



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: 7 April 2010

THE PROSECUTOR

v.

**Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR RECONSIDERATION OF
THE CHAMBER'S DECISION ON ADMISSION OF WRITTEN STATEMENTS**

Rule 73 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

INTRODUCTION

1. On 8 February 2010, Joseph Nzirorera filed a motion seeking reconsideration of the Chamber's Decision of 15 July 2009¹ on the admission of written statements pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence.² The Prosecution opposes the Motion.³

DELIBERATION

2. The 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 an injustice thereby warranting the exceptional remedy of reconsideration.⁴

3. Joseph Nzirorera submits that the Chamber has had the benefit of hearing some of his *viva voce* witnesses wherefore the Chamber now is in a better position to determine whether admission of five statements, previously rejected, in lieu of live testimony is warranted. For some of them, Nzirorera is "willing to delete certain paragraphs". According to Nzirorera these are new facts warranting reconsideration.⁵

4. The Chamber recalls that in his motion of 10 December 2008⁶ requesting the admission of written statements and transcripts pursuant to Rule 92 *bis*, Joseph Nzirorera made a blanket statement that the documents he was seeking to have admitted fulfilled the requirements of Rule 92 *bis*.⁷ However, there was no specific pleading in relation to each statement or transcript in the Original Motion. The Chamber considers that a motion for reconsideration cannot be based on fresh arguments that could have been developed in the Original Motion.

¹ Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Witness Testimony, 15 July 2009 ("Original Decision") and Reconsideration of and Corrigendum to the Chamber's Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Testimony, 31 July 2009.

² Joseph Nzirorera's Motion for Reconsideration of Ruhengeri Rule 92 *bis* Evidence, filed on 8 February 2010.

³ Prosecutor's Response to Nzirorera's Motion for Reconsideration of Ruhengeri Rule 92 *bis* Evidence, filed on 15 February 2010.

⁴ *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Reconsider the Warning Issued to Co-Counsel (TC), 8 September 2008, para. 4.

⁵ Motion, para. 2.

⁶ Joseph Nzirorera's Omnibus Motion for Admission of Written Statement and Testimony ("Original Motion"), filed on 10 December 2008.

⁷ Original Motion, paras. 4 and 5.

The Chamber will, therefore, not consider such arguments with respect to applications that were made in the Original Motion.

Statement of Charles Nzabagerageza

5. In its Original Decision, the Chamber denied the admission of the statement of Charles Nzabagerageza as attachments referred to in the said statement were missing and the probative value of the statement was therefore limited.⁸

6. The Chamber notes that Joseph Nzirora has had several opportunities to rectify this oversight, in particular when the Chamber rendered its decision, on 15 July 2009. However, Nzirorera waited more than six months before submitting the attachments to the statement of Charles Nzabagerageza. This demonstrates a clear lack of diligence on the part of the Defence of Joseph Nzirorera.

7. The Chamber, however, considers that the inclusion of the attachments to the statement of Charles Nzabagerageza is a material change in circumstances since the Chamber made its Original Decision. Consequently, the Chamber decides to reconsider its decision denying the admission of Charles Nzabagerageza's statement in view of the attachments provided.

8. The admission of a written statement under Rule 92 *bis* (A) involves an enquiry as to whether the statement sought to be admitted goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment and whether it satisfies Rule 89 (C), in that it is relevant and has probative value.⁹ Definitive proof of reliability and credibility of the evidence is not required, but merely a showing of *prima facie* reliability and credibility on the basis of sufficient indicia.¹⁰ In addition, the non-exhaustive factors listed in Rule 92 *bis* (A) (i) and (ii)¹¹ and the formal requirements of Rule 92 *bis* (B) must also be met. Even if a statement fulfils all of these requirements, the Chamber must decide whether or not to exercise its discretion to admit it, bearing in mind the overarching necessity of ensuring a fair trial. Pursuant to Rule 92 *bis* (E), if the Chamber finds a statement admissible, it must also decide whether to admit it in whole or in part and whether or not to require cross-examination of the

⁸ Original Decision, para. 13.

⁹ *Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T (“*Bagosora et al.*”), Decision on Prosecutor's Motion for the Admission of Written Statement Under Rule 92 *bis*, 9 March 2004, para. 12.

¹⁰ *Karemera et al.*, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts 29 May 2009, para. 15.

¹¹ Factors which favour admission include the fact that oral evidence has been heard on similar facts; the statement provides an historical, political or military background; or the statement relates to the character of the accused. Factors weighing against admission include whether there is an overriding public interest to hear the evidence orally; its nature and source render it unreliable; or its prejudicial effect outweighs its probative value.

witness. In addition to issues relating to the fairness of the trial, a relevant factor in this regard is whether the evidence relates to a live and important issue between the parties, as opposed to a peripheral one.¹²

9. The Chamber notes that some of the events described in this statement go to the acts and conducts of the Accused. The Chamber further notes that the author of the statement infers that Prosecution Witnesses BTH, GBU and BDX would not have told the truth during their testimony. These are allegations of such seriousness that an overriding public interest commands that they be heard orally. Charles Nzabagerageza also states that he was unaware of the existence of the *Interahamwe* in Mukingo commune which is in contradiction with some evidence adduced from Joseph Nzirorera's own witnesses.¹³ The statement is therefore not cumulative to evidence presented by Nzirorera. Consequently, the Chamber considers that the statement is not admissible pursuant to Rule 92 *bis*.

Statement of Cyprien Ntakabereho

10. In its Original Decision, the Chamber denied the admission of the statement authored by Cyprien Ntakabereho as it relates to proof of the acts and conduct of one of the Accused as charged in the Indictment.¹⁴

11. Joseph Nzirorera now submits that he is willing to redact one paragraph and so requests the Chamber to reconsider its Original Decision.¹⁵

12. The Chamber considers that Joseph Nzirorera made his complete submissions in his Original Motion and that he has not demonstrated that any of the reasons warranting reconsideration are satisfied. Making fresh submissions concerning the same application cannot amount to a new fact. Moreover, the Chamber notes that in its Original Decision it already considered whether portions of statements were admissible. Consequently, the Chamber denies Nzirorera's request to reconsider its Original Decision in relation to the statement of Cyprien Ntakabereho.

¹² *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under 92 *bis*, 9 March 2004, para. 16.

¹³ See T. 26 October 2009, p. 22 and 27 October 2009, p. 26.

¹⁴ Original Decision, para. 9.

¹⁵ Motion, para. 9.

Statement of Marc Ntigura

13. In its Original Decision, the Chamber denied the admission of the statement of Marc Ntigura as it goes to the acts and conduct of the Accused. The Chamber further considered that the statement had limited probative value as, from Ntigura's own declarations, he was not present every day at the Mukingo *commune* Office.¹⁶

14. In lieu of the written statement, Joseph Nzirorera is now seeking to have the transcript of the testimony of Marc Ntigura in another trial before this Tribunal admitted.

15. The Chamber considers that Joseph Nzirorera's request is a fresh application and not a request for reconsideration of his previous application concerning Marc Ntigura. The Chamber further notes that the transcript was available at the time Nzirorera filed his Original Motion. The Chamber expresses its disapproval of this approach by Nzirorera's Counsel.

16. Nevertheless, the Chamber considers that it is in the interests of justice to address Joseph Nzirorera's request to admit the said transcript.¹⁷ Having considered the transcript, the Chamber finds that the testimony of Ntigura in the other trial does not go to the act and conduct of the accused as charged in the Indictment. The Chamber further considers that the evidence of the Witness in the other trial is relevant and has probative value in the present case as Ntigura, who was working at the Mukingo *commune* office in 1994, testified *inter alia* whether military training took place in Mukingo and whether lists of Tutsis to be killed were made. The Chamber also finds that this evidence is cumulative to evidence already heard or scheduled to be heard. Consequently, the Chamber decides to admit the transcript. Noting that in the previous proceedings the Witness was cross-examined by the Prosecution, the Chamber considers that further cross-examination is not necessary. In order to preserve the protective measures for the witness in the first proceedings which are still in force, the Chamber considers that the transcript should be admitted under seal.

¹⁶ Original Decision, para. 9.

¹⁷ The Chamber notes that in this other trial, Marc Ntigura was a protected witness. Joseph Nzirorera does not demonstrate that the protective measures in place for Marc Ntigura in these proceedings have been varied. Consequently, the Chamber will not disclose the case and the pseudonym under which Marc Ntigura has testified in these proceedings in compliance with the protective measures in place.

Statement of André Gihanza

17. In its Original Decision, the Chamber denied the admission of the statement of André Gihanza along with statements of three other proposed witnesses as those statements contain allegations of false testimony and/or fabrication of evidence. The Chamber considered that such allegations are to be taken very seriously and that accepting such evidence by way of a witness statement goes against the public interest.¹⁸

18. Joseph Nzirorera claims that the Chamber made a mistake when it included the statement of André Gihanza with the three others and denied its admission.¹⁹

19. After review of its Original Decision, the Chamber considers that it erroneously included André Gihanza's statement with those of Jean-Claude Nsengiyumva, Haruna Manizabayo, and Pierre Célestin Rwigema. Consequently, the Chamber will reconsider its Decision not to admit this statement.

20. Having reviewed the statement of André Gihanza, the Chamber considers that it is relevant, has probative value and that it does not go to the acts and conduct of the Accused as charged in the Indictment. Consequently, the statement is admissible pursuant to Rule 92 *bis*. The Chamber also considers that the issues raised in this statement require that the Witness appears for cross-examination.

Statement of Edison Munyatarama

21. In its Original Decision, the Chamber found the statement of Edison Munyatarama to be of limited relevance as it is only minimally relevant to the adjudicated fact admitted in relation to meetings in Nkuli *commune* on 6 and 7 April 1994 and as its relevance in relation to allegations of rapes in Mukingo *commune* is not clear. The Chamber further considered that this statement lacks probative value regarding meetings held at Nkuli *commune* as paragraph 10 of the statement is vague and contains declarations without foundation.²⁰

22. Joseph Nzirorera submits that the Chamber failed to appreciate that the statement was offered to refute the statement of Prosecution Witness FAL and that the statement is corroborative and cumulative to the testimony of Juvénal Kajelijeli.

23. The Chamber notes that Joseph Nzirorera is presenting new arguments for his Original Application. He could have presented these arguments already in December 2008, in his

¹⁸ Original Decision, para. 24.

¹⁹ Motion, para. 18.

²⁰ Original Decision, para. 15.

Original Motion. Furthermore, the Chamber considers that it did not commit any error in denying the admission of this statement as contrary to Nzirorera's submissions, this statement does not contradict FAL's statement.

24. The Chamber notes that Joseph Nzirorera and the Prosecution have inadvertently disclosed the identity of a protected witness in another case in their submissions. Consequently, the Chamber orders that both submissions be re-filed under confidential cover. The Chamber reminds the Parties to be more diligent with respect to protective measures issued for witnesses by this Tribunal.²¹

25. The Chamber recalls its Order of 24 October 2008²² where it indicated that fees for additional filings of Motions pursuant Rule 92 *bis* would be withheld unless good cause is shown. The Chamber considers that in the present instance, Joseph Nzirorera has not demonstrated good cause for additional filings and that therefore payment of fees in relation to this motion should be denied pursuant to Rule 73 F).

FOR THESE REASONS, THE CHAMBER

GRANTS IN PART Joseph Nzirorera's Motion;

ORDERS Joseph Nzirorera to disclose to the Chamber and to the other parties all identifying information in relation to André Gihanza;

ORDERS Joseph Nzirorera to obtain certification within one month of this decision, as prescribed by Rule 92 *bis* (B), of the uncertified statement of André Gihanza;

DECLARES ADMISSIBLE, subject to the disclosure of the identifying information of its author and to its certification pursuant to Rule 92 *bis* (B), the entirety of the statement of André Gihanza;

GRANTS the Prosecution the right to cross-examine André Gihanza for one hour and Joseph Nzirorera the right to examine the Witness in re-direct for 15 minutes;

ADMITS into evidence under seal the transcript of the testimony of Marc Ntigura in French and in English as well as the exhibits admitted during his testimony in the other proceedings as indicated in Joseph Nzirorera's Motion;

²¹ See Rule 75.

²² Order to Joseph Nzirorera to Reduce his Witness List, 24 October 2008.

REQUESTS the Registrar to assign the transcript and their accompanying exhibits with one exhibit number; and

REQUESTS the Registrar to deny the payment of fees to Counsel for Nzirorera in relation to the present Decision.

Arusha, 7 April 2010 done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]