



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: 7 January 2010

THE PROSECUTOR

v.

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

DECISION ON VOIR DIRE OF KIM HUGHES

Rules 54 and 89(B) of the Rules of Procedure and Evidence

Office of the Prosecution:
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INTRODUCTION

1. Documents were produced by Witness BDW during his testimony and their genuineness became an issue. Joseph Nzirorera filed an *ex parte* motion for an order directing the Registrar to transfer the original documents to a document examiner in the United Kingdom, namely Kim Hughes of Document Evidence Ltd., who was retained by the Defence and under contract with the Registry.¹ In a Decision dated 4 September 2008, the Chamber directed the Registrar to send originals of Exhibits D Nz 444, D Nz 445 and D Nz 463 to D Nz 466 to Hughes for inspection in order to study the Exhibits in question.² In that decision, the Chamber stated that Hughes' expertise had not been predetermined by the Chamber.³

2. On 30 October 2008, Joseph Nzirorera filed the statement of proposed expert witness Kim Hughes, and attached Hughes' final report and curriculum vitae as Annexes.⁴ Nzirorera submits that Hughes' report will "reveal circumstances which will lead the Trial Chamber to conclude that [two documents provided by Witness BDW] were 'montages.'"⁵

3. Édouard Karemera supports Joseph Nzirorera's application in calling Kim Hughes as an expert on this subject.⁶

4. On 4 November 2008, the Prosecution filed its Notice as required by Rule 94 *bis* of the Rules of Procedure and Evidence ("Rules"),⁷ indicating that it: (i) does not accept the witness' qualifications as an expert; (ii) does not accept the expert witness statement; and (iii) wishes to cross-examine Kim Hughes.⁸ The Prosecution acknowledged the extensive curriculum vitae of Mr. Hughes, but requested an opportunity to ask specific questions regarding Kim Hughes' expertise in certain non-handwriting aspects of document examination, including the actual examination of paper and ink.⁹

¹ Joseph Nzirorera's *Ex Parte* Motion Re: Exhibits DNZ-444-45 and DNZ 463-466, filed 22 July 2008.

² *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera* ("Karemera et al."), Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's *Ex Parte* Motion Re: Exhibits DNZ-444-45 and DNZ-463-66 (TC), 4 September 2008.

³ *Ibid.* at para. 6.

⁴ Nzirorera Filing of Statement of Expert Witness: Kim Hughes, filed 30 October 2008 ("Filing of Kim Hughes' Statement").

⁵ *Ibid.* at para. 5.

⁶ Observation de M. [É]douard Karemera sur le Rapport d'expertise de M. Kim [Hughes], filed 3 November 2008.

⁷ Prosecutor's Rule 94 *bis* (B) Notice concerning Kim Hughes, Defence Expert Witness for Nzirorera, filed 4 November 2008.

⁸ *Ibid.* at para. 1.

⁹ *Ibid.* at para. 2.

DELIBERATIONS

5. The Chamber recalls that the following requirements have to be met for the admission of expert evidence: (i) the Chamber discretionarily deems it necessary to hear an expert on a determined issue; (ii) the prospective witness is an expert on that determined issue; (iii) the statement or report is reliable; (iv) the statement or report is relevant and of probative value; and (v) the substance of the statement or report falls within the expertise of the witness.¹⁰

6. The Chamber preliminarily finds that it is necessary to hear an expert on the issue of whether the documents produced by Witness BDW have been altered in some way since an expert may be able to explain to the Chamber certain features of the documents that, while unobservable to the naked eye, could point to the alteration of the document in a manner consistent with Defence claims. The Chamber further finds that the statement of Hughes is relevant and of probative value as the Prosecution disputes that the documents are montages, therefore making this an issue the Court will have to determine when weighing evidence. Whether these documents are what Witness BDW purports them to be is a matter which will affect Witness BDW's credibility, also making this issue relevant and of probative value in the instant case.

7. Before determining whether to admit the statement of Kim Hughes, the Chamber must make determinations on the other requirements listed above. The Chamber believes that it does not possess the appropriate information at this stage to make these determinations at present. Rule 89(B) provides that a Chamber "shall apply rules of evidence which will best favour a fair determination of the matter before it." The discretion provided for in this Rule can extend to conducting a *voir dire* procedure when it is determined appropriate by a Trial Chamber.¹¹ *Voir dire* is defined as "a preliminary examination to test the competence of a witness or evidence" and has been used by other chambers and tribunals in a variety of circumstances.¹²

8. The Chamber must determine if Kim Hughes is an expert as to the non-handwriting aspects of the documents at issue, the reliability of the statement, and whether the substance

¹⁰ *Karemera et. al.*, Decision on [É]douard Karemera's Motion for the Admission of an Expert Witness, 22 May 2009, para. 5.

¹¹ *Prosecutor v. Sefer Halilović*, Case No. ICTY-01-48-T, Decision on the Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table (AC), 19 August 2005, para. 46.

¹² *Black's Law Dictionary*, Second Pocket Edition (St. Paul, Minn: West Group, 2001). See e.g., *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-T, Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defence's Request to Hold a *Voir Dire* (TC), 5 February 2007, para. 7. and sources cited therein.

of the statement falls within the expertise of Hughes before it can admit Hughes' statement. The Chamber views that a *voir dire* procedure will best favour a fair determination of the matter, and if Kim Hughes' report is admitted, whether the Prosecution should have an opportunity to cross-examine him.

FOR THESE REASONS, THE CHAMBER

DECIDES that the proposed expert, Kim Hughes, shall be called for a *voir dire* examination as to whether his report should be admitted into evidence and, if admitted, for cross-examination.

Arusha, 7 January 2010, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]