

2796/H



UNITED NATIONS
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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-44-AR73.16

19th June 2009

{2796/H - 2787}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Iain Bonomy

ICTR Appeals Chamber
Date: 19th June 2009
Action: R. Jura
Copied To: Concerned Judges

Registrar: Mr. Adama Dieng

Decision of: 19 June 2009

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ÉDOUARD KAREMERA
MATTHIEU NGIRUMPATSE
JOSEPH NZIRORERA

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR73.16

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**DECISION ON APPEAL CONCERNING THE SEVERANCE OF
MATTHIEU NGIRUMPATSE**

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Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Joseph Nzirorera

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) is seized of three appeals from Mr. Édouard Karemera, Mr. Matthieu Ngirumpatse, and Mr. Joseph Nzirorera (“Appellants”), filed on 2 April 2009,¹ against the decision of Trial Chamber III to deny a stay of the joint proceedings and to sever Mr. Ngirumpatse from the *Karemera et al.* case.² The Prosecution filed a consolidated response on 9 April 2009.³ Mr. Ngirumpatse and Mr. Nzirorera filed their replies on 11 May 2009.⁴ Mr. Karemera did not file a reply.

INTRODUCTION

2. The Appellants have been in detention since 1998, and their trial originally commenced in November 2003.⁵ After successfully challenging the composition of the bench, their trial was restarted before the present bench on 19 September 2005.⁶ The Prosecution closed its case on 4 December 2007, and Mr. Karemera’s defence started on 7 April 2008.⁷ Although each Appellant intends to present his own case, they have also, at the Trial Chamber’s urging, divided some of the common issues among themselves and intend to call certain mutually beneficial witnesses on key areas.⁸

3. On 18 August 2008, the Trial Chamber learned that Mr. Ngirumpatse was ill and could not attend trial.⁹ Accordingly, the Trial Chamber stayed the proceedings. Estimates for his recovery

¹ *Mémoire d’Appel suite à la décision du 3 Mars 2009 relative à la continuation du procès*, 2 April 2009 (“Karemera Appeal”); *Appel de Matthieu Ngirumpatse contre « Decision on Continuation of Trial » du 3 Mars 2009*, 2 April 2009 (“Ngirumpatse Appeal”); Joseph Nzirorera’s Appeal from Decision to Sever Case of Mathieu (*sic*) Ngirumpatse, 2 April 2009 (“Nzirorera Appeal”).

² *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of Trial, 3 March 2009 (“Impugned Decision”).

³ Prosecutor’s Consolidated Response to “Joseph Nzirorera’s Appeal From Decision to Sever Case of Mathieu (*sic*) Ngirumpatse”, “*Appel de Matthieu Ngirumpatse contre « Decision on Continuation of Trial » du 3 Mars 2009*” and Édouard Karemera’s “*Mémoire d’Appel suite à la décision du 3 Mars 2009 relative à la continuation du procès*”, 9 April 2009 (“Prosecution Response”).

⁴ *Réplique de Matthieu Ngirumpatse à la réponse consolidée du procureur sur l’appel de la “Decision on Continuation of Trial” due 3 mars 2009*, 11 May 2009 (“Ngirumpatse Reply”); Reply Brief: Joseph Nzirorera’s Appeal from Decision to Sever Case of Mathieu (*sic*) Ngirumpatse, 11 May 2009 (“Nzirorera Reply”). Mr. Ngirumpatse also filed an intermediate reply on 23 April 2009 highlighting his intention to reply to the Prosecution Response and his urgent need for a translation. See *Mémoire en réplique intérimaire de M Ngirumpatse sur l’appel de la décision de continuation du procès en date du 3 mars 2009*, 23 April 2009.

⁵ Impugned Decision, para. 35.

⁶ Impugned Decision, para. 1.

⁷ Impugned Decision, para. 1.

⁸ Impugned Decision, para. 45.

⁹ Impugned Decision, para. 10.

were initially one week and then one month.¹⁰ Instead of returning to trial, on 8 October 2008, Mr. Ngirumpatse was transferred to Nairobi for further medical tests where he has remained for treatment.¹¹ Neither the parties nor the Chamber are aware of the full nature of his illness.¹²

4. On 28 October 2008, the Trial Chamber held a status conference. Dr. Épée Hernandez, the Tribunal's Chief Medical Officer, estimated that Mr. Ngirumpatse would need treatment for at least six months, but that she could provide a provisional evaluation of his condition in three months.¹³ Mr. Ngirumpatse, through his counsel, indicated that four defence witnesses could be heard in his absence.¹⁴ His counsel further indicated that, if proceedings were stayed until early 2009, Mr. Ngirumpatse would consent to proceedings being continued in his absence provided that adequate facilities were put in place for him to follow the case from his place of treatment.¹⁵ The Trial Chamber made arrangements to provide Mr. Ngirumpatse with the video recordings and written material connected with the proceedings.¹⁶ After hearing these witnesses, the proceedings were adjourned until February 2009.¹⁷

5. On 9 February 2009, Dr. Hernandez provisionally noted that Mr. Ngirumpatse's condition had improved "remarkably", but that a comprehensive report would only be available in three months.¹⁸ This encouraging assessment – coupled with complaints about the timely receipt of trial related materials and his access to counsel – prompted Mr. Ngirumpatse to withdraw his consent to be tried in his absence.¹⁹ Joined by his co-accused, Mr. Ngirumpatse sought a three-month stay of proceedings to allow for his condition to improve and for a full assessment of his prognosis.²⁰

6. This request was opposed by the Prosecution, which filed a competing motion to sever Mr. Ngirumpatse on 10 February 2009.²¹ A subsequent assessment by Dr. Hernandez provided less encouraging information about Mr. Ngirumpatse's prospects for a quick return to trial. She explained at a status conference on 16 February 2009 and in a report filed on 27 February 2009 that

¹⁰ Impugned Decision, para. 10.

¹¹ Impugned Decision, para. 10.

¹² Impugned Decision, para. 8. The Tribunal's Chief Medical Officer, Dr. Épée Hernandez has provided periodic oral and written updates after consulting with his treating physicians on his general condition and prognosis for recovery. See Impugned Decision, paras. 9, 14.

¹³ Impugned Decision, para. 11.

¹⁴ Impugned Decision, para. 2.

¹⁵ Impugned Decision, para. 16.

¹⁶ Impugned Decision, para. 18.

¹⁷ Impugned Decision, para. 3.

¹⁸ Impugned Decision, para. 13. See also T. 9 February 2009 p. 17 ("[Mr. Ngirumpatse's] clinical state of health is improving remarkably. His medication will continue for three more months, when we will be able to provide a more comprehensive report."). At the status conference of 16 February 2009, Dr. Hernandez suggested that she did not say this and instead only indicated that his condition had stabilized. See T. 16 February 2009 pp. 17, 18.

¹⁹ Impugned Decision, para. 20. See also T. 9 February 2009 pp. 22-25, 27, 28; Ngirumpatse Appeal, paras. 22-30; Ngirumpatse Reply, para. 46.

²⁰ Impugned Decision, paras. 6, 20. See also T. 9 February 2009 pp. 25, 27, 28; Ngirumpatse Appeal, paras. 29, 30.

²¹ Impugned Decision, paras. 5, 22.

Mr. Ngirumpatse would not be fit to attend trial for at least nine months and that he was not responding to treatment.²² She added that his attending physicians decided to continue his treatment for a further six months, which she had previously noted weakened Mr. Ngirumpatse and impacted his ability to concentrate for more than two hours a day.²³

7. On 3 March 2009, the Trial Chamber denied the request to stay the joint proceedings and granted the Prosecution motion to sever Mr. Ngirumpatse from the case.²⁴ It further ordered the trial of Mr. Karemera and Mr. Nzirorera to resume on 23 March 2009 with the hearing of Mr. Karemera's next witness.²⁵ Finally, the Trial Chamber granted certification to appeal the entirety of its decision.²⁶ After Mr. Ngirumpatse waived his right to be present while the appeal was pending, the Trial Chamber stayed the execution of the severance order and continued the presentation of the defence case of Mr. Karemera pending the outcome of the appeal.²⁷

8. In denying the Appellants' requests to stay the proceedings, the Trial Chamber reasoned that any further delay in the proceedings would constitute a violation of Mr. Karemera's and Mr. Nzirorera's right to be tried without undue delay, in particular in view of their already lengthy pre-trial detention, the advanced stage of the proceedings, and the fact that the "defence cases are prepared to proceed imminently and expected to finish within the year".²⁸ The Trial Chamber further pointed to several difficulties which had already resulted from the suspension of the proceedings. For example, some of Mr. Karemera's witnesses were brought to Arusha several times without being able to testify or doing so only after a considerable delay.²⁹

9. The Trial Chamber further determined that "the prejudice sustained by Édouard Karemera and Joseph Nzirorera from the further delay, if the proceedings were to be stayed until Ngirumpatse might become fit to attend trial again, constitutes a conflict of interest" and primarily for that reason severed Mr. Ngirumpatse from the case.³⁰ The Trial Chamber rejected claims that the accused would suffer prejudice from the severance. In particular, it noted that there was no evidence that witnesses for one accused would not also appear for the others.³¹ The Trial Chamber further emphasized that the assessment of Mr. Ngirumpatse's condition suggested that he may not be fit to

²² Impugned Decision, paras. 14, 15.

²³ Impugned Decision, paras. 11, 15, 19.

²⁴ Impugned Decision, p. 16.

²⁵ Impugned Decision, p. 16.

²⁶ Impugned Decision, para. 61. On 12 March 2009, the Trial Chamber clarified that its decision granted certification to all parties. *See also The Prosecutor v. Édouard Karemera et al.*, Case Nos. ICTR-98-44-T and ICTR-98-44E-T, Decision on Urgent Request for Precision or Alternatively Correction of the Decision of 3 March 2009 on Continuation of Trial, 12 March 2009, para. 3.

²⁷ T. 23 March 2009 p. 23.

²⁸ Impugned Decision, para. 38.

²⁹ Impugned Decision, para. 37.

³⁰ Impugned Decision, paras. 43, 54.

attend trial for at least another nine months.³² It determined therefore that his severance was “the least intrusive solution”, bearing in mind “the right of each accused to a fair trial and to be tried without undue delay, as well as the similar interests of victims and the international community that trials concerning serious crimes be completed without unnecessary delays”.³³ As a secondary concern, it held that Mr. Ngirumpatse’s severance served judicial economy and thus was in the interests of justice.³⁴

SUBMISSIONS OF THE PARTIES

10. Several main themes emerge in the Appellants’ submissions challenging the Impugned Decision. The Appellants submit that the Trial Chamber relied on incorrect, inconsistent, or inadequate information, in particular related to Mr. Ngirumpatse’s health and prognosis for recovery, when assessing the possible prejudice resulting from a further stay of proceedings.³⁵ The Appellants challenge the Trial Chamber’s reliance on the Tribunal’s Chief Medical Officer’s assessment as well as the Trial Chamber’s refusal to allow an independent medical expert to assess Mr. Ngirumpatse’s condition.³⁶ Mr. Nzirorera claims that the Chief Medical Officer provided inconsistent reports to the Trial Chamber, first offering a positive prognosis on 9 February 2009, when it appeared that Mr. Ngirumpatse would continue to waive his right to be present, followed by a more pessimistic outlook after he requested a stay of proceedings.³⁷ Finally, Mr. Nzirorera submits that, in relying solely on information provided by the Chief Medical Officer, the Trial Chamber deviated from the practice at the Tribunal and the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in similar matters.³⁸

11. Mr. Ngirumpatse also contests the Trial Chamber’s characterization of his ability to follow and participate in trial proceedings through counsel while receiving treatment.³⁹ He emphasizes that his mental faculties remain intact, and thus he disputes the Trial Chamber’s conclusion that they are insufficient to allow the trial to proceed expeditiously.⁴⁰ In this respect, he highlights that he receives regular reports from his counsel who are capable of defending his interests and discerning

³¹ Impugned Decision, para. 53.

³² Impugned Decision, para. 54.

³³ Impugned Decision, para. 54.

³⁴ Impugned Decision, para. 54.

³⁵ Ngirumpatse Appeal, paras. 76-81; Ngirumpatse Reply, paras. 43-49; Karemera Appeal, paras. 9-20, 48-53; Nzirorera Appeal, paras. 41-77; Nzirorera Reply, paras. 4, 6-15.

³⁶ Ngirumpatse Appeal, paras. 36, 76-81; Karemera Appeal, paras. 48-53; Nzirorera Appeal, paras. 41-77; Nzirorera Reply, paras. 4, 6-15.

³⁷ Nzirorera Appeal, paras. 68; Nzirorera Reply, paras. 9, 10. Furthermore, Mr. Nzirorera submits that the Chief Medical Officer’s report of 27 February 2009, which suggests that Mr. Ngirumpatse was not responding to treatment, is contradicted by laboratory results submitted by Mr. Ngirumpatse reflecting “a decrease in bad cells from 35% to 5%”. Nzirorera Appeal, para. 69. *See also* Nzirorera Reply, para. 10.

³⁸ Nzirorera Appeal, paras. 71-76; Nzirorera Reply, paras. 8, 13.

³⁹ Ngirumpatse Appeal, paras. 77-80.

the limits of their representation without seeking his opinion.⁴¹ Mr. Ngirumpatse further challenges the Trial Chamber's statement in the Impugned Decision that his counsel stated that, since 3 November 2008, he could no longer read,⁴² whereas, he submits, his counsel simply highlighted that he no longer regularly received documents related to his case.⁴³

12. The Appellants further contend that the Trial Chamber erred in concluding that a stay would unduly delay the proceedings concerning Mr. Karemera and Mr. Nzirorera, which necessitated the severance of Mr. Ngirumpatse.⁴⁴ They submit that the Trial Chamber erred in finding a conflict of interest among them and that severance served judicial economy.⁴⁵ They note that Mr. Karemera and Mr. Nzirorera supported the stay of proceedings and waived their right to trial without undue delay insofar as it involved delay arising from Mr. Ngirumpatse's medical condition.⁴⁶

13. Finally, the Appellants argue that the Trial Chamber failed to properly consider the prejudice to their cases that would result from the severance, notably in view of the joint nature of their defence strategy.⁴⁷ They highlight the potential harm they will suffer from the severance by noting that some of the witnesses they intend to call may not be willing to testify in cases of the other Appellants.⁴⁸

14. The Prosecution responds that the Trial Chamber did not err in refusing a further stay of the proceedings and ordering the severance of Mr. Ngirumpatse.⁴⁹ The Prosecution acknowledges that the Trial Chamber did not rely on the extent of medical expertise comparable to that procured by Chambers in the ICTY.⁵⁰ However, according to the Prosecution, the Trial Chamber had an adequate basis for assessing Mr. Ngirumpatse's medical prognosis and fitness for trial as it relied on regular updates from three medical professionals charged with treating him, which were conveyed through the Chief Medical Officer.⁵¹

15. The Prosecution further submits that the Trial Chamber properly held that the fair trial rights of the Appellants favored severance.⁵² In particular, it submits that, given Mr. Ngirumpatse's

⁴⁰ Ngirumpatse Appeal, paras. 77, 78.

⁴¹ Ngirumpatse Appeal, para. 79.

⁴² Ngirumpatse Appeal, para. 80.

⁴³ Ngirumpatse Appeal, para. 80.

⁴⁴ Ngirumpatse Appeal, paras. 53-75; Karemera Appeal, paras. 36-40; Nzirorera Appeal, paras. 84-90.

⁴⁵ Ngirumpatse Appeal, paras. 53-75, 82-95; Karemera Appeal, paras. 30-47; Nzirorera Appeal, paras. 84-106; Nzirorera Reply, paras. 22-31.

⁴⁶ Ngirumpatse Appeal, para. 60; Karemera Appeal, para. 39; Nzirorera Appeal, paras. 85-88.

⁴⁷ Ngirumpatse Appeal, paras. 82-95; Ngirumpatse Reply, paras. 25-42; Karemera Appeal, paras. 30-35, 41-47; Nzirorera Appeal, paras. 91-106; Nzirorera Reply, paras. 19-21.

⁴⁸ Ngirumpatse Appeal, paras. 86, 87; Karemera Appeal, para. 24; Nzirorera Appeal, paras. 91-102.

⁴⁹ Prosecution Response, para. 2.

⁵⁰ Prosecution Response, para. 46.

⁵¹ Prosecution Response, paras. 3, 43-48.

⁵² Prosecution Response, paras. 23-30.

condition and unwillingness to waive his right to be present, severance was the only option.⁵³ With respect to Mr. Nzirorera and Mr. Karemera, the Prosecution emphasizes that the Trial Chamber granted them leave to expand their witness lists to take account of the loss of Mr. Ngirumpatse's witnesses.⁵⁴ It also describes as speculation their inability to obtain the attendance of witnesses.⁵⁵ Finally, it argues that ensuring that their trials are expedient is consistent with their fair trial rights.⁵⁶ It further submits that the Trial Chamber properly considered judicial economy and the public interests of victims and the international community in expedient trials as a secondary consideration.⁵⁷ In this respect, the Trial Chamber's "decision to trump the waiver of the two co-accused was symbolic of the inherent jurisdiction of the Chamber to control its own process and ensure the promotion of the public interest and the protection of fair trial rights".⁵⁸

DISCUSSION

16. Decisions related to the general conduct of trial are matters within the discretion of the Trial Chamber.⁵⁹ The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.⁶⁰

17. The state of Mr. Ngirumpatse's health and his prognosis for recovery lie at the core of the Trial Chamber's decision to deny the request for a further stay of proceedings and instead to sever him from the case. In refusing to order a further stay, the Trial Chamber dismissed as "highly speculative" Mr. Ngirumpatse's claim that his health might sufficiently improve within three months to allow him to more actively participate in his defence from his hospital bed.⁶¹ In this respect, it pointed to the Chief Medical Officer's assessment that Mr. Ngirumpatse required six more months of treatment, which impaired his ability to concentrate; that he has so far not

⁵³ Prosecution Response, para. 24.

⁵⁴ Prosecution Response, para. 25.

⁵⁵ Prosecution Response, para. 29.

⁵⁶ Prosecution Response, para. 30.

⁵⁷ Prosecution Response, paras. 17-22, 31-35.

⁵⁸ Prosecution Response, para. 40.

⁵⁹ Decision on Nzirorera's Interlocutory Appeal Concerning His Right to Be Present at Trial, 5 October 2007, para. 7; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008, para. 4 ("*Stanišić and Simatović* Appeal Decision"); *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 5 ("*Tolimir et al.* Appeal Decision").

⁶⁰ See, e.g., Decision on Matthieu Ngirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008, 30 January 2009, para. 18; Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, para. 3. See also *Stanišić and Simatović* Appeal Decision, para. 5; *Tolimir et al.* Appeal Decision, para. 6.

⁶¹ Impugned Decision, paras. 25, 26.

responded to the treatment; and that he would not be fit to attend trial for at least nine months.⁶² The Trial Chamber considered that the impact on the proceedings resulting from such a scenario, coupled with the earlier delay, would result in serious prejudice to Mr. Karemera and Mr. Ngirumpatse.⁶³

18. Rule 82(B) of the Rules provides that a “Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.” In severing Mr. Ngirumpatse, the Trial Chamber concluded principally that there was a conflict of interests among the Appellants as a result of the prejudice Mr. Karemera and Mr. Nzirorera would suffer if the proceedings were stayed until Mr. Ngirumpatse became fit to attend trial.⁶⁴ The Trial Chamber noted that, “according to the doctor’s assessment”, Mr. Ngirumpatse “will, in the best case, not be fit to attend trial before nine months.”⁶⁵ The Trial Chamber also considered the interests of justice, namely, the interests of the victims and the international community that trials concerning serious crimes be completed without unnecessary delays.⁶⁶ It also noted that severance “significantly serves judicial economy”.⁶⁷

19. The Appeals Chamber notes that, in practice, Trial Chambers generally consider various professional opinions before taking an important procedural decision arising from an accused’s medical condition which may impact the course of a trial.⁶⁸ In this respect, Rule 74bis of the Tribunal’s Rules of Procedure and Evidence (“Rules”) expressly provides that “a Trial Chamber may, *proprio motu* or at the request of a party, order a medical [...] examination of the accused.”

⁶² Impugned Decision, paras. 26, 27.

⁶³ Impugned Decision, paras. 38, 54.

⁶⁴ Impugned Decision, para. 43.

⁶⁵ Impugned Decision, para. 54.

⁶⁶ Impugned Decision, para. 54.

⁶⁷ Impugned Decision, para. 54.

⁶⁸ See, e.g., *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Prosecution Motion for Re-Assessment of Jovica Stanišić’s Health and Re-Commencement of Trial and Decision on Prosecution Motion to Order Further Medical Reports on Jovica Stanišić’s Health, 17 December 2008, para. 6 (“*Stanišić and Simatović* Trial Decision”)(in assessing whether to further adjourn proceedings based on the chronic health problems of Jovica Stanišić, the Trial Chamber considered at least 11 medical reports from numerous experts); *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva’s Motions to Call Doctors and to Recall Eight Witnesses, 19 April 2007, paras. 4-6, 13 (considering several detailed medical reports on the Accused’s fitness to stand trial submitted by the Tribunal’s Chief Medical Officer, surgical consultants, and the Accused’s personal physician); *Slobodan Milošević v. Prosecutor*, Case No. IT-02-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004, para. 6 (in assigning Slobodan Milošević court appointed counsel based on “mounting health problems”, the Trial Chamber ordered two separate medical examinations by his treating physician and an independent cardiologist with no prior involvement in the case); *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, Decision on Prosecution’s Oral Request for the Separation of Trials, 20 September 2002, paras. 5-10 (in severing Momir Talić based on health consideration, the Trial Chamber considered reports from the Medical Officer at the detention unit, which it confirmed after appointing two medical experts and holding an evidentiary hearing).

20. In the present case, the Trial Chamber relied exclusively on the assessment of the Tribunal's Chief Medical Officer.⁶⁹ As a preliminary matter, the Appeals Chamber finds no merit in Mr. Nzirorera's submission that the Trial Chamber erred in not requiring the Chief Medical Officer to take the oath prescribed for witnesses in Rule 90(B) of the Rules.⁷⁰ The Chief Medical Officer did not appear as a witness, rather, her assessment, like other information submitted by the witness protection or defence counsel management section, is akin to a submission under Rule 33(B) of the Rules.

21. A review of the Chief Medical Officer's various assessments from when Mr. Ngirumpatse first became unable to attend trial in August 2008 reveals a significant fluctuation and uncertainty in his prospects for recovery.⁷¹ Moreover, in February 2009, the Chief Medical Officer emphasized the provisional nature of her assessment and the need for additional time for making a comprehensive prognosis.⁷² While the Trial Chamber dismissed as speculative Mr. Ngirumpatse's suggestion in February 2009 that he could be in a position to attend trial or at least more effectively participate in the proceedings from his hospital bed in three months,⁷³ the Trial Chamber also described as "speculative" the Chief Medical Officer's projection that he might only be fit to attend trial in nine months.⁷⁴

22. It is appropriate to take proper account of an assessment made by the Chief Medical Officer and, in some cases, to rely exclusively on it. However, the Appeals Chamber considers that particular care is warranted where, as here, the assessment is provisional and lacking in detail, is disputed by the parties, and plays a significant role in the Trial Chamber's assessment of prejudice. The Appeals Chamber also observes that the Trial Chamber had no specific information concerning the nature of Mr. Ngirumpatse's medical problem. While a Trial Chamber may adopt reasonable measures to protect the privacy interests of an accused, these measures cannot serve to deprive it of

⁶⁹ Impugned Decision, para. 23. The Trial Chamber noted that the Chief Medical Officer's assessment was made "in consultation and agreement" with Mr. Ngirumpatse's treating physicians. The Trial Chamber did not consult directly with the attending doctors.

⁷⁰ Nzirorera Appeal, paras. 41-49.

⁷¹ Impugned Decision, para. 10 ("On 18 August 2008, the Chamber was informed that Matthieu Ngirumpatse [...] would not be fit to attend trial for one week [...] On 25 August, Dr. Épée Hernandez reported that Ngirumpatse would not be fit for a minimum of one more month."); T. 9 February 2009 p. 17 ("Dr. Épée Hernandez: [...] [Mr. Ngirumpatse's] clinical state of health is improving remarkably."); T. 16 February 2009 p. 9 ("Given the current state of Mr. Ngirumpatse, clinically and biologically, he is not in a position to be present within three months, six months and even in nine months. And that is still hypothetical.").

⁷² Impugned Decision, para. 11. *See also* T. 9 February 2009 p. 17 ("His medication will continue for three more months, when we will be able to provide a more comprehensive report [...] after three months we would be able to make a report that will be more reflective of the reality. We are in an intermediary phase at this point in time, and we cannot come up with any specific conclusion. [...] I said that the initial treatment was for a period of six months. It's still six months. We are in an intermediary period that after three months we can say something. But last time I said it would take six months.").

⁷³ Impugned Decision, para. 26.

⁷⁴ Impugned Decision, para. 14.

information essential to reaching an informed decision. In view of the foregoing, the Appeals Chamber finds that, in this instance, the Trial Chamber reached its conclusions on prejudice without having assessed all relevant factors. It therefore committed a discernible error in the exercise of its discretion. Accordingly, the Appeals Chamber need not consider the other arguments on appeal.

23. In their replies, Mr. Ngirumpatse and Mr. Nzirorera also point to the significant improvement in Mr. Ngirumpatse's condition since the Impugned Decision was taken. In particular, Mr. Nzirorera refers to a report submitted by the Registry indicating that Mr. Ngirumpatse is scheduled to return to Arusha where he may soon be able to attend trial.⁷⁵ The Appeals Chamber has not taken this into account in assessing the nature of the information available to the Trial Chamber at the time of the Impugned Decision. Any developments subsequent to the Impugned Decision should be first properly considered by the Trial Chamber.

24. The three-month period which the Chief Medical Officer indicated would be necessary before a more comprehensive report could be filed has elapsed. Consequently, the Appeals Chamber considers it particularly appropriate to remand this matter back to the Trial Chamber for further evaluation based on the present circumstances of Mr. Ngirumpatse's condition.

DISPOSITION


25. For the foregoing reasons, the Appeals Chamber **REVERSES** the Impugned Decision and **REMANDS** the matter to the Trial Chamber for further consideration consistent with this opinion.

Done in English and French, the English version being authoritative.

Done this 19th day of June 2009,
At The Hague,
The Netherlands.



[Seal of the Tribunal]



Judge Patrick Robinson
Presiding

⁷⁵ See Ngirumpatse Reply, para. 7; Nzirorera Reply, para 11 (citing *Observations supplémentaire du greffier, en vertu de l'article 33(B) du règlement de procédure et de preuve à la suite de dépôt du rapport du médecin chef du TPIR en date du 27 Avril 2009*, 4 May 2009).