



UNITED NATIONS
NATIONS UNIES

ICTR-00-55C-T
09-05-2011
(6153-6149)

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AM

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 9 May 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

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JUDICIAL RECORDS ARCHIVE
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**DECISION ON DEFENCE MOTION PURSUANT TO RULE 92 BIS (A) AND (B)
FOR WITNESS MYLÈNE DIMITRI**

Office of the Prosecution:
Drew White
Kirsten Gray
Yasmine Chubin
Zahida Virani

Defence Counsel for Ildéphonse Nizeyimana:
John Philpot
Cainnech Lussiaà-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 5 April 2011, the Defence team of the Accused, Ildéphonse Nizeyimana (“the Defence” and “the Accused” respectively) filed a motion requesting the admission of an affidavit by Mylène Dimitri pursuant to Rule 92bis (“Defence Motion”).¹ The Defence submits that the Affidavit is admissible because (a) the statement does not go to the proof of the acts and conduct of the Accused;² (b) it will corroborate existing evidence;³ and (c) there is no need for cross-examining Ms. Dimitri, as the evidence she would provide goes to a matter that is only “marginally relevant” and not “live” between the parties.⁴
3. On 7 April 2011, the Defence filed the Certified Affidavit (“Affidavit”), with an attached declaration by a Presiding Officer appointed by the Registrar of the International Criminal Tribunal for Rwanda.⁵
4. On 13 April 2011, the Office of the Prosecutor (“Prosecution”) filed its response.⁶ The Prosecution submits that the Affidavit is “not properly admissible” pursuant to Rule 92bis, and alternatively, if the Affidavit is admitted by the Trial Chamber, the Prosecution should be allowed the opportunity to cross-examine Ms. Dimitri.⁷ More in particular, the Prosecution submits, *inter alia*, that (1) public interest favours Ms. Dimitri presenting her evidence orally;⁸ (2) the nature and source of the Affidavit raises questions about its reliability;⁹ (3) the prejudice suffered by the Prosecution from its inability to cross-examine

¹ Motion pursuant to Rule 92 Bis (A) and (B) for Witness Mylène Dimitri, 5 April 2011.

² Defence Motion, para. 19.

³ Defence Motion, para. 20.

⁴ Defence Motion, para. 22.

⁵ This statement differs slightly to Ms. Dimitri’s Affidavit attached to the Defence Motion. (*See* Defence Motion, p. 8; Certified Affidavit of 7 April 2011, para. 15).

⁶ Prosecutor’s Response to Defence Motion pursuant to Rule 92bis (A) & (B) for Witness Mylène Dimitri (“Prosecution Response”), 13 April 2011. As a preliminary note, the Chamber considers the Response to have been filed in a timely manner, as it was filed within seven days of the filing of the Certified Affidavit of 7 April 2011 (Rule 92bis (E)).

⁷ Prosecution Response, para. 5.

⁸ Prosecution Response, para. 15.

⁹ *Ibid.*

Ms. Dimitri outweighs the Affidavit's limited probative value;¹⁰ (4) the matter in question is "only marginally relevant".¹¹

5. The Defence did not file a reply.

DELIBERATIONS

The Law on Admission of Written Statements

6. For evidence to be admissible, Rule 89(C) of the Rules of Procedure and Evidence ("Rules") requires that it be relevant and of probative value.¹² Although definitive proof of reliability and credibility of the evidence is not required, a showing of *prima facie* reliability and credibility is necessary.¹³ In order for evidence to be considered relevant, the moving party must show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment.¹⁴ To establish the probative value of the evidence, the applicant must show that the evidence tends to prove or disprove an issue.¹⁵

7. The admission of a written statement under Rule 92bis (A) involves an enquiry as to whether the statement sought to be admitted goes to the proof of a matter other than the acts and conduct of the Accused as charged in the Indictment. The non-exhaustive factors listed in Rule 92bis (A) (i) and (ii) are to be evaluated.¹⁶

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 bis (TC) ("Bagosora Decision of 9 March 2004"), 9 March 2004, para. 12.

¹³ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts (AC), 29 May 2009, para. 15; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse (TC) ("Karemera Decision of 2 November 2007"), 2 November 2007, para. 2. See also *Nyiramasuhuko v. Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 33; *Prosecutor v. Delalic et al.*, Case No. IT-96-21, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 20.

¹⁴ Karemera Decision of 2 November 2007, para. 2.

¹⁵ *Ibid.*

¹⁶ Rule 92bis (A)(i) delineates factors favoring admission, including the fact that oral evidence has been heard on similar facts; the statement provides an historical, political or military background; or the statement relates to the character of the accused. Rule 92bis (B) (ii) delineates factors against admission, including whether there is an overriding public interest to hear the evidence orally; its nature and source render it unreliable; or its prejudicial effect outweighs its probative value.

8. In addition, the formal requirements of Rule 92bis (B) must be met. The statement needs to be witnessed either by a person authorised to witness such a declaration in accordance with the law and procedure of a State or by a Presiding Officer appointed by the Registrar of the Tribunal for the purpose of taking such a statement.

9. Even if a statement fulfils all of these requirements, the Chamber must decide whether or not to exercise its discretion to admit it, bearing in mind the overarching necessity of ensuring a fair trial as provided for in Articles 19 and 20 of the Statute.¹⁷ In that regard, among the matters for consideration are whether the statement goes to the proof of a critical element of the prosecution's case against the accused or touches upon a live and important issue between the parties.¹⁸ Where the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Chamber may decide not to admit the proposed evidence in written form.¹⁹

Ms. Dimitri's Affidavit

10. The Defence seeks to admit Ms. Dimitri's Affidavit as corroboration to Defence exhibits D9-D12,²⁰ which were introduced by the Defence as evidence of contradictory statements made by Prosecution Witness Jules Nkiko Kayibanda during the case-in-chief.²¹ The Affidavit is proffered by the Defence as further evidence to the fact that, contrary to Kayibanda statements during his testimony, Ms. Dimitri did apprise him of her status as Defence counsel when she interviewed Kayibanda for a case unrelated to that of the Accused. The Chamber finds the Affidavit relevant and probative as it relates to the credibility of Kayibanda, which will be assessed at the conclusion of this case.

11. Turning to Rule 92bis (A), Ms. Dimitri's Affidavit touches solely on the credibility of Prosecution Witness Kayibanda, and does not go to the proof of the acts and conduct of the Accused as charged in the Indictment.²² Where the affidavit or statement is "necessary to the Trial Chamber's assessment of the witnesses' credibility and [is] not used to prove the truth

¹⁷ Bagosora Decision of 9 March 2004, para. 16.

¹⁸ *Ibid.*

¹⁹ *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis(D) and of Expert Reports Pursuant to Rule 94 bis (TC), 13 January 2006, para. 16; *Prosecutor v. Galic*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, para. 10.

²⁰ Defence Exhibit 9: Business card of Ms. Dimitri; Defence Exhibit 10: Email from Witness Kayibanda to Ms. Dimitri; Defence Exhibit 11: Solemn declaration of Witness Kayibanda signed on 3 January 2008; Defence Exhibit 12: Solemn declaration of Witness Kayibanda dated 5 January 2008; Defence Exhibit 13: Audio CD interview between Witness Kayibanda and Ms. Dimitri.

²¹ T. 2 February 2011, p. 63; Certified Statement of 7 April 2011, pp. 1-2.

²² Rule 92bis (A).

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of [its] content”, the Chamber may exercise its discretion to admit the statement into evidence.²³ Moreover, given that the Affidavit relates to a rather narrow facet of the case with no immediate relation to any of the paragraphs in the Indictment, it does not appear that the Prosecution will be prejudiced by the admission thereof.²⁴ The Chamber finds the Affidavit in compliance with Rule 92bis (B).

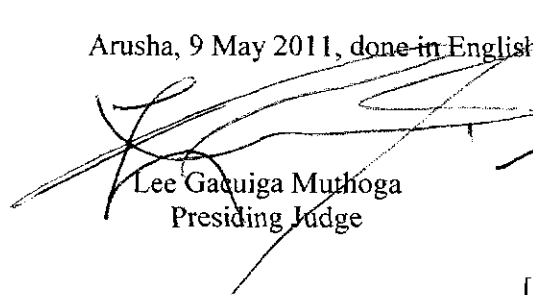
12. The Chamber does note, however, that Prosecution may suffer prejudice if it is not afforded the opportunity to cross-examine Ms. Dimitri on the contents of her Affidavit. The Chamber therefore conditions the admission of the Affidavit as a Defence exhibit on the appearance of Ms. Dimitri as a witness.

FOR THESE REASONS, THE CHAMBER

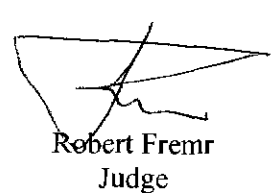
GRANTS the Defence Motion in part;

DECLARES the Affidavit admissible on the condition that the Defence makes available Ms. Dimitri as a Defence witness.

Arusha, 9 May 2011, done in English.


Lee Gacuga Muthoga
Presiding Judge


Seon Ki Park
Judge


Robert Fremr
Judge

[Seal of the Tribunal]



²³ *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Judgement (AC), 27 November 2007, para. 20.

²⁴ Rule 92bis (A)(ii)(a).