

ICTR-98-44-T
(45433 - 45430)
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 Joensen

Registrar: Adama Dieng

Date: 24 March 2009

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTION

v.

**Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA**
Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR RECONSIDERATION OF
DECISION ON BISENGIMANA DISCLOSURE**

Office of the Prosecution:
Don Webster
Iain Morley
Saidou N'Dow
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. On 26 January 2009, Joseph Nzirorera filed a motion claiming that the Prosecution violated Rule 66(B) and possibly Rule 68 of the Rules of Procedure and Evidence by failing to disclose a letter dated 1 December 2008 from Paul Bisengimana ("Letter").¹ The Chamber denied the Rule 66 Motion on the basis that there was no evidence that the Letter was in fact ever sent and therefore in the possession of the Prosecution.² The Chamber held further that the Rule 66 Motion was frivolous and that fees related to the Rule 66 Motion should be denied.³

2. After filing the Rule 66 Motion, on 2 February 2009, counsel for Joseph Nzirorera contacted the Registry, requesting verification that the Letter was received and transmitted.⁴ On 19 February 2009, the Registry filed submissions pursuant to Rule 33(B) stating that the Letter did not exist in the records of the Tribunal.⁵ Although Paul Bisengimana informed the Registry that he had filed the Letter, he could not recollect whom he gave it to.⁶ The Office of the President, Court Management Services and the United Nations Detention Facility all informed the Registry that they had no evidence of the Letter.⁷

3. Joseph Nzirorera now seeks reconsideration of the sanction imposed on counsel in the Impugned Decision, on the basis that Paul Bisengimana's assertion that he filed the Letter constitutes a new fact.⁸ The Prosecution submits that the Motion for Reconsideration should be denied in its entirety and that fees related to it should be withheld.⁹

DELIBERATIONS

4. The exceptional remedy of reconsideration is justified when there have been new circumstances since the filing of the challenged decision that affect the premise of the

¹ Joseph Nzirorera's 22nd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Paul Bisengimana, filed 26 January 2006 ("Rule 66 Motion").

² *The Prosecutor v. Édouard Karemera, Matthieu Ndirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Joseph Nzirorera's 22nd Notice of Rule 66 Violation and Motion for Remedial Measures: Paul Bisengimana, 13 February 2009 ("Impugned Decision").

³ Impugned Decision, paras. 5-6.

⁴ Registry's Submission under Rule 33(B) of the Rules on Joseph Nzirorera's 22nd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Paul Bisengimana, filed 19 February 2009 ("Registry Submission"), para. 2.

⁵ Registry Submission, para. 8.

⁶ Registry Submission, para. 5.

⁷ Registry Submission, paras. 3 and 6.

⁸ Joseph Nzirorera's Motion for Reconsideration of Decision on Bisengimana Disclosure, filed 23 February 2009 ("Motion for Reconsideration").

⁹ Prosecutor's Response to Nzirorera's Motion for Reconsideration of Decision on Bisengimana Disclosure, filed 27 February 2009 ("Prosecution Response").

decision, such as when a new fact has been discovered that was not previously known to the Chamber.¹⁰ The Motion for Reconsideration does not meet this standard.

5. Joseph Nzirorera argues that the Chamber should reconsider its sanction because it now has a representation from Paul Bisengimana that he sent the Letter to the Prosecution. Nzirorera further argues that making informal inquiries with the Prosecution regarding its receipt of the Letter, as suggested in the Impugned Decision, could not have influenced his duty to file the Rule 66 Motion, since the Prosecution has a record of denying possession of material which it in fact has.¹¹

6. The Chamber finds these arguments inapposite. The pertinent question is counsel's conduct at the time of filing the Rule 66 Motion. Paul Bisengimana's assertion to the Registrar that he filed the Letter, provided after the Rule 66 Motion was filed, does not explain counsel's filing the Rule 66 Motion without any demonstrated reason for belief that the Letter was in the custody or control of the Prosecution, as required by both Rule 66(B)¹² and Rule 68.¹³ Even now counsel for Joseph Nzirorera does not submit that he had any basis for such an assertion.

7. Indeed, the Registry Submission only serves to confirm that the Rule 66 Motion was frivolous. As counsel for Joseph Nzirorera himself makes plain, it was open to him to ask the Registry to make inquiries regarding the transmission and receipt of the Letter before filing the Rule 66 Motion. While Nzirorera asserts that asking the Prosecution directly would be pointless,¹⁴ he does not explain why other means of ascertaining that the Letter was either sent to, or received by, the Prosecution could not have been pursued. Finally, the Chamber notes that the Registry Submission also substantiates that there is no evidence, apart from

¹⁰ *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Reconsideration of 2 December 2008 Decision, 27 February 2009, para. 2; *The Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Bagosora Request for Certification or Reconsideration Concerning Admission of Correspondence, 8 May 2007, para. 5; *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8.

¹¹ Motion for Reconsideration, paras. 5-6.

¹² *Karemera et al.*, Decision on Prosecution's Interlocutory Appeal Concerning Disclosure Obligations (AC), 23 January 2008, para. 12 ("for a Trial Chamber to order inspection of documents ... the defence must (1) demonstrate that the material sought is in the custody or control of the Prosecution...").

¹³ *Prosecutor v. Juvénal Kajelijeli*, Case no. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262 ("Defence must first establish that the evidence was in the possession of the Prosecution"); *Prosecutor v. Radoslav Brđjanin*, Case No. IT-99-36A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for Order to the Registrar to Disclose Certain Materials (AC), 7 December 2004 (application must "be accompanied by *prima facie* proofs tending to show that it is likely that the evidence is exculpatory and is in the possession of the Prosecution").

¹⁴ Motion for Reconsideration, para. 5.

Paul Bisengimana's bare assertion, that the Letter was ever received by anyone in the Tribunal.¹⁵

8. There is therefore no new fact, or any other basis, to reconsider any aspect of the Impugned Decision. The Chamber notes the Prosecution's submission that the Motion for Reconsideration may be in bad faith¹⁶ and finds that it is at the very least abusive of the process and therefore that related fees should be denied.

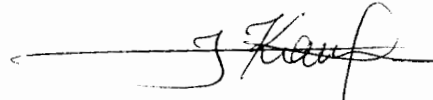
FOR THESE REASONS, THE CHAMBER

- I. **DENIES** Joseph Nzirorera's Motion for Reconsideration in its entirety; and
- II. **DIRECTS** the Registrar to deny counsel for Joseph Nzirorera all fees with respect to the Motion for Reconsideration.

Arusha, 24 March 2009, done in English.



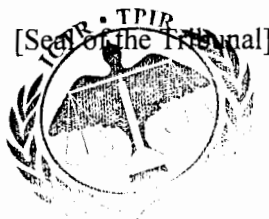
Dennis C. M. Byron
Presiding Judge



Gberdao Gustave Kam
Judge



Vagn Joensen
Judge



¹⁵ See *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko Motion for Reconsideration of the "Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process'", 20 May 2004, p. 3.

¹⁶ Prosecution Response, para. 6.