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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before Judges: Taghrid Hikmet, Presiding
Seon Ki Park
Joseph Masanche

Registrar: Adama Dieng

Date: 13 January 2010

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-T

JUDICIAL RECORDS ARCHIVES
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**DECISION ON THE EXTREMELY URGENT DEFENCE MOTION FOR
WITNESS KG15 TO TESTIFY BY MEANS OF VIDEO-LINK**

Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Holo Makwaia
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Defence Counsel:
David Jacobs
Claver Sindayigaya
Marc Nerenberg

INTRODUCTION

1. The trial in this case commenced on 31 August 2009. After calling eleven witnesses over fourteen trial days, the Prosecution closed its case on 17 September 2009. The Defence case is scheduled to occur between 18 January and 12 February 2010.¹
2. On 4 January 2010, the Defence filed an extremely urgent confidential motion for leave to hear Witness KG15's testimony by video link.² The Defence submits that Witness KG15 is "an essential exculpatory witness," without whose testimony it would be unfair to proceed.³ The Defence further submits that Witness KG15 is willing to testify before the Tribunal but is unable, due to professional commitments, to travel to Arusha at the appointed time.⁴ The Defence therefore requests that Witness KG15 be allowed to testify by video link from his country of residence or from a neighbouring country.⁵
3. On 7 January 2010, the Prosecution filed a response, arguing that only in exceptional circumstances can the Trial Chamber take a deposition, which includes the use of video-link testimony.⁶ The Prosecution further argues that the Defence has not addressed the possibility that the witness may be replaced by another colleague for the time he is away and that the reasons given as to why Witness KG15 cannot travel to Arusha to give evidence have not been supported by an affidavit from the witness's employer.⁷
4. On 11 January 2010, the Defence filed a reply, arguing that the Prosecution has misconstrued the applicable law on video-link testimony.⁸

DELIBERATIONS

5. As a preliminary matter, the Chamber notes that Witness KG15's statement concerning his inability to travel to Arusha is dated 19 November 2009, approximately one month prior to the filing of the Pre-Defence Brief and six weeks prior to the Defence's "Extremely Urgent Motion to Allow Defence Witness KG15 to Give Testimony by Means of Video-Conference."⁹ Given the Defence's knowledge of Witness KG15's unwillingness or inability to testify in Arusha, the Chamber considers that the

¹ Scheduling Order following the Status Conference held on 17 September 2009 (TC), 28 September 2009, Order I.

² Extremely Urgent Motion to Allow Defence Witness KG15 to Give Testimony by Means of Video Conference, filed on 4 January 2009 ("Motion").

³ Motion, para. 4.

⁴ Motion, paras. 5-6.

⁵ Motion, para. 7.

⁶ *Réponse à la Requête Urgente de la Défense Sollicitant le Témoignage de KG15 par Vidéo-Conférence Article 54 du Règlement de Procédure et de Preuve*, filed on 7 January 2010, paras. 6-8

⁷ *Réponse à la Requête Urgente de la Défense Sollicitant le Témoignage de KG15 par Vidéo-Conférence Article 54 du Règlement de Procédure et de Preuve*, filed on 7 January 2010, paras. 9-11.

⁸ Reply to Prosecution Response to Extremely Urgent Motion to Allow Defence Witness KG15 to Give Testimony by Means of Video Conference, filed on 11 January 2009.

⁹ Motion, Annex 1.



motion could have been made in a more timely manner and that the “extremely urgent” designation is unjustified.

6. Rule 90(A) of the Rules of Procedure and Evidence (“the Rules”) provides that “[w]itnesses shall, in principle, be heard directly by the Chambers”. A Trial Chamber may, however, authorise testimony by video-link, in lieu of physical appearance, when it is “necessary to safeguard the witness’s security”¹⁰ or in the interests of justice.¹¹

7. In determining whether video-link testimony is in the interests of justice, the Trial Chamber shall consider the importance of the testimony, the witness’s inability or unwillingness to attend and whether a good reason has been adduced for that inability or unwillingness.¹² The burden of proof rests with the Party making the request.¹³

8. In this case, the Defence submits that Witness KG15 will provide unique exculpatory testimony regarding meetings, which the Prosecution alleges were held in the “bishop’s room” at the Nyange Parish during April 1994.¹⁴ Having considered the summary of Witness KG15’s anticipated testimony, the Chamber is satisfied that the witness’s testimony could be important to Kanyarukiga’s Defence.

9. With respect to the second and third criteria, the Defence submits that Witness KG15 is willing to testify before the Tribunal but is unable to come to Arusha during January or February 2010 due to pre-existing professional commitments.¹⁵ In support of these submissions, the Defence provides a statement from Witness KG15, outlining his professional responsibilities and the reasons why he cannot be away for more than a day.¹⁶ In his statement, the witness notes that he has been advised of the possibility of testifying by video-conference link and requests leave to testify from his country of residence or a neighbouring country.¹⁷

10. The Chamber recalls that, while inability to attend (due to ill-health, for example) is not a prerequisite for video-link testimony,¹⁸ practical inconveniences related to family

¹⁰ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, para. 8.

¹¹ *Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-00-56-T, Decision on the Prosecution Request for Witness Romeo Dallaire to Give Testimony by Video-Link (TC), 15 September 2006, para. 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference (TC), 29 August 2006, para. 3; *Bagosora et al.*, Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), paras. 5-7.

¹² *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Decision on Testimony by Video-Link (TC), 29 June 2006, para. 2; *Bagosora et al.*, Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), para. 6.

¹³ *Augustin Bizimungu et al.*, Decision on the Prosecution Request for Witness Romeo Dallaire to Give Testimony by Video-Link (TC), para. 13; *Bagosora et al.*, Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference (TC), para. 3; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Sylvain Nsabimana’s Extremely Urgent – Strictly Confidential – Under seal Motion to Have Witness AGWA Testify via Video-link (TC), 17 August 2006, para. 8.

¹⁴ Motion, para. 4.

¹⁵ Motion, para. 5.

¹⁶ Motion, Annex 1.

¹⁷ Motion, Annex 1.

¹⁸ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion to Allow Witness DK 52 to give Testimony by Video-Conference (TC), 22 February 2005, para. 4; *Bagosora et al.*, Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), para. 6.

or work do not, in themselves, justify testimony by video-link.¹⁹ In this case, the Chamber notes that Witness KG15 provided only vague assertions regarding his inability to travel to Arusha during the first part of 2010. He did not identify specific commitments that could prevent him from testifying in person nor did he suggest that others are incapable of performing these duties in his absence. Moreover, while the Defence motion includes details regarding the witness's commitments during the relevant period, it does not provide specific dates for these events nor does it suggest that they could not be handled by someone else. Thus, the Chamber is not convinced that the exceptional circumstances required to authorise testimony by video-link have been established in this case.²⁰

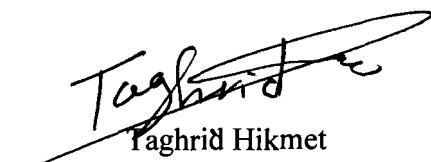
11. Instead, the Chamber finds that Witness KG15's concerns could be addressed by appropriate planning and travel arrangements.²¹ Indeed, the Chamber notes that Witness KG15 is currently scheduled to testify 28th of the 35 Defence witnesses,²² thus allowing sufficient time for his travel arrangements to be made.

FOR THESE REASONS, the Chamber


DENIES the Defence motion.

Arusha, 13 January 2010




Yaghiid Hikmet
Presiding Judge


Seon Ki Park
Judge


Joseph Masanche
Judge

[Seal of the Tribunal]

¹⁹ *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Motion for Video-Link Testimony for Witness SLB (TC), 3 October 2007, para. 5; *Karera*, Decision on Testimony by Video-Link (TC), para. 6, citing *Bagosora et al.*, Decision on Ntabakuze Motion to Allow Witness DK 52 to give Testimony by Video-Conference (TC), para. 5.

²⁰ See *Augustin Bizimungu et al.*, Decision on the Prosecution Request for Witness Romeo Dallaire to Give Testimony by Video-Link (TC), para. 15.

²¹ *Rukundo*, Decision on Defence Motion for Video-Link Testimony for Witness SLB (TC), para. 5.

²² Pre-Defence Brief, filed on 18 December 2009, pp. 19-20.