

ICTR-07-91-T
26-2-2009
(3084-3081)

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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: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 26 February 2009

THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-T

2009 FEB 26 1P 6: 01
JUDICIAL RECORDS ARCHIVE
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**DECISION ON DEFENCE MOTION FOR RECONSIDERATION
OF THE CHAMBER'S FURTHER ORDER
FOR THE DEFENCE TO REDUCE ITS WITNESS LIST**

Rules 54 and 73 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Paul Ng'aura
Abdoulaye Seye
Dennis Mabura
Marie Ka

For the Accused:

Allison Turner

INTRODUCTION

1. On 9 and 16 January 2009, the Defence filed, pursuant to a court order, its preliminary list of witnesses, which contained more than forty witnesses.¹ On 4 February 2009, the Defence filed, *ex parte*, a preliminary list of Defence witness summaries pursuant to the Chamber's direction.² The Chamber then made two written orders for the Defence to reduce its Witness List, and one oral order for the Defence file its reduced Witness List.³ Accordingly, the Defence filed a revised Preliminary Witness List and summaries on 16 and 20 February 2009.⁴ On 23 February 2009, the Chamber directed the Defence to further reduce the number of witnesses it will call to give oral testimony to no more than ten.⁵

2. By way of a motion filed on 25 February 2009, the Defence now seeks reconsideration of the Chamber's 23 February 2009 Order for the Defence to reduce its witness list ("the Impugned Decision").⁶

DISCUSSION

Law on Reconsideration

3. Though reconsideration is not expressly provided for in the Statute or the Rules, the Trial Chamber has an inherent power to reverse or revise a prior decision where new material circumstances have arisen that did not exist at the time of the original decision, or where the decision was erroneous or an abuse of discretion and has caused prejudice or injustice to a party.⁷ Further, it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.⁸

¹ *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-PT, "Defence Strictly Confidential, *Ex Parte* and Under Seal Filing," filed 9 January 2009; *Nshogoza*, "Defence Further Strictly Confidential, *Ex Parte* and Sealed Filing," filed 16 January 2009 ("Witness List").

² *Nshogoza*, "Ex Parte Preliminary List of Defence Witness Summaries Filed Pursuant to the Court Order of 28 January 2009, filed 4 February 2009. This was filed pursuant to *Nshogoza*, Order for the Defence to File a Summary of Anticipated Witness Testimony, 28 January 2009.

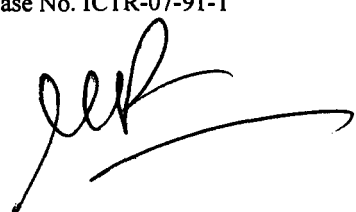
³ *Nshogoza*, *Ex Parte* Order for the Defence to Reduce its List of Witnesses, 12 February 2009; *Ex Parte* Order for the Defence to Further Reduce its List of Witnesses, 17 February 2009; T. 19 February 2009, p.105.

⁴ *Nshogoza*, "Ex Parte Revised Preliminary List of Witness of Defence Witness Summaries Filed Pursuant to Court Order of 12 February 2009," filed 16 February 2009; "Confidential Preliminary List of Defence Witnesses and Motion for One-Week Postponement of Defence Case," 20 February 2009.

⁵ *Nshogoza*, Further Order for the Defence to Reduce its List of Witnesses, 23 February 2009. This Order was made by Judge Khan, sitting pursuant to Rule 54 of the Rules of Procedure and Evidence.

⁶ *Nshogoza*, "Defence Request for Reconsideration of the 'Further Order for the Defence to Reduce its List of Witnesses'," filed 25 February 2009 ("Motion"). Although the Impugned Decision was rendered by a Judge of the Chamber, the Defence requests reconsideration of the Impugned Decision by the full bench. *See* Motion, para. 7.

⁷ *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ngirumpatse's Appeal from the Trial Chamber Decision on 17 September 2008 ("*Karemera* AC Decision"), para. 13; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 26 April 2007, para. 7; *Karemera et al*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions, 8 November 2007, para. 6; *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera et al.*, Decision on Defence Motion for Modification of Protective Order:



Does the Impugned Decision Warrant Reconsideration?

4. The Defence submits that it intended to call forty five witnesses in this case, but that it subsequently reduced the number to thirty six witnesses, and then to twenty witnesses.⁹ According to the Defence, the request to reduce the number of witnesses to no more than ten violates the Accused's right to a fair trial. In addition, the Defence asserts that the Impugned Decision is manifestly unreasonable and that it will "have no practical effect on the expeditious conduct of the proceedings."¹⁰

5. The Chamber recalls that reconsideration is possible where there are new material circumstances that were not known at the time the original decision was made, or where the decision was erroneous or an abuse of discretion. As the Defence has not submitted that there are any new material circumstances warranting reconsideration of the Impugned Decision, the Chamber will consider whether there was an error of law or abuse of discretion.

6. In reaching its decision, the Chamber considered the complexity of the case, including the nature of the charges against the Accused; the fact that the Prosecution called five witnesses to give oral evidence; and that there are several other witnesses for whom the Defence will seek to admit evidence pursuant to Rule 92 *bis*.¹¹

7. Pursuant to its authority under Rule 54, which allows the Chamber to issue such orders as may be necessary for the conduct of the trial, the Chamber twice ordered the Defence to reduce its Witness List due to the repetitive nature of the testimony sought to be adduced before specifically limiting the number of Defence witnesses who can be called to give live testimony to a maximum of ten.

8. The Appeals Chamber has held that it is well established that Trial Chamber's exercise discretion in relation to the conduct of the proceedings before them, and has upheld decisions of Trial Chambers ordering a Party to reduce its list of witnesses to a specific number of witnesses.¹² Where the Trial Chamber has taken into consideration the complexity of the case, or the evidence to be adduced by an accused, the Appeals Chamber has found that it is not a violation of the rights of the Accused for a Trial Chamber to order a reduction in the witness list.¹³ In this case, the Chamber has concluded, taking these factors into

Timing of Disclosure, 31 October 2005, para. 3; *Karemera et al.*, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph).

⁸ See *Prosecutor v. Nzirorera et al.*, Case No. ICTR-98-44-T, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago, 10 October 2003, para 6.

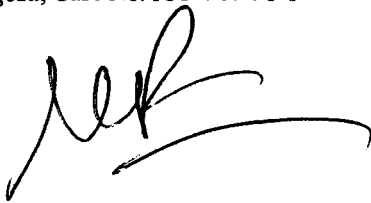
⁹ Motion, paras. 3 -6.

¹⁰ Motion, pp. 3-5; Motion, p. 5, para (c).

¹¹ Impugned Decision. Rule 92 *bis* provides for the admission of the evidence of a witness in the form of a written statement rather than by oral evidence.

¹² *Karemera* AC Decision, general, and para 17: In this case, the Trial Chamber ordered an Accused to reduce his list of witnesses from three hundred and fifty four witnesses to thirty five witnesses.; *Prosecutor v. Elie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal Against the Decision of the Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 ("Kanyabashi Decision").

¹³ *Karemera* AC Decision, para. 23, 27; Kanyabashi Decision, paras 22-24.



consideration, that ten *viva voce* witnesses is sufficient to allow the Accused to adequately present his defence.

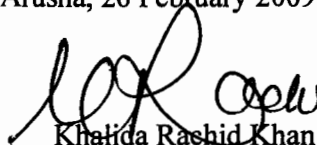
9. The Chamber is not therefore satisfied that there has been an error of law or abuse of discretion that has caused any injustice or prejudice to the Accused. Accordingly, the test for reconsideration is not met.

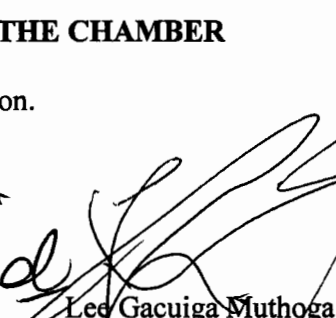
10. However, if the Accused will testify in his own defence, the Chamber will, in the interests of justice, allow the Defence to call the Accused to testify in addition to the ten other witnesses within the allocated time.¹⁴


FOR THESE REASONS THE CHAMBER

DENIES the Defence Motion.

Arusha, 26 February 2009


Khalida Raehid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


Aydin Sefa Akay
Judge

[Seal of the Tribunal]



¹⁴ The Defence case is scheduled to run from 9 March 2009 to 20 March 2009.