



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
03-05-2010
(50974 - 50970)

50974
A

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: 3 May 2010

JUDICIAL RECORDS/ARCHIVES
RECEIVED

2010 MAY -3 P 5:43

THE PROSECUTOR

v.

**Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S MOTION TO POSTPONE OR COMPEL
THE TESTIMONY OF AUGUSTIN NGIRABATWARE**

*Article 20 of the Statute and Rules 54, 79 and 90(E) 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

50973

INTRODUCTION

1. On 15 April 2010, Joseph Nzirorera filed a motion seeking an order to postpone the testimony of Augustin Ngirabatware, an accused whose case is currently pending before the Tribunal, until judgement in that case or, alternatively, an order compelling his earlier testimony.¹ Augustin Ngirabatware opposes the Motion.² The Prosecution expresses a preference for postponement over compelling Ngirabatware's testimony and observes that for consistency this motion should be denied.³

DELIBERATIONS

2. Joseph Nzirorera asserts that the anticipated testimony of Augustin Ngirabatware is important to his case as Ngirabatware is expected to refute the testimony adduced by various prosecution witnesses and to address diverse allegations in the Indictment.⁴ Nzirorera states that his Lead Counsel has spoken with Lead Counsel for Ngirabatware and that Ngirabatware is willing to testify on his behalf concerning these matters, but only after his own judgement is delivered by the Trial Chamber.⁵ Consequently, Nzirorera requests an order that Ngirabatware be permitted to testify once his judgement has been rendered, even if Nzirorera's Defence is otherwise concluded.⁶ In the alternative, Nzirorera moves for the Chamber to compel Ngirabatware's testimony while invoking protections against that testimony being used in Ngirabatware's own case.⁷

3. Augustin Ngirabatware opposes Joseph Nzirorera's motion, arguing that it will greatly hinder his right to a fair trial pursuant to Article 20 of the Statute.⁸ Ngirabatware unequivocally refuses to testify before the completion of his own case.⁹ Contrary to Nzirorera's assertions, Ngirabatware states that his counsel only briefly discussed with

¹ Joseph Nzirorera's Motion to Postpone or Compel Testimony of Augustin Ngirabatware ("Motion"), filed on 15 April 2010.

² Augustin Ngirabatware's Response to Joseph Nzirorera's Motion to Postpone or Compel the Testimony of Augustin Ngirabatware ("Ngirabatware's Response"), filed on 19 April 2010.

³ Prosecutor's Response to Joseph Nzirorera's Motion for Postpone or Compel the Testimony of Augustin Ngirabatware, filed on 19 April 2010.

⁴ Motion, paras. 9-29. *See also* Prosecution Witnesses XBM, Fidele Uwizeye, Jean Bosco Twahirwa, and Ahmed Mbonkunkiza and Paragraphs 6, 24.8, 25.2, 36, 40, and 51 of the Indictment.

⁵ Motion, para. 5.

⁶ *Ibid.*, paras. 6, 34.

⁷ *Ibid.*, paras. 7, 34.

⁸ Ngirabatware's Response, para. 3.

⁹ *Ibid.*, paras. 7-10.

Nzirorera's counsel the possibility of testifying and that neither he nor his Counsel have met with Counsel for Nzirorera to discuss the substance or specifics of his proposed testimony.¹⁰ To his reply Nzirorera attached a declaration from his Lead Counsel asserting that Nzirorera's offer of proof came directly from Ngirabatware.

4. The Chamber notes that although Ngirabatware may have special knowledge because he was a member of the MRND préfectoral committee for Gisenyi and Minister of Planning in the Interim Government, the subject matters on which Nzirorera would require him to testify have been addressed by several other witnesses called by Nzirorera.¹¹ Moreover, the Chamber has noted the allegation that this application was made without adequate consultation.¹² This has raised doubts about the accuracy of Nzirorera's representations as to the content of Ngirabatware's testimony. The Chamber considers, however, that at best, his testimony would be repetitive and is not necessary for a fair trial.

5. The Chamber is vested with discretion, and is the authority best placed, to address matters relating to trial management, including whether it is appropriate to postpone or adjourn the proceedings at the request of a party.¹³ This discretion is grounded in the Trial Chamber's organic familiarity with the day-to-day conduct of the trial and the practical demands of the case.¹⁴ Time and resource constraints exist in all judicial institutions and it is legitimate for a Trial Chamber to ensure that the proceedings do not suffer undue delays and that the trial is completed within a reasonable time, provided that the exercise of this discretion does not encroach on fair trial rights.¹⁵

6. The unequivocal refusal of Augustin Ngirabatware to testify voluntarily before the completion of his case would imply an indefinite delay until after both the delivery of trial judgement and the completion of any appellate proceedings. Current calendaring indicates

¹⁰ *Ibid.*, paras. 8-10.

¹¹ See Théoneste Bagosora, Anatole Nsengiyumva, Justin Mugenzi, Pauline Nyiramasuhuko, Eliezer Niyitegeka, Jean Habyarimana, Georges Rutaganda, Francois Karera, Casimir Bizimungu, Emanuel Ndingabahizi.

¹² Ngirabatware's Response, paras. 7-10.

¹³ *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Joseph Nzirorera's Interlocutory Appeal ("Decision of 28 April 2006") (AC), 28 April 2006, paras. 7-8.

¹⁴ *Karemera et al.*, Decision on Nzirorera's Interlocutory Appeal Concerning His Right to be Present at Trial (AC), 5 October 2007, para. 8; *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.8 ("*Šešelj*"), Decision on Prosecution's Appeal Against the Trial Chamber's Order Regarding the Resumption of Proceedings ("Decision of 16 September 2008") (AC), 16 September 2008.

¹⁵ *Šešelj*, Decision of 16 September 2008, para. 3; *Karemera et al.*, Decision of 28 April 2006, para. 7. *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-01-64-T, Judgement, 7 July 2006, para. 19.

that the trial judgement in this case will precede this eventuality. Postponing Ngirabatware's testimony indefinitely must therefore result in the delay of the completion of this trial for an indefinite and uncertain period. This would constitute an undue delay that cannot be justified and would not serve the interests of justice. The application to postpone is denied.

7. In the alternative, Joseph Nzirorera requests that the Chamber compel Augustin Ngirabatware to testify, invoking the protections for his fair trial rights provided by Rules 90(E) and 79.¹⁶ Ngirabatware submits that these rules do not provide adequate protection and requests that the order be denied.¹⁷

8. The Chamber recalls that Rule 90(E) provides protection against self incrimination. Moreover, the submission of Augustin Ngirabatware that self incrimination is not the only right guaranteed by article 20 of the Statute which may be infringed if he is compelled to testify has not been rebutted. In particular he fears that he may be required to testify on matters that have been excluded from his own trial, and that such testimony could provide support for applications to reopen his case. Similarly, Rule 79 provides for the testimony to be given in closed session, but does not afford any power to limit the content of the testimony. The Chamber accepts the contention that any order to compel Ngirabatware to testify before the completion of his case has the capacity to prejudice his fair trial rights. Bearing in mind the finding that this testimony is not essential to Nzirorera's fair trial rights, the Chamber is satisfied that on balance the interests of justice would require that the application to compel Ngirabatware to testify before the completion of his case be denied.

¹⁶ Motion, paras. 30-33.

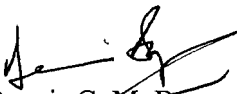
¹⁷ Ngirabatware's Response, paras. 12-17.

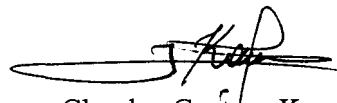
50970

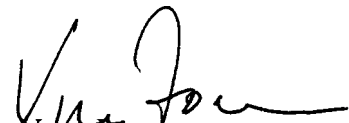
FOR THESE REASONS, THE CHAMBER

DENIES Joseph Nzirorera's Motion in its entirety.

Arusha, 3 May 2010, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge

