



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
02-10-2009
(48073-48069)

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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: 2 October 2009

THE PROSECUTOR

v.

Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

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**DECISION ON REMAND FOLLOWING APPEAL CHAMBER'S DECISION
OF 29 MAY 2009**

Rules 92 bis (D), 94 (B) and 89 (C) of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 10 November 2008 the Chamber denied Joseph Nzirorera's motion to admit a portion of the testimony of Elizaphan Ntakirutimana pursuant to Rule 92 *bis* (D) of the Rules Procedure and Evidence ("the Rules") in order to rebut adjudicated fact No. 116.¹ On 24 March 2008,² following Nzirorera's application for certification to appeal the decision,³ the Chamber *proprio motu* reconsidered its decision and upheld it with revised reasons ("Impugned Decision"). Further, the Chamber granted Nzirorera certification to appeal.
2. On 29 May 2009, the Appeal Chamber granted the appeal and remanded the matter to the Chamber for reconsideration.⁴

DELIBERATIONS

3. Pursuant to Rule 92 *bis* (D) of the Rules "[a] Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than acts and the conduct of the accused." In addition, the Chamber must be satisfied that the transcript at issue is relevant and has probative value under Rule 89 (C).⁵
4. With respect to adjudicated facts, Rule 94(B) of the Rules prescribes that the Chamber [...] may decide to take judicial notice of adjudicated facts [...] from other proceedings of the Tribunal relating to the matter at issue in the current proceedings. Facts judicially noticed are merely presumptions that may be rebutted with evidence at trial.⁶ The legal effect of judicially noticing an adjudicated fact is only to relieve the Prosecution of its burden to

¹ *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana, (TC), 10 November 2008 ("Initial Decision").

² *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Motion to Admit Testimony of Elizaphan Ntakirutimana, (TC), 24 March 2009 ("Impugned Decision").

³ *Karemera et al.*, Joseph Nzirorera's Application for Certification to Appeal Decision on Motion to Admit Testimony of Elizaphan Ntakirutimana (TC), 12 November 2008 ("Application to Appeal").

⁴ *Karemera et al.*, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009 (AC) ("Decision on Joseph Nzirorera's Appeal").

⁵ *Karemera et al.*, Decision on Admission of Transcript of Prior Testimony of Antonius Maria Lucassen (TC), 15 November 2005, para. 3.

⁶ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007 ("*Dragomir Milošević Appeal Decision*"), para. 16; citing *Karemera et al.*, Decision on Appeals Chamber Remand of Judicial Notice, 11 December, para. 42; See also *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice ("*Nikolić Appeal Decision*"), para. 11; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003 ("*Slobodan Milošević Appeal Decision*"), p. 4.

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produce evidence on the point; the Defence may put the adjudicated fact into question by introducing evidence to the contrary.⁷ Therefore, the Defence may rebut the presumption by introducing "reliable and credible" evidence to the contrary.⁸ The requirement that the evidence be 'reliable and credible' must be understood in its proper context, through the lens of the general standard for the admission of evidence at trial as set out in Rule 89 (C) of the Rules "[a] Chamber may admit any relevant evidence which it deems to have probative value."

5. As for any other evidence for which no additional requirements have been specified in the Rules, the threshold for admission of rebuttal evidence of the type presented in the instant case is relatively low: what is required is not a definitive proof of reliability or credibility but the showing of *prima facie* reliability and credibility on the basis of sufficient indicia.⁹ The final evaluation of the reliability and credibility, and hence the probative value of the evidence, will only be made in light of the totality of the evidence in the case, in the course of determining the weight to be attached to it.¹⁰

6. Adjudicated Fact No. 116 reads:

"Elizaphan Ntakirutimana brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill one day in the middle of May 1994, and the group was searching for Tutsi refugees and chasing them. Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers who then chased these refugees singing "Exterminate them"; look for them everywhere; kill them; and get it over with, in all the forests."¹¹

7. In the instant case, Joseph Nzirorera requests the Chamber to admit a portion of Elizaphan Ntakirutimana's testimony in his own trial in lieu of live testimony.¹² In his testimony, Ntakirutimana testified that he never went to Bisesero and that he did not know

⁷ *Dragomir Milošević Appeal Decision*, paras. 16; *Appeal Decision on Judicial Notice*, para. 42, 49.

⁸ *Karamera et al.*, *Appeal Decision on Notice*, para. 49, 49; *Dragomir Milošević Appeal Decision*, paras.

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⁹ *Naletilić and Martinović Appeal Judgement*, para. 402; *Delalić et al. Appeal Decision*, para. 17, 20; *Nyiramusuhuko Appeal Decision*, para. 7; *Musema Appeal Judgement*, para. 47; *Akayesu Appeal Judgement*, para. 286; *Karamera et al.*, *Decision on Joseph Nzirorera's Appeal*, para. 14, footnote 38.

¹⁰ *Pauline Nyiramusuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, *Decision on Pauline Nyiramusuhuko's Appeal on the Admissibility of Evidence*, 4 October 2004 ("Nyiramusuhuko Appeal Decision"), para. 7; *Rutaganda Appeal Judgement*, fn. 63, 425; *Karamera et al.*, *Decision on Joseph Nzirorera's Appeal*, para. 15.

¹¹ *Karamera et al.*, *Decision on Appeals Chamber Remand of Judicial Notice (TC)*, 11 December 2006.

¹² *Karamera et al.*, *Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana*, 18 August 2008, para. 1 ("Motion").

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the sole witness (Witness CC) whose testimony is the basis of the allegation underlying Adjudicated Fact No. 116, and that in fact he warned people to go to Bisesero.¹³

8. In the Impugned Decision the Chamber opined that the transcript of Ntakirutimana's testimony did not constitute reliable and credible evidence as the Trial Chamber in his own case had rejected the testimony after hearing *viva voce* evidence.¹⁴ The Appeal Chamber, however, ruled that the "assessment of admissibility criteria must be done on a case-by-case basis in light of the specific circumstances in each case."¹⁵

9. The Chamber notes that by admitting Adjudicated Fact No. 116 it has previously determined that the matter is an issue in this trial.¹⁶ Further, following the Appeals Chamber's guideline, as the testimony which Nzirorera seeks to have admitted tends to disprove the adjudicated fact, it has probative value. Moreover, the testimony does not go to proof of the acts and conduct of the Accused and has been recorded before a Trial Chamber and subjected to cross-examination. Therefore, the transcript of Ntakirutimana's testimony meets the requirements to be admitted.

10. The Chamber further notes that under Article 19 of the Statute it shall ensure a fair trial and may, pursuant to Rule 98, *proprio motu* order a party to produce additional evidence. As the Trial Chamber in Elizaphan Ntakirutimana's case, from which the adjudicated fact was extracted, made its finding after hearing the evidence of the accused and Prosecution Witness CC, the Chamber believes that in order to assess the testimony of Ntakirutimana it needs also to consider the testimony of Witness CC and finds it appropriate that the relevant part of CC's testimony be admitted into evidence simultaneously with the transcript of Ntakirutimana's testimony.

FOR THE FOREGOING REASONS, THE CHAMBER,

- I. **GRANTS** Joseph Nzirorera's Motion, subject to him tendering into evidence the relevant portions of the transcript of Prosecution Witness CC's testimony.
- II. **REQUESTS** the Registry to, eventually, assign exhibit numbers to the transcripts.

¹³ *Karemera et al.*, Motion, para.4; See Annex A to the Motion, citing excerpts of T. 7 & 8 May 2002.

¹⁴ *Karemera et al.*, Impugned Decision, paras. 11&12


¹⁵ *Karemera et al.*, Decision on Joseph Nzirorera's Appeal, para.16.


¹⁶ *Karemera et al.*, Decision on Appeals Chamber Remand of Judicial Notice, 11 December 2006, para 20.


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Arusha, 2 October 2009, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao-Gustave Kam
Judge


Vagn Joensen
Judge

