



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
18-05-2010
(51030 - 51024)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 18 May 2010

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THE PROSECUTOR

v.

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

**DECISION ON REMAND FOLLOWING APPEAL CHAMBER'S DECISION
OF 16 FEBRUARY 2010**

Rule 91 of the Rules of Procedure and Evidence

Office of the Prosecution:
Don Webster
Sunkarie Ballah-Conteh
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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

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INTRODUCTION

1. Witness BTH testified as a Prosecution witness in June 2006. BTH was then recalled in April 2008, when he stated under oath that he knowingly lied during his testimony under oath in June 2006 and in other proceedings before this Tribunal. Consequently, the Chamber directed the Registrar to appoint an *amicus curiae* ("*Amicus Curiae*") to investigate the false testimony of BTH and to advise on the instigation of proceedings for false testimony.¹ The *Amicus Curiae* filed a final report ("Report") concerning his investigation on 17 April 2009.² Subsequently, the Prosecution filed a motion seeking three related grounds of relief.³ In his response to the motion, Joseph Nzirorera requested that the Chamber further expand upon the investigation that the Prosecution calls for.⁴

2. On 10 September 2009, the Chamber denied the Prosecution's motion to prosecute Witness BTH for providing false testimony, finding it premature.⁵ The Chamber also denied the Prosecution's motion to seek clarification from the *Amicus Curiae* relating to the reliability of certain witnesses interviewed by him, noting that the *Amicus Curiae* fully satisfied his mandate, and that the requested clarifications did not undermine the conclusions arrived at in the Report.⁶ The Chamber additionally denied the Prosecution's motion for an order directing the *Amicus Curiae* to conduct a further inquiry into witness interference by family members of accused persons before the Tribunal, holding that some evidence of tampering had been adduced but that there is a strong possibility that this evidence is relevant to the current proceedings, and therefore that separating this issue before hearing all the evidence creates the risk of serious prejudice.⁷ The Chamber also denied a request by Joseph Nzirorera to expand the mandate of the *Amicus Curiae* to include the alleged suborning or

¹ *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera* ("*Karemera et al.*"), Decision on Prosecutor's Confidential Motion to Investigate BTH for False Testimony (TC), 14 May 2008.

² Final Report of the *Amicus Curiae* of the Investigations into the False Testimony of Prosecution Witness BTH/GFA in *The Prosecutor v. Édouard Karemera et al.* and *The Prosecutor v. Casimir Bizimungu et al.*, filed 17 April 2009.

³ Prosecutor's Motion Seeking Prosecution of BTH for Providing False Testimony, and Other Relief related to the Final Report of the *Amicus Curiae*, filed 16 June 2009.

⁴ Joseph Nzirorera's Response to Motion Relating to *Amicus Curiae* Report, filed 21 August 2009.

⁵ *Karemera et al.*, Decision on Motions to Prosecute BTH for Providing False Testimony ("*Impugned Decision*") (TC), 10 September 2009, para. 8.

⁶ *Ibid.* at para. 12.

⁷ *Ibid.* at para. 10.

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inciting false testimony of all witnesses who have testified in these proceedings who were incarcerated at Ruhengeri prison, finding that this issue was also premature.⁸

3. Both the Prosecutor⁹ and Joseph Nzirorera¹⁰ appealed the Chamber's decision. On 16 February 2010, the Appeal Chamber granted the appeal and remanded the matter to the Chamber for reconsideration.¹¹ In its Decision, the Appeals Chamber determined that the Chamber erred in concluding that ordering the prosecution of BTH would risk causing serious prejudice to the *Karemera et al.* proceedings, holding that proceedings for false testimony are separate from the core crimes trial and that proceedings for false testimony need not be deferred until the completion of the trial in which the false testimony was allegedly given.¹² The Appeals Chamber determined that the Trial Chamber set out the correct standard for ordering an investigation of possible contempt charges but determined that the Chamber erred when it exercised its discretion not to order an investigation at that stage of the proceedings on the basis of a risk of serious prejudice to the instant case.¹³ In its decision, the Appeals Chamber directed the Trial Chamber to "apply the correct legal standards and exercise its discretion accordingly."¹⁴

DELIBERATIONS

Prosecution of Witness BTH

4. Rule 91(C) states that if the Chamber considers, after appointing an *amicus curiae* to investigate pursuant to Rule 91(B)(ii), that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may either direct the Prosecutor to prosecute the matter or issue an order *in lieu* of an indictment and direct an *amicus curiae* to prosecute the matter. The Appeals Chamber has held that the 'sufficient grounds' requirement is satisfied by the existence of evidence which establishes a *prima facie* case of false testimony before the Tribunal.¹⁵

⁸ *Ibid.* at para. 11.

⁹ Prosecutor's Notice of Appeal (Rule [sic] 77 and 91), filed confidentially on 23 September 2009.

¹⁰ Joseph Nzirorera's Appeal from Decision Not to Prosecute Witness BTH for False Testimony, filed confidentially on 24 September 2009.

¹¹ *Karemera et al.*, Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision Not to Prosecute Witness BTH for False Testimony, 16 February 2009 (AC) ("Decision on Appeal").

¹² Decision on Appeal, para. 19, 20.

¹³ *Ibid.* at para. 23.

¹⁴ *Ibid.* at para. 26.

¹⁵ *Ibid.* at para. 19.

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5. The report of the *Amicus Curiae* found that it was beyond reasonable doubt that Witness BTH had given false testimony, however the report was unable to establish on which occasion he did so.¹⁶ In the Impugned Decision, the Chamber also recognized that BTH gave false testimony on at least one occasion, but placed priority on the trial on the merits by finding a prosecution premature at that point in time.¹⁷ As the Appeals Chamber has found that to be in error, the Chamber has no choice but to refer BTH on for prosecution for false testimony at this time.

6. Reaching this conclusion, the Chamber has the discretion to direct the Prosecution to prosecute the matter; or, in circumstances where the Prosecution has a conflict of interest with respect to the prosecution, the Chamber may issue an order *in lieu* of an indictment and direct the *amicus curiae* to prosecute.¹⁸ In this circumstance, considering that it was both the Prosecution's original Motion and Appeal which have driven this issue to prosecution, the Chamber notes that a conflict of interest would exist if it conducted the upcoming prosecution. As such, the Chamber issues an order *in lieu* of an indictment directing an *amicus curiae*, as appointed by the Registrar, to conduct the prosecution of Witness BTH for false testimony.

Further Investigations of Relatives of Certain Accused and Individuals Connected with Ruhengeri Prison

7. Rule 77(A)(iv) provides that the Tribunal may hold in contempt those who knowingly and wilfully interfere with the administration of justice - including any person who threatens, intimidates, causes injury, offers a bribe to or otherwise interferes with a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber or a potential witness. If a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may, in its discretion, direct an investigation of the matter under Rule 77(C). The Chamber again notes the permissive language (*i.e.* the use of the word "may") of both provisions of Rule 77.

8. In the Report, the *Amicus Curiae* states that "none of the prisoners confirmed BTH's allegation as to the existence of a joint plan within the prisons to give false evidence."¹⁹ The

¹⁶ Amicus Report, paras. 119-120.

¹⁷ Impugned Decision, para. 8

¹⁸ Rule 91(C)(i) and (ii). *See also* Rule 91(B)(ii).

¹⁹ Amicus Report, para. 117(iv).

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Amicus Curiae received a written statement from Joseph Nzirorera's Lead Counsel, which claims that the testimony of BTH regarding evidence fabrication is corroborated by witnesses that testified in the *Ndindiliyimana* trial and Witness UOW who testified in this case in March 2009.²⁰ Nzirorera's Counsel also informed the *Amicus Curiae* that he had interviewed several witnesses in Ruhengeri prison who told him that Rwandan prison and prosecution authorities offered inducements and that BTH was one of those prisoners who had agreed to fabricate evidence against Édouard Karemera and Nzirorera.²¹ However, the *Amicus Curiae* did not interview Nzirorera's Counsel at any point in his investigation²², and was not able to confirm with him the veracity of statements made by witnesses mentioned in his statements or other details which may have impacted the *Amicus Curiae's* findings. Also, the *Amicus Curiae* notes that he personally interviewed one of the witnesses Nzirorera's Counsel alleges told him about the fabrication of testimony which goes on at Ruhengeri prison, and in his interview with the *Amicus Curiae*, the witness stated that BTH is lying about any allegations of fabrication of evidence.²³

9. Similarly, the Chamber finds the evidence surrounding the allegations that family members of accused persons at the Tribunal are engaging in witness tampering to be equally incapable of being the basis for further investigation into the matter based on the evidence we have at this time. The Chamber recognizes that the *Amicus Curiae* found that on the balance of probabilities, it appeared that offers of money or promises of more favourable treatment were made to prisoners in exchange for their testimony.²⁴ However, in reviewing the findings of fact for witnesses who claimed such behaviour occurred, the *Amicus Curiae* by and large found these witnesses to have diminished credibility overall.²⁵ Indeed, one witness who

²⁰ *Ibid.* at para. 106.

²¹ *Ibid.* at para. 107.

²² *Ibid.* at para. 109.

²³ *Ibid.* at para. 29.

²⁴ *Ibid.* at para. 117(viii).

²⁵ See, e.g., Amicus Report, paras. 31, 37, 38 (findings of fact regarding interviewee [redacted name] who reported: (1) that family members asked him to testify for Kajelijeli, promising him anything he wanted in return; and (2) that counsel for Joseph Nzirorera offered him money, where the *amicus curiae* ultimately found that [redacted name]'s credibility was severely diminished both in his erroneous description of counsel for Nzirorera and by the *amicus'* opinion that the witness was overzealous in providing information in the hope of early release). See also Amicus Report, paras. 46-48 (findings of fact regarding interviewee [redacted name] who stated that: (1) he had been asked/forced to testify in favour of Kajelijeli by family members; and (2) that Kajelijeli's family members, in collaboration with Joseph Nzirorera's family members, would ask Prosecution witnesses to change their testimony, and where the *amicus* found that the witness' credibility was diminished because of his professed lack of knowledge regarding BTH's evidence seeing as they were close and past accomplices). See also Amicus Report, paras. 84-94 (findings of fact relating to interviewee [redacted name] who claimed that: (1) relatives of detainees in Arusha would go to see BTH and others and that those people approached him to change his testimony; (2) that he was offered 50,000 Rwandan francs by Kajelijeli's family members to testify in Kajelijeli's favour; (3) that he received 70,000 Rwandan francs from BTH who had

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reported being forced to change his testimony by relatives of Juvenal Kajelijeli and Joseph Nzirorera gave contradictory responses in the same reply to the question of the role played by these individuals.²⁶ One interviewee the *Amicus Curiae* finds to be credible and whom he uses as a partial basis to conclude that there was an "element of truth" in claims of relatives of accused persons persuading potential witnesses not to testify, arguably did not provide information of conduct that would fall within Rule 77 violations.²⁷

10. The *Amicus Curiae* did find one witness truthful who reported being offered money in exchange for testimony.²⁸ However, other witnesses claim to never have been approached by relatives of detainees or of being aware of offers of money being made to other prisoners.²⁹ Still other interviewees claim that it was Witness BTH himself who was attempting to influence witnesses to change their testimony.³⁰

11. Recognizing that the threshold for ordering the further investigation of either matter, by the Prosecutor or an *Amicus Curiae*, is lower than the *prima facie* standard³¹, the Chamber believes that at this point the allegations do not reach even that lower standard. Based upon the evidence as it currently stands, the Chamber exercises its discretion and does not find it reasonable to order any further investigations at this time. Of course, the Chamber is vested with the inherent power to hold people in contempt of the Tribunal, and remains willing to exercise that power in the event of newly discovered evidence which makes it

received it from Nzirorera's family members; and (4) that he received money and promises for more from counsel for Nzirorera, and the *amicus* determined to attach little credibility to this witness for a variety of reasons).

²⁶ Amicus Report, para. 47 (referring to the interview of [redacted name] where in response to a question posed by the *amicus* as to the role played by Nzirorera's cousin, [redacted name] replies *verbatim*:

[redacted name of family member of Accused] . . . would ask Prosecution witnesses to change their testimony. I know he asked [names redacted] to agree to give evidence in favour of Nzirorera. I am however not aware of [redacted name of family member of Accused] having asked any of these persons to change their testimonies, but merely to give evidence for the Defence. (Italics added).

²⁷ Amicus Report, para. 55. The interviewee [redacted name] stated: (1) that a relative of Nzirorera had a "keen interest in which witnesses were due to testify, or had already testified, in Arusha"; (2) that this same relative of Nzirorera had *attempted* to persuade a witness not to testify in the *Setako* case; and (3) that he was personally acquainted with Kajelijeli's family member when they were in prison together and that he was not aware of any role that family member had in influencing evidence. Amicus Report, paras. 53, 54.

²⁸ Amicus Report, paras. 61, 62. Interviewee [redacted name] was found credible by the *amicus* and: (1) reported that he had been offered money to testify in favour of Kajelijeli by family members but that he had refused to accept; and (2) stated that no other relative of a detainee in Arusha had tried to convince him to change his testimony.

²⁹ Amicus Report, para. 70.

³⁰ Amicus Report, para. 77.

³¹ Rule 77(C) states that "where a Chamber has reason to believe that a person maybe in contempt of the Tribunal" as the standard for ordering an investigation by an *amicus curiae* or the Prosecutor.

reasonable to do so.

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FOR THE FOREGOING REASONS, THE CHAMBER,

- I. **GRANTS** the Prosecutor's Motion in Part; and
- II. **REQUESTS** the Registry to appoint an *Amicus Curiae* to prosecute Witness BTH for false testimony; and
- III. **ORDERS** the *amicus curiae* to prosecute Witness BTH for the crime of false testimony; and
- IV. **REJECTS** the requests for further investigations.

Arusha, 18 May 2010, done in English.



Dennis C. M. Byron
Presiding Judge



Gberdao Gustave Kam
Judge



Vagn Joensen
Judge

