamber finds that the Prosecution has established beyond a reasonable doubt that Musema ordered the rape of Annunciata Mujawyezu, a Tutsi woman, and the cutting off of her breast to be fed to her son. No evidence was introduced to indicate that he ordered her to be killed, although there is conclusive evidence that she was in fact killed. Considering Musema's high position in the *commune*, he must have known that his words would necessarily have had an important and even binding impact on his interlocutors.

829. There is no conclusive evidence that Annunciata Mujawyezu was raped, or that her breast was cut off, although there is some evidence to support an inference that these acts were perpetrated.

The Chamber notes that the Trial Chamber did not take account of this incident, either as a basis for a conviction of Musema on the count in question, or in determining the sentence passed.⁸ The Trial Chamber also found that, whereas there was sufficient evidence that Musema ordered the rape of the victim, it was not sufficient for him to incur criminal responsibility, given that no evidence was adduced to show the order was executed to produce the result of rape.⁹

9. In light of the above, the Chamber does not consider Fact No. 13 to be misleading, inconsistent, or otherwise taken out of context of the judgement. It is the ordering of the rape which is the subject of Fact No. 13. This fact does not refer to the actual occurrence of the rape and murder, nor does it indicate that Musema incurred individual criminal responsibility for such acts. Further, the Chamber considers that Fact No. 13 was not unclear or misleading

⁶ Appeals Chamber Decision, para. 55.

⁷ *Prosecutor v. Popovic et al.*, Case No. IT-05-88-T, Decision on Popovic's Motion for Adjudicated Facts with Annex (TC), 2 June 2008, para. 10 ("*Popovic* Decision").

⁸ *Musema* Judgement (AC) para. 168 referring to Judgement (TC) paras. 976 to 1008.

⁹ *Musema* Judgement (TC) para. 889.

in the context of other proposed adjudicated facts evaluated by the Chamber in its Decision. Accordingly, Nzirorera's submissions on this issue fall to be rejected.

Was Fact No. 13 Finally Adjudicated on Appeal?

10. Joseph Nzirorera submits that the Chamber erred in taking judicial notice of a fact which was determined in favour of the accused and which could not be challenged on appeal. He contends that, in so doing, the Chamber frustrated the requirement that judicial notice may only be taken of facts which have been adjudicated on appeal, or not appealed.

11. In its Decision, this Chamber held that "a fact cannot be considered as adjudicated in circumstances where those facts *are* or *might be* subject to *pending appeal*". The Chamber considers that this finding does not preclude it from taking judicial notice of a fact which the Appeals Chamber has declined to consider on appeal. In such circumstances, the key issue is not whether the fact was appealable in character, but whether the fact is definitive or the subject of ongoing appeal proceedings. A Trial Chamber may, for example, decline to consider a fact as definitive where the fact is the subject of recently re-opened appeal proceedings.¹⁰ The Appeals proceedings in the *Musema* case were completed over six years ago: clearly, Fact No. 13 is finally adjudicated for the purposes of taking judicial notice. Nzirorera's submissions in this regard are accordingly rejected.

FOR THESE REASONS, THE CHAMBER

DENIES Joseph Nzirorera's Motion in its entirety.

Arusha, 15 July 2008, done in English.

Dennis C. M. Byron

Gberdao Gustave Kam

Vagn Joensen

Presiding Judge

Judge

Judge

[Seal of the Tribunal]

¹⁰ See for example *Popovic* Decision, para. 6; *Prosecutor v Seselj*, Case No. IT-03-67, Decision on the Prosecution Motion to Take Judicial Notice of Facts under Rule 94(B) of the Rules of Procedure and Evidence (TC), 10 December 2007, para. 16.