



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 28 October 2009

The PROSECUTION

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

**DECISION ON DEFENCE MOTION FOR LEAVE TO MEET WITH THE
HUSBAND OF WITNESS ANAE AND FOR POSTPONEMENT OF HER
TESTIMONY**

Office of the Prosecution

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

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri

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

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

BEING SEIZED of the “Defence Extremely Urgent and Confidential Motion for Leave to Meet with the Husband of Prosecution Witness ANAE and for Postponement of her Testimony” filed on 9 October 2009 (the “Motion”);

CONSIDERING the:

- (a) “Prosecution’s Response to Defence’s Extremely Urgent and Confidential Motion for Leave to Meet the Husband of the prosecution Witness ANAE and for Postponement of her Testimony”, filed on 13 October 2009 (the “Response”); and
- (b) “Ngirabatware’s Reply to the Prosecution’s Response to Defence’s Extremely Urgent and Confidential Motion for Leave to Meet the Husband of Prosecution Witness ANAE and for Postponement of her Testimony ” filed on 15 October 2009 (the “Reply”);

RECALLING the:

- (a) Chamber’s oral decision of 13 October 2009 denying the Defence application for a postponement of witness ANAE’s testimony or, alternatively her cross-examination (“Oral Decision”), which thus ruled on part of the Motion; and
- (b) “Decision on Prosecution’s Motion for Special Protective Measures for Prosecution Witnesses and Others” (“Decision on Protective Measures”), 7 May 2009.

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 (B) of the Rules.

INTRODUCTION

1. On 28 July 2009, the Defence sent a letter to the Prosecution raising the issue of accuracy of the identity of Prosecution witnesses, particularly that of Witness ANAE.¹ The Prosecution responded to the Defence by an email stating that it had no reason to doubt the identity of Prosecution witnesses but that it would conduct verifications and revert to the Defence in due course.²

2. On 18 August 2009, the Defence sent a new letter to the Prosecution requesting its consent to meet with a person whom the Defence believed to be the husband of Witness

¹ Letter of the Defence to the Prosecution, filed 28 July 2009, *see also* Motion, para. 1; Annex 1.

² Motion, para. 2, Annex 2.

ANAE.³ The Prosecution responded that it wished to be provided with proof that the person is Witness ANAE's husband and that he has consented to meet with the Defence. Should these requests be fulfilled, the Prosecution asked if the Defence would allow for the presence of a member of the Prosecution at the interview and asked to be provided with a transcript of the interview.⁴

3. On 27 August 2009, the Defence provided the Prosecution with the marriage certificate of Witness ANAE and her alleged husband, along with a letter of consent from ANAE's husband to meet with the Defence.⁵ The same day, the Prosecution responded that details were missing on the documents provided and reiterated its request for a member of the Prosecution to be present at the interview.⁶

4. On 1 September 2009, the Defence renewed its request to meet with Witness ANAE's husband and stated that it would only accept the presence of a representative of the Witness and Victim Support Section (hereinafter "WVSS") at the interview.⁷

5. On 4 September 2009, the Prosecution responded to the Defence, acknowledging that Witness ANAE was indeed married to the individual the Defence wish to interview and reiterating that the Prosecution would only consent to the meeting if the Defence agreed to permit the presence of a member of the Prosecution, as well as provide the Prosecution with a transcript of the interview proceedings.⁸

6. On 11 September 2009, the Defence filed the "Defence Extremely Urgent Motion on Issues Relating to the Preparation of the Trial", which raised, *inter alia*, the same issue.⁹ In its decision of 17 September 2009, the Chamber noted that no formal motion had been filed by the parties on this issue.¹⁰

7. On 5 October 2009, the Prosecution filed a document titled Will Say statement or Additional Statement of Witness ANAE providing new information regarding the Witness' identity, as well as new factual allegations brought by the Witness.¹¹

8. On 9 October 2009, the Defence filed the present Motion. On 13 October 2009, after hearing the Parties' oral submissions on the issue of the postponement of Witness ANAE's testimony, the Chamber denied the Defence Motion in that regard.¹² Consequently, the present decision only addresses the remaining aspects of the Motion,

³ Letter of the Defence Co-counsel to the Prosecution, filed 18 August 2009, *see also* Motion, para. 3, Annex 3.

⁴ Letter of the Prosecution to the Defence, filed 20 August 2009, *see also* Motion, para. 4, Annex 4.

⁵ Motion, para. 5, Annex 5.

⁶ Letter of the Prosecution to the Defence, filed 27 August 2009, *see also* Motion, para. 6, Annex 6.

⁷ Letter of the Defence Co-counsel to the Prosecution, filed 27 August 2009, *see also* Motion, para. 7, Annex 7.

⁸ Letter of the Prosecution to the Defence, filed 8 September 2009, *see also* Motion, para. 8, Annex 8.

⁹ Motion, para. 9.

¹⁰ Decision on Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial, 17 September 2009, *see* para. 44; Motion, paras. 9-10.

¹¹ Will Say du témoin ANAE ou Déclaration Supplémentaire de ANAE, filed on 5 October 2009, *see also* Motion, para. 11, Annex 9.

¹² T. 13 October 2009, p. 55-56 (ICS).

i.e. the Defence's application for an Order allowing it to meet and interview Witness ANAE's husband in the absence of a representative of the Prosecution but in the presence of a member of WVSS.

SUBMISSIONS OF THE PARTIES

Defence Motion

9. The Defence asserts that potential Defence witnesses mentioned that Witness ANAE's husband had crucial information that may assist the Defence to meet the Prosecution's case.¹³ Witness ANAE's husband has personal knowledge of the events of April to July 1994 in the Rushubi Sector of Nyamuyumba Commune and could therefore provide information relevant to the cross-examination of Prosecution witnesses.¹⁴ It is further alleged that witness ANAE's husband possessed a firearm during the events covered by the Indictment and it is therefore crucial for the Defence to meet him.¹⁵

10. The Defence submit that should they not be allowed to meet with Witness ANAE's husband, the Defence would be deprived of the ability to conduct an effective cross-examination, as guaranteed by the provisions of Rule 90 (G) (ii) of the Rules. They would further be deprived of the possibility to meet and interview a potentially critical witness, which is at the core of the right of the Accused to benefit from a full and effective Defence, as stated in Articles 19 and 20 of the Statute.¹⁶

11. The Defence submits that the Chamber's Decision on Protective Measures does not grant the Prosecution any right to be represented during any meeting between the Defence and any Prosecution witness or any member of his/her family.¹⁷ Even if Witness ANAE's husband is protected by the Chamber's Decision on Protective Measures, he is not on the list of Prosecution witnesses.¹⁸ This, according to the Defence, entitles the Defence to meet that person without the presence of the Prosecution.¹⁹ Likewise, the Prosecution is not entitled to be supplied with a copy of the notes of the interview. The Defence submit that there is no doubt that WVSS staff is aware of their duties and obligations and that their presence is thus sufficient to ensure the protective measures ordered by the Chamber are respected.²⁰

12. Accordingly, the Defence requests that the Chamber issue an order allowing the Defence to meet and interview Witness ANAE's husband in the absence of any representative of the Prosecution and an order to the Registrar to direct a representative of WVSS to be present during the said meeting.²¹

¹³ Motion, para. 14.

¹⁴ Motion, para. 15.

¹⁵ Motion, paras., 16-18.

¹⁶ Motion, paras. 19-21.

¹⁷ Motion, paras. 22-23.

¹⁸ Motion, para. 25.

¹⁹ Motion, para. 26.

²⁰ Motion, para. 27.

²¹ Motion, Relief.

Prosecution Response

13. The Prosecution partially opposes the Motion and requests a member of the Prosecution to be granted access to the interview on the grounds that the marriage creates a special relationship of trust between Witness ANAE and her husband, which the Prosecution claim they have reason to believe may affect the quality of the testimony of Witness ANAE.²²

14. The Prosecution submit that the Decision on Protective Measures does not exclude the Prosecution's right to be present in a matter relating to the Protected prosecution witnesses and members of their families.²³

Defence Reply

15. The Defence argues that the Prosecution fails to demonstrate that it could suffer a prejudice were the Defence allowed to meet Witness ANAE's husband, in the absence of a member of the Prosecution.²⁴ It further submits that the argument of the Prosecution is moot considering the Chamber's Oral Decision since, should the Motion be granted, the Defence would only meet witness ANAE's husband, after ANAE's testimony.²⁵

16. The Defence reiterates that it would agree to the presence of a neutral party in the form of a representative of WVSS, which is more than provided for in the Decision on Protective Measures.²⁶ The Prosecution did not demonstrate that WVSS is incapable to deal with the Prosecution's concern regarding the security of witness ANAE.²⁷ According to the Defence, the special relationship of trust between the two persons is therefore an irrelevant reason to hold the meeting in presence of a member of the Prosecution.²⁸

17. Lastly, the Defence avers that the Prosecution has breached its disclosure obligations regarding protected witnesses identifying information, pursuant to the Decision on Protective Measures. Indeed, the name of Witness ANAE's parents and her marital status were only disclosed to the Defence in the submissions regarding the present Decision. The Defence thus requests that the Chamber recognize the breach by the Prosecution of its obligation to disclose the accurate identifying information of Witness ANAE 30 days prior to commencement of the Prosecution case.²⁹

DELIBERATIONS

18. The Chamber notes that the Parties agree on the possibility for the Defence to meet Witness ANAE's husband but disagree as to the conditions of the interview. The

²² Response, paras. 3-4, citing to the Letters of the Prosecution to the Defence, filed 20 and 27 August and 4 September 2009.

²³ Response, para. 5.

²⁴ Reply, para. 6.

²⁵ Reply, para. 7.

²⁶ Reply, para. 8.

²⁷ Reply, para. 10.

²⁸ Reply, para. 9.

²⁹ Reply, para. 11 and relief.

Chamber further notes that ANAE's husband himself has consented to meet with the Defence.

19. The Chamber recalls the relevant part of the Decision on Protective Measures reads as follows:

The Defence team in this case and any representative acting on its behalf shall notify the Prosecution in writing if it wishes to contact any protected witness and/or his or her family. If the person concerned consents, the Prosecution shall facilitate such contact together with the WVSS.³⁰

20. The Chamber further recalls the case law of the Tribunal with regards to this particular issue established that "[w]itnesses to a crime are the property of neither the Prosecution nor the Defence; both sides have an equal right to interview them."³¹ Indeed, the Appeals Chamber held that a party may have a legitimate need to interview the other party's witness to prepare its case.³² However, the opportunity to contact a witness of the other party must not interfere with the course of justice.³³

21. The Chamber notes that in several cases where the Defence requested and obtained authorization to meet with a protected Prosecution witness, the Prosecution agreed to the meeting and did not request to be present because the witnesses were not or no longer on the witness list.³⁴ In one case, cited by the Defence, the Chamber held that "[w]hile the Prosecution shall undertake all necessary arrangements to facilitate the interview, with the assistance of Witnesses and Victims Support Section of the Tribunal, it has no right to attend the meeting."³⁵ However, the Chamber notes that, similarly, the witnesses at stake in that case were not or no longer on the list of Prosecution witnesses

³⁰ Decision on Prosecution Motion for Special Protective Measure for Prosecution Witnesses and Others, 07 May 2009, Orders (v).

³¹ *Prosecutor v. Mile Mrksić*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003, para. 15.

³² *The Prosecutor v. Sefer Halilović*, Case No. IT-01-42-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 14, the Appeals Chamber held that "[g]iven that during cross-examination the Defence can elicit from the Prosecution witness information which is relevant to its own case and goes beyond the scope of the Prosecution's examination-in-chief, the Defence may have a legitimate need to interview this witness prior to trial in order to properly prepare its case."

³³ *Prosecutor v. Mile Mrksić*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003, para. 16; *See also The Prosecutor v. Augustin Ndirilayimana et al.*, Case No. ICTR-00-56-T, Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet with Prosecution Witness GAP, 26 October 2007, para. 3; *Prosecutor v. Callixte Ntabonimana*, Case No. ICTR-98-44-5-PT, Decision on Motion to Interview Prosecution Witnesses, 24 August 2009, para. 5.

³⁴ *See e.g. Prosecution v. Alphonse Nteziryayo*, Case No. ICTR97-29-T Joint Case No. ICTR-98-42-T, "Decision on Alphonse Nteziryayo's Request to Meet Witness FAT in the Absence of the Prosecution", 4 February 2005; *Prosecution v. Joseph Kanyabashi*, Case No. ICTR-96-15-T Joint Case No. ICTR-98-42-T, "Decision on Joseph Kanyabashi's Request to Meet SW and FAT and All Other Persons Whose Identities Were not Disclosed to the Defence", 23 November 2004.

³⁵ *Prosecution v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, "Decision on Defence Written Request to Interview prosecution Witnesses", 20 September 2005, para. 5, the Trial Chamber stated that "While the Prosecution shall undertake all necessary arrangements to facilitate the interview, with the assistance of Witnesses and Victims Support Section of the Tribunal, it has no right to attend the meeting."

in any case pending before the Tribunal.³⁶ Indeed, in the *Nzabonimana* case, the Pre-Trial Chamber distinguished witnesses who had been removed from the Prosecution witness list from those who still were on the list in order to determine whether or not the Prosecution could attend the interviews of witnesses with the Defence.³⁷

22. Having considered the particular circumstances of this case in the light of the aforementioned jurisprudence, *inter alia*, the fact that the person the Defence wishes to interview is currently married to a Prosecution witness, the fact that the Prosecution witness is still on the Prosecution witness list, and the fact that, although the witness already testified, she could be recalled,³⁸ the Chamber holds that a representative of the Prosecution must attend the interview, so as to ensure that there be no interference with the course of justice. In that regard, the Chamber concludes that, while WVSS is tasked with protecting witnesses' security, it might not be sufficiently familiar with the details of the case to adequately protect the interests of justice in such a sensitive situation, especially given the significance of the relationship between the Prosecution witness and the person the Defence wishes to interview.

23. With respect to the disclosure issues raised by the Defence, the Trial Chamber recalls its 17 September 2009 Decision in which it held that "inconsistencies affect the credibility of the witnesses. However, credibility is a matter for cross-examination"³⁹ and its 13 October 2009 Oral Decision, in which it held that "in the Chamber's view on the totality of the available information, the Defence should be able to carry out any investigation it might require in preparation for the testimony of the witness and conduct effective cross-examination of the witness."⁴⁰ The Chamber also notes that the fact that the Witness provided inaccurate identifying information may, if appropriate, be considered in its assessment of the witness' credibility, at the end of the proceedings.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Motion in part and;

DIRECTS the Prosecution to make the necessary arrangements to facilitate the contact of the Defence with Prosecution Witness ANAE's husband;

ORDERS the Registrar to avail a representative of WVSS to be present during the meeting between the Defence and Witness ANAE's husband;

GRANTS the Prosecution's request to be present during the meeting between the Defence and Witness ANAE's husband;

DENIES the parties' requests in all other respects.

³⁶ *Ibid.*, paras. 1 and 5.

³⁷ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44-5-PT, Decision on Motion to Interview Prosecution Witnesses, 24 August 2009, para. 10.

³⁸ "Decision on Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial", 17 September 2009, para. 44.

³⁹ Decision on Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial, 17 September 2009, *see* para. 45.

⁴⁰ T. 13 October 2009, p. 56 (ICS).

Arusha, 28 October 2009

William H. Sekule
Presiding Judge

Solomy Balungi Bossa
Judge

Mparany Rajohnson
Judge

[Seal of the Tribunal]