



UNITED NATIONS
NATIONS UNIES

ICTR-98-44D-T
25-06-2010
(4600-4596)

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Ivan

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 25 June 2010

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

DECISION ON DEFENCE MOTION FOR THE RECALL OF WITNESS CNAI
Rules 54 of the Rules of Procedure and Evidence

Office of the Prosecution

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INTRODUCTION

1. Prosecution witness CNAI testified before this Trial Chamber (“Chamber”) on 26 and 27 November 2009. Witness CNAI alleged that the Accused Nzabonimana convened a meeting on 14 April 1994 at *Cyayi Cellule*, *Kiyumba Secteur*, *Nyakabanda Commune* where he asked the population to prioritise the killing of Tutsi before seizing their properties.¹ During the course of his testimony, witness CNAI mentioned the names of other participants at the meeting.²

2. On 27 April 2010, Defence witness T24 testified before this Chamber that during Gacaca proceedings held in January 2010, witness CNAI accused him of participating at the *Cyayi* meeting.³

3. On 18 May 2010, the Defence filed the instant Motion pursuant to Rule 54 of the Rules of Procedure and Evidence (“Rules”), requesting that it be permitted to recall Prosecution witness CNAI for further cross-examination.⁴

4. On 21 May 2010, the Prosecution filed a response opposing the instant Motion.⁵

5. On 31 May 2010, the Defence filed a reply.⁶

Submissions of the Parties

6. The Defence requests permission to recall Prosecution witness CNAI for further cross-examination, on the basis of new information regarding his testimony before a Gacaca Court concerning Defence Witness T24.⁷ The Defence submits that during the cross-examination of witness CNAI on that allegation, it highlighted a number of contradictions between the witness’ oral testimony and other records including his written statements of 1998 and 2002, a report dated December 1998 to a Judicial Police Inspector, and a Decision issued by the Gitarama Tribunal of

¹ Transcript of 26 November 2009, (CS), pp.64-65.

² Transcript of 26 November 2009, (CS), pp.64-65.

³ Transcript of 27 April 2010, (CS), pp. 7-9.

⁴ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana’s Motion for the Recall of Witness CNAI (“Motion”), 18 May 2010.

⁵ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor’s Response to Nzabonimana’s Motion for the Recall of Witness CNAI (“Response”), 21 May 2010.

⁶ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Reply to Prosecutor’s Response to Nzabonimana’s Motion for the Recall of Witness CNAI (“Reply”), 31 May 2010.

⁷ Motion, para. 11.

First Instance on 20 March 2003.⁸ According to the Defence, at no point in CNAI's prior statements or during his oral testimony before this Chamber did he mention that Defence witness T24 was present at the alleged meeting held on 14 April 1994 in Cyai.⁹

7. The Defence states that since this new information emerged it has requested from the Rwandan authorities the Gacaca documents in which witness CNAI allegedly testified against witness T24.¹⁰ The Defence requests an opportunity to obtain and review the Gacaca records pertaining to this new allegation made by witness CNAI against witness T24 and to confront witness CNAI on the failure to mention these allegations in his prior statements.¹¹ The Defence contends that it was unable to put these contradictions to witness CNAI because the documents came into existence after he testified.¹²

8. The Defence avers that it had no notice of this allegation and now seeks further explanations from witness CNAI who made this allegation for the first time in January 2010 during Gacaca proceedings.¹³

9. In its response, the Prosecution does not challenge the Defence contention that the presence of witness T24 at the Cyai meeting was not mentioned in witness CNAI's prior statements or his testimony before this Chamber. Rather it notes that witness CNAI did not provide an exhaustive list of those present at the meeting during his testimony.¹⁴ Although the Prosecution accepts that the Defence may obtain and review relevant Gacaca or other documents to establish good cause, it notes that the Defence Motion attaches no tangible evidence to support witness T24's assertion of the allegations made by witness CNAI against him.¹⁵ It therefore submits that the Defence fails to show good cause.¹⁶

10. The Prosecution further submits that the alleged presence of witness T24 at the Cyai meeting is not of significant probative value but of a cumulative nature for the Defence case.¹⁷ In support of its submission, the Prosecution cites *Niyaramasuhuko et al.*, which held that "[.]

⁸ Motion, paras. 4-5.

⁹ Motion, para. 6.

¹⁰ Motion, para. 8.

¹¹ Motion, para. 14.

¹² Motion, para. 15.

¹³ Motion, paras. 12 - 13.

¹⁴ Response, paras. 5, 11-12.

¹⁵ Response, paras. 6-7.

¹⁶ Response, para. 8.

¹⁷ Response, para. 10.

recalling a witness should be granted only in compelling circumstances where further evidence is of significant probative value and not of a cumulative nature, such as to explore inconsistencies between a witness' testimony and declarations obtained subsequently [...]."¹⁸

DELIBERATIONS

Applicable Law

11. According to the established jurisprudence of the Tribunal, the party seeking to recall a witness must demonstrate good cause.¹⁹ Assessing good cause requires fulfilling a two-pronged analysis: (1) considering the purpose for which the witness will testify; and (2) the reasons why the witness was not questioned earlier on those matters.²⁰ If the Defence discovers inconsistent statements pertaining to a witness who has already testified, fairness to the accused justifies recalling that witness.²¹

Preliminary Issues

12. The Chamber recalls that at the start of Trial it informed the parties that responses to motions must be filed within five days, and that replies to any responses must be filed within three days.²² The Chamber notes that the Defence filed its reply to the instant Motion on 31 May 2010 ten days after the Prosecution filed its response. The reply is therefore, out of time. Because the Defence has not provided good cause for the late filing, the Chamber will not consider the reply.

The Gacaca testimony of witness CNAI

13. The Defence requests that it be permitted to recall witness CNAI to cross-examine him and challenge his credibility on the basis of information that was not available at the time.²³

14. The Chamber observes that the Defence submits this request on the basis of the testimony of witness T24 about what witness CNAI allegedly stated during Gacaca hearings in

¹⁸ Response, para. 10.

¹⁹ *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumve* ("Bagosora et al."), Case No. ICTR-98-41-T, Decision on the Prosecution Motion to Recall Witness Nyanjwa (TC), 29 September 2004, para. 6; *Bagosora et al.*, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 2; *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination (TC), 28 October 2004, para. 5.

²⁰ *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera* ("Karemera et al."), Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Ahmed Mbonnyunkiza (TC), 25 September 2007, para. 5.

²¹ *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness (TC), 4 March 2008, para. 30.

²² Transcript of 9 November 2009, p. 10.

²³ Motion, para. 14.


January 2010, rather than on the basis of the Gacaca transcripts themselves. This is unacceptable. The Chamber further observes that while the Defence asserts that it has sought cooperation from Rwandan authorities in obtaining the relevant records, it provided no dates for the request, nor has it attached any documentation confirming that such a request to the Rwandan authorities is outstanding.

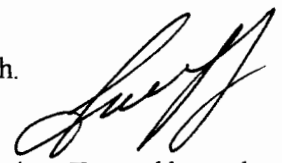
15. Thus, at this stage the Chamber concludes that the Defence submission that witness CNAI contradicted himself during Gacaca hearings held after his testimony before this Chamber is merely speculative. It can not ask the Tribunal to use its scarce resources for what appears at this stage to be a Defence fishing expedition.

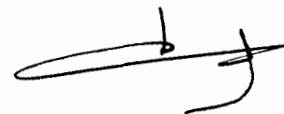
FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Motion;

Arusha, 25 June 2010, done in English.


Solomy Balungi Bossa
Presiding Judge


Bakhtiyar Tuzmukhamedov
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal]

