

ICTR-98-44-T  
19-11-2008  
(38375-38371)

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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:** 19 November 2008

JUDICIAL RECORDS ARCHIVES  
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**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**

*Case No. ICTR-98-44-T*

**DECISION ON JOSEPH NZIRORERA'S OMNIBUS MOTION ON THE  
TESTIMONY OF AHMED MBONYUNKIZA, NOTICE OF 15<sup>TH</sup> VIOLATION OF  
RULE 72(E), AND MOTION TO STRIKE THE PROSECUTOR'S RESPONSE**

*Rules 54, 72(E) and 73(E) of the Rules of Procedure and Evidence*

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**Defence Counsel for Joseph Nzirorera**  
Peter Robinson and Patrick Nimy Mayidika  
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## INTRODUCTION

1. On 10 September 2008, Joseph Nzirorera filed a motion<sup>1</sup> seeking: (1) a declaration that he has no case to answer on the testimony of Prosecution Witness Ahmed Mbonyunkiza; and (2) reconsideration of the Chamber's decisions not to investigate Mbonyunkiza, under Rule 91(B) of the Rules of Procedure and Evidence, for false testimony.<sup>2</sup> The Prosecution's Response was filed on 22 September 2008.<sup>3</sup>

2. On 24 September 2008, Joseph Nzirorera filed a motion to strike the Prosecution's Response, on the ground that it was untimely filed. This motion, in addition, alleges a fifteenth violation of Rule 72(E).<sup>4</sup>

## DELIBERATIONS

### *Preliminary Issues Related to Nzirorera's Motion to Strike the Prosecutor's Response*

3. The Chamber notes that Joseph Nzirorera erred when he filed his Motion to Strike the Prosecutor's Response under Rule 72(E) instead of Rule 73(E). Furthermore, the Chamber finds that Nzirorera should have made this argument in a Reply to the Prosecutor's Response to his Omnibus Motion, instead of in an entirely new motion. Therefore, the Chamber finds that Nzirorera should only be paid fees for filing the Motion to Strike the Prosecutor's Response under the pay rate for filing a reply.

4. The Prosecution states that, to the best of its recollection, its Response to Joseph Nzirorera's Omnibus Motion was submitted for filing on 12 September 2008, purportedly at a time when the CMS officer in charge was away on mission. The Prosecution cannot recall to which officer the Response was submitted. The Prosecution requests that the Chamber grant it an extension of time to review its Response to the Omnibus Motion, which was filed on 22 September 2008.

5. The Chamber recalls that, according to Rule 73(E), a responding party shall file a reply within five days from the date on which Counsel received the motion. Nzirorera's Omnibus Motion was filed on 10 September 2008, which means that the Prosecution had until 15 September 2008 to file its Response. The Chamber does not accept the Prosecution's excuse for filing a response more than a week after the deadline prescribed by the Rules of Procedure and Evidence and does not take the Response into consideration.

<sup>1</sup> Joseph Nzirorera's Omnibus Motion on the Testimony of Ahmed Mbonyunkiza, filed on 10 September 2008, ("Omnibus Motion").

<sup>2</sup> Oral Decision of 14 October 2005 denying as premature Nzirorera's oral motion to have an amicus curiae appointed to investigate whether Witness Mbonyunkiza gave false testimony to the Chamber; *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony (TC), 29 December 2006.

<sup>3</sup> Prosecutor's Response to Joseph Nzirorera's Omnibus Motion on the Testimony of Ahmed Mbonyunkiza, filed on 22 September 2008 ("Prosecution's Response").

<sup>4</sup> Joseph Nzirorera's Notice of 15<sup>th</sup> Violation of Rule 72(E) and Motion to Strike Prosecutor's Response to Joseph Nzirorera's Omnibus Motion on the Testimony of Ahmed Mbonyunkiza, filed on 24 September 2008, ("Motion to Strike the Prosecutor's Response").

### No Case to Answer

6. Rule 98bis confers upon the Chamber the power to enter a judgement of acquittal on any "count" in the indictment where there is insufficient evidence to sustain a conviction. Further, in some instances Chambers have ruled that, although there was *prima facie* evidence to sustain a conviction on a particular count in the indictment, the accused should not be called upon to rebut those allegations for which insufficient evidence had been adduced.

7. In his Motion Joseph Nzirorera relies on a decision rendered in the *Kalimanzira* case,<sup>5</sup> which concerned allegations upon which a conviction could be based.<sup>6</sup> No other evidence had been presented in support of these allegations but the testimony of one witness. When the Prosecution, at the Chamber's invitation, stated that it would not rely on the testimony of that particular witness, the Chamber ruled that the Accused had no case to answer in relation to those particular allegations.

8. Joseph Nzirorera's reliance on the *Kalimanzira* decision is misplaced. Ahmed Mbonnyunkiza's testimony concerns meetings that took place in early 1992 and, if believed, constitutes background information reflecting on the allegations as of January 1994 upon which a conviction could be based. His testimony is not the only such evidence concerning the allegations that the Prosecution has presented.

9. Chambers have not in the past ruled that an accused had no case to answer in respect of the testimony *per se* of a particular witness. Further, three problems inherent in Joseph Nzirorera's argument regarding the testimony of Ahmed Mbonnyunkiza render it unpersuasive. First, Nzirorera's request encompasses the totality of Mbonnyunkiza's testimony, which lasted 13 full or partial trial days, but he cites only four inconsistencies with the testimony of four other Prosecution witnesses. Moreover, if the Chamber is, as he suggests, already in a position to make the assessment that the testimony is so unworthy of belief as to require no further refutation, it is unclear why Nzirorera would call upon thirteen additional witnesses<sup>7</sup> to contradict it.<sup>8</sup> Finally, the Chamber could only decide that Mbonnyunkiza is not credible by determining that certain Prosecution witnesses are credible, at least as to certain facts. Even at the invitation of an Accused, the Chamber will not err by crediting the testimony of a Prosecution witness prior to hearing all the evidence, including that presented by each Accused.<sup>9</sup> The Chamber assesses the weight of all admitted evidence at the end of the trial after hearing the totality of the evidence.<sup>10</sup>

<sup>5</sup> *Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Decision of No Case to Answer (TC), 3 September 2008 ("*Kalimanzira* Decision").

<sup>6</sup> *See Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Decision on Defence Motion to Exclude Prosecution Witnesses BWM, BWN, BXB, BXC, BXD and BXL (TC), 24 June 2006.

<sup>7</sup> Nzirorera's Motion, para. 14.

<sup>8</sup> The Chamber recently noted that an excessive number of witnesses had been scheduled by Nzirorera to prove the same facts. *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Order to Joseph Nzirorera to Reduce his Witness List, 24 Oct 2008, para. 8.

<sup>9</sup> *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonnyunkiza for False Testimony, 29 Dec 2006.

<sup>10</sup> *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Admit Statements of Augustin Karara (TC), 9 July 2008, para. 18.

**Reconsideration of Chamber's Decision not to Investigate Ahmed Mbonyunkiza for False Testimony**

10. 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 warranting the exceptional remedy of reconsideration.<sup>11</sup> The Chamber recalls that it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.<sup>12</sup>

11. The Chamber has already denied the Defence request, pursuant to Rule 91(B), to direct the Registrar to appoint an *amicus curiae* to investigate Ahmed Mbonyunkiza for false testimony.<sup>13</sup> The Chamber identified several factors that support the ordering of an investigation, such as: (1) the belief of the witness at the time the statement was made that it was false, (2) an intent by the witness to mislead and cause harm, (3) a relationship between the statement and a material matter in the case, and (4) the possible bearing of the statement on the Chamber's decision.<sup>14</sup> Taking these factors into consideration, the Chamber concluded that it did not have strong reasons for believing that Mbonyunkiza had knowingly and wilfully given false testimony. Therefore, under Rule 91(B), the prerequisite for directing the Registrar to appoint an *amicus curiae* to investigate the matter was absent.

12. As Joseph Nzirorera concedes, motions for reconsideration are granted only in extraordinary circumstances. He suggests that a new fact and new law justify reconsideration. The new fact that a fifth witness contradicted Ahmed Mbonyunkiza's testimony, after the Chamber's 2006 Decision<sup>15</sup> in no way affects the rationale of the decision the Chamber is being asked to reconsider. While each witness's testimony will assuredly enter into the Chamber's assessment of the probative value of and the weighing of every piece of evidence, conflicting testimony does not suffice to demonstrate that a contradicted witness has intentionally given false testimony.

13. The new law brought to the Chamber's attention does not concern Rule 91(B). The *Šešelj* Decision<sup>16</sup>, which clarifies the standard for instigating contempt proceedings in the context of the disclosure of confidential information, confines itself to Rule 77(D), and does not mention or shed any new light on Rule 91(B).

14. The Chamber concludes that the portion of Nzirorera's Motion, which concerns reconsideration of the Chamber's decision not to investigate Ahmed Mbonyunkiza for false testimony, is so lacking in legal and logical support both as to the relief requested and the

<sup>11</sup> *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8.

<sup>12</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions (TC), 8 November 2007.

<sup>13</sup> *Idem.* The Decision documents three motions by Nzirorera for an investigation, made on 14 October 2005, 1 March 2006, and 29 May 2006.

<sup>14</sup> The Chamber cited, at para. 6, *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision on Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R" (TC), 9 March 1998.

<sup>15</sup> *Karemera et al.*, Case No. ICTR-98-44-P, Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony, 29 Dec 2006.


<sup>16</sup> *Prosecutor v. Šešelj*, IT-03-67-AR77.2, Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008, *Public Redacted Version* (AC), 25 July 2008.

arguments made in support thereof, that it must be deemed frivolous, and all fees related to it should be denied.

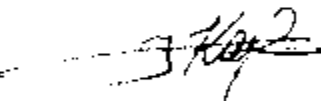
**FOR THESE REASONS, THE CHAMBER**

- I. **DENIES** Joseph Nzirorera's Omnibus Motion in its entirety.
- II. **DIRECTS** the Registrar to: (1) pay Counsel for Nzirorera under the pay rate for replies only for all fees incurred in the researching and drafting of the Notice of 15<sup>th</sup> violation of Rule 72 (E) and Motion to Strike the Prosecutor's Response; and (2) deny Counsel for Nzirorera fees for researching and drafting that portion of the Omnibus Motion which concerns reconsideration of the Chamber's prior decision not to investigate Ahmed Mbonnyunkiza for false testimony.

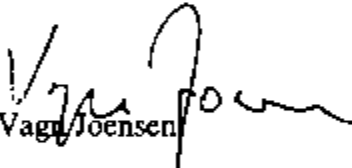
Arusha, 19 November 2008, done in English.

  
Dennis C. M. Byron

Presiding Judge

  
Gberdao Gustave Kam

Judge

  
Vagn Joensen

Judge

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