



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-00-56-T
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OR: ENG

TRIAL CHAMBER II

Before Judges: Asoka de Silva, Presiding
Taghrid Hikmet
Seon Ki Park

Registrar: Adama Dieng

Date: 10 February 2010

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU
Case No. ICTR-00-56-T

JUDICIAL RECORDS ARCHIVES
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DECISION ON WITNESS GFR'S RECANTATION OF HIS EVIDENCE

Office of the Prosecution:

Mr Alphonse Van
Mr Abubacarr Tambadou
Ms Faria Rekkas

Counsel for the Defence:

Mr Gilles St-Laurent and Mr Benoît Henry for **Augustin Bizimungu**
Mr Christopher Black and Mr Vincent Lurquin for **Augustin Ndindiliyimana**
Mr Charles Taku and Ms Beth Lyons for **François-Xavier Nzuwonemeye**
Mr Fabien Segatwa and Mr Seydou Doumbia for **Innocent Sagahutu**

INTRODUCTION

1. Prosecution Witness GFR gave evidence before this Chamber on 29 and 30 March 2005. On 24 June 2009, before the commencement of the closing oral arguments, Mr Christopher Black, Lead Counsel for Ndindiliyimana, informed the Chamber that he had received a letter written in Kinyarwanda purporting to be from Witness GFR and which was addressed to the President of the Tribunal.¹ According to the Defence, in the alleged letter, Witness GFR expressed a desire to recant his testimony before this Chamber because he was coerced by the Rwandan authorities to give false testimony against the Accused Ndindiliyimana.² The Defence requested the Chamber to admit the aforesaid letter either as an ID document or an exhibit.³ The Prosecutor objected to the admission of the letter either as an ID or exhibit since there was a great deal of uncertainty about the provenance of the letter.⁴ The Chamber instructed the Defence for Ndindiliyimana to file a motion on the subject of Witness GFR's alleged recantation.⁵
2. On 26 June 2009, the Defence for Ndindiliyimana filed a Motion on the above subject in compliance with the Chamber's oral instructions of 24 June 2009.⁶ In its motion, the Defence requested the Chamber to either admit Witness GFR's purported letter as an exhibit pursuant to Rule 92 *bis* for the purpose of evaluating Witness GFR's credibility, or alternatively, that the Chamber allow the Defence and a representative of the Prosecution to take a deposition from Witness GFR so as to determine the veracity of the letter.
3. On 1 July 2009, the Prosecution opposed the Defence Motion and submitted that the letter in question is not genuine since the signature on it does not resemble the signature on Witness GFR's pre-trial statement.⁷
4. On 4 August 2009, the Trial Chamber denied the Defence Motion, but directed the Registrar to appoint *Amicus Curiae* to investigate (i) Witness GFR's current whereabouts; (ii) whether he did in fact write the letter; and if so (iii) whether he is willing to return to the Tribunal to give testimony under oath.⁸
5. On 2 October 2009, the Trial Chamber received the *Amicus Curiae* report.⁹ On 19 October 2009, the Chamber issued an Interim Order (i) directing the Registrar to disclose the *Amicus Curiae* report to the Parties and (ii) directing the Parties to file submissions regarding the report.¹⁰

¹ T. 24 June 2008, p. 2

² T. 24 June 2008, pp. 2, 3

³ T. 24 June 2008, p. 3

⁴ T. 24 June 2008, p. 3

⁵ T. 24 June 2008, p. 4

⁶ Ndindiliyimana's Motion Requesting Remedy for Possible Witness Recantation. Filed on 26 June 2009.

⁷ *Réponse du Procureur a la Requête de la Défence du Général Augustin Ndindiliyimana Intitulée* "Motion Requesting Remedy for Possible Witness Recantation," 1 July 2009.

⁸ *Prosecutor v. Augustin Ndindiliyimana*, Case No. ICTR-2000-56-T, Decision on Ndindiliyimana's Motion Requesting a Remedy for Possible Witness Recantation (TC), 4 August 2009.

⁹ Final Report by Boniface Njiru *Amicus Curiae* Relating to Witness GFR on Ndindiliyimana's Motion Requesting a Remedy for Possible Witness Recantation, 14 September 2009.

¹⁰ Interim Order on Report of the *Amicus Curiae* Regarding the Alleged Recantation of Prosecution Witness GFR, 19 October 2009.

6. On 26 October 2009, the Defence filed a Motion requesting that the Trial Chamber admit into evidence the letter purportedly written by Witness GFR and the full report of the *Amicus Curiae*. The Defence further requested the Chamber to reject the testimony of Witness GFR.¹¹
7. On 26 October 2009, the Prosecution filed a response in which it opposed the Defence Motion.¹² The Prosecution submitted that the *Amicus Curiae* did not establish the identity of Witness GFR since the person who presented himself to the *Amicus Curiae* as Witness GFR did not provide any form of identification. The Prosecution also pointed out a number of contradictions between the statements made by Witness GFR in the *Amicus Curiae* report and the statements made by the witness to investigators of the Prosecutor's office. For these reasons, the Prosecution submitted that the *Amicus Curiae* report is unreliable. Furthermore, the Prosecution expressed its concern about the manner in which the Defence came into possession of the letter allegedly written by Witness GFR, and suggested that the Defence may have violated protective measures which were granted to Witness GFR.¹³
8. On 30 October 2009, the Defence filed a reply to the Prosecution's submissions.¹⁴ The Defence stated that it is satisfied with the determination made by the *Amicus Curiae* that the person whom he met during his investigation was in fact Witness GFR. With respect to the Prosecution's concern that the Defence may have violated protective measures granted to Witness GFR, the Defence maintains that Witness GFR's alleged letter was sent to the Lead Counsel for Ndindiliyimana by email through someone who was previously unknown to anyone in the Defence team, and that it has not had any kind of communication with Witness GFR himself.¹⁵ In its reply, Defence suggested that the Chamber may, if it pleases, order the recall of Witness GFR in order to ameliorate the prejudice suffered by the accused as a result of the witness' recantation of his testimony. However, the Defence argued that recalling Witness GFR at this late stage of the proceedings would be deleterious to the efficient progress of the case and the rights of the Accused. The Defence further submitted that the Accused has been in detention for a considerable period and the resumption of the proceedings due to the recall of Witness GFR would further prolong his detention. The Defence therefore submitted that in the event that the Chamber is inclined to recall Witness GFR, it should grant the Accused provisional release in order to avert the unfair detention of the Accused. The Defence further submitted that the most viable remedy to Witness GFR's recantation is the exclusion of his entire testimony for lack of credibility.

¹¹ Augustin Ndindiliyimana's Motion for Admission of Statements Relating to Witness GFR's Recantation of his Testimony, filed on 26 October 2009, paras. 15-16; Reply to the Submissions of the Prosecutor Regarding the Report of the *Amicus Curiae* Regarding the Recantation of Prosecution Witness GFR, filed on 30 October 2009, para. 11.

¹² *Réponse du Procureur a la Requête de la Défense du Général Augustin Ndindiliyimana Intitulée* " Augustin Ndindiliyimana's Motion for Admission of Statements Relating to Witness GFR's Recantation of his Testimony," filed on 26 October 2009.

¹³ *Réponse du Procureur a la Requête de la Défense du Général Augustin Ndindiliyimana Intitulée* " Augustin Ndindiliyimana's Motion for Admission of Statements Relating to Witness GFR's Recantation of his Testimony," filed on 26 October 2009.

¹⁴ Reply to the Submissions of the Prosecutor Regarding the Report of the *Amicus Curiae* Regarding the Recantation of Prosecution Witness GFR, filed on 30 October 2009.

¹⁵ Reply to the Submissions of the Prosecutor Regarding the Report of the *Amicus Curiae* Regarding the Recantation of Prosecution Witness GFR, filed on 30 October 2009, para. 4.

9. On 19 November 2009, the Chamber issued another Interim Order in which it instructed the Registrar, through the Witnesses and Victims Support Section (WVSS), to ascertain whether the person whom the *Amicus Curiae* met was in fact Prosecution Witness GFR.¹⁶ The Chamber further directed the Registrar to examine the circumstances under which the letter that was purportedly written by Witness GFR fell into the possession of the Lead Counsel for Ndindiliyimana.
10. On 18 December 2009, the Chamber received the Registrar's submissions in which it confirmed that it was indeed Prosecution Witness GFR who met with the *Amicus Curiae*, the submissions also referred to other matters related to the witness' alleged recantation of his testimony before this Chamber.¹⁷ On 21 December 2009, the Registrar filed additional submissions relating to his findings on the aforementioned issues.¹⁸
11. On 23 December 2009, the Chamber issued a further Interim Order in which it ordered the Registrar to disclose his submissions on Witness GFR to all the parties on a confidential basis.¹⁹ The Chamber also invited the parties to file their submissions on the findings of the Registrar no later than 8 January 2010.
12. On 5 January 2010, the Prosecution filed its submissions on the Registrar's findings. On 8 January 2010, the Defence for Ndindiliyimana responded to the Prosecution's submissions.²⁰ In its submissions, the Defence vehemently denied the assertions of the Prosecution that the Defence had induced Witness GFR to recant his testimony. The Defence further requested the Chamber to take into consideration the letter of recantation written by Witness GFR as well as the coercive circumstances that led to his perjured testimony when assessing the credibility of all the witnesses who testified on the events of Nyaruhengeri. Finally, the Defence requested the Chamber to sanction Mr. Van, Counsel for the Prosecution, for making unfounded and false accusations against the Defence Counsel and for misleading the Chamber.

DELIBERATIONS

Witness GFR's recantation of his testimony before the Chamber.

13. The Chamber has considered the Prosecution's submissions impugning the soundness of the findings of the *Amicus Curiae* and the Registrar with respect to Witness GFR's letter of recantation. The Chamber finds that its review of the aforesaid reports does not support the contentions of the Prosecution. In the absence of any evidence to suggest that the above reports suffer from debilitating flaws, the Chamber will accept their findings to be sufficient.
14. The Chamber has also considered the Prosecution submission that there is reason to believe that Witness GFR was prevailed upon by Ndindiliyimana's Defence to recant his

¹⁶ Interim Order to Ascertain the Identity of Witness GFR and Other Matters, dated 19 November 2009.

¹⁷ Registrar's Strictly Confidential Submissions in Respect of the Trial Chamber II "Interim Order to Ascertain the Identity of Witness GFR and Other Matters" dated 17 December 2009

¹⁸ Registrar's Strictly Confidential Additional Submissions in Respect of the Trial Chamber II "Interim Order to Ascertain the Identity of Witness GFR and Other Matters" dated 21 December 2009

¹⁹ Interim Order Concerning the Registrar's Report on the Identity of Witness GFR and Other Matters, dated 23 December 2009

²⁰ Augustin Ndindiliyimana's Submissions Relative to the Report of the Registrar and in Compliance with the Trial Chamber's Interim Order of 23 December 2009, dated 8 January 2010

testimony. The Chamber notes that the Prosecution has not adduced any evidence to support its assertions. The Chamber reminds the Prosecution that the allegation that a party has infringed the protective measures granted to a witness by the Trial Chamber is a serious matter. Therefore, the Prosecution must desist from making such allegations lightly without supporting evidence.

15. Having reviewed the letter of Witness GFR and the above reports, the Chamber concludes that the witness has now disavowed the entirety of his testimony. The Chamber will address the consequences of Witness GFR's recantation in its final Judgement

Recall

16. The Chamber notes that the Defence does not make a specific request to recall Witness GFR, it merely suggests that it is a remedial measure that the Chamber can adopt in order to address the issues resulting from Witness GFR's recantation of his evidence. The recall of Witness GFR is an important issue that merits the Chamber's consideration despite the fact that it is not seized of a specific request for recall.
17. The Chamber notes that the remedy of recalling a witness should be availed only in the most compelling of circumstances and where there is a good ground to warrant such a measure.²¹ The Chamber finds that, in this instance, there is no good ground to warrant the recall of Witness GFR. The evidence hearing phase in this case was concluded almost a year ago, and the Chamber is currently in deliberations for final judgement. The recall of Witness GFR will therefore be tantamount to re-opening the case, the result of which would hinder the expeditious conclusion of the case and negatively impact on the rights of the accused to a fair trial. The Chamber therefore finds that the negative repercussions of recalling the witness outweigh any benefits that might accrue from such a course of action. For the foregoing reasons, recalling the witness in this circumstance would not be a judicious exercise of the Chamber's discretion.

Exclusion of the Testimony of Witness GFR

18. The Defence for Ndindiliyimana submits that the optimal solution to the problems arising from Witness GFR's recantation is to exclude his entire testimony for lack of credibility. The Chamber recalls that the exclusion of evidence is at the extreme end of a scale of remedies available to the Chamber in ameliorating prejudice caused to the accused.²² The Chamber notes that, in particular, the moving party has to demonstrate that it has suffered

²¹ *Prosecutor v. Bizimungu et al.*, Decision on Jerome Bicamumpaka's Motion Requesting Recall of Prosecution witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA (TC), 21 April 2008, para. 6, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-examination (TC), 19 September 2005, para. 2, *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Defence Motion to Recall Witness KEL for Further Cross-examination (TC), 28 October 2004, para. 4, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR -95-I-T, Decision on the Defence Motion for the Re-examination of Defence Witness DE (TC), 19 August 1998, para. 14

²² *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor Andre Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11, *Karemera et al.*, Case No. ICTR 98-44-T, Decision on the Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions against the Prosecution and Exclusion of Evidence outside the Scope of the Indictment (TC), 19 October 2006, para. 6

a degree of prejudice to justify the exclusion of such evidence.²³ In this instant case, the Chamber finds that the fact that a witness may have recanted his testimony *per se* does not absolve the Defence from the obligation of showing that it has suffered a degree of prejudice that warrants the exclusion of the testimony in question. However, the Chamber will consider Witness GFR's recantation of his evidence when evaluating his credibility. Therefore, maintaining his evidence in the Trial record will not be antithetical to either the fairness of the proceedings or the rights of the Accused.

19. The Defence also requested the Chamber to bear in mind the fact that Witness GFR was coerced by the Rwandan authorities to give false testimony when considering the credibility of other Prosecution witnesses who testified on the events of Nyaruhengeri. As a preliminary observation, the Chamber notes that apart from the unverified assertions of Witness GFR that the Rwandan authorities induced him by duress to give false testimony against the Accused, the Chamber has not been furnished with any objective evidence to attest to Witness GFR's claims. The Chamber recalls that the mandate of both the *Amicus Curiae* and the Registrar did not extend to a determination of the factors that prompted Witness GFR to recant his testimony. Their findings are limited to ascertaining whether the witness wrote a letter in which he articulated a desire to recant his testimony; however, the findings do not address the veracity of the contents of the said letter. The Chamber further notes that the Defence has not attempted to demonstrate whether Witness GFR's recantation of his evidence does have any bearing on the credibility of the rest of Prosecution witnesses who testified on the events of Nyaruhengeri.
20. Notwithstanding the foregoing, the Chamber hastens to emphasize that it will evaluate the credibility of all witnesses in the context of the Trial record as a whole.

Admission into Evidence of the Letter of Witness GFR, the Report of the Amicus Curiae and the Submissions of the Registrar

21. In its submissions, the Defence requests the Chamber to admit into evidence pursuant to Rule 92 *bis*, the letter written by Witness GFR, the report of the *Amicus Curiae* and the annexes attached to it. The Chamber notes that none of the parties made any request to admit into evidence the submissions of the Registrar. Given the importance of the Registrar's submissions in determining the credibility of Witness GFR, the Chamber will *proprio motu* consider whether they should also be admitted into evidence.
22. The Chamber will now determine whether there are any considerations that militate against the admissibility of the above documents under Rule 89(C) and 92 *bis* of the Rules. Rule 92 *bis* bestows a discretionary power upon a Trial Chamber to admit a written statement which goes to proof of a matter other than the acts and conduct of the Accused. The meaning of the term "acts and conduct of the accused as charged in the Indictment" is a plain expression that should be accorded its ordinary meaning: deeds and behavior of the Accused himself and not the acts and conduct of his co-perpetrators and/or subordinates.²⁴ Once the Chamber is satisfied that the threshold requirement of Rule 92 *bis* has been met, its discretion to admit the written material is enlivened.

²³ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Second Motion to Exclude the Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness, 4 March 2008, para. 19

²⁴ *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Prosecutions's Request to Have Written Statements Admitted under Rule 92 *bis* (TC), 21 March 2002, para. 22

- 23. However, for material to be admissible under Rule 92 *bis*, the general requirements of relevance and probative value, applicable to all genre of evidence under Rule 89 (C) must be satisfied. For the purposes of Rule 89(C), evidence will be considered to be relevant where there is a nexus between such evidence and proof of an allegation pleaded in the Indictment. Evidence will be considered to have probative value if it tends to prove, or disprove, an issue and has sufficient *indicia* of reliability.²⁵ Further, the exercise of a Chamber's discretion under both Rules 89 (C) and 92 *bis* must be governed by the right of the accused to a fair trial, as provided for in Articles 19 and 20 of the Statute.
- 24. The Chamber is satisfied that the documents sought to be admitted into evidence satisfy the threshold requirement of Rule 92 *bis* since they do not advert to the acts and conduct of the Accused as pleaded in the Indictment. The letter of the witness only explains the fact that he gave false testimony before the Chamber and that he has recanted his perjured testimony; the reports of the *Amicus Curiae* and the Registrar do not refer to the conduct and the acts of the Accused as charged in the Indictment, but merely report on the circumstances surrounding Witness GFR's recantation and his identity. The Chamber is also satisfied that the documents are relevant to the question of Witness GFR's credibility and therefore meet the requirements of relevance and probative value stipulated in Rule 89 (C). The Chamber notes that material relating to the credibility of a witness is *prima facie* relevant and has probative value.²⁶

FOR THE ABOVE REASONS, THE CHAMBER

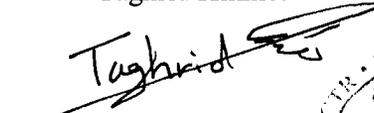
- I. GRANTS** in part the Defence motion.
- II. ADMITS** into evidence, the following documents, (i) the letter of recantation written by Witness GFR in which he admitted that he gave false testimony before the Chamber; (ii) the report of the *Amicus Curiae* and the annexes attached to it, (iii) and the submissions of the Registrar and its annexes.
- III. DIRECTS** the Registrar to assign appropriate exhibit numbers to the aforementioned documents, forthwith.

Arusha, 10 February 2010, done in English.

Read and approved by
Asoka de Silva

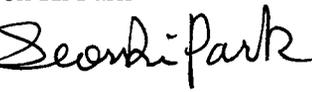

Presiding Judge

Taghrid Hikmet


Judge

Seon Ki Park




Judge

[Seal of the Tribunal]

²⁵ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-1, Decision on Jerome Bicomumpaka's Confidential and Amended Motion to Admit Rwandan Judicial Records Into Evidence, 10 June 2008, paras. 4-5.; *Bizimungu et al.*, Decision on Justin Mugenzi's Motion to Admit into Evidence the Transcripts from the Munyakazi Referral Hearing, 23 July 2008, paras. 9-10

²⁶ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-1, Decision on Jerome Bicomumpaka's Confidential and Amended Motion to Admit Rwandan Judicial Records into Evidence (TC), 10 June 2008, para. 11