



UNITED NATIONS
NATIONS UNIES

ICTR-00-56-T
03-12-08
(28187-28184)

28187.
PM

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before Judges: Asoka de Silva, Presiding
Taghrid Hikmet
Seon Ki Park

Registrar: Adama Dieng

Date: 3 December 2008

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU
Case No. ICTR-00-56-T

JUDICIAL RECORDS ARCHIVES
RECEIVED

1 2008 DEC - 3 10 5:07

**DECISION ON NZUWONEMEYE'S VERY URGENT THIRD MOTION TO VARY
HIS WITNESS LIST PURSUANT TO RULE 73 TER**

Office of the Prosecutor:

Mr Alphonse Van
Mr Moussa Sefon
Mr Segun Jegede
Mr Lloyd Strickland
Mr Abubacarr Tambadou
Ms Felistas Mushi
Ms Faria Rekkas

Counsel for the Defence:

Mr Gilles St-Laurent and Mr Benoît Henry for Augustin Bizimungu
Mr Christopher Black and Mr Vincent Lurquin for Augustin Ndingiliyimana
Mr Charles Taku and Ms Beth Lyons for François-Xavier Nzuwonemeye
Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

INTRODUCTION

1. The Defence for Nzuwonemeye ("Defence") presented its case from 23 June to 8 October 2008. On 8 October 2008 the Chamber granted the Defence's request to call two Defence Witnesses (F10 and B2) during the Accused Sagahutu's case.¹ Witness F10 testified via video-link on 24 October 2008. Witness B2's testimony is still outstanding. On 14 November 2008, the Defence filed a Motion ("Defence Motion") to replace Witness B2 with Witness K3.² The Prosecution filed a Response opposing the Defence Motion on the grounds that Witness K3 had previously testified as protected Witness XXO for the Prosecution in the case of *Bagosora et al.*³ The Defence filed a reply stating that Trial Chamber I had authorized the Defence to access Witness XXO's identifying information and to interview Witness XXO.⁴ The Prosecution filed a rejoinder opposing the Defence Motion.⁵

DELIBERATIONS

2. Rule 73ter(E) of the Rules of Procedure and Evidence ("Rules") provides that after a Defence case has started, the Chamber may authorize the variation of a witness list if it is in the interests of justice. In a case with multiple accused, the Defence case as a whole effectively starts with the presentation of the first accused's defence.⁶ In considering the interests of justice, Trial Chambers have taken into account various factors such as the potential importance of the testimony in relation to existing witnesses and allegations in the indictment, the complexity of the case, any prejudice to the opposing party, the legitimacy of the reasons and timing for the variation of the witness list.⁷

3. The Defence requests the Chamber to permit it to vary its witness list by substituting Witness K3 for Witness B2. The Defence submits that Witness B2 would not be able to come and testify in Arusha due to security and professional reasons. The Defence further submits that Witness K3, who it had not been able to contact since he went to Brussels, may now be able to be located in Europe.⁸ The Chamber notes that Witness K3 was a *gendarme* in the

¹ T. 8 October 2008, p. 83; See also T. 16 September 2008, p. 30.
² Nzuwonemeye Defence Very Urgent Motion To Vary The Witness List Under Rule 73 ter, dated 15 November 2008 (sic) and filed on 13 November 2008. The Defence subsequently filed a Corrigendum to this Defence Motion in order to correct the date: Nzuwonemeye Date Corrigendum on Nzuwonemeye Defence [sic] Very Urgent Third Motion to Vary the Witness List Under Rule 73ter, filed on 14 November 2008 ("Defence Motion").
³ Réponse Consolidée du Procureur à "Nzuwonemeye Defence very urgent Motion to vary the Witness List under Rule 73 ter" datée du 15 Novembre 2008 et déposée au Greffe le 13 Novembre 2008 et à "Date Corrigendum on Nzuwonemeye Defence very urgent Third Motion to vary the Witness List under Rule 73 ter" datée du 14 Novembre 2008 et déposée au Greffe le 14 Novembre 2008, filed on 19 November 2008.
⁴ Nzuwonemeye Defence Reply To The "Réponse Consolidée du Procureur à "Nzuwonemeye Defence very urgent Third Motion to vary the Witness List under Rule 73 ter datée du 14 Novembre 2008", filed on 20 November 2008, paras. 11-14; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision On Nzuwonemeye Request For Disclosure Of Identifying Information Of Witness XXO And Authorization To Interview Him, 31 October 2005 ("Bagosora Decision").
⁵ Duplique Du Procureur à "Nzuwonemeye Defence Reply To The [Réponse Consolidée du Procureur A "Nzuwonemeye Defence very Urgent Third Motion to vary the Witness List under Rule 73 ter du 14 Novembre 2008", filed on 21 November 2008.
⁶ *Ndindiliyimana et al.*, Decision On Nzuwonemeye's Request To Vary His Witness List, 31 January 2008, para. 3; *Prosecutor v. Alphonse Nteziryayo*, Joint Case No. ICTR-98-42-T, Decision on Alphonse Nteziryayo's Motion to Modify His Witness List, 14 July 2006, para. 24.
⁷ *Ndindiliyimana et al.*, Decision On Nzuwonemeye's Request To Vary His Witness List, 31 January 2008, para. 3, Decision on Augustin Bizimungu's Request to Vary His Witness List, 24 October 2007, para. 3 (citations omitted).
⁸ Defence Motion, paras. 9-10.

group which was allegedly in charge of protecting Prime Minister Agathe Uwilingiyimana prior to her death. Witness K3 is expected to testify about the circumstances surrounding the death of the Prime Minister and the situation at her residence, including the arrival and disarmament of the Belgian UNAMIR soldiers and the Prime Minister's attempt to escape. He is also expected to testify how the Prime Minister was discovered in her hiding place, that she was killed by Presidential Guard soldiers and that ESM soldiers were also present. In addition, he is expected to testify that no armoured vehicles were present at or fired upon the Prime Minister's residence.⁹

4. The Defence submits that Witness K3 was on the Defence list since the filing of the pre-Defence brief and was never withdrawn from Nzuwonemeye's witness list.¹⁰ The Chamber however recalls that on 7 March 2008, the Defence for Nzuwonemeye withdrew Witness K3 from its witness list.¹¹ The Chamber further recalls that the Defence interviewed Witness K3 (then Witness XXO) on 18 April 2006, after permission was granted by the *Bagosora et al.* Trial Chamber.¹² The Chamber also notes that despite having met Witness K3 on 18 April 2006 the Defence was unable to locate this witness in sufficient time for him to testify before the close of its case on 8 October 2008.

5. The Chamber recalls that Rule 46(A) of the Rules provides that a Chamber may after a warning impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings or is otherwise contrary to the interests of justice. The Chamber admonishes the Defence for misleading the Chamber by stating that Witness K3 had never been withdrawn from its witness list. The Chamber also considers that the Defence's failure to locate Witness K3 for over two years demonstrates a lack of due diligence. The Chamber therefore finds the Defence's behaviour obstructive to the proceedings and issues a warning to Lead Counsel for Nzuwonemeye pursuant to Rule 46(A).

6. The Chamber, however, finds that Witness K3's testimony appears to be relevant to the allegations against the Accused Nzuwonemeye's, particularly given Witness K3's position at the time of the events in question.¹³

7. The Chamber has already granted the Defence's request to present Witness B2's testimony during Sagahutu's Defence case. The Chamber finds that the substitution of Witness K3 for Witness B2 will not further delay the proceedings or cause any prejudice to the Prosecution. The Chamber therefore finds that it is in the interests of justice to allow the Defence to vary its witness list in order to replace Witness B2 with Witness K3. However in order not to further delay the proceedings the Chamber finds it necessary to limit Witness K3's examination-in-chief to no more than 1 hour.

⁹ Defence Motion, paras. 2, 13.

¹⁰ Defence Motion, para. 9; *Mémoire Préable A La Présentation Des Eléments De Preuve A Décharge de Francois Nzuwonemeye*, 15 March 2007, p. 24.

¹¹ Nzuwonemeye Defence Compliance With The Trial Chamber's Order In Its "Decision on Request to Vary His Witness List," Dated 31 January 2008 and Observations on Same, filed on 7 March 2008, para. 2.

¹² Bagosora Decision.

¹³ See in particular paras. 22, 25, 38, 78, 103 – 108 of the Amended Indictment dated 24 August 2004.

28184

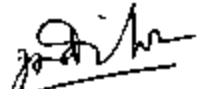
FOR THE ABOVE REASONS, THE CHAMBER HEREBY

GRANTS the Defence request to replace Witness B2 with Witness K3;

ISSUES a warning to Lead Counsel for Nzuwonemeye pursuant to Rule 46(A) of the Rules;
and

DIRECTS the Defence to limit its examination-in-chief of Witness K3 to no more than
1 hour.

Arusha, 3 December 2008, done in English.


Asoka de Silva

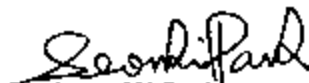
Presiding Judge



Taghrid Hikmet

Judge

[Seal of the Tribunal]


Seon Ki Park

Judge