



UNITED NATIONS
NATIONS UNIES

ICTR-00-55C-T
05-08-2011
(7875-7871)

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**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: 5 August 2011

JUDICIAL RECORDS ARCHIVE
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THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

DECISION ON MOTION TO HEAR WITNESS BNN07 AND TO AMEND WITNESS LIST

Articles 19 and 21 of the Statute and Rules 54, 69, and 73ter (E) of the Rules of Procedure and Evidence

Office of the Prosecution:
Drew White
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John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi

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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 25 February 2011, after having called 38 witnesses. The Defence closed its case on 16 June 2011, after having called 38 witnesses.

2. On 4 July 2011, the Defence team of the Accused, Ildéphonse Nizeyimana (“the Defence” and “the Accused” respectively) filed a motion urgently seeking protective measures for Defence Witness BNN07.¹ The Defence attached a confidential, *ex parte*, declaration by its investigator, Léopold Nsengiyuma, attesting to the fact that Witness BNN07 would like to seek protective measures for fear of reprisals by the Rwandan government.²

3. The Office of the Prosecutor (“Prosecution”) did not file a response.

4. On 13 July 2011, the Chamber rendered its decision, dismissing the motion as premature.³ The Chamber noted that the Defence had provided scant information regarding Witness BNN07 and could not grant any protective measures before the Defence sought leave to present evidence in rejoinder.⁴

5. On 18 July 2011, the Defence filed a motion seeking leave to amend its witness list to include Witness BNN07, who is expected to testify about the events at *Groupe Scolaire*.⁵ The Defence submits that since the “Defence is not closed” it can apply for leave to amend its witness list at this stage.⁶ In anticipation of the Prosecution’s arguments, the Defence alternatively sets out the law on the re-opening of its case and submits that it has met the criteria thereof and exercised reasonable diligence in trying to locate Witness BNN07.⁷ The Defence lastly submits that the Prosecution “suffers no prejudice”, and indeed the Defence would “suffer a serious prejudice” if Witness BNN07 were not to be heard.⁸

¹ Extremely Urgent Defence Motion for Protective Measures for Defence Witness BNN07, 4 July 2011.

² Confidential and *Ex Parte* Annex to Extremely Urgent Defence Motion for Protective Measures for Defence Witness BNN07, 29 June 2011.

³ Decision on Extremely Urgent Defence Motion for Protective Measures for Defence Witness BNN07 (“Decision on Protective Measures”), 13 July 2011.

⁴ Decision on Protective Measures, para. 3.

⁵ Motion to Hear Witness BNN07 and to Amend Witness List, (“Defence Motion”), 18 July 2011, paras. 3-4.

⁶ Defence Motion, para. 2.

⁷ Defence Motion, paras. 18-31.

⁸ Defence Motion, paras. 33, 36.

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6. On 21 July 2011, the Prosecution filed its response.⁹ The Prosecution submits that the Defence characterization that the Defence case is still open more than a month after the final witness was heard is “misleading.”¹⁰ Indeed, the fact that the rebuttal case has been granted does not mean that the Defence case remains open.¹¹ The Prosecution further submits that the Defence has not satisfied the criteria which would justify the re-opening of its case.¹²

7. On 26 July 2011, the Defence filed its Reply.¹³ The Defence submits that the Prosecution failed to address one key issue in its Response, namely the fact that it will not suffer any prejudice.¹⁴

DELIBERATIONS

8. The Chamber notes at the outset that, contrary to what the Defence seems to argue, the Defence closed its case-in-chief on 16 July 2011. The hearing of rebuttal evidence on 7 and 8 September does not *ipso facto* result in the Defence case only closing when the rebuttal case commences. Rule 85 of the Rules of Procedure and Evidence (“Rules”), which provides the sequence in which the proceedings are to be conducted, does not support this over-reaching interpretation, nor does the Tribunal’s case law. Any addition to the Defence witness list, beyond applying for leave to present evidence in rejoinder, therefore amounts to a *de facto* application for the re-opening of the Defence case.

Standard for Re-Opening a Case

9. Rule 85, which governs the sequence of the proceedings, is silent on the re-opening of a case by a party. According to the jurisprudence, a case may be re-opened by the Chamber for the introduction of new evidence only under exceptional circumstances.¹⁵ The moving party must show that the evidence could not, with reasonable diligence, have been identified and presented during its case in chief. In addition, the Chamber exercises its discretion as to whether to admit the evidence, taking into account the probative value of the evidence and

⁹ Prosecutor’s Response to Defence Motion to Hear Witness BNN07 and to Amend Witness List (“Prosecution Response”), 21 July 2011.

¹⁰ Prosecution Response, para. 5.

¹¹ Prosecution Response, paras. 8, 10-12.

¹² Prosecution Response, paras. 15-23.

¹³ Reply to Prosecution Response to Motion to Hear Witness BNN07 and to Amend Witness List (“Defence Reply”), 26 July 2011.

¹⁴ Defence Reply, paras. 3-4.

¹⁵ *Prosecutor v. Delalic et al.*, Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 288; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for re-opening its Case and for reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-link, 16 November 2006, para. 10; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Nyiramasuhuko’s Motion for Disclosure of Documents under Rule 68 and for Re-opening of her Case, 29 April 2008, para. 49.

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the need to ensure a fair trial. The probative value of the new evidence should outweigh the prejudice caused by delaying the fair and expeditious conduct of the proceedings.¹⁶ Factors to be considered include the advanced stage of the trial at which the evidence is sought to be adduced and the potential delay in the trial.¹⁷

10. The Defence submits that it first interviewed Witness BNN07 in March 2010, during which he confirmed his presence at *Groupe Scolaire* at the end of April 1994.¹⁸ The Defence subsequently “lost all contact” with the Witness, who did not respond to his phone and had “lost contact with the Rwandan community.”¹⁹ The Defence therefore declined to include him on the Defence witness list.²⁰ In May 2011, Witness CMN08 informed the Defence of Witness BNN07’s possible presence in Cameroon, after which the Defence was put in contact with Witness BNN07 in June 2011.²¹ The Defence met with the Witness on 28 June 2011, and finally filed for his inclusion on the Defence Witness list on 15 July 2011.²²

11. The Defence submits that Witness BNN07 is the sole defence witness to testify to the events which allegedly occurred at *Groupe Scolaire* in April 1994, and would therefore provide valuable evidence with respect to the Accused’s alleged presence at *Groupe Scolaire* with *Sous-Lieutenant Modeste Gatsinzi*.²³ The Defence notes that it has “been diligent in bringing the witness to testify since he was rediscovered”, and the Prosecution will not suffer any prejudice by the hearing of Witness BNN07.²⁴

12. The Chamber notes that the Defence knew of the existence of this witness and his evidence more than one year before the presentation of its case in chief. The Defence did not provide any details regarding the efforts it undertook to locate the Witness within this year, particularly considering the fact that Witness BNN07 would be the sole Defence witness testifying to the events at *Groupe Scolaire* in the presence of Gatsinzi.

¹⁶ *Prosecutor v. Delalic et al.*, Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 283; *Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-T, Decision on Defence Motion in Order to Admit into Evidence the Certified Copy Conform to the Original of the Extrajudicial Declaration of Prosecution Witnesses, 14 August 2007, para. 7.

¹⁷ *Prosecutor v. Delalic et al.*, Case No. ICTY-IT-96-21-Abis, Appeal Judgement, 2 February 2001, para. 290; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Bagaragaza via Video-link, 16 November 2006, para. 16.

¹⁸ Defence Motion, para. 27.

¹⁹ *Ibid.*

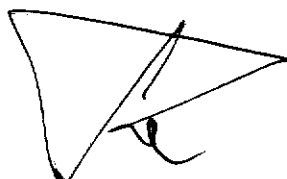
²⁰ *Ibid.*

²¹ Defence Motion, para. 28.

²² *Ibid.*

²³ Defence Motion, paras. 29-30.

²⁴ Defence Motion, paras. 31, 33.



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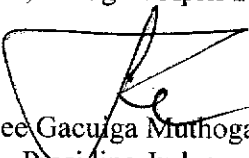
13. Notwithstanding the ambiguous description of the Defence’s “reasonable diligence” in locating Witness BNN07, the Chamber does consider the evidence of this Witness as it pertains to his presence at *Groupe Scolaire* with Gatsinzi towards the end of April 1994²⁵ to be relevant and of probative value. The Chamber therefore considers it in the interest of justice to allow the Defence to re-open its case for the limited purpose of hearing Witness BNN07’s testimony. Witness BNN07’s testimony is to take place on 6 September 2011, so as to avoid any further delay in the proceedings.

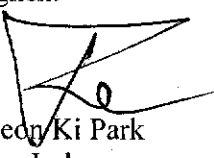
FOR THESE REASONS, THE CHAMBER

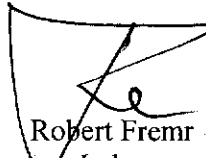
GRANTS the Defence motion; and

ORDERS that Witness BNN07’s testimony take place on 6 September 2011.

Arusha, 5 August 2011, done in English.


Lee Gacunga Muthoga
Presiding Judge


Seon Ki Park
Judge


Robert Fremr
Judge

[Seal of the Tribunal]

[Absent at the time of signing]

[Absent at the time of signing]



²⁵ Annex “Résumé BNN07” to Defence Motion.
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