

ICTR-99-54-T
12-04-2011
(102439-102433)

102439
Mwamba



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 12 April 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

Handwritten signature and date: 12 APR 2011

**DECISION ON DEFENCE MOTION TO AUTHORIZE
WITNESS DWAN-7 TO TESTIFY VIA VIDEO-LINK**

Office of the Prosecutor

Mr. Wallace Kapaya
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Defence Counsel

Mr. Peter Herbert
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Ms. Anne-Gaëlle Denier
Ms. Chloé Gaden-Gistucci

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the "Chamber");

BEING SEIZED of the "Defence Motion to Authorize Witness DWAN-7 to Testify via Video-Link [Rules 54, 75 and 89 of the Rules of Procedure and Evidence]", filed confidentially on 1 March 2011 (the "Defence Motion");

CONSIDERING:

- (a) The "Prosecutor's Response to Defence Motion to Authorize Witness DWAN-7 to Testify via Video-Link [Rules 54, 75 and 89 of the Rules of Procedure and Evidence]", filed on 4 March 2011 (the "Prosecution Response"); and
- (b) The "Defence Reply to Prosecutor's Response to Defence Motion to Authorize Witness DWAN-7 to Testify via Video-Link [Rules 54, 75 and 89 of the Rules of Procedure and Evidence]", filed confidentially on 8 March 2011 (the "Defence Reply");

CONSIDERING also the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 54, 71 and 90(A) of the Rules.

SUBMISSIONS OF THE PARTIES

Defence Motion

1. The Defence requests the Chamber to authorize witness DWAN-7 to testify via video-link from any location chosen by the Registry in France, prior to the completion of the Defence case. The Defence contends that all three factors to be considered for allowing testimony via video-link have been met for DWAN-7 to testify via video-link.¹
2. The Defence submits that DWAN-7's testimony is relevant because of his professional relationship with the Accused. DWAN-7 will testify that he had numerous discussions with the Accused on the prevailing political situation in Rwanda, but never heard the latter express any anti-Tutsi sentiments. The witness will likewise state that he never heard of the Accused discriminating against any employee of the Ministry of Planning on ethnic or other unlawful grounds. Finally, DWAN-7 will testify that the Accused called him early in the afternoon of 7 April 1994 to ask whether the former could provide refuge to his family, which will corroborate the Accused's alibi that he was in Kigali on 7 April 1994. The Defence recalls that this Chamber considered the

¹ Defence Motion, paras. 1-3.



anticipated testimonies of Prosecution witnesses ANAW, DAK, and AHJ on the Accused's alibi relevant.²

3. The Defence points out that Prosecution witness ANAW was allowed to testify via video-link, and submits that DWAN-7 should be treated in the same manner in accordance with the principle of equality of arms. The Defence recalls that the Chamber accepted a signed statement from ANAW as sufficient to meet the second and third factors outlined above.³

4. The Defence submits that due to his advanced age and medical condition, DWAN-7 is unable to travel to Arusha to testify in person. In support thereof, the Defence attaches a medical certificate issued by a doctor in France, on 26 November 2010, stating that DWAN-7 is not fit to embark on lengthy trips, such as from Europe to Arusha, particularly as a result of a stroke and his high blood pressure. The Defence recalls that both this Tribunal and the ICTY have allowed witnesses' health reasons to justify testimony through video-link.⁴

Prosecution Response

5. The Prosecution opposes the Defence Motion on the ground that the medical certificate attached thereto cannot be relied upon to justify the exceptional measure of testimony via video-link. The Prosecution notes that the medical certificate was produced at the behest of the Defence, and contends that the handwritten note does not properly explain the nature and gravity of the witness's medical condition and how his alleged hypertension renders him unable to travel.⁵

6. The Prosecution stresses that video-link testimony is an exceptional measure that is granted only upon sound and legitimate justification supported by proper documentation. The Prosecution cites the Trial Chamber's Decision in *Nsabimana et al.*, wherein a request for testimony via video-link was denied as the medical certificate accompanying the request did not specify the nature or gravity of the witness's illness.⁶

² *Id.*, paras. 10-13, 15.

³ *Id.*, paras. 15-17, 25.

⁴ *Id.*, paras. 19-24, citing, among others, *The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Extremely Urgent and Confidential Request for Video-Link Testimony of Witnesses Y1, S2, Y3, F10 and F11 (TC), 9 June 2008 ("*Ndindiliyimana et al.* Trial Decision of 9 June 2008"), para. 6; and *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Confidential Motion Requesting the Chamber to Hear Expert Witness Helmut Strizek in The Hague or Alternatively to Authorize Testimony by Video-Link (TC), 11 September 2006 ("*Bizimungu et al.* Trial Decision of 11 September 2006"), paras. 3-4.

⁵ Prosecution Response, paras. 7-10, 14-15.

⁶ *Id.*, paras. 5-6, citing *The Prosecutor v. Sylvain Nsabimana et al.*, Case No. ICTR-98-42-T, Joint Case No. ICTR-98-42-T, Decision on Sylvain Nsabimana's Extremely Urgent – Strictly Confidential – Under Seal – Motion to Have Witness AGWA Testify Via Video-Link (TC), 17 August 2006 ("*Nsabimana et al.* Trial Decision of 17 August 2006").

Defence Reply

7. The Defence contends that, contrary to the Prosecution's assertions, it has furnished the Chamber with sufficient evidence to demonstrate why DWAN-7 should be authorized to testify via video-link. The Defence stresses that the Prosecution, when seeking to present Prosecution witness ANAW via video-link, argued that ANAW's affidavit was accepted by the Chamber as sufficient in itself to justify such mode of testifying. The Defence points out that the medical certificate annexed to the Defence Motion was in a form in conformity with French laws and regulations and was issued by a doctor subject to the French Code of Medical Ethics. Moreover, there is nothing irregular with the medical certificate having been issued upon DWAN-7's request, as medical information is confidential and is available only to the concerned patients, and not third parties.⁷

8. The Defence points out that the *Nsabimana et al.* Trial Chamber Decision cited by the Prosecution was in fact later reversed upon the submission of a medical certificate detailing the disease the witness was afflicted with and the treatment he was receiving therefor.⁸

DELIBERATIONS

9. Rule 90(A) provides that witnesses shall, in principle, be heard directly by the Chamber. Jurisprudence provides, however, that Trial Chambers have the discretion to allow testimonies to be given via video-link for the purposes of witness protection or, in exceptional circumstances and in the interests of justice, if the following factors are met:

- a. Importance of the testimony;
- b. Witness's inability or unwillingness to appear before the Tribunal; and
- c. Whether valid reasons have been adduced for the witness' inability or refusal to appear.

The burden of proof lies with the moving party.⁹

⁷ Defence Reply, paras. 5-17, 20-26.

⁸ *Id.*, para. 18, citing *The Prosecutor v. Sylvain Nsabimana et al.*, Case No. ICTR-98-42-T, Joint Case No. ICTR-98-42-T, Decision on Sylvain Nsabimana's Extremely Urgent Motion for to Reconsider the Decision on Sylvain Nsabimana's Extremely Urgent – Strictly Confidential – Under Seal – Motion to Have Witness AGWA Testify Via Video-Link (TC), 5 September 2006 (“*Nsabimana et al.* Trial Decision of 5 September 2006”), paras. 2-3, 7-8.

⁹ See, among others, *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for Video-Link Testimony of Witness T7 [Rules 54 and 71(D) of the Rules of Procedure and Evidence] (TC), 19 May 2010, para. 6; *The Prosecutor v. Gaspard Kanyakuriga*, Case No. ICTR-2002-78-T, Decision on the Extremely Urgent Defence Motion for Witness KG15 to Testify by means of Video-Link [Rules 54 of the Rules of Procedure and Evidence] (TC), 13 January 2010, paras. 6-7;

10. The Chamber notes that while the will-say statement of DWAN-7 pertains mostly to the paragraphs of the Indictment alleging the diversion of external development funds, which have all been dropped,¹⁰ the Defence submits that he is the only witness who can corroborate the Accused's alibi that he spoke to him over the telephone on 7 April 1994. Moreover, the Defence indicates that DWAN-7 will testify that the Accused never expressed any anti-Tutsi sentiments nor discriminated against Ministry of Planning employees who were of Tutsi ethnicity.¹¹ The Chamber is therefore of the view that DWAN-7's proposed testimony, as it concerns one of the Accused's alibis, is sufficiently important and relevant.

11. The Defence has submitted a medical certificate from a doctor in France, which appears to indicate that the witness was 78 years old at the time the certificate was issued (26 November 2010) and to certify that the witness has suffered a stroke in the past and suffers from hypertension. As a result of this condition, the full details of which are spelled out in the medical certificate, the witness is unable to embark on lengthy trips.

12. The Chamber notes that the *Ndindiliyimana et al.* Trial Chamber allowed a witness of advanced age and with hypertension to testify via video-link.¹² Unlike the initial situation in *Nsabimana et al.*,¹³ the Chamber is of the view that the medical certificate presented by the Defence sufficiently describes the nature and gravity of the witness's health condition preventing him from traveling to Arusha.

13. The Chamber therefore is of the view that the Defence has met all three factors to be considered when determining whether a witness may testify by video-link. In the interests of justice, DWAN-7 may testify via video-link.



Ndindiliyimana et al. Trial Decision of 9 June 2008, para. 3; *Bizimungu et al.* Trial Decision of 11 September 2006, para. 6; *Nsabimana et al.* Trial Decision of 17 August 2006, para. 8.

¹⁰ Pre-Defence Brief, 21 October 2010, Will-Say Statement of DWAN-7, paras. 3-13 (out of 18 paragraphs); Decision on Defence Motion for Judgement of Acquittal (TC), 14 October 2010, para. 19.

¹¹ Defence Motion, paras. 10-14.

¹² *Ndindiliyimana et al.* Trial Decision of 9 June 2008, para. 6.

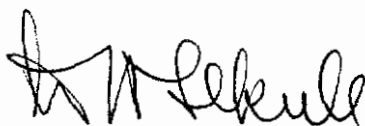
¹³ *Nsabimana et al.* Trial Decision of 17 August 2006, para. 10.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion, and

DIRECTS the Registry, in consultation with the Parties, to make the necessary arrangements for witness DWAN-7 to testify via video-link from a suitable location in France.

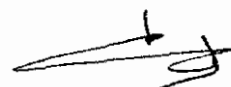
Arusha, 12 April 2011



William H. Sekule
Presiding Judge



Solomy Balungi Bossa



Mparany Rajohnson
Judge