



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-44-T SO947
26-4-2010
(SO947-SO944) [Signature]

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 26 April 2010

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTION

v.

**Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR SUBPOENA TO RULE 92
bis WITNESSES OR FOR RECONSIDERATION**

Rules 54 and 92 bis of the Rules of Procedure and Evidence

Office of the Prosecution:
Don Webster
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Dior Diagne Mbaye and Félix Sow

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

[Handwritten initials]

INTRODUCTION

1. Joseph Nzirorera moves the Chamber to reconsider its decision that the statements of witnesses Alphonse Ntilivamunda, Witness 10, Charles Nyandwi, and Seraphin Rwabukumba may only be admitted if they attend for cross-examination. Alternatively, Nzirorera requests that the Chamber issue a subpoena to these witnesses.¹
2. The Prosecution opposes the motion in its entirety and requests that the Chamber deny the admission of the witnesses' statements if they do not appear for cross-examination.²

DELIBERATION

Reconsideration

3. A Chamber has the power to reconsider its decisions when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision; (2) there has been a material change in circumstances since it made its original Decision; or (3) there is reason to believe that its original Decision was erroneous or constituted an abuse of power, which resulted in an injustice thereby warranting the exceptional remedy of reconsideration.³
4. Joseph Nzirorera contends that the Chamber should reconsider its decision and admit Alphonse Ntilivamunda's statement without cross-examination because, having heard Nzirorera's evidence regarding the Ruhengeri events, it is now aware that there are a multitude of witnesses who have contradicted Prosecution Witness GBU's claim that they attended a meeting at the house of Nzirorera's mother in Mukingo *commune*.⁴ Nzirorera implies therefore, that cross-examination is no longer required because other witnesses in addition to Ntilivamunda have questioned Witness GBU's credibility.
5. While other witnesses may have challenged the credibility of Witness GBU, the Chamber does not consider that this reduces the need for cross-examining Alphonse Ntilivamunda before admitting his statement under Rule 92 *bis*. Witness credibility is of paramount importance when determining the merits of a case; often, it is the aggregate effect of multiple statements contradicting or corroborating a witness that is determinative when

¹ Joseph Nzirorera's Motion for Subpoena to Rule 92 *bis* Witnesses or for Reconsideration, filed 17 February 2010 ("Motion").

² Prosecutor's Response to Joseph Nzirorera's Motion for Subpoena to Rule 92 *bis* Witnesses or for Reconsideration, filed 22 February 2010.

³ *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Reconsideration of 2 December 2008 Decision (TC), 27 February 2009, para. 2.

⁴ Motion, para. 9.

assessing his or her credibility. Thus, simply because other witnesses may have also challenged Witness GBU's credibility, this does not diminish the importance of Ntilivamunda's statement. It is entirely possible that his statement, if believed, could tip the balance in favor of the Defence's claim that Witness GBU is not credible. Accordingly, the Chamber does not find that additional testimony contradicting Witness GBU constitutes a ground for reconsidering its decision.

6. Joseph Nzirorera claims that the Chamber should reconsider its decision and admit Witness 10's statement without cross-examination because, having heard Nzirorera's evidence regarding the Ruhengeri events, it is now in a better position to assess the significance of Witness 10's evidence in the context of the case.⁵ Having heard Nzirorera's evidence regarding the Ruhengeri events, the Chamber does not find any grounds to reconsider its decision requiring the cross-examination of this witness.

7. Joseph Nzirorera also argues that the Chamber should reconsider its decisions requiring the cross-examination of all four witnesses because they recently informed Nzirorera that they are not willing to travel to Arusha.⁶ This is the only argument Nzirorera sets forward regarding Charles Nyandwi and Seraphin Rwabukumba. While the witnesses' refusal to travel to Arusha is certainly a new fact not known to the Chamber at the time it made its original decision, it is not a new fact that affects the Chamber's reasoning for requiring cross-examination. The Chamber decided that the witnesses had to be cross-examined because of the content of their statements, not their willingness to travel to Arusha. Accordingly, the Chamber denies Nzirorera's motion for reconsideration.

Subpoenas

8. Rule 54 permits the issuance of orders, summonses, subpoenas, warrants, and transfer orders as may be necessary for the purposes of an investigation, or for the preparation or conduct of the trial, and encompasses the Chamber's power to require a prospective witness to be present at a nominated place and time in order to be interviewed.⁷ In order for the Chamber to grant a request for subpoena to interview a prospective witness, the requesting party must demonstrate that: (1) it has made reasonable attempts to obtain the voluntary cooperation of the witness; (2) the witness' testimony can materially assist its case; and (3)

⁵ Motion, para. 16.

⁶ Motion, paras. 10, 17, 23, 29

⁷ *Prosecutor v. Édouard Karemera, Mathieu Ndirumutse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on Nzirorera's Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3 (TC), 12 July 2006, para. 9.

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the witness' testimony must be necessary and appropriate for the conduct and the fairness of the trial.⁸

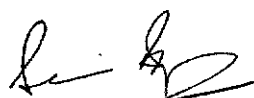
9. However, according to this Tribunal's jurisprudence, a subpoena order is not to be issued lightly. When deciding whether the applicant has met the evidentiary threshold, the Chamber may also consider whether the information the applicant seeks to elicit through the use of subpoena is obtainable through other means.⁹ Additionally, the Appeals Chamber in the *Halilović* case further held that that a subpoena should be issued if "it is at least reasonably likely that an order would produce the degree of cooperation needed for the defence to interview the witness."¹⁰


10. Joseph Nzirorera has not demonstrated that he has made reasonable attempts to obtain the voluntary cooperation of the witnesses. Instead, he has merely stated that the witnesses have informed him that they are not willing to come to Arusha voluntarily. Because the test for the issuance of a subpoena is cumulative, the Chamber need not address the remaining two prongs of the test and denies Nzirorera's alternative request for subpoenas for the witnesses at issue.

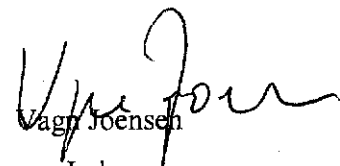
FOR THE ABOVE REASONS, THE CHAMBER

DENIES Joseph Nzirorera's Motion in its entirety.

Arusha, 26 April 2010, done in English.


Dennis C.M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge

[Seal of the Tribunal]



⁸ *Idem.*
⁹ *Ibid.*, para. 10.
¹⁰ *Idem.*