

ICTR-98-44-T
6-4-2010
(50734-50729)

50734
HM



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: 6 April 2010

THE PROSECUTOR

v.

Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
RECEIVED

2010 APR 28 PM 10:26

DECISION ON JOSEPH NZIRORERA'S MOTIONS TO APPOINT AN *AMICUS CURIAE* TO INVESTIGATE GAP FOR FALSE TESTIMONY AND TO APPOINT AN *AMICUS CURIAE* TO INVESTIGATE PROSECUTION WITNESS BDW FOR FALSE TESTIMONY

Rule 91 of the Rules of Procedure and Evidence

Office of the Prosecution:
Don Webster
Saidou N'Dow
Sunkarie Ballah-Conteh
Takeh Sendze
Jean-Baptiste Nsanzimfura

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

8/7

INTRODUCTION

1. On 26 January 2010, Joseph Nzirorera orally moved the Chamber, pursuant to Rule 91 of the Rules of Procedure and Evidence, for the appointment of an *amicus curiae* to investigate Defence Witness GAP for false testimony.¹ The Prosecution responded to the motion on the record and filed a supplemental submission deferring to the discretion of the Chamber whether another *amicus curie* should be appointed or if the Chamber can await the results of the report which Trial Chamber II has already ordered regarding GAP.²
2. On 3 February 2010, Joseph Nzirorera filed a motion requesting the appointment of an *amicus curiae* to investigate Prosecution Witness BDW for false testimony.³ The Prosecution opposes the motion.⁴

DELIBERATIONS

3. If "strong grounds" exist for believing that a witness has knowingly and wilfully given false testimony, Rule 91(B) provides the Trial Chamber with the discretionary power to either: (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or (ii) where the Prosecutor, in the view of the Trial Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Trial Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.
4. In determining whether strong grounds exist, a Chamber must examine, on a case-by-case basis, and given the particular circumstances of each case, whether evidence exists of intent to commit the offence.⁵ Jurisprudence of the Tribunal establishes that contradictions between witnesses' testimony do not, standing alone, demonstrate that a witness intended to

¹ T. 26 Jan. 2010, pp. 46-50.

² Prosecutor's Supplemental Submission in Response to Joseph Nzirorera's Motion to Appoint an *Amicus Curiae* to Investigate GAP for False Testimony, filed on 2 February 2010 ("Supplemental Submission").

³ Joseph Nzirorera's Motion for Appointment of Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony, filed on 3 February 2010 ("Motion").

⁴ Prosecutor's Response to Nzirorera's Motion for Appointment of *Amicus Curiae* to Investigate Prosecution Witness BDW for False Testimony, filed on 8 February 2010.

⁵ *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera* ("Karemera et al."), Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony (TC), 29 December 2006, para. 7.

887

mislead the Chamber and to cause harm.⁶ Likewise, the mere existence of discrepancies between a witness's testimony and his or her earlier statements do not constitute strong grounds for believing that the witness may have knowingly and wilfully given false testimony.⁷ However, where additional evidence exists that goes beyond mere contradictions in testimony, and indicates an intent to knowingly and wilfully mislead or deceive the Chamber, it may be appropriate to appoint an *amicus curiae* to investigate the matter further.⁸

5. In exercising its discretion, the Trial Chamber must take into account certain factors, such as (i) indicia as to the *mens rea* of the witness, including his or her intent to mislead and cause harm; (ii) the relationship between the statement in question and a material matter in the case; (iii) the possible bearing of the statement in question on the Chamber's final decision.⁹ Finally, the elements of false testimony are: (i) the witness must make a solemn declaration; (ii) the false statement must be contrary to the solemn declaration; (iii) the witness must believe the statement was false at the time it was made; and (iv) there must be a relevant relationship between the statement and a material matter within the case.¹⁰

Defence Witness GAP

6. Witness GAP testified as a Prosecution Witness in four trials before this Tribunal before he was called as a Defence Witness for Joseph Nzirorera.¹¹ The Chamber is aware that an *amicus curiae* has been appointed by Trial Chamber II to investigate alleged false testimony on the part of Witness GAP, after that Chamber found strong grounds to believe that the Witness has knowingly and wilfully given false testimony.¹² Witness GAP testified in the instant case that Nzirorera called the *commune* office the evening of 6 April and chaired a

⁶ *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T ("*Bagilishema*"), Decision on the Request of the Defence for the Chamber to Direct the Prosecution to Investigate a Matter with a View to the Preparation and Submission of an Indictment for False Testimony (TC), 11 July 2000, para. 6.

⁷ *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Judgement (AC), 27 November 2007, para. 32.

⁸ See *The Prosecutor v. Jean de Dieu Kamuhanda*, Oral Decision (Rule 115 and Contempt of False Testimony) (AC), 19 May 2005 (ordering an *amicus curiae* investigator where there was a conflict of testimony between witnesses and where there was evidence of witness tampering and solicitation of false testimony, purportedly by two Tribunal employees).

⁹ *Karemera et al.*, Decision on "Joseph Nzirorera's Appeal From Refusal to Investigate [a] Prosecution Witness for False Testimony" and on Motion for Oral Arguments (TC), 22 January 2009, para. 21.

¹⁰ *The Prosecutor v. Jean-Paul Akayesu* ("*Akayesu*"), Case No. ICTR-96-4-T, Decision on Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R" (TC), 9 March 1998 (signed 24 March 1998), p 3 ("*Witness R Decision*").

¹¹ Supplemental Submission, para 1.

¹² *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza*, Case No. ICTR-99-50-T, Decision on Jérôme-Clément Bicamumpaka's Motion for the Recall of Prosecution Witness GAP (TC), 5 March 2009, para 27.

meeting at his mother's house in the morning of 7 April 1994 by telephone.¹³ However, in previous statements and in other trials GAP asserted that Nzirorera was physically present at the meeting of 7 April 1994.¹⁴ Nzirorera asserts that this contradiction between his instant testimony and prior testimony and statements warrants the appointment of an *amicus curiae* under Rule 91(B).

7. Nonetheless, the Chamber notes that the Indictment merely alleges that Nzirorera held meetings at his mother's home, without specifically referring to presence either by phone or in person.¹⁵ Moreover, the Prosecution has elected to not attempt to prove Nzirorera's presence either by phone or in person at that 7 April 1994 meeting.¹⁶ As such, the testimony alleged to be false is not relevant to a material matter in the case. Instead, it goes to the credibility of the witness and that is a determination to be made by the Chamber which will not be aided by the appointment of an *amicus curiae*. Therefore, the motion must be denied.

Prosecution Witness BDW

8. At issue is whether BDW knowingly and wilfully gave false testimony when he testified in November 2007 that Joseph Nzirorera participated in an MRND rally at a stadium in Kibuye in June of 1993 during which Nzirorera allegedly told the assembled crowd that they were lagging behind in their efforts to confront the Tutsi and had failed to organise a group of *Interahamwe* in Kibuye.¹⁷

9. Joseph Nzirorera asserts that he has satisfied the requirements of Rule 91(B) for appointing an *amicus curiae* as: (i) the testimony of six Defence witnesses contradicts that given by BDW; (ii) BDW recanted his prior testimony concerning Nzirorera during a meeting with Defence Investigator Dick Prudence Munyeshuli in May 2009; (iii) Prosecution Witness BGD, who also testified that Nzirorera participated in the rally, has recanted and has signed a written statement in which he states that he falsely accused Nzirorera at the behest of BDW; and (iv) Defence Expert Witness Kim Hughes testified that the relevant portions of a written statement purportedly made by BDW on 20 December 2002 ("Kibuye prison

¹³ T. 25 Jan. 2010, pp. 11, 12.

¹⁴ T. 25 Jan. 2010, pp. 12-32.

¹⁵ Indictment, para. 27.

¹⁶ T. 25 Jan. 2010, pp. 8, 9.

¹⁷ Motion, paras. 3, 4.

document”), and spontaneously produced by BDW during his cross-examination on 8 April 2008 as evidence corroborating his testimony, is a montage.¹⁸

10. Recalling that the moving party bears the burden of proving the predicate elements of false testimony¹⁹, the Chamber concludes that there has not been a sufficient showing of strong grounds to warrant the appointment of an *amicus curiae* in regards to the investigation of this Witness’ testimony. First, the Chamber notes that the conflicting testimony between BDW and the witnesses listed by Joseph Nzirorera is insufficient, in itself, to constitute strong grounds for ordering an investigation under Rule 91(B).²⁰ Also, the Prosecution correctly points out that because the six witnesses identified by Nzirorera who contradict BDW’s testimony are alleged participants in Kibuye rally, the proper venue for making credibility determinations among them is in judgement deliberations, not a decision concerning whether to appoint an *amicus curiae*. Therefore, the Chamber considers that contradictory testimony will not be considered in assessing whether strong grounds exist.

11. Turning to the affidavit of Defence Investigator Dick Prudence Munyeshuli, the Chamber considers that Investigator Munyeshuli is not a disinterested third-party and there is no independent corroboration of this alleged recantation on the part of Witness BDW. While the Chamber does not discount the value of the statement, it finds it insufficient, by itself, to establish strong grounds for appointing an *amicus curiae*.

12. Thirdly, accepting as true that BGD did recant his sworn testimony and claim that he falsely accused Joseph Nzirorera at the behest of BDW in a statement made to Investigator Munyeshuli, this would tend to show false testimony on the part of BGD or possibly contempt of the Tribunal on the part of Witness BDW. However, it does not show strong grounds for believing that BDW’s testimony is false. BDW’s recruitment of BGD to give false testimony does not *per se* impact the truthfulness of BDW’s testimony as to the live or material issue; namely Nzirorera’s presence at the Kibuye rally in June of 1993.

13. Turning lastly to the Kibuye prison document and the testimony of Kim Hughes, the Chamber recalls that Hughes was accepted as an expert witness and his report was entered into evidence. The expert report shows that there are indicia of the possibility of false

¹⁸ Motion, paras. 6-13.

¹⁹ *Akayesu*, Witness R Decision at pp. 3-4; *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 253.

²⁰ *Bagilishema*, Decision on the Request of the Defence for the Chamber to Direct the Prosecution to Investigate a Matter with a View to the Preparation and Submission of an Indictment for False Testimony (TC), 11 July 2000, para. 6.


testimony on the part of BDW, but makes no ultimate determination that BDW intended to knowingly and wilfully mislead or deceive the Chamber. Therefore, at this stage the Chamber is merely faced with inconsistencies and contradictions between two different forms of evidence, which cannot rise to the level of strong grounds warranting the appointment of an *amicus curiae*. As such, none of the evidence supporting Joseph Nzirorera's motion meets the threshold of strong grounds for believing that a witness has knowingly and wilfully given false testimony as required by Rule 91(B). Therefore, the motion must be dismissed.

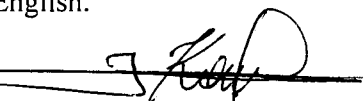
14. The Chamber additionally notes that even if strong grounds were to be found which would support the appointment of an *amicus curiae*, on a practical level the proceedings would not benefit from the resulting report. The Chamber recalls that Witness BDW has been thoroughly examined and cross-examined on multiple occasions, Witness BGD has given sworn testimony and was scheduled to testify for the Defence before his name was withdrawn by Joseph Nzirorera, and that Kim Hughes' expert report is in evidence. It is unclear what additional evidence would be adduced by having an *amicus curiae* re-interview those people.

FOR THESE REASONS, THE CHAMBER

DENIES Joseph Nzirorera's Motions for the appointment of an *amicus curiae* to investigate Defence Witness GAP and Prosecution Witness BDW for false testimony.

Arusha, 6 April 2010, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Wagn Joensen
Judge

[Seal of the Tribunal]

