



UNITED NATIONS
NATIONS UNIES

ICTR-01-68-T
11-02-2011
(2690-2686)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Florence Rita Arrey, Presiding
Bakhtiyar Tuzmukhamedov
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 11 February 2011

THE PROSECUTOR

v.

GREGOIRE NDAHIMANA

Case No. ICTR-2001-68-T

JUDICIAL RECORDS ARCHIVES
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**DECISION ON DEFENCE MOTION FOR LEAVE TO VARY ITS WITNESS LIST AND
CORRECT THE PSEUDONYM OF A WITNESS
(Rule 73 ter (E) of the Rules of Procedure and Evidence)**

Office of the Prosecutor:
Holo Makwaia, Senior Appeals Counsel
Althea Alexis-Windsor, Appeals Counsel
Segun Jegede, Trial Attorney
Lansana Dumbuya, Case Manager

Counsel for the Defence
Bharat B. Chadha, Lead Counsel
Wilfred Ngunjiri Nderitu, Co Counsel
Tharcisse Gatarama, Legal Assistant
Marie-Pier Barbeau, Legal Assistant

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INTRODUCTION

1. The Trial commenced on 6 September 2010. The Prosecution called fifteen witnesses over nineteen trial days and closed its case on 19 November 2010.
2. On 7 December 2010, the Defence filed its Pre-Defence Brief ("Pre-Defence Brief").¹ In Annexes I and II of the Pre-Defence Brief, the Defence proposed calling 42 witnesses including witness ND22.
3. On 14 December 2010, the Chamber ordered the Defence to reduce its witness list.² On 11 January 2011, the Defence filed a reduced list of 33 witnesses.³
4. The first session of the Defence case ended on 28 January 2011. The Defence called ten witnesses during this session.
5. On 3 February 2011, the Defence filed a motion to vary its witness list. ("Motion")⁴
6. On 7 February 2011, the Prosecution filed a response. ("Response").⁵

SUBMISSIONS

7. The Defence requests that the Trial Chamber permit it to vary its witness list to substitute the testimony of Witness ND22 for the testimony of Witness ND25. The Defence notes that Witness ND22 was on the original list of witnesses attached to its Pre-Defence Brief, but that his name was not among a later list submitted by the Defence on 11 January 2011.⁶ The Defence submits that the testimony of Witness ND22 is relevant and has probative value as he will refute allegations contained in paragraphs 8, 9, 10, 11, 12, 13, 25, 26, 27, 30, 31, 32, 33, 34, 35, 36, and 37 of the Indictment.⁷ It states that calling Witness ND22 will not cause any prejudice to the Prosecution as the summary of his intended testimony is contained in the

¹ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Gregoire Ndahimana's Pre-Trial Brief, Pursuant to Rule 73ter of the Rules of Procedure and Evidence, 07 December 2010

² *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Order for the Deence to reduce its list of witnesses, 14 December 2010

³ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Revised list of Defence witnesses (Annex1), 11 January 2011

⁴ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Ndahimana's Defence motion for leave to vary its witness list and correct the pseudonym of witness ND24 in lieu of ND16 ("Motion"), 3 February 2011

⁵ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Prosecution's consolidated response to the Defence motion to vary its witness list and correct the pseudonym of witness ND24 in lieu of ND16 and corrigendum to the disclosure of identifying information of Protected Defence witness and request to grant leave to file the said PIS form of the Defence witness ND22 ("Reponse"), 7 February 2011

⁶ Motion, paras. 7-9.

⁷ Motion Para 14

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Pre-Defence brief.⁸ Further, the testimony of Witness ND22 will not delay the proceedings and his testimony will assist the court in determining the issues in the case.⁹

8. The Defence also points to a clerical error regarding one of its witnesses. It notes that the Personal Information Sheet of a particular witness refers to this witness as ND16, while the Defence refers to this same witness as ND24 in its Pre-Defence Brief.
9. The Prosecution does not object to replacing Witness ND25 with Witness ND22, but argues that it will suffer prejudice because the Defence only disclosed the identifying particulars of Witness ND22 on 1 February 2011 and Witness ND19 on 3 February.¹⁰
10. With respect to Witness ND19 in particular, the Prosecution further notes that witness ND19 is scheduled to testify as the third Defence witness during the session that started on 7 February 2011. The Prosecution recalls the Chamber's decision ordering the Defence to file the identifying particulars of the witnesses at least 21 days prior to the commencement of the Defence case.¹¹
11. The Prosecution requests that the testimony of Witness ND19 be heard during the week of 14 February 2011, or in the alternative to hear his evidence in chief as scheduled and to have his cross-examination during the week of 14 February 2011, thus giving the Prosecution adequate time to prepare.¹² Further, it requests that Witness ND22 be heard during the last session of the Defence case.¹³

DELIBERATIONS

Applicable Law

12. Rule 73 *ter* (E) of the Rules of Procedure and Evidence provides that, "[a]fter commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called." The practice in Chambers has been to allow either party to vary its witness list upon a showing of good cause where the requested

⁸ Motion Para 15

⁹ Motion Para 16, 17

¹⁰ Response para 4-6

¹¹ Response para 8

¹² Response para 9

¹³ Response para 9

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variance is in the interests of justice.¹⁴ Relevant factors include the materiality and probative value of the testimony in relation to existing witnesses and allegations in the Indictment, the complexity of the case, prejudice to the opposing party, justifications for the late addition of witnesses, and delays in the proceedings.¹⁵

Substitution of Witness ND22 for Witness ND25

13. The Trial Chamber notes that the Defence seeks to replace Witness ND25 with Witness ND22, who was originally on the Defence witness list filed in the Pre-Defence brief. As the Defence has indicated that Witness ND22 has information relevant to seventeen indictment paragraphs, the Trial Chamber considers that his testimony may have material and probative value. It further notes that as the Defence is proposing a substitution of witnesses, thus giving leave to the Defence to add this witness to the list will not delay or extend proceedings. Finally, the Trial Chamber is mindful that the Prosecution does not object to the variation in principle.
14. The Prosecution does request that the Trial Chamber hear Witness ND22's testimony during the last trial session due to the late disclosure of ND22's identifying particulars. The Trial Chamber considers this to be a reasonable request, and accepts the substitution of witnesses proposed by the Defence as long as his identifying particulars are disclosed by 16 February 2011, and the Defence schedules his testimony for the last session of this case.

Late disclosure-Witness ND19

15. With regard to Witness ND19, the Chamber notes that it gave an oral ruling on 7 February 2011, holding that Witness ND19 will be heard as scheduled and delaying his cross-examination to compensate for the late disclosure.¹⁶ This issue is therefore now moot.

¹⁴ *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50, Decision on Casimir Bizimungu's Motion to vary Witness List; and to Admit Evidence of Witnesses in Written Form in Lieu of Oral Testimony (TC), 1 May 2008, para. 13; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecutor's Motion to Vary its Witness List (TC), 2 October 2006, para. 3; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E) (TC), 26 June 2003, para. 13; *The Prosecutor v. Musema*, Case No. ICTR. 96-13-T, Decision on the Prosecutor's Request for Leave to Call Six New Witnesses (TC), 20 April 1999, paras. 4, 13.

¹⁵ *Bizimungu et al.*, Decision on Casimir Bizimungu's Motion to vary Witness List; and to Admit Evidence of Witnesses in Written Form in Lieu of Oral Testimony, 1 May 2008, para. 13; *Bagosora et al.*, Decision On Bagosora Motion To Present Additional Witnesses And Vary Its Witness List, 17 November 2006, para. 2; *Prosecutor v. Mpambara*, Case No. ICTR-2001-65-T, Decision on the Prosecution's Request to Add Witness AHY (TC), 27 September 2005, para. 4.

¹⁶ T. 7 February 2011, p.70-71

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Clerical error-Witness ND24

16. The Trial Chamber notes that the Prosecution has made no submissions regarding the error with respect to Witness ND16/ND24. Therefore, it concludes that this error has caused no prejudice to the Prosecution.

FOR THESE REASONS, THE CHAMBER

GRANTS the Defence Motion to vary its witness list;

ALLOWS the Defence, pursuant to Rule 73 *ter* (E), to drop Witness ND25 from its list:

ALLOWS the Defence, pursuant to Rule 73 *ter* (E), to replace witness ND25 with Witness ND22;

HOLDS that witness ND22 will be called during the last session of the Defence case;

NOTES the Defence correction of its witness' pseudonym, and

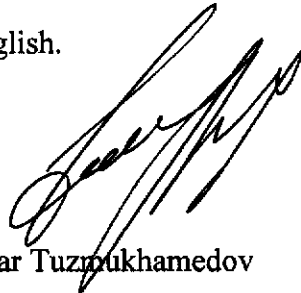
HOLDS that the witness referred to Witness "ND16" in a Personal Information Sheet disclosed to the Prosecution shall henceforth be referred to as Witness "ND24" instead.

Arusha, 11 February 2011, done in English.



Florence Rita Arrey

Presiding Judge



Bakhtiyar Tuzmukhamedov

Judge



Aydin Sefa Akay

Judge

[Seal of the Tribunal]