



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
26-08-2010
(51841-51835)

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**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: 26 August 2010

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTION

v.

**Édouard KAREMERA
Matthieu NGIRUMPATSE**

Case No. ICTR-98-44-T

**REASONS FOR ORAL DECISION OF 23 AUGUST 2010 AND ON ORAL
APPLICATIONS FOR CERTIFICATION TO APPEAL**

Rules 54 and 73 of the Rules of Procedure and Evidence

Office of the Prosecution:
Don Webster
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INTRODUCTION

1. On 1 July 2010, shortly before Matthieu Ngirumpatse's defence was scheduled to begin, the Chamber learned that Joseph Nzirorera had died that same day at the Arusha Lutheran Medical Center. The Chamber cancelled the remainder of the trial session and postponed the commencement of Ngirumpatse's defence case until the start of the following trial session on 23 August 2010. On 12 August 2010, following the Registrar's notification of the demise of Nzirorera the Chamber issued a Decision terminating the proceedings against Joseph Nzirorera¹ and a Scheduling Order² reiterating that Matthieu Ngirumpatse's defence case would commence on 23 August to be preceded by a status conference and inviting the Parties to make all submissions they deemed appropriate in writing to ensure that potential issues were addressed adequately by the Chamber before the start of the next trial session.³ At the status conference on 23 August 2010, the Chamber, based on the written submissions and additional oral arguments from the Parties, issued an Oral Decision⁴ with written reasons to follow relating to the Indictment, the body of evidence, and other outstanding issues regarding the death of Joseph Nzirorera. These are the reasons for that Oral Decision.
2. During proceedings on 24 and 25 August 2010, Counsel for Matthieu Ngirumpatse and Counsel for Édouard Karemera, respectively, made oral applications for certification to appeal the Chamber's Decision on the issues concerning a stay of proceedings, amendments of the Indictment and the evidence adduced by Joseph Nzirorera. The Prosecution does not oppose the applications.⁵

¹ *The Prosecutor v Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44 ("Karemera et al."), Decision Relating to Registrar's Submission Notifying the Demise of Accused Joseph Nzirorera (TC), filed 12 August 2010.

² *Karemera et al.*, Scheduling Order (TC), 12 August 2010.

³ *Id.*

⁴ T. 23 August 2010, p. 18.

⁵ T. 24 August 2010, p. 10.

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DELIBERATIONS

Stay of Proceedings

3. Matthieu Ngirumpatse and Édouard Karemera request a stay of the proceedings until determinations are made relative to how Joseph Nzirorera's death impacts the trial.⁶ The Prosecution opposes the request.⁷
4. The Chamber denied the request for a stay of proceedings for the following reasons: Matthieu Ngirumpatse's defence was scheduled to commence during the previous trial session. Due to the cancellation of the remainder of the trial session following the death of Joseph Nzirorera the Parties were afforded almost eight additional weeks for further preparations. The death of Nzirorera raised issues as to the allegations in the Indictment related to Nzirorera and as to the evidence adduced in relation to those allegations. These issues, however, do not affect the scope of the testimony of the witnesses Ngirumpatse will call for this session, and thus do not affect the Parties' preparations for this session. The Chamber, therefore, found no reason to further postpone the commencement of Ngirumpatse's defence case.

Body of Evidence

5. Matthieu Ngirumpatse and Édouard Karemera request that the evidence adduced in the case of Joseph Nzirorera must be re-evaluated due to Nzirorera's death.⁸ The Prosecution submits that the entire body of evidence should remain in the record.⁹
6. The Chamber ruled that the entire body of evidence remains in the record for the following reasons:
7. The Chamber took note of a decision by The Special Court for Sierra Leone in a multi-accused case where an Accused died after the closing arguments. That Court

⁶ Requête de Matthieu Ngirumpatse aux fins de mise en état de la procédure, filed 19 July 2010 ("Ngirumpatse Requête"); Requête sur la nécessité d'une conférence de mise en état avant la reprise de la prochaine session, 20 July 2010 ("Karemera Requête").

⁷ Prosecution's Consolidated Response, dated 22 July 2010.

⁸ Ngirumpatse Requête; Karemera Requête.

⁹ Prosecutor's Consolidated Response to «*Requête de Matthieu Ngirumpatse aux fins de mise en état de la procédure*» and Édouard Karemera's «*Requête sur la nécessité d'une conférence de mise en état avant la reprise de la prochaine session*», filed on 23 July 2010. ("Prosecution's Consolidated Response").

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held that the verdict eventually rendered would be on the basis of the entire evidentiary record before it.¹⁰ While factually different in many respects to the instant case, it offers some guidance on how another Tribunal has handled this issue. The Chamber has reviewed the transcripts of the case to-date and it is clear that the three defence teams were working together to promote a common defence strategy. The Chamber has recognized numerous instances where Lead Counsel for Joseph Nzirorera would make objections that benefited Édouard Karemera and Matthieu Ngirumpatse, sometimes being the only counsel for any of the Accused to do so.¹¹ The Chamber also notes that at one point Joseph Nzirorera voluntarily refrained from calling a witness that would be beneficial to his case because the testimony of the witness, if not strictly limited, would harm the interests of Édouard Karemera.¹² Counsel for Matthieu Ngirumpatse explicitly admitted to the Chamber that while having three strategies, the teams also “coordinated [their] strategies to counter [the] Prosecution case.”¹³ Given the inter-connectedness of the defense strategies, it would not be in the interests of justice to eliminate the entire body of evidence related to the allegations against Nzirorera.

8. The Chamber, while recognizing that the Defence case of Joseph Nzirorera was not fully completed as there were witnesses on his witness list that were not called and the cross-examination of witnesses Nzirorera or Théoneste Bagosora were finished, observes that Nzirorera’s case was substantially presented. The Prosecution waives its right to finish the cross-examination of Bagosora. As it stands, the evidence of these two witnesses is complete from a defence perspective, aside from any potential questions the Accused may have on re-direct based on what cross-examination was done. Any potential prejudice to Édouard Karemera or Matthieu Ngirumpatse will be slight, as they both declined to ask any questions of the witnesses, and can be remedied by appropriate action taken by the Chamber, such as allowing either party to seek leave to re-call Bagosora for re-examination on issues raised that impact their

¹⁰ *Prosecutor v. Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa*, Case No. SCSL-04-14-T, Decision on Registrar’s Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues (“CDF Decision”), 21 May 2007, para. 22.

¹¹ *See e.g.*, T. 27 Oct 2006, p. 18 (where Counsel for Joseph Nzirorera motioned the Chamber to exclude evidence concerning the presence of Karemera at a rally when the Indictment only alleges that Ngirumpatse was present. Neither counsel for Karemera nor Ngirumpatse raised the issue nor spoke in relation to the motion).

¹² T. 3 Feb 2010, p. 20.

¹³ T. 23 August 2010, p. 16.

client or to seek leave to call any witness on Nzirorera's witness list who was not called.

9. The Chamber recalls that Joseph Nzirorera, Matthieu Ngirumpatse, and Édouard Karemera were all charged with being part of a joint criminal enterprise with other individuals. The death of Nzirorera does not affect the fact that Ngirumpatse and Karemera remain charged with participating in a joint criminal enterprise. The Chamber has the ability to consider the evidence while it is deliberating and separate the evidence that relates only to Nzirorera and that which relates to a joint criminal enterprise or conspiracy or aiding and abetting amongst Nzirorera and others, which may be included in relevant paragraphs of the eighth Amended Indictment.¹⁴ This is a power that the Chamber fully intends to utilize at the stage of deliberation upon and drafting the Judgement in this case. As with the ICTY Trial Chamber in *Brđanin* before it, this Chamber will be "very alive to the 'personal interest' which each accused has in such a case."¹⁵
10. The Chamber also notes that there are others listed in certain paragraphs of the Indictment who have died since 1994 and/or have never been joined to the case of the Accused and there has never been an issue raised as to their presence in the Indictment as alleged cohorts of the Accused. As such, the Chamber sees no reason to now engage in what will surely be a lengthy process of reviewing every piece of evidence adduced to date and expunging those no longer related to the case, when it can be done in a much easier and more streamlined approach between now and the final Judgement.
11. In sum, the Chamber finds that it is neither possible nor desirable to separate the evidence of Joseph Nzirorera from the entire evidentiary record at this stage.

Indictment

12. Édouard Karemera argues that all paragraphs relating to Joseph Nzirorera should be expunged from the Indictment.¹⁶ Matthieu Ngirumpatse argues that the current Indictment should not continue to be the basis on which the Prosecution charges the

¹⁴ See *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T ("*Brđanin and Talić*"), Judgement (TC), 1 September 2004, para. 36 (The Chamber "has taken into consideration the evidence given against former co-accused Momir Talić, whose case was severed from that of the Accused and who subsequently passed away, as far as it is relevant to the case against the Accused.") (italics added).

¹⁵ *Brđanin and Talić*, Decisions on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply (TC), 9 March 2000, para. 29.

¹⁶ T. 23 August 2010, p. 6.

remaining Accused persons.¹⁷ Ngirumpatse charges that Ngirumpatse's rights have been violated by leaving the Indictment "practically unchanged."¹⁸ The Prosecution argues that the joint Indictment should remain unchanged by the death of Nzirorera.¹⁹

13. Édouard Karemera emphasizes the Chamber's 3 March 2009 Decision relating to the severance of Ngirumpatse from these proceedings and suggests that the Chamber should adopt the same standard in this situation.²⁰ However, the Chamber recalls that in the Decision to sever Matthieu Ngirumpatse the Chamber ruled that "there was no basis for the Chamber to order the Prosecution to make substantial amendments to the Indictment."

14. There is clear statutory language and jurisprudence which emphasize the individual nature of criminal responsibility in this Tribunal.²¹ Even if Accused persons are joined together into one trial, this in no way diminishes the Prosecution's burden to prove each element of each crime individually against each of the co-Accused. As such, the Chamber deems it appropriate to keep the Indictment largely the same in line with its decision of 3 March 2009 and jurisprudence from the Special Court for Sierra Leone. However, certain changes must be made to reflect that Joseph Nzirorera is no longer an Accused in this case. Therefore, the Chamber ordered the Prosecution to amend the Indictment to remove Nzirorera's name from the title and from the counts in the Indictment. Also, any reference that Nzirorera is an accused in the case should be deleted. And finally, any reference to Nzirorera in the Indictment should be changed to normal font and no longer be in bold, making Nzirorera the same as any other alleged associate to the remaining co-Accused.

Certification to Appeal

15. The Chamber agrees with the Parties that the aforementioned three disputed issues will materially affect the fair and expeditious conduct of the proceedings and that an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Chamber, therefore, grants Matthieu Ngirumpatse's and Édouard Karemera's applications for certification to appeal the Decision on all three disputed

¹⁷ T. 23 August 2010, pp. 6-7.

¹⁸ T. 24 August 2010, pp. 2-3.

¹⁹ Prosecution's Consolidated Response, para. 15.

²⁰ T. 23 August 2010, p. 15.


²¹ Article 6 of the Statute of the International Criminal Tribunal for Rwanda.

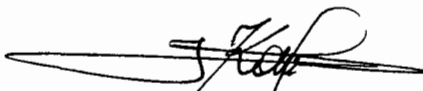
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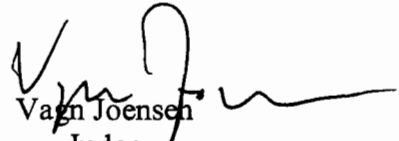
FOR THE ABOVE NOTED REASONS, THE CHAMBER

- I. DENIES** requests for a stay in the proceedings;
- II. DETERMINES** that the body of evidence adduced to date will remain in the record;
- III. ORDERS** the Prosecution to make the following amendments to the Indictment:
 - a. Amend the Indictment by taking Joseph Nzirorera's name from the title and from the counts of the Indictment,
 - b. Delete any reference in the Indictment that Joseph Nzirorera is an Accused in the case,
 - c. Refer to Joseph Nzirorera in the Indictment in a normal font, not in bold;
- IV. ALLOWS** Édouard Karemera and Matthieu Ngirumpatse to apply to the Chamber should they wish to call any witness from Joseph Nzirorera's witness list who were not heard before Nzirorera's death;
- V. ALLOWS** Édouard Karemera and Matthieu Ngirumpatse to respond to the Prosecution's submissions relative to Exhibit DB-218 within 5 days;
- VI. GRANTS** Matthieu Ngirumpatse and Édouard Karemera certification to appeal the Decision on issues concerning a stay of proceedings, amendments of the Indictment and the evidence adduced by Joseph Nzirorera.

Arusha, 26 August 2010, done in English.


Dennis C.M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge

