



UNITED NATIONS
NATIONS UNIES

ICTR-00-55C-T

06-05-2011

(6117 - 6114)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

6117
AM

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 6 May 2011

THE PROSECUTOR

v.

Idéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

2011 MAY -6 A 11:57
JUDICIAL RECORDS ARCHIVE

**DECISION ON DEFENCE MOTION TO RECONSIDER THE DECISION ON
DEFENCE MOTION FOR A HEARING BY VIDEO-LINK FOR WITNESS BEJ01**

Office of the Prosecution:

Drew White
Kirsten Gray
Yasmine Chubin
Zahida Virani

Defence Counsel for Idéphonse Nizeyimana:

John Philpot
Cainnech Lussiaa-Berdou
Myriam Bouazdi

INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on Friday, 25 February 2011, after having called 38 witnesses. The Defence case is scheduled to commence on 9 May 2011.
2. On 30 March 2011, the Defence team of the Accused, Ildéphonse Nizeyimana (“the Defence” and “the Accused” respectively) filed a motion requesting that the Trial Chamber permit Witness BEJ01, presently residing in Belgium under state supervision due to a criminal conviction, to give evidence via video-link from the Hague (“First Defence Motion”).¹
3. On 4 April 2011, the Office of the Prosecutor (“Prosecution”) filed a response to the First Defence Motion, opposing the Defence request.² The Prosecution submitted, *inter alia*, that the Defence did not provide sufficient justification to allow Witness BEJ01 to testify via video-link, and instead should testify in person at the Tribunal.³
4. On 18 April 2011, the Chamber handed down its ‘Decision on Defence Motion for a Hearing by Video-link for Witness BEJ01’ (“Impugned Decision”), denying the Defence Motion on the basis that (1) the Defence did not show that the Belgian authorities are unwilling or unable to transfer Witness BEJ01 to Arusha; (2) restrictions on the Witness’s movement due to his sentence do not preclude the Defence from requesting the Witness’s transfer pursuant to Rule 90*bis*; and (3) the Tribunal’s jurisprudence favors live testimony by witnesses.⁴
5. On 26 April 2011, the Defence filed the ‘Motion to Reconsider the Decision on Defence Motion for a Hearing by Video-Link for Witness BEJ01’ (“Motion for Reconsideration”), urging the Chamber to reconsider the Impugned Decision, because the Defence failed to include in Witness BEJ01’s affidavit, attached to the First Defence Motion, the witness’s unwillingness to travel to Africa out of fear for his own safety.⁵ The Defence

¹ Defence Motion for a Hearing by Video-Link for Witness BEJ01, 30 March 2011.

² Prosecutor’s Response to Defence Motion for a Hearing by Video-Link for Witness BEJ01 (“Prosecution Response to First Defence Motion”), 4 April 2011.

³ Prosecution Response to Defence First Motion, paras. 34-38.

⁴ Impugned Decision, paras. 8-9.

⁵ Motion for Reconsideration, paras. 17-18, 26-27, 29.

further submits that the denial of the video-link request, and the subsequent refusal by Witness BEJ01 to testify in person, causes prejudice to the Accused.⁶

6. On 29 April 2011, the Prosecution filed its response to the Defence Motion for Reconsideration.⁷ The Prosecution submits that Witness BEJ01's fear of traveling to Africa does not constitute a "new critical fact" and was implied in the First Defence Motion.⁸

DELIBERATIONS

7. The Chamber recalls that, "[w]itnesses shall, in principle, be heard directly by the Chamber".⁹ According to the Tribunal's jurisprudence, a Trial Chamber may exercise its discretion to reconsider a decision when one of the following criteria has been met: "(i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision; (ii) there has been a material change in circumstances since it made its original Decision; or (iii) there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice."¹⁰ The party seeking reconsideration bears the burden of demonstrating the existence of the enumerated circumstances.¹¹

8. The Defence submits that Witness BEJ01's refusal to testify in Africa for fear discovery is a "new fact" that was previously unknown to the Chamber, warranting a reconsideration of the Chamber's Impugned Decision on the matter. While the Chamber takes note of the Witness's fear for traveling to Africa, it does not consider his refusal to constitute a "new fact" within the meaning of the first factor enumerated above. The failure by the Defence to include Witness BEJ01's fear of discovery when traveling to Africa in his

⁶ Defence Motion for Reconsideration, paras. 17, 29, p. 9.

⁷ Prosecutor's Response to Defence Motion to Reconsider the Decision on Defence Motion for a Hearing by Video-Link for Witness BEJ01 ("Response to Motion for Reconsideration"), 29 April 2011.

⁸ Response to Motion for Reconsideration, para. 7.

⁹ Rule 90(A).

¹⁰ *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on the Defence Motion for Reconsideration of the Chamber's 13 January 2010 Decision on Video-Link Testimony (TC), 29 January 2010, para. 5; *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza (TC) ("Karemera Decision of 29 September 2008"), 29 September 2008, para. 4. See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ndirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008 (AC), 30 January 2009, para. 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)" (TC), 15 June 2004, paras. 8-9.

¹¹ See, e.g., *Prosecutor v. Nindiliyimana*, Case No. ICTR-00-56-T, Decision on Prosecution's Motion for Reconsideration of the Chamber's Decision Dated 18 February 2009 (TC), 19 March 2009, para. 2; *Karemera Decision of 29 September 2008*, para. 4.

prior affidavit does not render it a new fact merely by including it in its current Motion for Reconsideration by means of a revised affidavit. As the Defence admitted, the Defence was aware of this fact when it met with Witness BEJ01 to discuss his testimony prior to the filing of its First Defence Motion.¹²

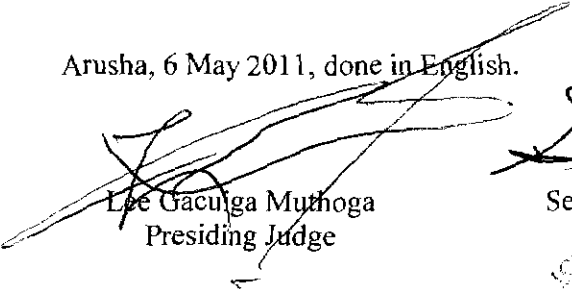
9. Moreover, even if the Chamber were to consider Witness BEJ01's refusal to come to testify in Arusha a new fact, this does alone not constitute sufficient reason to justify the witness's refusal to attend.¹³ The Witness is covered by the protective measures provided by the Witnesses and Victims Support Section ("WVSS") while in Arusha, who have ample experience in ensuring the safety of the vast number of witnesses who have come to testify before this Tribunal. Witness BEJ01 did not provide any reason why his testimony as a protected witness in Belgium or the Netherlands would be any different from his testimony in Arusha.¹⁴


10. The Chamber reminds the Defence that the denial of the video-link application does not constitute a denial of the hearing of Witness BEJ01's testimony. There exist various means of securing a witness's testimony, including the Chamber's ability to subpoena a witness in the event of his continued refusal. The Chamber therefore finds that the Defence has not met its burden of demonstrating sufficient justification for the reconsideration of the Impugned Decision.

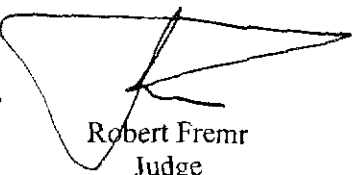
FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion.

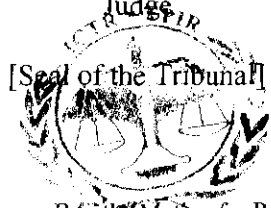
Arusha, 6 May 2011, done in English.


Lee Gacunga Muthoga
Presiding Judge


Seon Ki Park
Judge


Robert Fremr
Judge

[Seal of the Tribunal]



¹² Motion for Reconsideration, para. 17; Annex B to the Motion for Reconsideration, para. 6.

¹³ *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Decision on Testimony by Video-Link (TC), 29 June 2006, para. 2; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004, para. 8.

¹⁴ Motion for Reconsideration, Annex B.