



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 28 October 2008

The PROSECUTOR v. Joseph KANYABASHI

Case No. ICTR-96-15-T

The PROSECUTOR v. Sylvain NSABIMANA

Case No. ICTR-97-29-T

Joint Case No. ICTR-98-42-T

**DECISION ON KANYABASHI'S AND NSABIMANA'S MOTIONS TO CROSS-
EXAMINE PROSECUTION WITNESS QA ON ADDITIONAL TOPICS**

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED of the

- i. “*Requête de Joseph Kanyabashi afin de contre interroger le témoin à charge QA sur d’autres sujets*”, filed confidentially on 6 October 2008 (“Kanyabashi’s Motion”);
- ii. “*Requête de Sylvain Nsabimana aux fins de contre interroger le témoin QA sur d’autres sujets*”, filed confidentially on 21 October 2008 (“Nsabimana’s Motion”);

CONSIDERING the:

- i. “Prosecutor’s Response to the ‘*Requête de Joseph Kanyabashi afin de contre interroger le témoin à charge QA sur d’autres sujets*,’” filed confidentially on 10 October 2008 (“Prosecution’s Response to Kanyabashi’s Motion”);
- ii. “*Réponse de Sylvain Nsabimana à la ‘Requête de Joseph Kanyabashi afin de contre interroger le témoin à charge QA sur d’autres sujets,’*” filed confidentially on 10 October 2008 (“Nsabimana’s Response to Kanyabashi’s Motion”);
- iii. “Alphonse Nteziryayo’s Response to the ‘*Requête de Joseph Kanyabashi afin de contre interroger le témoin à charge QA sur d’autres sujets*,’” filed confidentially on 10 October 2008 (“Nteziryayo’s Response to Kanyabashi’s Motion”);
- iv. “*Réplique de Joseph Kanyabashi aux réponses du Procureur, de Nsabimana et de Nteziryayo relativement à sa requête de Joseph Kanyabashi afin de contre interroger le témoin à charge QA sur d’autres sujets*,’” filed confidentially on 14 October 2008 (“Kanyabashi’s Reply”);
- v. “Prosecutor’s Response to the ‘*Requête de Sylvain Nsabimana aux fins de contre interroger le témoin à charge QA sur d’autres sujets*,’” filed confidentially on 22 October 2008 (“Prosecution’s Response to Nsabimana’s Motion”);
- vi. “*Réponse de Joseph Kanyabashi à la Requête de Sylvain Nsabimana aux fins de contre interroger le témoin à charge QA sur d’autres sujets*,’” filed confidentially on 22 October 2008 (“Kanyabashi’s Response to Nsabimana’s Motion”);
- vii. “*Réplique de Sylvain Nsabimana à la Réponse du Procureur à sa ‘Requête aux fins de contre interroger le témoin à charge QA sur d’autres sujets*,’” filed confidentially on 23 October 2008 (“Nsabimana’s Reply”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Motions pursuant to Rule 73 (A) of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. On 2 July 2008, the Chamber granted Kanyabashi's Motion to recall Prosecution Witness QA for further examination on specific contradictions as found in Witness QA's *Gacaca* record of 2006, namely whether Witness QA was present at roadblocks and participated in lootings between April and July 1994.¹
2. On 4 September 2008, the Defence for Kanyabashi filed a motion before the Canadian Court for the ICTR to be provided with the transcripts of Witness QA's statement (given under the pseudonym DDM-41), to a rogatory commission on 12 and 13 May 2008 in the context of the trial of Désiré Munyaneza. On 10 September 2008, the Canadian judicial authorities granted the Defence request and ordered that the transcripts be sent to the ICTR Registrar. The transcripts were received by the Registry on 17 September 2008. Upon Kanyabashi's request, the Chamber issued an order for the Registrar to disclose the said transcripts on 30 September 2008.²
3. On 6 and 21 October 2008, the Defence for Kanyabashi and for Nsabimana filed their respective Motions to cross-examine Prosecution Witness QA on additional topics related to the transcripts of his 12 and 13 May 2008 statements to the Canadian authorities. Attached to the Motions are CDs containing the transcripts of QA's statements before the rogatory commission of 12 and 13 May 2008 and the English version of QA's *Gacaca* dossier of 2006.
4. The Chamber notes that the requests submitted in Nsabimana's Motion are identical to those submitted in his Response to Kanyabashi's Motion; therefore the Response will not be reflected in this Decision.

SUBMISSIONS OF THE PARTIES

Kanyabashi's Motion

5. The Defence requests to cross-examine Prosecution Witness QA on lies that the Witness allegedly admitted having told and which concern Kanyabashi. According to the 12 and 13 May 2008 transcripts, Witness QA confirmed that an individual asked Witness QA to give false evidence about the content of Kanyabashi's speech in Butare on 19 April 1994 and to testify that Kanyabashi assured President Sindikubwabo that his instructions had been put into action. The transcripts would also demonstrate that Witness QA admitted that he lied about this matter and about other issues when he was interviewed by the ICTR Prosecution in 1996 and during his testimony before the ICTR on 18 March 2004. Witness QA would also state that this particular individual introduced him to the ICTR Prosecution investigators in 1996 and that Witness QA falsely testified out of fear of that person and other persons.
6. The Defence requests to cross-examine Witness QA with respect to lies he admitted to having told about Désiré Munyaneza. According to the transcripts of 12 and 13 May 2008, three people asked Witness QA to testify against Munyaneza and offered him 1,000,000

¹ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's motion to re-open his case and to re-call Prosecution Witness QA, 2 July 2008.

² *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Confidential Motion for Disclosure of the Transcripts of Witness QA's Statement before Canadian Judicial Authorities, 30 September 2008.

Rwandan Francs. The next morning, Witness QA falsely accused Munyaneza before the Canadian police, because of the money and because he was afraid of IBUKA members and local authorities. Witness QA later decided to inform the Defence for Munyaneza about the false testimony because he never received the money, he had planned to go into exile and he was feeling guilty for having lied.

7. The Defence requests to cross-examine Witness QA on his statements before the rogatory commission to the effect that he would be willing to testify falsely again if it meant that he could return home to his family and that a person will tell the truth only when he is inclined to do so.

8. The Defence also requests to cross-examine Witness QA on his real status in Butare *préfecture* in 1994 and about his possession of weapons between April and July 1994.

9. Finally, the Defence requests to cross-examine Witness QA on the fact that he was convicted by a *Gacaca* court for several attacks and that he fled Rwanda to avoid his sentence. According to the transcripts of 12 and 13 May 2008, Witness QA falsely stated that he had been accused only of one attack concerning the death of one person.

10. The Defence submits that the above listed topics are relevant to Kanyabashi's case as they directly concern Witness QA's credibility; furthermore they relate to incitement of false accusations against Kanyabashi.

Prosecution's Response to Kanyabashi's Motion

11. The Prosecution opposes the Motion and submits that in its Decision of 2 July 2008 and in its Scheduling Order of 30 September 2008 the Chamber ruled on the limits of Witness QA's further cross-examination. The Prosecution submits therefore that Kanyabashi's Motion is a request for reconsideration of the Chamber's decision and that the requirements for reconsideration have not been met. Alternatively, the Prosecution submits that Witness QA should only be additionally recalled and cross-examined on the nature of Kanyabashi's speech of 19 April 1994.

12. The Prosecution objects to the cross-examination of Witness QA on his alleged lies about Désiré Munyaneza, because it is not within the Chamber's competence to determine Munyaneza's guilt or innocence. The Prosecution also objects to the cross-examination of Witness QA on his willingness to lie again. The Prosecution submits that this line of cross-examination is too vague and cannot be used for assessing the credibility of the witness.

13. The Prosecution does not object to the witness being cross-examined on the exact nature of his position in Butare *préfecture* in 1994 because Witness QA's testimony before this Chamber and his statement before the rogatory commission are inconsistent on that point. Witness QA may also be cross-examined on the issue of whether he was armed between April and July 1994 and what weapons he was armed with at which times, as this topic relates to inconsistencies between statements made to the Chamber and others made during his *Gacaca* trial. The Prosecution does not object to the Defence cross-examining Witness QA on his conviction by a *Gacaca* court for various attacks and on the fact that he fled justice.

Nteziryayo's Response to Kanyabashi's Motion

14. The Defence for Nteziryayo supports the Motion and joins the request to cross-examine Witness QA on the issues raised by the Defence for Kanyabashi.

Kanyabashi's Reply

15. The Defence for Kanyabashi replies to the Prosecution Response that the fact that Witness QA was incited by an individual to give false testimony directly concerns Witness QA's credibility and the integrity of the trial proceedings. According to the Defence, the fact that this individual introduced Witness QA to the ICTR Prosecution indicates that the Prosecution has been manipulated.

16. The Defence submits that Witness QA's assertions that he had been incited to give false testimony about Désiré Munyaneza, that he remains willing to give false testimony and that a person will tell the truth only when he is inclined to do so directly concern Witness QA's credibility, even if they do not relate directly to Kanyabashi's case.

Nsabimana's Motion

17. The Defence for Nsabimana requests that it be allowed to cross-examine the witness on the following two subjects, in addition to those subjects alluded to in Kanyabashi's Motion of 6 October 2008:

18. The Defence requests to cross-examine Witness QA regarding a meeting held by Nsabimana on a football field in Ngoma parish, and in particular on the order of the speakers and the date of the meeting. According to Witness QA's testimony before this Chamber, Kanyabashi spoke first and was followed by Nsabimana, who closed by saying: "things must be such as they were programmed to be done, as was known by the president of the republic."³ However, before the rogatory commission, Witness QA not only reversed the speaking order, but he did not mention Nsabimana's final formulation at all. While Witness QA stated before this Chamber that the meeting was held at the end of May 1994, he said before the rogatory commission that the RPF arrived in Butare at the end of April 1994, meaning that the meeting must have taken place before May 1994.

19. The Defence requests to cross-examine Witness QA on his knowledge about killings at the Ngoma parish. Witness QA testified before this Chamber in 2004 that he himself saw the bodies of Tutsi who had been killed the day before in Ngoma parish. However, Witness QA stated before the rogatory commission that he heard about these killings from other people, including from the priest at the parish the day following the killings.

Prosecution's Response to Nsabimana's Motion

20. The Prosecution opposes the Motion. It submits that as Nsabimana was not an accused before the Canadian courts, Witness QA was not obligated to repeat verbatim the complete speech given by Nsabimana during the meeting held on a football field in Ngoma parish; furthermore it submits that an omission is not a contradiction and does not necessarily concern the credibility of a witness. The Prosecution states that the Defence failed to indicate

³ The Defence cites T. 22 March 2004, p. 9 French Version (corresponds to p. 8 English Version)

how the question of whether the speech was given in April or May 1994 prejudices the conduct of its case.

21. The Prosecution submits that Witness QA did not allege before this Chamber that Nsabimana was involved in killings at Ngoma parish and that the Defence failed to show how the alleged contradiction concerning this issue prejudices its case.

Kanyabashi's Response to Nsabimana's Motion

22. The Defence for Kanyabashi supports the Motion and requests that it be given authorisation to cross-examine Witness QA with regard to any subjects that may eventually be authorised by the Chamber.

Nsabimana's Reply

23. The Defence submits that in its Response, the Prosecution has failed to address the issue of the order of speeches at the Ngoma parish meeting, which is an important factor in assessing the witness' credibility. In addition, the Defence states that to not cross-examine Witness QA about the alleged content of Nsabimana's speech would gravely prejudice the Nsabimana's rights.

24. Regarding Witness QA's knowledge about the killings which took place at Ngoma parish, the Defence submits that testifying, first, to having personally witnessed an event and, subsequently, to having only heard about its occurrence, constitutes a serious contradiction that undermines the witness' credibility. Furthermore, the Defence states that the Prosecution tried to connect the above-mentioned meeting and the killings at Ngoma parish through Witness QA and that it is therefore relevant to cross-examine Witness QA on this issue.

DELIBERATIONS

25. According to the jurisprudence, a Chamber may recall a witness where good cause is demonstrated by the moving party. Factors to be taken into account are the purpose for which the witness will testify and the party's justification for not offering such evidence when the witness originally testified.⁴ The recall of a witness should be granted only in the most compelling of circumstances where further evidence is of significant probative value and not of a cumulative nature, such as to explore inconsistencies between a witness' testimony and a declaration obtained subsequently. In case of inconsistencies, the Defence may request the recall of a witness if prejudice can be shown from its inability to put these inconsistencies to that witness. If there is no need for the witness' explanation of the inconsistency, because it is minor or its nature is self-evident, then the witness will not be recalled.⁵

26. The Chamber notes that Prosecution Witness QA testified before the ICTR in March 2004; that Witness QA gave a statement to the Canadian rogatory commission in May 2008 and that the Defence for Kanyabashi and Nsabimana obtained the transcripts of the rogatory

⁴ *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ and QY For Additional Cross-examination, 3 March 2006, para. 32.

⁵ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's motion to re-open his case and to re-call Prosecution Witness QA, 2 July 2008, para. 33.

commission on or after 30 September 2008. Therefore, the evidence could not have been presented during Witness QA's testimony and the Motions are timely filed.

Alleged False Testimony Regarding Kanyabashi's Speech of 19 April 1994

27. The Chamber considers that Witness QA's testimony before this Chamber and his statements before the rogatory commission regarding the content of Kanyabashi's speech on 19 April 1994 appear to be inconsistent. Before this Chamber, the Witness testified that Kanyabashi thanked the President of the Republic for having visited the Butare region and promised on behalf of all *bourgmestres* to implement the President's instructions. Before the rogatory commission, the witness appears to have stated that Kanyabashi thanked the President without adding anything else about following his instructions.⁶ Furthermore, in his statement to the rogatory commission, Witness QA appears to admit to the facts that a certain individual incited him to give false testimony and introduced him to the ICTR Prosecution, and to having lied before this Chamber out of fear of this individual.⁷

28. The Chamber considers that the apparent discrepancies and the alleged admission of false testimony may relate to Witness QA's credibility and could be of significant probative value. The allegation of incitement to give false evidence against Kanyabashi could be probative and warrants the recall of Witness QA for further cross-examination. Therefore, the Chamber grants the request to recall and cross-examine Witness QA about the content of Kanyabashi's speech on 19 April 1994 and about having been incited to give false evidence before this Chamber.

Alleged False Testimony and Disposition to Repeat False Testimony

29. Regarding the request to cross-examine Witness QA on alleged false testimony about Désiré Munyaneza, the Chamber notes that Witness QA did not testify before this Chamber about Munyaneza and that there is no apparent contradiction between Witness QA's testimony before this Chamber and his statement before the rogatory commission in that regard.

30. However, Witness QA's alleged agreement to give false testimony and his alleged inclination to repeat false testimony may relate to his credibility and could be of probative value to Kanyabashi's case. Therefore, the Chamber grants the request to recall and cross-examine Witness QA about the allegation of false testimony and about his alleged inclination to lie.

Witness QA's Status in Butare Préfecture in 1994 and his Possession of Weapons Between April and July 1994

31. The Chamber considers that Witness QA's testimony before this Chamber and his statement before the rogatory commission regarding his leadership position in Butare *préfecture* in 1994 may be inconsistent.⁸ The Chamber considers that the apparent discrepancies regarding Witness QA's position between April and July 1994 may relate to his credibility and could be of significant probative value warranting the recall for further

⁶ Testimony before this Chamber, T. 18 March 2004 p. 79; Rogatory commission, T. 12 May 2008 pp. 24, 25

⁷ Rogatory commission, T. 12 May 2008 pp. 119; T. 13 March 2008 pp. 18, 25, 26.

⁸ Testimony before this Chamber, T. 23 March 2004 p. 27 (ICS).

cross-examination. Therefore, the Chamber grants the request to recall and cross-examine Witness QA on this issue.

32. The Chamber considers that Witness QA's statement before the rogatory commission that he was armed during that time does not seem to contradict his testimony before this Chamber. During Witness QA's testimony, this issue was never raised before this Chamber and there is no basis established for the recall. Therefore, the threshold for recalling Witness QA has not been met and the Chamber denies the request to recall Witness QA on this issue.

Alleged False Testimony about Gacaca Proceedings

33. The Chamber considers that the request to cross-examine Witness QA on his alleged false testimony before the rogatory commission that during his *Gacaca* proceedings he was only accused of one attack concerning the death of a certain person has no bearing on Witness QA's testimony before this Chamber. Therefore, the Chamber denies the request for recall of Witness QA on this issue.

Testimony about a Meeting held at Ngoma Parish Football Field

34. The Chamber considers that Witness QA's testimony before this Chamber and his statement to the rogatory commission do not appear to contain any contradiction regarding the order of speeches given by Nsabimana and Kanyabashi or regarding the date of the meeting held at the Ngoma parish. While the witness testified before this Chamber that Kanyabashi spoke before Nsabimana did,⁹ he did not explicitly indicate the order of speeches in his statements before the rogatory commission.¹⁰ Furthermore, while the witness testified before this Chamber that the meeting took place at the end of May 1994, he did not provide any date in his statement before the rogatory commission. The alleged discrepancy in the timeframes appears to be an inference from the Defence and does not meet the threshold for recalling a witness. Therefore the Chamber denies Nsabimana's request to cross-examine the witness on this issue.

35. Regarding the content of Nsabimana's speech, the Chamber considers that while Witness QA testified before this Chamber that Nsabimana stated that "things must be such as they were programmed to be done, as was known by the president of the republic" and "things must go on as they used to be, and as programmed,"¹¹ he did not mention that Nsabimana uttered these words in his statements before the rogatory commission. The Chamber considers that this alleged difference may relate to Witness QA's credibility and to accusations against Nsabimana and could be probative. The Chamber therefore grants Nsabimana's request to recall and cross-examine Witness QA about whether or not Nsabimana stated the above-mentioned words during the speech at Ngoma parish.

Killings at Ngoma Commune Parish

36. The Chamber considers that there does not appear to be any inconsistency between Witness QA's statement before the rogatory commission and his testimony before this Chamber concerning his knowledge about the killings at Ngoma *commune* parish. Before this Chamber the witness testified that he was not present during the killings but saw bodies of

⁹ Testimony before this Chamber, T. 22 March 2002 pp. 7, 8.

¹⁰ Rogatory commission, T. 12 May 2008 pp. 56-58.

¹¹ Testimony before this Chamber, T. 22 March 2002 p. 8; rogatory commission, T. 12 May 2008 pp. 56-58.

the killed persons the next morning.¹² The issue of whether or not he did see any dead bodies the next day was not raised before the rogatory commission. The witness was only asked whether or not he was present during the killings; the witness denied having been present.¹³ Therefore, the threshold for recalling a witness has not been met and the Chamber denies the request to recall Witness QA on this issue.

Nteziryayo's Request

37. Regarding the Defence for Nteziryayo's request to cross-examine Witness QA on the issues raised by the Defence for Kanyabashi, the Chamber notes that a response should only address matters raised in the motion. A response is not a forum for adding new requests such as the ones put forward by the Defence for Nteziryayo. The proper procedure would have been for the Defence to file its own motion. However, in the interests of justice and judicial economy, the Chamber will address the Defence for Nteziryayo's request.

38. The Chamber notes that Witness QA did not testify about Nteziryayo before this Chamber or before the rogatory commission. In addition, the Defence for Nteziryayo declined to cross-examine Witness QA when he testified before this Chamber.¹⁴ Therefore, the Chamber denies the request to further cross-examine Witness QA.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Motions in part;

GRANTS the Defence for Kanyabashi request to further cross-examine Witness QA on the content of Kanyabashi's speech of 19 April 1994; on having been incited to give false evidence in this regard; on having agreed to give false testimony and on his disposition to tell lies; on his leadership position in Butare *préfecture* between April and July 1994; the Prosecution may re-examine Witness QA on the same topics.

GRANTS the Defence for Nsabimana request to further cross-examine Witness QA on the content of Nsabimana's speech at the Ngoma parish; the Prosecution may re-examine Witness QA on the same topics.

DENIES the Motions in all other respects.

Arusha, 28 October 2008

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

¹² Testimony before this Chamber, T. 22 March 2002 pp. 54, 55.

¹³ Rogatory commission, T. 12 May p. 58.

¹⁴ Testimony before this Chamber, T. 23 March 2002 (ICS) p. 30.