



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
15-2-2010
(50391-50387)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

50391
Mey
\$

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 15 February 2010

THE PROSECUTOR

v.

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

JUDICIAL RECORDS ARCHIVES
2010 FEB 15 P 4: 51
Mey

**DECISION ON PROSECUTOR'S MOTION FOR RECONSIDERATION OF TRIAL
CHAMBER III DECISION OF 11 NOVEMBER 2009 NOT TO ADMIT INTO
EVIDENCE I-P-048**

Office of the Prosecution:
Don Webster
Saidou N'Dow
Sunkarie Ballah-Conteh
Eric Husketh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

28

INTRODUCTION

1. Édouard Karemera presented his defence case between 21 April 2008 and 28 May 2009 both calling witnesses and testifying himself. During the cross-examination of Karemera, the Prosecution relied on documents not previously admitted during its case-in-chief and sought admission of some of these documents into evidence. In its Decision of 11 November 2009 ("Impugned Decision"), the Chamber refused to admit into Evidence I-P-048, *préfet* Clément Kayishema's draft letter to the Minister of the Interior.¹

2. On 23 November 2009, the Prosecution filed a Motion for Reconsideration of the Impugned Decision with respect to the said document.² Édouard Karemera opposes the motion.³

DELIBERATIONS

3. The standard for reconsideration has been well-established by this Tribunal. A Chamber has the inherent 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 injustice thereby warranting the exceptional remedy of reconsideration.⁴

4. The Prosecution submits that the Chamber's decision was erroneous in law or an abuse of discretion because the Chamber used the wrong legal standards as it relied primarily on the 2004 Appeal Chamber Judgement in *Kordić and Čerkez*, whereas it would have been more appropriate to rely on the principles laid down in the 2009 Appeals Chamber decision in *Prlić*.⁵

¹ *Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et. al."), Decision on Admission of Documents Used in Cross-Examination of Édouard Karemera and Witness 6, ("Impugned Decision"), 11 November 2009.

² Prosecutor's Motion for Reconsideration of Trial Chamber III Decision of 11 November 2009 Not to Admit into Evidence I-P-048 (*Prefet Kayishema's Draft Letter to MININTER*), 23 November 2009 ("Motion for Reconsideration").

³ Prosecutor's Reply to Édouard Karemera's Response *Motion for Reconsideration of Trial Chamber III Decision of 11 November 2009 Not to Admit into Evidence I-P-048* 22, December 2009 ("Prosecutor's Reply").

⁴ *Karemera et. al.*, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2.

⁵ Motion for Reconsideration, para. 17, Prosecutor's Reply, para. 4. The decision referred to is *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, and Berislav Pušić*, Case No. IT-04-74-AR.73.14, Decision on the Interlocutory Appeal Against the Trial Chamber's

5. The Chamber, however, recalls that in the Impugned Decision it referred to the Appeals Chamber decisions in *Kordić and Čerkez*, as well as *Delić*.⁶ In *Prlić*, the ICTY Trial Chamber set guidelines for the admission of fresh prosecution evidence, and the Appeals Chamber confirmed the principles laid out in the two prior decisions cited by the Chamber in the Impugned Decision. The Appeals Chamber noted that while the Trial Chamber's decision "appears to be more lenient to the admission of fresh evidence for the sole purpose of 'imposing a witness's credibility or refreshing his/her memory' it still specifies that the Trial Chamber will decide on the admission on the case-by-case basis in conformity with Rule 89 of the Rules and in light of that clarification the Appeals Chamber [did] not find that such an approach is erroneous."⁷ Thus, *Prlić* does not signal a more liberal approach to the admission of fresh evidence than prior decisions.

6. The Prosecution submits that the Chamber omitted to address certain specific issues such as "the importance of the new document", the "nature of the tendered material", and "purpose for its admission", in relation to the available measures to address the prejudice of admitting it.⁸ With respect to "the importance of the new document", the Chamber notes that "it is not the contents of the documents that the Trial Chamber is required to assess, but the purpose of its admissibility."⁹ In assessing the evidence, the Trial Chamber has the discretion to limit the purpose for which the admitted piece of evidence may be used.¹⁰ However, with regards to this specific document and in this instance it is not possible to distinguish between the purpose of impeaching a witness and the purpose of proving the guilt of the Accused because the witness is Édouard Karemera, one of the accused in the instant case. As such, impeaching his credibility as a witness would also reflect upon his guilt as to the charges brought against him in the Indictment.

7. The issue that arose during cross-examination is whether Édouard Karemera knew that the civil defence programme had become operational in Kibuye *préfecture*, which he denied.¹¹ Admitting the draft report into evidence would not *per se* impeach Karemera's

Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses (AC), 26 February 2009 ("*Prlić* Decision").

⁶ Impugned Decision, *fn*ts. 8, 11 (citing *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeals Judgement, para. 222 ("*Kordić and Čerkez* Appeal Judgement"); *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal against Trial Chamber's Oral Decision on Admission of Exhibits 1316 and 1317 (AC), 15 April 2008, para. 22.

⁷ *Prlić* Decision, para. 28.

⁸ Prosecutor's Reply, para. 5.

⁹ *Prlić* Decision, para. 29.

¹⁰ *Id.*

¹¹ Motion for Reconsideration, para 3.

credibility, because it is not in dispute that he did not receive the written report. The draft report will only tend to impeach Karemera's credibility in conjunction with other evidence, such as the evidence that Karemera met with *préfet* Clément Kayishema shortly after the report was drafted, from which – as was suggested by the Prosecutor during cross-examination – it could be inferred that the *préfet* would have given him the same information orally as was contained in the report. Thereby, the admission of the draft report would serve the purpose of proving an allegation.

8. In this instance Édouard Karemera was not put on notice of this issue before the closure of the Prosecution case or at any time before the draft report was put to him during his cross-examination, as the document was not disclosed to the Defence until after the commencement of the cross-examination when counsel for the Defence was not allowed to inform Karemera about the document or discuss it with him. The Prosecution argues that, before the close of its case, it could not have anticipated that Karemera would refute that the civil defence programme was operational in Kibuye *préfecture* and that a party is allowed a certain element of surprise in cross-examination. The Chamber does not accept these arguments. The Prosecution could not, at the close of its case, rely on the Defence stipulating to anything or that Karemera would testify in his defence and, if so, which facts he would agree to. The fact that the Prosecutor included the draft report in the bundle of documents distributed to the Parties during cross-examination before the issue in question arose also suggests that the Prosecution was indeed prepared for the eventuality that Karemera would contest the information in the draft report. Furthermore, the principle that a party during cross-examination is allowed a certain element of surprise cannot supersede the principle that the Accused must be put on notice before the close of the Prosecution case of the allegations that he or she is required to answer.

9. The Prosecution further submits that the Chamber, instead of denying the admission of the draft report should have considered ways to remedy the prejudice to Édouard Karemera resulting from the late disclosure of the draft report. The Chamber recalls that during his cross-examination Karemera denied any knowledge of the information in the draft report; wherefore a rebuttal of the aforementioned inference suggested by the Prosecutor would require Karemera to call *préfet* Clément Kayishema to testify, if possible. In light of the Prosecution's unsatisfactory reasons for the late disclosure of the draft report, the Chamber found that the resulting delay of trial would not be in the interest of justice.

S0387


10. The Prosecution, moreover, argues that it otherwise intends to tender the draft report into evidence during its rebuttal case and therefore suggests that the document might be admitted now in the way the Prosecution wishes. The Chamber notes that this submission has no basis in the jurisprudence that the Prosecution is relying upon. On the contrary, accepting the submission would negate the modalities established in the jurisprudence for the admission of fresh evidence.

11. Therefore, the Chamber finds no reason to reconsider the Impugned Decision.

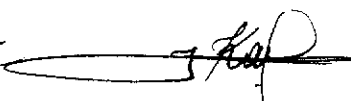
FOR THESE REASONS, THE CHAMBER

DENIES the Prosecutor's Motion for Reconsideration.

Ausha, 15 February 2010, done in English.



Dennis C. M. Byron
Presiding Judge



Gberdao Gustave Kam
Judge



Vagn Joensen
Judge

[Seal of the Tribunal]

