

ICTR-01-68-T
18-04-2011
(2786-2782)



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

2786
P

UNITED
NATIONS
NATIONS
UNIES

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 18 April 2011

JUDICIAL RECORDS ARCHIVER
RECEIVED

2011 APR 19 P 5: 27

THE PROSECUTOR

v.

GREGOIRE NDAHIMANA

Case No. ICTR-2001-68-T

DECISION ON DEFENCE MOTION TO VARY ITS WITNESS LIST

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

24

2785

INTRODUCTION

1. On 7 December 2010, the Defence filed its Pre-Defence Brief (“Pre-Defence Brief”) in which it indicated it indicated that it wished to call 42 witnesses.¹
2. On 14 December 2010, the Trial Chamber ordered the Defence to reduce its witness list.²
3. On 11 January 2011, the Defence filed a revised witness list reducing its list of witnesses from 42 to 33.³
4. On 17 January 2011, the Defence commenced its case calling ten witnesses during the first session which ended on 28 January 2011. Fourteen witnesses were called during the second session which was held from 7 February 2011 to 28 February 2011, thereby leaving 9 witnesses to be heard by the Chamber in the remaining sessions.
5. On 16 March 2011, the Defence filed a motion requesting leave to vary its witness list and seeking protective measures for those witnesses it wished to add to its witness list (“Original Motion”).⁴ On 31 March 2011, the Chamber granted the Defence motion to vary its witness list in part (31 March Decision”).⁵

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 Defence to reduce its list of witnesses, 14 December 2010.

³ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Revised list of Defence witnesses(Annex 1) and the list containing the revised order of appearance (Annex 2) filed pursuant to the Trial Chamber III’s decision of 15 December 2010 together with the identifying information of protected witnesses with pseudonyms ND20 and ND21, 11 January 2011.

⁴ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Extremely Urgent Defence motion to vary its witness list and request for protective (Pursuant to Rule 73ter (E) of the Rules of Procedure and Evidence), and Request for the grant of protective measures to witnesses ND36, AM1, AM2, FM1, FM2 and ND37 (Pursuant to Rule 69 and 75 of the Rules of Procedure and Evidence), 16 March 2011, and Corrigendum to the Extremely Urgent Defence motion to vary its witness list and request for protective (Pursuant to Rule 73ter (E) of the Rules of Procedure and Evidence), and Request for the grant of protective measures to witnesses ND36, AM1, AM2, FM1, FM2 and ND37 (Pursuant to Rule 69 and 75 of the Rules of Procedure and Evidence), 18 March 2011.

⁵ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Decision on Defence Motion to vary its witness list and request for protective measures for new witnesses, 31 March 2011.

M

2784

6. On 7 April 2011, the Defence file a motion requesting leave to further vary its witness list. ("Motion").⁶ According to the Defence, Witness FB11 is afraid of losing her job if she comes to Arusha to testify. Thus the Defence asks permission to substitute Witness FB11 with Witness ND38.⁷
7. On 13 April 2011, the Prosecution filed a response, opposing the Defence Motion. The Prosecution submits that the Defence should respect the Original Decision meaning that the Defence must drop Witnesses ND20 and FB1 if it wishes to call Witnesses ND38 and ND35.⁸
8. In its Reply of 14 April 2011, the Defence clarifies that it wishes to add Witness ND38 to its witness list for the purpose of seeking admission of her statement into evidence pursuant to Rule 92 *bis*; it does not intend to call her to testify *viva voce*. Thus, Witness ND38 is not a direct substitution for Witness FB11.⁹

DELIBERATIONS

Applicable Law

9. Rule 73 *ter* (E) of the Rules of Procedure and Evidence allows the Defence to move the Trial Chamber to vary its witness list "if it considers it to be in the interests of justice." Trial Chambers have allowed either party to vary its witness list upon a showing of good cause and where the requested variance is in the interests of justice.¹⁰ Relevant factors include the

⁶ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Order of appearance pursuant to the Trial Chamber III's decision of 31 March 2011 and request for leave to vary the approved list of witnesses by dropping Witness FB11 and to replace it with Witness ND38 (Pursuant to Rule 73*ter* (E) of the Rules of Procedure and Evidence), 7 April 2011.

⁷ Motion para .3.

⁸ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Prosecution's response to the Order of appearance pursuant to the Trial Chamber III's decision of 31 March 2011 and request for leave to vary the approved list of witnesses by dropping Witness FB11 and to replace it with Witness ND38 (Pursuant to Rule 73*ter* (E) of the Rules of Procedure and Evidence), 13 April 2011, paras. 5 and 8.

⁹ *Prosecutor v. Ndahimana*, ICTR-2001-68-T, Defence reply to the Prosecution's response to the Order of appearance pursuant to the Trial Chamber III's decision of 31 March 2011 and request for leave to vary the approved list of witnesses by dropping Witness FB11 and to replace it with Witness ND38 (Pursuant to Rule 73*ter* (E) of the Rules of Procedure and Evidence), 14 April 2011, paras. 2-3.

¹⁰ Decision on the Defence Motion to Vary the Defence Witness List to Add M. Gaspard Musabyimana, 13 April 2007 (TC), para. 2; Decision on the Defence Motion to Vary the Defence Witness List (TC), 28 March 2007, para. 3

MA

2783

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.¹¹

Analysis

10. The Chamber recalls that it has granted permission to the Defence to a total of 33 *viva voce* witnesses to rebut the allegations of the Prosecution.
11. The Chamber is of the view that the Defence Motion is unduly sloppy. First it notes that both the title of the Motion and the Disposition are misleading in that they only refer to a request to replace Witness FB11 with Witness ND38. Moreover, the Defence has not complied with the Chamber's 31 March Decision. In that Decision, the Chamber stated that it would only permit the Defence to call Witness ND38 and ND35 if it removed Witnesses ND20 and FB1 from its list by 11 April 2011.¹² The Defence has removed Witness FBI from the witness list but has not asked to remove Witness ND20. Finally, in disregarding the plain wording of a prior Trial Chamber Decision, the Defence places an undue burden on the Chamber to decipher its intentions and make sense of its continuously changing witness list.
12. The Trial Chamber understands that what the Defence is actually seeking in its Motion is to be permitted to remove Witnesses FB1 and FB11 from its witness list, substitute these witnesses with Witnesses ND35 and ND38, and retain Witness ND20. Despite its objections to the form of the Defence Motion, the Trial Chamber nevertheless considers that the Prosecution has not argued that the Defence has failed to disclose in a timely manner information relevant to the witnesses it wishes to add to its witness list. As Witness ND38 is not expected to testify *viva voce*, the Chamber is further of the view that permitting the

(citing *Prosecutor v. Karemera et al.*, Decision on Prosecutor's Motion to Vary its Witness List (TC), 2 October 2006, para. 3; *Prosecutor v. Musema*, Decision on the Prosecutor's Request for Leave to Call Six New Witnesses (TC), 20 April 1999, paras. 4, 13; *Prosecutor v. Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E) (TC), 26 June 2003, para. 13).

¹¹ Decision on the Defence Motion to Vary the Defence Witness List to Add M. Gaspard Musabyimana, 13 April 2007 (TC), para. 2; Decision on the Defence Motion to Vary the Defence Witness List (TC), 28 March 2007, para. 3 (citing *Prosecutor v. Bagosora et al.*, Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List (TC), 17 November 2006, para. 2; *Prosecutor v. Mpambara*, Decision on the Prosecution's Request to Add Witness AHY (TC), 27 September 2005, para. 4).

¹² Decision 31 March 2011, para. 35 and Disposition.

2782

Defence to make the substitutions requested will not result in an expansion of the Defence witness list, beyond the 33 witnesses permitted, meaning that the substitutions will not result in further delays or prejudice the Prosecution.

For these reasons, and in the interests of justice,

THE CHAMBER THEREFORE

GRANTS the Defence Motion; and

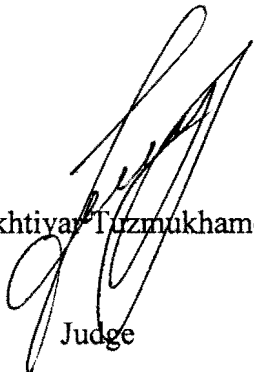
ALLOWS the Defence to remove Witnesses FB1 and FB11 from the witness list, add Witnesses ND 35 and ND 38 to the list, and retain Witness ND20 on the list. This Decision does not prejudice any Defence application, pursuant to Rule 92 *bis*, with regards to Witness ND38.

Arusha, 18 April 2011, done in English.



Florence Rita Arrey

Presiding Judge



Bakhtiyar Tuzmukhamedov

Judge



Aydin Sefa Akay

Judge

