

ICTR-98-44-T
(45420-45415)
24-03-2009

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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 Joenson

Registrar: Adama Dieng

Date: 24 March 2009

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

**Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S APPLICATION FOR CERTIFICATION
TO APPEAL THE DECISION DENYING HIS MOTION TO ADMIT TESTIMONY
OF ELIZAPHAN NTAKIRUTIMANA**

Rules 54 and 73(B) of the Rules of Procedure and Evidence

Office of the Prosecutor:
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Defence Counsel for Matthieu Ngirumpatse
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Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika
Ngimbi

INTRODUCTION

1. On 11 December 2006, the Chamber took judicial notice of an adjudicated fact from the Judgment in *The Prosecutor v. Elizaphan and Gerard Ntakirutimana* ("Adjudicated Fact 116").¹ On 18 August 2008, Joseph Nzirorera moved to admit portions of Elizaphan Ntakirutimana's testimony from his own trial into the current proceedings in order to rebut Adjudicated Fact 116.² On 10 November 2008, the Chamber denied the Motion to Admit Testimony in its entirety, finding that Nzirorera had failed to demonstrate how the rebuttal of Adjudicated Fact 116 would be relevant and probative for his own defence.³
2. On 12 November 2008, Joseph Nzirorera filed a motion seeking certification to appeal the Impugned Decision pursuant to Rule 73(B) of the Rules of the Procedure and Evidence.⁴ Nzirorera argues that the Chamber erred in preventing him from rebutting adjudicated facts regardless of which accused, if any, the acts pertained to.
3. In Response, the Prosecution states that while it agrees with the disposition of the Impugned Decision, it also agrees with Joseph Nzirorera that the Chamber's reasoning was in error, and therefore invites the Chamber to modify the reasons for its decision. In the alternative, the Prosecution joins Nzirorera's application for certification to appeal.⁵

DELIBERATIONS

Joseph Nzirorera's Submissions

4. Joseph Nzirorera contends that the Chamber erred in finding that he had not established the relevance and probative value of the testimony of Elizaphan Ntakirutimana to his defence. He states that the Chamber did not cite any authority or precedent for this proposition. Nzirorera submits that because the Indictment alleges that he was a member of a joint criminal enterprise ("JCE") with his co-accused, he risks being held liable for their acts. As such, he submits that the Chamber wrongfully prevented him from rebutting Adjudicated Fact 116 regardless of which accused, if any, the acts pertain to.⁶ Nzirorera argues that the

¹ *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Appeals Chamber Remand of Judicial Notice, 11 December 2006.

² Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana ("Motion to Admit Testimony"), filed on 18 August 2008.

³ *Karemera et al.*, Decision on Motion to Admit Testimony of Elizaphan Ntakirutimana, 10 November 2008 ("Impugned Decision").

⁴ Joseph Nzirorera's Application for Certification to Appeal Decision on Motion to Admit Testimony of Elizaphan Ntakirutimana, filed on 12 November 2008 ("Motion").

⁵ Prosecutor's Response to Joseph Nzirorera's Application for Certification to Appeal Decision on Motion to Admit Testimony of Elizaphan Ntakirutimana, filed on 17 November 2008 ("Response"), para. 7.

⁶ Motion, para. 5.

Impugned Decision eviscerates the right of an accused to rebut adjudicated facts and results in adjudicated facts having conclusive, rather than presumptive, effect.⁷

Prosecution's Submissions

6. The Prosecution, while agreeing with Joseph Nzirorera that an accused in principle should be allowed to rebut an adjudicated fact, further submits that the Chamber did not fully appreciate its submissions opposing the Motion to Admit Testimony, as the Chamber did not address the issue as to what evidence can be used to rebut an adjudicated fact.⁸

7. The Prosecution's position is that it would not be appropriate for the Chamber to receive the very same evidence to rebut an adjudicated fact that was already discounted by the original finder of fact. In the current proceedings, the Prosecution takes the position that Joseph Nzirorera should not be permitted to introduce Elizaphan Ntakirutimana's testimony in order to rebut Adjudicated Fact 116, because that testimony was already considered, and rejected, by Trial Chamber I when making its finding.⁹

8. The Prosecution also claims that the Chamber misinterpreted the Prosecution's Submission concerning the doctrine of *res judicata*. The Prosecution argues that since Elizaphan Ntakirutimana cannot rely on his testimony from his own case to overturn or rebut findings of fact made in his case, no stranger to the case should be permitted to do so either.¹⁰

Reconsideration

9. The Chamber has an inherent power, upon application by one of the parties or *proprio motu*, to reconsider its decisions when: (i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision; (ii) there has been a material change in circumstances since it made its original Decision; or (iii) 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 thereby warranting the exceptional remedy of reconsideration.¹¹

⁷ Motion, para. 6.

⁸ Response, para. 3(i).

⁹ Response, para. 3(i).

¹⁰ Response, para. 3(ii).

¹¹ *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Reconsider the Warning Issued to Co-Counsel, 8 September 2008, para. 4; See also *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-AR72, Decision (Motion for Review or Reconsideration) (AC), 12 September 2000; *Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Interlocutory Appeal from Refusal to Reconsider Decisions relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction" (AC), 2 May 2002, para. 10; *The Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo*, Case No. IT-96-21-A, Decision on Hazim Delić's Emergency Motion to Reconsider Denial of Request of Provisional Release (AC), 1 June 1999, para. 4.

10. Upon further consideration, the Chamber accepts Joseph Nzirorera's submission that it erred in preventing him from rebutting Adjudicated Fact 116 because it was not relevant and probative to his own defence. Because the accused are charged with participating in a JCE, and may be subject to criminal liability for the acts and conduct of each participant in the JCE, the Chamber agrees that each accused should be entitled to bring evidence to rebut an adjudicated fact that pertains to the acts and conduct of the other accused, and indeed any participant in the JCE. It would not be in the interests of justice to prevent an accused from undermining evidence that has the potential to increase his or her personal liability. Having identified an error in the Impugned Decision, the Chamber withdraws its reasoning and finds it appropriate to exercise its *proprio motu* power to reconsider the Impugned Decision.

11. The Chamber recalls that adjudicated facts, of which judicial notice has been taken, may only be rebutted by introducing reliable and credible evidence.¹² In *The Prosecutor v. Elizaphan and Gerard Ntakirutimana*, Trial Chamber I heard the *viva voce* evidence of both Witness CC and the contradictory testimony of Elizaphan Ntakirutimana and found that "[r]egarding the credibility of witness CC, the Chamber notes that he testified about two events in the Bisesero area. His testimony was generally consistent."¹³ Trial Chamber I considered the testimony of Witness CC to be more reliable than that of Ntakirutimana.

12. The Chamber accepts the Prosecution's submission that evidence which has already been considered and rejected by another Trial Chamber in making a finding of fact should not be admissible in a later proceeding to rebut that same finding of fact. In the present circumstances, Trial Chamber I weighed the testimony of both witnesses and determined that Witness CC's version of events was more reliable than Elizaphan Ntakirutimana's. Trial Chamber I was in a much better position to make determinations regarding reliability and credibility than this Chamber, having heard the evidence *viva voce*. Moreover, were this Chamber to re-engage in this determination, it would essentially be acting in review of another Chamber, and therefore outside of its jurisdiction. Finally, the very purpose of admitting adjudicated facts would be undermined by permitting a party to admit such evidence. Judicial economy would not be achieved if parties were entitled to challenge adjudicated facts with evidence that has already been rejected in relation to that finding. Therefore, the Chamber finds that Ntakirutimana's testimony is not admissible to rebut Adjudicated Fact 116.

¹² *Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006, para. 42.

¹³ *The Prosecutor v. Elizaphan and Gerard Ntakirutimana*, Judgment, 21 February 2003, para. 591.

13. However, the Chamber does not accept the Prosecution's submission that it erred with respect to the doctrine of *res judicata*. In its submissions concerning the Motion to Admit Testimony, the Prosecution notes that Adjudicated Fact 116 is *res judicata* as between Elizaphan Ntakirutimana and the Prosecution.¹⁴ The Prosecution then goes a step further, in essence contending that Joseph Nzirorera should not be permitted to accomplish what Ntakirutimana plainly cannot; namely, re-litigating an adverse finding of fact based on evidence which was already considered.¹⁵ The Chamber finds, however, that this stretches the doctrine of *res judicata* too far.

14. *Res judicata* is a procedural bar which operates to prevent the same parties from re-litigating the same issues on substantially the same basis.¹⁶ As pointed out in the Impugned Decision, since Joseph Nzirorera was not a party to *The Prosecutor v. Elizaphan and Gerard Ntakirutimana*, the same party requirement is not met.¹⁷ The doctrine does not control what kind of evidence may be used in a subsequent proceeding involving the same issue, between different parties. The Prosecution has not demonstrated that the Chamber erred either in its understanding of *res judicata*, or its applicability to the present situation.

Certification to Appeal

16. Rule 73(B) provides that leave for an interlocutory appeal may be granted when the applicant demonstrates that the following two conditions are met: 1) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and 2) an immediate resolution by the Appeals Chamber – in the view of the Trial Chamber - may materially advance the proceedings. Certification has been granted where a decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence.¹⁸

18. Joseph Nzirorera's submissions regarding certification to appeal are directed to the reasoning contained in the Impugned Decision, which the Chamber has now withdrawn. Consequently, that issue is now moot. However, the Chamber finds that the issue related to

¹⁴ Prosecutor's Response to Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana, 20 August 2008, para. 7.

¹⁵ Response, para. 3(ii).

¹⁶ See Raitt, *Evidence*, Edinburg 2001, p. 103; See also Black's Law Dictionary, 7th ed. 1999, which defines *res judicata* as: "An affirmative defense barring the same parties from litigating a second law suit on the same claim arising from the same transaction. The three essential elements are: (1) an earlier decision on the issue, (2) a final judgement on the merits and (3) the involvement of the same parties."

¹⁷ Impugned Decision, para. 5.

¹⁸ *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerome-Clement Bicamumpaka, and Prosper Mugiraneza*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 3.

the revised reasons for the Chamber's decision meets the above mentioned criteria for certification to appeal. The Chamber therefore grants certification to appeal the issue related to the revised reasons for the Impugned Decision, should Joseph Nzirorera wish to do so.

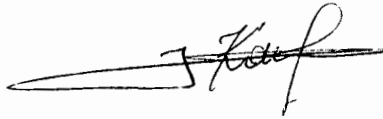
FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

GRANTS Joseph Nzirorera's motion for certification to appeal the Chamber's revised reasons for the Impugned Decision.

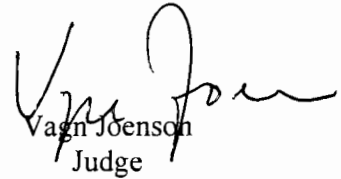
Arusha, 24 March 2009, done in English.



Dennis C. M. Byron
Presiding Judge



Gberdao Gustave Kam
Judge



Vagn Joenson
Judge

