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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:** 29 January 2010

**THE PROSECUTOR**

v.

**Gaspard KANYARUKIGA**

*Case No. ICTR-2002-78-T*

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JUDICIAL OFFICE  
ICTR

**DECISION ON THE DEFENCE MOTION FOR RECONSIDERATION OF THE  
CHAMBER'S 13 JANUARY 2010 DECISION ON VIDEO-LINK TESTIMONY**

**Office of the Prosecutor:**

Holo Makwaia  
Althea Alexis Windsor  
Cheikh Tidiane Mara  
Lansana Dumbuya

**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 began on 18 January 2010 and is scheduled to run until 12 February 2010.
2. On 4 January 2010, the Defence filed an extremely urgent confidential motion for leave to hear Witness KG15's testimony by video link.<sup>1</sup> The Defence argued that Witness KG15 is willing to testify before the Tribunal but is unable to travel to Arusha due to pre-existing professional commitments.<sup>2</sup>
3. On 13 January 2010, the Trial Chamber denied the Defence motion for video-link testimony, finding that Witness KG15's concerns could be addressed through appropriate planning and travel arrangements.<sup>3</sup> While the Chamber accepted that Witness KG15's testimony could be important to Kanyarukiga's defence, it found that the Defence had failed to identify specific commitments that could prevent the witness from testifying in person or to suggest that others were incapable of performing these duties in the witness's absence.<sup>4</sup>
4. On 19 January 2010, the Defence filed a motion for certification to appeal the decision of the Trial Chamber of 13 January 2010, arguing that the Chamber had applied the wrong legal standard in denying the Defence motion for video-link testimony.<sup>5</sup>
5. On 22 January 2010, the Defence also filed a confidential motion for reconsideration of the Chamber's decision.<sup>6</sup> The Defence submits that new facts have been discovered since the Chamber issued the Impugned Decision and that the Trial Chamber applied the wrong legal standard in deciding the underlying Defence motion.<sup>7</sup>
6. On 26 January 2010, the Prosecution filed a confidential response to the Defence motion for reconsideration.<sup>8</sup> The Prosecution submits that "the criteria for reconsideration are high and ... the Defence has not met them" in this case.<sup>9</sup>
7. On 27 January 2010, the Chamber gave an oral order, instructing the Defence to file its reply, if any, by 12 noon on Thursday, 28 January 2010.

<sup>1</sup> Extremely Urgent Motion to Allow Defence Witness KG15 to Give Testimony by Means of Video Conference, filed on 4 January 2010.

<sup>2</sup> Extremely Urgent Motion to Allow Defence Witness KG15 to Give Testimony by Means of Video Conference, filed on 4 January 2010, paras. 5-6.

<sup>3</sup> Decision on the Extremely Urgent Defence Motion for Witness KG15 to Testify by Means of Video-Link, 13 January 2010.

<sup>4</sup> Decision on the Extremely Urgent Defence Motion for Witness KG15 to Testify by Means of Video-Link, 13 January 2010, para. 10.

<sup>5</sup> Motion for Certification to Appeal the Trial Chamber's 13 January 2010 Decision on Video-Link Testimony, filed on 19 January 2010, paras. 1-4.

<sup>6</sup> Motion for Reconsideration of the Trial Chamber's 13 January 2010 Decision on Video-Link Testimony, filed on 22 January 2010 ("Motion").

<sup>7</sup> Motion, paras. 5, 7.

<sup>8</sup> Prosecutor's Response to the Motion for Reconsideration of the Trial Chamber's 13 January 2010 Decision on Video-Link Testimony, filed on 26 January 2010 ("Response").

<sup>9</sup> Response.

8. On 28 January 2010, the Defence filed a confidential reply, rejecting the Prosecution's reading of the law on reconsideration.<sup>10</sup> The Defence maintains that it has satisfied the criteria for reconsideration.<sup>11</sup> In particular, the Defence submits that "new facts have been brought to the attention of the Chamber (that were not in the possession of the Defence at the time of filing of the original Motion) that alter the underlying basis of the original Decision."<sup>12</sup>

### DELIBERATIONS

5. A Trial Chamber has an inherent, discretionary power to reconsider its decisions when (i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision; (ii) there has been a material change in circumstances since it made its original Decision, or (iii) there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.<sup>13</sup> The party seeking reconsideration bears the burden of demonstrating special circumstances.<sup>14</sup>

6. The Defence argues first that the Trial Chamber erred in law when it found that it was "not convinced that the exceptional circumstances required to authorise testimony by video-link had been established".<sup>15</sup> The Defence submits that the "exceptional circumstances" standard only applies to depositions under Rule 71 of the Rules of Procedure and Evidence and that the Impugned Decision is therefore erroneous. The Chamber does not consider its use of the term "exceptional circumstances" to warrant reconsideration in this case. The Impugned Decision was clear: the Defence did not provide adequate support for Witness KG15's unwillingness or inability to testify in Arusha, thereby failing to satisfy the test for video-link testimony.

9. The Defence further submits that, since the Impugned Decision was issued, new facts have been discovered that "provide a clear basis for granting the video-link testimony due to the impossibility of bringing the witness to Arusha."<sup>16</sup> The Defence

<sup>10</sup> Reply to "Prosecutor's Response to the Motion for Reconsideration of the Trial Chamber's Decision on Video-Link Testimony," filed on 28 January 2010, paras. 1-2 ("Reply").

<sup>11</sup> Reply, para. 3.

<sup>12</sup> Reply, para. 3.

<sup>13</sup> *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza (TC), 29 September 2008, para. 4. See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ndirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008 (AC), 30 January 2009, para. 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)" (TC), 15 June 2004, para. 9.

<sup>14</sup> See, e.g., *Prosecutor v. Nindiliyimana*, Case No. ICTR-00-56-T, Decision on Prosecution's Motion for Reconsideration of the Chamber's Decision Dated 18 February 2009 (TC), 19 March 2009, para. 2; *Karemera et al.*, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza (TC), para. 4; *Prosecutor v. Nzirorera et al.*, Case No. ICTR-98-44-T, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago (TC), 10 October 2003, para. 6.

<sup>15</sup> Motion, para. 7.

<sup>16</sup> Motion, para. 5.

avers that Witness KG15 has events planned on virtually every day of the Defence case, that no one else is available to perform these activities in his absence and that the events were scheduled in advance and are not susceptible to change.<sup>17</sup> In support of these submissions, the Defence provides a calendar of Witness KG15's commitments for January and February 2010 and an email from the Witness and Victims' Support Section indicating that the witness is unable to take three continuous days away from his place of employment.<sup>18</sup>

10. The Trial Chamber does not consider this information to constitute a new fact that did not exist at the time the original decision was rendered.<sup>19</sup> The information in question was known to the witness at the time of the original motion and could have been included had the Defence exercised due diligence.<sup>20</sup> The Chamber therefore finds that the test for reconsideration has not been met in this case.<sup>21</sup>

11. In the interests of justice, however, the Chamber shall treat the Defence request as a new motion and consider the request for video-link testimony on the basis of the information now available. The Chamber has already found that Witness KG15's testimony "could be important to Kanyarukiga's Defence."<sup>22</sup> Moreover, having considered the new Defence submissions and supporting documents, the Chamber finds that a good reason has been shown for Witness KG15's unwillingness or inability to testify in Arusha. Thus, the Chamber finds that the criteria for video-link testimony have been satisfied.

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<sup>17</sup> Motion, para. 4.


<sup>18</sup> Motion, Annexes 1 and 2.

<sup>19</sup> See *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence Motion to Reconsider Order of 2 June 2008 Denying Admission of Church and School Records (TC), 23 July 2008, para. 7; *Nzirorera et al.*, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago (TC), para 6.

<sup>20</sup> See *Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-00-56-T, Decision on the Prosecution Request for Reconsideration of the Chamber's Decision 15 September 2006 Concerning the Testimony of Witness Romeo Dallaire by Video-Link, 20 October 2006, para. 9.

<sup>21</sup> See *Bizimungu et al.*, Decision on Defence Motion to Reconsider Order of 2 June 2008 Denying Admission of Church and School Records (TC), para. 8.

<sup>22</sup> Decision on the Extremely Urgent Defence Motion for Witness KG15 to Testify by Means of Video-Link, 13 January 2010, para. 8.



**FOR THESE REASONS**, the Chamber

**DENIES** the Defence Motion for reconsideration;


**TREATS** the Defence request as a new application;

**AUTHORISES** the taking of Witness KG15's testimony by video-link;

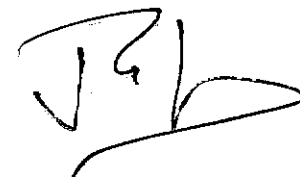
**ORDERS** that Witness KG15's testimony be taken by video-link from The Hague between 8 and 12 February 2010;

**INSTRUCTS** the Registrar, in consultation with the parties, to make all necessary arrangements in respect of the testimony of Witness KG15 by video-link, and to videotape the testimony for possible future reference by the Chamber.

Arusha, 29 January 2010

  
Taghrid Hikmet  
Presiding Judge

  
Saomki Park  
Judge  
  
[Seal of the Tribunal]

  
Joseph Masanche  
Judge