

-0149

14R-01-68-T
26-04-2011
(2825-2820)

2825
MWW



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 26 April 2011

UNICTR
JUDICIAL RECORDS/ARCHIVES
RECEIVED

2011 APR 26 11:11

THE PROSECUTOR

v.

GREGOIRE NDAHIMANA

Case No. ICTR-2001-68-T

DECISION ON DEFENCE REQUEST FOR RECONSIDERATION OF CHAMBER RULING OF 19 APRIL 2011, WHICH DISALLOWED THE DEFENCE TO ADDUCE EVIDENCE BASED ON ADDITIONAL WILL SAY STATEMENT OF WITNESS ND23 AND TO RECALL WITNESS ND23

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

M

INTRODUCTION

1. On 19 April 2011, the Defence filed an extremely urgent motion requesting the Trial chamber's reconsideration of its ruling issued on 19 April 2011, disallowing the defence from adducing evidence based on the additional will say statement of witness ND23. The Defence also sought the Chamber's leave to recall witness ND23. ("Motion")¹
2. On 21 April 2011, the Prosecution filed a response to the extremely urgent defence motion ("Response").²
3. On 23 April 2011, the Defence replied to the Prosecution's response to the Motion³

SUBMISSIONS

Defence submissions

4. The Defence submits that the Chambers Ruling on 19 April 2011⁴ has blocked the presentation of 'essential and crucial evidence capable of rebutting the suggestion of the Prosecution that witness ND23 gave untrue testimony before the Court concerning his attendance at the meeting of 11 April 1994', thus in the interests of a just and fair trial, the ruling should be reconsidered.⁵
5. The Defence argues that the Prosecutor of Rwanda could not have charged the witness ND23 for attending the meeting of 11 April 1994 without any basis and concrete evidence that he

¹ *Prosecutor v Ndahimana* Case No ICTR 2001-68-T, Extremely urgent defence request for reconsideration of the ruling issued on 19 April 2011 by which the trial chamber disallowed the defence to adduce evidence based on the additional will say statement of witness ND23 and to recall witness ND23, 19 April 2011.

² *Prosecutor v Ndahimana* Case No. ICTR 2001-68-T, Prosecution's Response to Defence extremely urgent request for reconsideration of the ruling issued on 19 April 2011 by which the trial chamber disallowed the defence to adduce evidence based on the additional will say statement of witness ND23 and to recall witness ND23, 21 April 2011.

³ *Prosecutor v Ndahimana* Case No ICTR 2001-68-T, Defence's Reply to the Prosecution's Response to the extremely urgent request for the reconsideration of the ruling issued on 19 April 2011 by which the Trial Chamber disallowed the Defence to adduce evidence based on the additional will-say statement of Witness ND23 and to recall ND23, 23 April 2011.

⁴ Transcript 19 April 2011 p. 28-29; The Chamber ruled to exclude evidence sought to be presented by the Defence by way of an additional will say which was disclosed to the Prosecution only a few minutes before the commencement of the hearing of Defence Witness ND23.

⁵ Motion paras. 13 and 19

- did attend.⁶ Further, that it was surprised by the introduction of Prosecution exhibits P.63 (A) and P.63 (B) as no notice and/or copy of the statement was served on the Defence in advance.⁷
6. The Defence states that due to a failure of the email system, the parties with email addresses ending by “un.org” did not receive the Defence mail containing the will-say statement sent on 18 April 2011, which was unforeseen and beyond the control of the Defence.⁸
7. The Defence prays the Chamber to reconsider its ruling made on 19 April 2011 and to allow the Defence to produce evidence concerning ND23’s participation in the meeting of 11 April 1994 and his subsequent trial and acquittal before the Gacaca court for attending that meeting.⁹

Prosecution submissions

8. The Prosecution submits that the Defence has met neither the standard for reconsideration nor for recall,¹⁰ nor has it demonstrated any exceptional circumstances that merit reconsideration of the decision and prays the Trial Chamber to dismiss the Defence Motion.¹¹
9. The Prosecution argues that will-say evidence must be served within reasonable time in order to ensure that the served party has sufficient time to prepare its case,¹² pointing out that in the instant case, the Defence handed them the additional will say of the witness just 25 minutes before the witness entered the court room.¹³ Prosecution adds that even if the attempted disclosure by the Defence of the will say on 18 April 2011 had been successful, the time to investigate the allegations contained therein and the notice would still have been insufficient.¹⁴

⁶ Motion paras. 14.

⁷ Motion para. 16.

⁸ Motion para. 17.

⁹ Motion para.18.

¹⁰ Response para. 1.

¹¹ Response para a. 14.

¹² *Prosecutor v Andre Rwamakuba*, CASE No ICTR-98-44C-T, Decision on the Defence Motion regarding the will say statements, 14 July 2005, para 7.

¹³ Response para 2.

¹⁴ Response paras 2 and 7.

10. The Prosecution states that the Defence has not shown any probative reason for recalling ND23 and relies on *Bagosora et al*¹⁵ submitting that the Chamber's discretion to recall a witness must be 'exercised carefully ... in the most compelling of circumstances where such further evidence is of significant probative value'.¹⁶
11. The Prosecution argues that the issue at stake is the credibility of the witness who testified that he did attend the meeting at the communal office on 11 April 1994 contrary to statements he made to ICTR Investigators in 2002 and 2003,¹⁷ and asserts that even if the Gacaca records are presented as testimony that ND23 was tried in Rwanda for having attended that meeting, this would not add credence to the Defence case, thus the exclusion of this testimony does not cause prejudice to the Defence.¹⁸

DELIBERATIONS

Applicable Law

12. Although the Rules of Procedure and Evidence do not contain a specific rule that speaks as to Reconsideration, a substantial amount of jurisprudence such as the *Karemera case* affirmed that Trial Chambers have the "inherent power" to reconsider their own decisions, under the following "exceptional" circumstances:
- i. when a new fact has been discovered that was not known by the Trial Chamber;
 - ii. where new circumstances arise after the original decision;
 - iii. where there was an error of law or an abuse of discretion by the Trial Chamber resulting in an injustice.¹⁹

¹⁵ *Prosecutor v Bagosora et al*, Case No ICTR-98-41-T, Decision on the Prosecution's Motion to Recall Witness Nyanjwa, 29 September 2004, para 6.

¹⁶ Response para. 9.

¹⁷ Response para 3.

¹⁸ Response para. 4.

¹⁹ *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera*, ICTR-99-44-T, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, ICTR-99-44-T, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY, 28 September 2007, paras. 10-11.

13. In its oral ruling on 18 April 2011, the Chamber ordered the Defence not to lead evidence based on an additional will-say statement, which was disclosed to the Prosecutor minutes before witness ND23 began testifying. The Chamber stated that the Will-say statement contained newly disclosed essential elements regarding the Defence case, which were supposed to have been disclosed earlier.²⁰ The Defence was therefore ordered to limit its examination in chief to issues that were disclosed to the Prosecution on 16 March 2011²¹
14. The Chamber observes that the Defence should have, but failed, to avail itself of the ample opportunity during re-examination to address the evidence elicited by the Prosecution on witness ND23's Statement made to the ICTR Investigators concerning the said meeting of 11 April 1994. The Defence missed its chance at 'setting the record straight' and chose instead, to bring this Motion for the Chamber to reconsider its ruling and to recall Witness ND23.
15. The Trial Chamber notes that it has inherent power to reconsider its own decisions under particular circumstances and where the interests of justice so require based on clear cut criteria,²² but finds however, that in light of these considerations, the Defence has failed to satisfy any of these criteria in order to trigger a reconsideration of the Chambers' decision on this issue.
16. The Trial Chamber notes that notwithstanding Defence's 'surprise' at the Prosecution's production of Exhibits P. 63 (A) and P. 63(B)²³ it is the intrinsic duty of the Defence to

²⁰ Transcript 19 April 2011 p. 28-29.

²¹ *Prosecutor v Ndahimana* Case No ICTR-2001-68, Extremely Urgent Defence Motion to Vary its witness List (Pursuant to Rule 73 ter [E]) and Request for the Grant of Protective measures to Witnesses ND36, AM1, AM2, FM1, FM2 and ND37 pursuant to Rules 69 and 75 of the RPE, 16 March 2011, Annex p. 10.

²² *Prosecutor v. Nzabonimana*, Decision on Nzabonimana's Motion for Stay in the Proceedings, Reconsideration and/or Certification of Decision Rendered on 29 October 2009, 13 November 2009, para. 21 ; *Prosecutor v. Nyiramasuhuko et al.*, Decision on Ntahobali's Motion for Reconsideration of the Decision of March 2006, 11 June 2007, paras 9, 10, quoting further decisions : *Prosecutor v. Bizimungu et al.*, Extremely Urgent Decision Reconsidering Trial Chamber's Decision of 24 January 2008 and Order of the Testimony of Witness RDG to be Taken by Deposition, 29 January 2008, paras 4 and 5 ; *Prosecutor v. Karemera et al.*, Decision on Motion for Partial Reconsideration of the Decision on Joseph Nzirorera's Tenth Notice of Rule 68 Violation, 16 April 2008, para. 5. The criteria for such a reconsideration include facts which have newly been discovered but were not known to the Chamber at the time of issuance of the original decision; a material change in circumstances since the issuance of the original decision; or where there is any reason to believe that the original decision was erroneous, or constituted an abuse of power by the Trial Chamber that resulted in an injustice.

²³ Prosecution Exhibits P. 63 (A) and P. 63.(B)- Statements Witness ND23 admits he made to ICTR Investigators on 29 August 2002 and 25 March 2003.

discover all prior statements made by its witnesses. Thus, the fact that they did not discover or address this Statement made by ND23 cannot be excused, nor can it remedy any prejudice caused to the Prosecution by the Defence's inability to disclose the Will-say on time before the commencement of the examination of the Witness. Moreover, the Defence did not object to the Prosecution use of Exhibits P. 63(A) and P. 63(B), neither did they choose to re-examine witness ND23 on the contents of the exhibit after the Prosecution had used it.

17. The Chamber finds that the Defence has failed to demonstrate that the said ruling was erroneous and prejudicial to the Defence's case thus warranting reconsideration. Furthermore, it is the opinion of the Chamber that to recall Witness ND23 to be examined in chief once again would not be a judicious use of the Tribunal's resources since the Defence has not shown good cause why it failed, during its re-examination of the witness, to address the issues raised by the Prosecution from Exhibits P. 63(A) and P. 63(B).

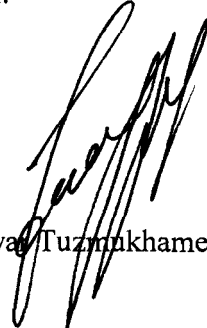
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

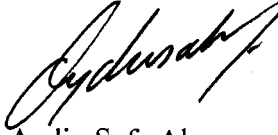
Arusha, 26 April 2011, done in English.


Florence Rita Atrey

Presiding Judge


Bakhtiyar Tuzmukhamedov

Judge


Aydin Sefa Akay

Judge

[Seal of the Tribunal]



discover all prior statements made by its witnesses. Thus, the fact that they did not discover or address this Statement made by ND23 cannot be excused, nor can it remedy any prejudice caused to the Prosecution by the Defence's inability to disclose the Will-say on time before the commencement of the examination of the Witness. Moreover, the Defence did not object to the Prosecution use of Exhibits P. 63(A) and P. 63(B), neither did they choose to re-examine witness ND23 on the contents of the exhibit after the Prosecution had used it.

17. The Chamber finds that the Defence has failed to demonstrate that the said ruling was erroneous and prejudicial to the Defence's case thus warranting reconsideration. Furthermore, it is the opinion of the Chamber that to recall Witness ND23 to be examined in chief once again would not be a judicious use of the Tribunal's resources since the Defence has not shown good cause why it failed, during its re-examination of the witness, to address the issues raised by the Prosecution from Exhibits P. 63(A) and P. 63(B).

FOR THE ABOVE REASONS, THE CHAMBER

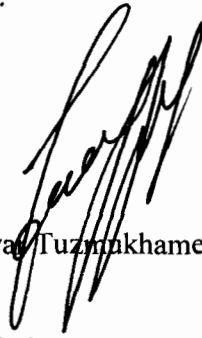
DENIES the Defence Motion in its entirety.

Arusha, 26 April 2011, done in English.



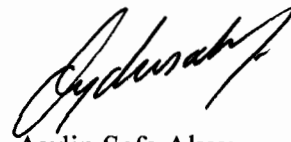
Florence Rita Atrey

Presiding Judge



Bakhtiyar Tuzmukhamedov

Judge



Aydin Sefa Akay

Judge

[Seal of the Tribunal]