

ICTR-99-54-T
25-03-2009
(492-487)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 25 March 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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DECISION ON DEFENCE MOTION TO VARY TRIAL DATE

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Defence Counsel

Mr. David C. Thomas

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the “Trial Chamber”);

BEING SEIZED of the “Defence Motion to Continue 18 May 2009 Trial Date”, filed on 11 March 2009 (the “Motion”);

CONSIDERING:

- a) The “Prosecutor’s Response to the Defence Motion to Continue 18 May 2009 Trial Date”, filed on 13 March 2009 (the “Response”); and
- b) “Dr. Ngirabatware’s Consolidated Reply to Prosecutor’s Responses filed on March 13, 2009”, filed on 19 March 2009 (the “Reply”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Motion pursuant to Rule 73(A) of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. On 29 January 2009, the President of the Tribunal issued an Interoffice Memorandum stating that the trial of Augustin Ngirabatware was scheduled to start on 4 May 2009. On the same day, the Trial Chamber granted in part the Prosecution’s Motion to amend the initial indictment and ordered the Prosecution to file an amended indictment within one week of the filing of its Decision.¹
2. On 4 February 2009, the Defence filed a motion requesting the Trial Chamber to vacate the 4 May 2009 trial date.²
3. The Prosecution filed its Amended Indictment on 5 February 2009,³ and the Accused pleaded not guilty to all charges contained in the Amended Indictment during his further appearance on 9 February 2009.
4. On 25 February 2009, the Trial Chamber denied in its entirety the Defence motion to vacate the 4 May 2009 trial date but, for scheduling reasons, ordered that the trial shall commence on 18 May 2009 (“Decision of 25 February 2009”).⁴

SUBMISSIONS OF THE PARTIES

Defence Motion

5. The Defence moves for an order striking the 18 May 2009 trial date.⁵

¹ Decision on Prosecution Motion for Leave to Amend the Indictment, 29 January 2009, p. 11.

² Defence Motion to Vacate Trial Date of May 4, 2009, 4 February 2009, para. 13.

³ Amended Indictment, 5 February 2009.

⁴ Decision on Defence Motion to Vacate Trial Date of 4 May 2009, 25 February 2009, p. 4.

6. The Defence claims that the Accused in the present case is being treated differently from the accused Bizimungu and refers to a decision in the latter case, pursuant to which the Prosecution's request for leave to amend the indictment was denied because the Trial Chamber found that it would bring about substantial changes necessitating that the Accused be given adequate time to prepare his defence. The Defence thus alleges that the Trial Chamber's reasoning in the case of *Bizimungu* was that three months would not be enough time to prepare a defence case and requests that the same reasoning should apply to the Accused in the present case.⁶

7. The Defence submits that the Accused is also being treated differently from other accused as regards preparation time and refers to a table attached to the Motion comparing the time from the initial appearance to the judgement for 31 accused before the Tribunal.⁷ The Defence argues that this difference in treatment is due to the Tribunal's Completion Strategy and claims that this administrative goal was applied to the detriment of the Accused's right to a fair trial.⁸

8. Pointing to the Decision of 25 February 2009, in which the Trial Chamber stated that it had evaluated priorities taking into account *inter alia* the rights of an accused to have a fair trial within a reasonable time, the Defence submits that it cannot understand how the Tribunal could evaluate the time needed for the Accused to prepare for trial, and points to a lack of communication between the Trial Chamber and the Defence.⁹

9. Overall, the Defence submits that it would not be ready to meet the Prosecution's case or to present its own if the trial was to start as scheduled on 18 May 2009¹⁰ and that Counsel would not be able to comply with his obligations under Rule 5 of the Code of Professional Conduct for Defence Counsel before the Tribunal.¹¹

Prosecution's Response

10. The Prosecution reiterates its position that it is ready for a hearing on 18 May 2009 or any date on which the case may subsequently be re-scheduled to commence.¹² It further notes that the Defence does not indicate what would happen if the scheduled trial date is struck out as requested.¹³

11. The Prosecution submits that the Defence is mistaken in its assertion that the Trial Chamber took the Completion Strategy into account when issuing its Decision of 25 February 2009, since it was not mentioned therein as one of the guiding principles governing the determination of a date for commencement of trial.¹⁴

⁵ Motion, para. 21.

⁶ Motion, paras. 14-16.

⁷ Motion, para. 16.

⁸ Motion, paras. 17, 20.

⁹ Motion, para. 20.

¹⁰ Motion, para. 18.

¹¹ Motion, para. 19.

¹² Response, para. 6.

¹³ Response, para. 5.

¹⁴ Response, para. 3.

12. While the Prosecution cannot comment on the Defence state of trial readiness, it submits that it disclosed material pursuant to Rule 66(A)(ii) of the Rules on 13 March 2009, "well beyond" the 60 day period prescribed under this Rule.¹⁵

Defence Reply

13. The Defence requests the Trial Chamber to set a new starting date for the trial for January 2010.¹⁶

14. The Defence compares the dates of initial appearances and scheduled trial dates of those accused currently awaiting trial and finds that a majority of cases awaiting trial have had between three and five years to prepare their defence case.¹⁷

15. The Defence further notes that the Prosecution does not dispute the alleged prejudicially discriminatory treatment of the Accused, and that, although denying that the Completion Strategy was taken into consideration in the Decision of 25 February 2009, the Prosecution is unable to point to any other cause. The Defence therefore resubmits its argument that the Completion Strategy was the main reason for the Trial Chamber's determination of the trial date.¹⁸

16. While the Prosecution's most recent disclosure of material pursuant to Rule 66(A)(ii) of the Rules is acknowledged, the Defence claims that it still needs adequate time to investigate both its witnesses and those of the Prosecution, as well as to collect necessary documents.¹⁹ It also notes that the Prosecution admitted that it has not yet disclosed all the material to which the Defence is entitled under Rule 66(A) of the Rules.²⁰

17. Overall, the Defence reiterates its position, that it cannot be ready for trial on 18 May 2009.²¹

DELIBERATIONS

18. As a preliminary matter, the Trial Chamber underscores that the Defence appears to raise issues similar to those that were adjudicated in the Decision of 25 February 2009.²² In the Trial Chamber's opinion, the appropriate manner to challenge the aforesaid Decision would have been for the Defence to submit a Motion for reconsideration. However, and as the Trial Chamber deems it to be in the interests of justice, it will treat the present Motion as a motion for reconsideration and apply the law accordingly.

Applicable Law

19. The Trial Chamber recalls that it has the inherent power to reconsider its own decisions as an exceptional measure available under particular circumstances and where the interests of justice so require. The criteria for reconsidering include but are not limited to the following: (1) a new fact has been discovered that was not known to the Trial Chamber at the

¹⁵ Response, para. 4.

¹⁶ Reply, paras. 4(l), 9(a).

¹⁷ Reply, paras. 4(a)-4(h).

¹⁸ Reply, para. 4(i).

¹⁹ Reply, para. 4(j).

²⁰ Reply, para. 4(k).

²¹ Reply, para. 4(l).

²² see Decision of 25 February 2009.

time it made its original decision; (2) there has been a material change in circumstances since it made its original decision; or (3) there is reason to believe that its original decision was erroneous, or constituted an abuse of power that resulted in an injustice. The Trial Chamber further recalls that the burden rests with the party seeking reconsideration to demonstrate that sufficiently special circumstances exist.²³

20. The Trial Chamber recalls the issues raised by the Defence in support of its motion to vacate the trial date of 4 May 2009, which was determined by the Trial Chamber in the Decision of 25 February 2009. The Trial Chamber further notes the Defence submission in the present Motion, comparing the circumstances of different accused before this Tribunal, and the timeframes applied in their respective trials, as justification for vacating the scheduled trial date of 18 May 2009. The Chamber considers that this does not amount to a new element warranting a reconsideration of the Decision of 25 February 2009. The Trial Chamber recalls that each situation has to be assessed on a case-by-case basis and that the scheduling of trials in each case can significantly differ in many respects, depending on, *inter alia*, the number of accused, issues of disclosure, the nature of the case, and the judicial calendar. The Trial Chamber therefore rejects this argument.

21. Regarding the Defence allegation that the Completion Strategy was taken into account when deciding upon a trial date, the Trial Chamber recalls that it has not referred to the Completion Strategy in setting the trial date. In any event, the Trial Chamber recalls and agrees with an earlier finding in the case of *Karemera et al.*, according to which “the completion strategy [...] is not equivalent to the mandate of this Tribunal and is more of a target date. [...] Cases are managed by Trial Chambers taking into account the rights of each and every accused, including the right to a fair trial.”²⁴ This finding was confirmed by the Appeals Chamber, which held:

when assessing the implications of Resolution 1503 and Resolution 1534 to on-going trials, the overriding consideration must be the strict adherence to the minimum guarantees afforded to accused persons pursuant to Article 20 of the Tribunal’s Statute.²⁵

22. The Trial Chamber recalls that “the determination of a date for the commencement of a trial is a matter for the general administration of the Tribunal and its judicial calendar.”²⁶

23. Accordingly, the Trial Chamber considers that none of the arguments raised by the Defence warrant a reconsideration of its Decision of 25 February 2009. The Trial Chamber therefore denies the Motion and reiterates that the trial shall commence on 18 May 2009.

24. Finally, the Chamber reminds the Defence that during the Status Conference on 9 February 2009, and in the Decision of 25 February 2009, the Chamber expected that the staffing position of the Defence team will be addressed and completed in a timely manner.²⁷

²³ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Oral Motions by Nyiramasuhuko, Ndayambaje, Nsabimana, Nteziryayo, Ntahobali and the Prosecution for Reconsideration of the Timeframes of Oral Submissions set in the 29 August 2008 Decision and to fix the Duration of Oral Submissions and Scheduling Order, 5 March 2009, para. 20, with further references.

²⁴ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings, 6 March 2007, para. 87.

²⁵ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR15bis.3, Decision on Appeals Pursuant to Rule 15bis(D), 20 April 2007, para. 24.

²⁶ Decision of 25 February 2009, para. 10.

²⁷ Decision of 25 February 2009, para. 11.

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This includes the issue of the appointment of Co-Counsel for which Lead Counsel is responsible.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety; and

REITERATES its order that the trial shall commence on 18 May 2009; and

REMINDS Counsel for the Defence to take action in respect of the appointment of Co-Counsel as soon as possible.

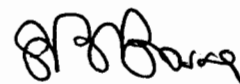
Arusha, 25 March 2009



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]