



UNITED NATIONS
NATIONS UNIES

**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: 4 December 2008

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

**DECISION ON BIZIMUNGU'S MOTION FOR THE ADMISSION INTO EVIDENCE
OF THE TRANSCRIPTS AND EXHIBITS OF WITNESS BTH'S TESTIMONY IN
THE KAREMERA ET AL. CASE PURSUANT TO RULE 92 BIS**

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INTRODUCTION

1. On 4 November 2008, the Defence for the Accused Bizimungu ("Defence") filed a Motion requesting the Chamber to admit into evidence closed and open session trial transcripts, identification documents and exhibits of Witness GFA/BTH's testimony given in the *Karemera et al.* case between 10 and 17 April 2008 ("Defence Motion").¹ The Prosecution filed a response opposing the Motion ("Prosecution Response").² The Defence replied to the Prosecution Response.³
2. Witness GFA testified as a Prosecution Witness against Augustin Bizimungu on 30, 31 January and 1, 2 February 2006. Witness GFA also testified as a Prosecution witness in the case of *Bizimungu et al.* from 11 to 13 October 2004 and in the case of *Karemera et al.* from 8 to 20 June 2006.
3. On 8 February 2008 Witness GFA stated in a recorded interview with a representative of the Accused Bicomumpaka's Defence team in the case of *Bizimungu et al.* that he had given false testimony and that he wanted to recant his testimony.⁴
4. Witness GFA was recalled, under the pseudonym BTH ("Witness GFA/BTH"), to testify in the case of *Karemera et al.* from 10 to 17 April 2008. In that testimony, Witness GFA/BTH admitted that he lied before the Tribunal.⁵ Witness GFA/BTH was also recalled in the case of *Bizimungu et al.* and gave further testimony on 30 April and 5 May 2008. On 6 May 2008 Witness GFA/BTH absconded.⁶
5. On 16 May 2008, the Defence made an application to the *Karemera et al.* Chamber, pursuant to Rules 75(F) and (G) of the Rules of Procedure and Evidence ("Rules"), for access to, and use of the closed session and extracted testimony and the sealed documents currently sought for admission. The Defence's application was subsequently granted.⁷

¹ Requête D'Augustin Bizimungu en Vertu de l'article 92bis D) et C) du RPP en Vue de Verser au Dossier Le Compte-Rendue De La Déposition du Témoin BTH Donnée Dans L'Affaire Karemera et al. Du 10 Au 17 Avril, 2008 Et Pièces Déposées à L'occasion De Celle-Ci, filed on 4 November 2008 ("Defence Motion").

² Prosecutor's Response to "Requête D'Augustin Bizimungu en Vertu de l'article 92bis D) et C) du RPP en Vue de Verser au Dossier Le Compte-Rendue De La Déposition du Témoin BTH Donnée Dans L'Affaire Karemera et al. Du 10 Au 17 Avril, 2008 Et Pièces Déposées à L'occasion De Celle-Ci" filed on 10 November 2008 ("Prosecution Response").

³ Réplique D'Augustin Bizimungu à la Réponse Du Procureur à sa Requête en Vertu de l'article 92bis D) et 89 C) du RPP en Vue de Verser au Dossier Le Compte-Rendue De La Déposition du Témoin BTH Donnée Dans L'Affaire Karemera et al. Du 10 Au 17 Avril, 2008 Et Pièces Déposées à L'occasion De Celle-Ci, filed on 17 November 2008 ("Defence Reply").

⁴ *Prosecutor v. Karemera et al.*, Case Number ICTR-98-44-T, Exhibit DNZ461 admitted on 14 April 2008 (under seal); *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision On Jérôme-Clément Bicomumpaka's Motion Requesting Recall Of Prosecution Witness GFA: Disclosure of Exculpatory Material; And To Meet With Witness GFA (TC), 21 April 2008, paras. 1-2.

⁵ *Karemera et al.*, T. 16 April 2008, p. 13, Witness GFA/BTH says, "I simply wanted the Judges to understand that during my first testimony, I told lies"; T. 16 April 2008, p. 27, Witness GFA/BTH says, "My conscience requested of me that I come back on what I said because I did not want to carry on living bearing the burden of having told a tissue of lies before this Tribunal . . ."; See also T. 17 April 2008, pp. 30-32.

⁶ Registrar's Submission In respect Of The Disappearance Of Prosecution Witness GFA/BTH, 21 May 2008, paras. 5-6.

⁷ *Karemera et al.*, Décision Relative à La Requête De Général Augustin Bizimungu En Communication Des Transcriptions De L'Audition A Huis Clos Du Témoin BTH Et Des Pièces Produites Sous Scellés Durant Ces Audiences (TC), 26 May 2008. Rule 75 (F) provides that "once protective measures have been ordered in respect of ... a witness in any proceedings before the Tribunal, such protective measures: shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal unless they are rescinded, varied or augmented in accordance with the procedure set out in this Rule." Rule 75 (G) requires that "a party to the

DELIBERATIONS

Admission of Transcripts as Evidence

6. Rule 92 *bis*(D) of the Rules gives a Trial Chamber the discretionary power to “admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.”

7. The meaning of the term “acts and conduct of the accused as charged in the indictment” has been defined by the Appeals Chamber, which noted that the term is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused himself and not the acts and conduct of his co-perpetrators and/or subordinates.⁸ The purpose behind this restriction is to protect the accused’s right to examine or have examined the witnesses against him.⁹

8. For a statement to be admissible under Rule 92 *bis*, the general requirements of relevance and probative value, applicable to all types of evidence under Rule 89(C), must be satisfied.¹⁰ Under Rule 89(C), the Chamber has broad discretion to admit any evidence which it deems to be relevant and of probative value.¹¹ Evidence will be considered relevant, for the purposes of Rule 89(C), if it can be shown that a connection exists between the evidence and proof of an allegation sufficiently pleaded in the indictment.¹² Evidence tendered before the Chamber has probative value if it tends to prove or disprove an issue and has sufficient *indicia* of reliability.¹³

9. The discretion exercised by a Chamber under Rules 92 *bis* and 89(C) must be governed by the accused’s right to a fair trial.¹⁴

second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply: to any Chamber, however constituted, remaining seized of the first proceedings.”

⁸ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request to have Written Statements Admitted Under Rule 92 *bis* (TC), 21 March 2002, para. 22; See also, *Karemera et al.*, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 *bis* of the Rules; and Order for Reduction of Prosecution Witness List (TC), 11 December 2006, para. 11, indicating that the term, “acts and conduct of the accused” has the same meaning in 92 *bis* (D) as it does in 92 *bis* (A).

⁹ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Prosecutor’s Motion to Remove from Her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses (TC), 22 January 2008, para. 19.

¹⁰ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor’s Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 12.

¹¹ *Karemera et al.*, Decision on the Prosecution Motion for Admission Into Evidence of UNAMIR Documents (TC), 20 October 2007, paras. 5-7; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness (AC), 21 July 2000, para. 20; *Prosecutor v. Jeun De Dieu Kumuhandu*, Case No. ICTR-99-54A-T, Decision on Kamuhanda’s Motion to Admit Evidence Pursuant to Rule 89 of the Rules of Procedure and Evidence (TC), 10 February 2003, para 10.

¹² *Karemera et al.*, Decision on Joseph Nzirodera’s Motion to Admit Documents Authored by Enoch Ruhigira (TC), Decision, 26 March 2008, para. 3 (“Karemera Decision 26 March 2008”), citing *Nyiramasuhuko et al.*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsene Shalom Ntahohali on the “Decision on Defence urgent Motion to Declare Part of the Evidence of Witnesses RV and ABZ Inadmissible” (AC), July 2004.

¹³ *Karemera* Decision 26 March 2008, para. 3. A possible criteria for determining reliability was outlined in *Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence Under Rule 89(C) (TC), 25 May 2006, para. 4.

¹⁴ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision On Casimir Bizimungu’s Motion To Vary Witness List And To Admit Evidence Of Witness In Written Form In Lieu Of Oral Testimony (TC), 1 May 2008, para. 20. Article 19 (1) and 20 (2) of the Statute of the International Criminal Tribunal for Rwanda read as follows: 19 (1) The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the

Description of the evidence sought to be admitted

10. The Defence seeks to admit open, extracted and closed session transcripts of Witness GFA/BTH's testimony in *Karemera et al.* on 10, 14, 15, 16 and 17 April 2008 ("Transcripts"), two unsealed exhibits and twenty one sealed exhibits admitted during that testimony ("Exhibits") as well as nineteen identification documents which were not admitted during the proceedings ("Identification Documents").¹⁵

11. The unsealed exhibits consist of the text of a Rwandan law and a publication of the Official Gazette of the Republic of Rwanda.¹⁶

12. The sealed exhibits include: several lists containing the names of persons who were mentioned by number to protect their identities, or names written by Witness GFA/BTH to avoid stating them in court; witness statements given by Witness GFA/BTH and others; investigator's notes; documents relating to Witness GFA/BTH's proceedings in the Rwandan *Gacaca* courts; a transcription of the DVD recordings from the interview conducted by Bicomupaka's Defence with Witness GFA/BTH on 8 February 2008; and a letter purportedly written by Witness GFA/BTH requesting the Tribunal to facilitate such an interview.¹⁷

13. The Identification Documents (of which two are public documents and seventeen were placed under seal) consist of witness statements given by witnesses other than Witness GFA/BTH, interview notes, a transcription of an interview conducted by Bicomupaka's Defence with Witness GFA/BTH on 8 February 2008 and a letter from a witness support advisor.¹⁸

Is the material admissible pursuant to Rule 92 bis(D)?

(i) *Is the evidence relevant and probative?*

14. The Chamber recalls that material relating to the credibility of a witness is *prima facie* relevant and probative.¹⁹ The Transcripts relate to Witness GFA/BTH's credibility and constitute official testimony given before this Tribunal. The Exhibits also relate to Witness GFA/BTH's testimony and credibility. The Chamber is therefore satisfied that the Exhibits and Transcripts meet the general requirements of Rule 89(C).

15. The Chamber, however, is not satisfied that the Identification Documents meet the general requirements of Rule 89(C). First, none of the Identification Documents, apart from the transcription of the interview with Witness GFA/BTH, emanated directly from Witness GFA/BTH. Secondly, none of the Identification Documents were admitted into evidence in the *Karemera et al.* case and therefore such documents fail to demonstrate a sufficient *indicia* of reliability. The Chamber also notes that the transcription of the interview with Witness GFA/BTH appears to be a duplicate of a similar transcription of the same interview which was admitted into evidence by the *Karemera et al.* Trial Chamber as Defence Exhibit DNZ461. The Chamber will consider admitting the transcription marked as Exhibit DNZ461 with the rest of the Exhibits below. In light of the explanations set out above, the Chamber

accused and due regard for the protection of victims and witnesses; 20 (2) In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.

¹⁵ See Confidential Annex 1 to this Decision.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Bizimungu et al.*, Decision on Jerome (*sic*) Bicomupaka's Confidential and Amended Motion to Admit Rwandan Judicial Records into Evidence (TC), 10 June 2008, para. 11, fn. 12.

finds that the Identification Documents are not relevant for the purposes of Rule 89(C) and therefore no analysis pursuant to Rule 92 *bis*(D) is required. The Chamber denies the Defence request with regards to the Identification Documents.

(ii) Do the Transcripts and Exhibits go to proof of a matter other than the acts and conduct of the accused?

16. The Prosecution submits that the trial transcripts sought to be admitted by the Defence do not fall within the scope of Rule 92 *bis*(D) of the Rules because they do not constitute “proof of a matter other than the acts and conduct of the accused.”²⁰ The Defence cites a decision from the *Bizimungu et al.* Trial Chamber and submits that the Chamber should not be prevented from admitting the documents which go to the acts and conduct of the accused.²¹ The Defence requests the Chamber to admit the open, extracted and closed session trial transcripts on the grounds that: Witness GFA/BTH recanted his previous testimony against the Accused Bizimungu in respect of the Accused's conduct and certain acts charged in the Indictment; and that it is unlikely that the Defence will be able to locate Witness GFA/BTH in order to call him to testify.²²

17. The Chamber notes that some portions of Prosecution Witness GFA/BTH's testimony in the *Karemera et al.* case appear to concern the acts and conduct of the Accused in this case.²³ The Chamber recalls that other Trial Chambers of this Tribunal have admitted evidence in the form of written statements or prior testimonies which have gone to the acts and conduct of the Accused.²⁴ More importantly however, the Chamber notes that Rule 92 *bis*, which usually functions to protect the accused, should not be used to prevent the Defence from admitting the evidence of Witness GFA/BTH who admitted to lying before this Chamber during his testimony in the *Karemera et al.* case.²⁵ In addition, the Chamber notes that admission of such materials is necessary in order to properly assess Witness GFA/BTH's credibility and to preserve the Accused's right to a fair trial. For that purpose, the Chamber therefore admits the Transcripts and Exhibits, listed in Confidential Annex 2 to this Decision into evidence.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS IN PART the Defence Motion in respect of the Transcripts and Exhibits listed in Confidential Annex 1 to this Decision;

²⁰ Prosecution Response, paras. 15-16.

²¹ *Bizimungu et al.*, Decision On Defence Motions For The Admission Of Testimony Given By Prosecution Witness GFA Before The Karemera Et Al. Chamber, 26 September 2008 (TC), (“Bizimungu et al. Decision”) para. 28.

²² Defence Motion, paras. 14-15, 29.

²³ See for example *Karemera et al.*, T. 10 April 2008, pp. 26, 45; T. 17 April 2008, pp. 30-32.

²⁴ *Bizimungu et al. Decision*, paras. 26-28; *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Decision on Kamuhanda's Motion to Admit Into Evidence Two Statements by Witness GER (AC), 20 May 2003 (was originally recorded as 20 May 2002), para. 31, “It appears to this Chamber that a proper reading of Rules 89(C) and 92 *bis* may not interfere with the Chamber's discretion in a fitting case, at the instance (*sic*) of the accused, to admit statements of witnesses which are relevant and have probative value, even if those witnesses might be dead;” See also, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Decision on the Prosecution Motion for Admission of Witness Statements (TC), 20 May 2004, paras. 29-30.

²⁵ *Bizimungu et al. Decision*, para. 28.

DENIES the Defence Motion in respect of the Identification Documents listed in Confidential Annex 1 to this Decision;

ADMITS into evidence, pursuant to Rules 89(C) and 92 *bis*(D) of the Rules,

- all Transcripts of Witness GFA/BTH's testimony before the *Karemera et al.* Chamber listed in Confidential Annex 2 to this Decision; and
- all Exhibits listed in Confidential Annex 2 to this Decision; and

DIRECTS the Registry to assign exhibit numbers to all the documents listed in Confidential Annex 2 to this Decision with due regard to the confidentiality of such documents.

Arusha, 4 December 2008, done in English.

Asoka de Silva

Taghrid Hikmet

Seon Ki Park

Presiding Judge

Judge

Judge

[Seal of the Tribunal]