

ICTR-98-44D-T

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UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

23-08-2011
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OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 23 August 2011

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THE PROSECUTOR
v.
Callixte NZABONIMANA
Case No. ICTR-98-44D-T

DECISION ON DEFENCE MOTION FOR DISCLOSURE AND RECALL
(Rules 54, 66 (B) and 68 (A) of the Rules of Procedure and Evidence)

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8539

INTRODUCTION

1. Defence Witness Jean Marie Vianney Mporanzi testified before the Trial Chamber in the instant proceedings on 25, 26, 27 and 31 May 2010. During his testimony he alleged that when he was interviewed by investigators from the Office of the Prosecutor (“OTP”) of the Tribunal in 1998 in Gitarama *préfecture*, certain monies were disbursed to him through the intermediary of the local government by a *sous-préfet* named “Marguerite”.¹
2. On 10 August 2010, the Prosecution filed a motion seeking to admit an “affidavit” by OTP Chief of Investigations Alfred Kwende and a “declaration” by Marguerite Mukansanga, a *sous-préfet* in Gitarama *préfecture* at the time of Mr. Mporanzi’s interview in 1998.² Both declarants strenuously denied the allegations raised by Mr. Mporanzi during his testimony. However, the Trial Chamber denied the motion in a decision issued on 16 September 2010.³
3. On 21 January 2011, the Prosecution filed a motion seeking to recall Mr. Mporanzi for further cross-examination regarding the alleged disbursements.⁴ In support of its motion, the Prosecution attached “affidavits” from Prosecution investigators Adamou Allagouma and Almahamoud Sidibe, as well as the previously-submitted “declaration” of Marguerite Mukansanga, all denying that any disbursements were made to prospective OTP witnesses through Rwandan officials. On 14 February 2011, the Trial Chamber granted the motion.⁵
4. On 2 March 2011, the Defence filed a motion seeking disclosure of records pertaining to disbursements paid to Mr. Mporanzi when he was interviewed by OTP Investigators in

¹ See generally, Transcript of Trial Proceedings (English), 25-27 and 31 May 2010 (“Transcript”).

² *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Motion for admission of Marguerite Mukansanga and Alfred Kwende’s affidavits pertaining to the testimony of Jean-Marie Mporanzi, 10 August 2010.

³ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Prosecutor’s Motion for the Admission of Marguerite Mukansanga and Alfred Kwende’s Affidavits Pertaining to the Testimony of Jean Vianney Mporanzi, 16 September 2010.

⁴ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi, 21 January 2011.

⁵ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Prosecutor’s Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi, 14 February 2011.

88

- 1998.⁶ On 28 March 2011, the Prosecution disclosed to the Defence several documents outlining, *inter alia*, the transfer of 245,000 Rwandese Francs between Prosecution Investigator Adamou Allagouma; Immaculée Mukamsabo, a *sous-préfet* of Gitarama *préfecture*; and the Finance Section of the Tribunal on 25 August 1998. (“Mporanzi receipts”).
5. On 24 May 2011, the Defence filed a motion seeking disclosure of further financial records pertaining to witness compensation and recall of eight Prosecution witnesses for the purpose of testifying as to the manner of their compensation (“Motion”).⁷
6. On 30 May 2011, the Prosecution filed a response, opposing the Defence motion (“Response”).⁸ The Defence did not file a reply.
7. On 13 July 2011, the Trial Chamber ordered the Prosecution to provide additional information regarding its possible custody or control over the financial records sought by the Defence.⁹ The Prosecution complied on 15 July 2011 (“Prosecution’s Additional Information”).¹⁰

SUBMISSIONS OF THE PARTIES

8. The Defence submits that any payments made to witnesses may impact on the credibility of those witnesses, and recalls that evidence has already been adduced of an unusual payment scheme to one Prosecution witness.¹¹ The Defence therefore asks that the Trial Chamber order the Prosecution to disclose “all documentation that relates to any payments made to potential and actual Prosecution witnesses in these proceedings.”¹² Referring to an affidavit by Alfred Kwende, Officer in Charge of the OTP Investigations Section in Kigali, the Defence concludes that the documents it seeks are under the control

⁶ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Urgent Motion for Inspection and Disclosure of Evidence Pertaining to Mr. Mporanzi’s Recall, 2 March 2011.

⁷ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Defence Motion for Disclosure and Recall (“Motion”), 24 May 2011.

⁸ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Response to Motion for Disclosure and Recall (“Response”), 30 May 2011.

⁹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Order to the Prosecution to Provide Additional Information, 13 July 2011.

¹⁰ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Compliance with the Trial Chamber’s Order to the Prosecution to Provide Additional Information, 15 July 2011.

¹¹ Motion, para. 14.

¹² Motion, Prayers.

of the Prosecution. It further submits that it is entitled to such documents pursuant to Rules 66 (B) and 68 (A) of the Rules of Procedure and Evidence (“Rules”).¹³

9. The Defence also seeks the recall of eight Prosecution witnesses whom it believes may have received payments from the Prosecution via Rwandan authorities as did Witness Mporanzi. The Defence submits that the “large sum provided by the OTP to the *sous-préfet* of Gitarama in explicit connection with the present proceedings... renders it exceedingly likely that other Prosecution witnesses were provided with similar compensation.”¹⁴ It would like to ask the Prosecution witnesses at issue if they received compensation through the Rwandan authorities and if they did, whether “they were given the impression that the OTP was working in conjunction with the Government of Rwanda and local officials. If so, did that make them feel pressured to give testimony in favour of the Prosecution?”¹⁵ The Defence further contends that the reason these witnesses were not questioned earlier about any payments is because “evidence that the money was being disbursed from the OTP via Rwandan authorities” was only confirmed by the disclosure of the receipts relating to payments made to Mr. Mporanzi.¹⁶

10. In its Response the Prosecution notes that the Defence has sufficiently identified the requested material “being financial records relating to payments made to Prosecution witnesses in the present proceedings”,¹⁷ and states that “[it] is not aware of any further documents relating to witnesses in this matter that are in [its] custody or control...”¹⁸ It further submits that the documents disclosed by the Prosecution to the Defence on 28 March 2011 relate to the “treatment of witnesses” and are not related to Mr. Mporanzi alone¹⁹, and asserts that “it is baseless to read into Mr. Kwende’s affidavit that further records exist apart from those already disclosed.”²⁰ The Prosecution also argues that the assertion that payments to witnesses by the Rwandan authorities affect their credibility “is in itself tenuous.”²¹

¹³ Motion, para. 19.

¹⁴ Motion, para. 24.

¹⁵ Motion, para. 31.

¹⁶ Motion, para. 35.

¹⁷ Response, para. 19.

¹⁸ Response, para. 22.

¹⁹ Response, para. 19.

²⁰ Response, para. 24.

²¹ Response, para. 29.

11. With respect to the recall of Prosecution witnesses, the Prosecution argues that the request is unfounded in the absence of proof that the Prosecutor has abused his discretion on disclosure. It further submits that the Defence was aware at the time it cross-examined the eight Prosecution witnesses at issue that "Prosecution and Defence witnesses received reasonable cash disbursements to cover for their expenses"²²; thus it asks that the Motion be dismissed in its entirety.²³

DELIBERATIONS

Applicable Law

Disclosure

12. Rule 66 (B) provides that:

At the request of the Defence, the Prosecutor shall... permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

13. Rule 68(A) provides that the Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence. In *Karemera et al.* the Trial Chamber held that if an accused wishes to show that the Prosecution was in breach of its disclosure obligation, he or she would be obliged to (1) identify specifically the materials sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material requested was in the custody or under the control of the Prosecution.²⁴

Recall

14. Rule 54 states that:

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrant and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

²² Response, para. 35.

²³ Response, Prayer.

²⁴ *Prosecutor v. Édouard Karemera et al.*, ICTR-98-44-T ("Karemera et al."), Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, paras. 5-6.

15. According to the established jurisprudence of the Tribunal, the party seeking to recall a witness must demonstrate good cause.²⁵ Assessing good cause requires fulfilling a two-pronged analysis: (1) considering the purpose for which the witness will testify; and (2) the reasons why the witness was not questioned earlier on those matters.²⁶ If the Defence discovers inconsistent statements pertaining to a witness who has already testified, fairness to the accused justifies recalling that witness.²⁷ Furthermore, the right to be tried without undue delay as well as concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature.²⁸

Discussion

Disclosure

16. With respect to the Defence submission that it is entitled to the material requested pursuant to Rule 68 (A), the Trial Chamber concludes that the Defence has not made a *prima facie* showing of the probable exculpatory nature of the records.

17. With regards to Rule 66 (B), the Chamber recalls that the Appeals Chamber has held that the term “preparation is a broad concept... Moreover, the use of the phrase ‘at trial’ in the second category of Rule 66(B) signals its applicability throughout the proceedings...”²⁹ Thus, in the circumstances of this case, the Chamber considers that the records requested may be material to the preparation of the Defence case, pursuant to Rule 66 (B).

²⁵ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Prosecution Motion to Recall Witness Nyanjwa (TC), 29 September 2004, para. 6; *Bagosora et al.*, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 2; *Prosecutor v. Aloys Simba*, ICTR-01-76-T, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination (TC), 28 October 2004, para. 5.

²⁶ *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion to Recall Ahmed Mbonyunkiza (TC), 25 September 2007, para. 5.

²⁷ *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera’s Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera’s Motion to Recall the Witness (TC), 4 March 2008, para. 30.

²⁸ *Prosecutor v. Bagosora et al.* Case No. ICTR-98-41-T, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6;. See also *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Decision on the Defence Motion for the Re-examination of Defence Witness DE, August 1998, para. 14; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion to recall Prosecution Witness BTH, 12 March 2008, para. 5.

²⁹ *Prosecutor v. Bagosora et al.* ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal’s Rules of Procedure and Evidence, 25 September 2006, para. 9.

18. The Prosecution accepts that the Defence has sufficiently identified the requested material, thus what remains to be determined is whether the material is within the possession or control of the Prosecution. In its response, the Prosecution “reiterates that [it] takes [its] disclosure obligations seriously and in good faith...”,³⁰ and in the Prosecution’s Additional Information, the Prosecution confirms that the Prosecution does not have the information sought by the Defence.³¹ The Trial Chamber recalls that the Prosecution is presumed to discharge its disclosure obligations in good faith.³²
19. Nevertheless, it would appear that there is a disconnect between the Defence request for disclosure and the Prosecution response. The Defence Motion asks that the Prosecution disclose “all documentation that relates to any payments made to potential and actual Prosecution witnesses in these proceedings.” The Prosecution itself asserts that it has been asked for “financial records relating to Prosecution witnesses in the present proceedings.”³³ Yet, when asked by the Trial Chamber whether the Prosecution had consulted with the Finance Department before responding to the Defence request for disclosure --as it had done with respect to the Defence request for disclosure of the Mporanzi payment receipts-- the Prosecution responded that it was unnecessary to do so as the Prosecution took “pre-emptive steps to obtain the same information...”³⁴ In support of this contention, the Prosecution provides copies of correspondence between itself and the Finance Section of the Tribunal in the period between March and May 2011.³⁵ In an initial correspondence between the Prosecution and the Finance Section dated 23 March 2011, the Prosecution seeks financial records “regarding Allagouma and Sidibe from 1997 to beginning of 1999...”; in a second correspondence also dated 23 March 2011, the Prosecution asks the Finance section for “accounting documents raised in Kigali in August 1998” and in a third correspondence dated 18 May 2011, the Prosecution asks for records of “payments made to certain prosecution witnesses in 1998.” Thus, it would appear that the Prosecution only contacted the Finance Section about payments to

³⁰ Response, para. 27.

³¹ Prosecution’s Additional Information, paras. 8-10.

³² *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007, para. 8, *see also* para. 6: “something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility)”.

³³ Response, para. 19.

³⁴ Prosecution’s Additional Information, para. 12.

³⁵ Prosecution’s Additional Information, Annex A.

witnesses during a discrete period and not over the full length of the proceedings as requested by the Defence in its Motion.

8534

20. However, although the Prosecution response does not properly address the Defence request, the Chamber notes that in his affidavit, Alfred Kwende, Officer in Charge of OTP Investigations in Kigali, explained that payments to witnesses “are paid for directly by the investigators who make well accounted returns...that the Chief of Investigations controls and certifies at the end of each mission and then forwards...to the Finance Unit of the ICTR.”³⁶ On this basis, the Trial Chamber surmises that the documents sought by the Defence are within the possession or control of the Finance Section of the Tribunal rather than that of the Prosecution. Had the material been in the possession of the Prosecution, the Trial Chamber would have ordered the Prosecution to make the material available to the Defence pursuant to Rule 66 (B).

21. Under these circumstances, the Trial Chamber requests that the Registry permit the Defence to inspect any books or documents relating to payments made to Prosecution witnesses in the instant proceedings that may be in the custody or control of the Finance Section of the Tribunal in relation to the 245,000 Rwandese Francs that were disbursed on 28 August 1998. Should this inspection reveal any pertinent documents, the Trial Chamber further requests that the Finance Section provide the Defence with as detailed a breakdown as possible as to how the 245,000 Rwandese Francs were disbursed, if such documentation exists. However, the Trial Chamber finds the Defence’s more expansive request to inspect “all documentation that relates to any payments made to potential and actual Prosecution witnesses in these proceedings” to be unduly broad and unsupported by a sufficient factual record. The Trial Chamber therefore denies this speculative request.

Recall

22. The Chamber recalls that the Defence assertion that Prosecution witnesses were unduly compensated by the Prosecution and/or Rwandan authorities has been a live issue in this case for some time, and further recalls its prior pronouncement that this is a crucial

³⁶ Motion, para. 19 citing *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Motion for the Admission of Marguerite Mukansanga and Alfred Kwende’s Affidavits Pertaining to the Testimony of Jean-Marie Vianney Mporanzi, 21 January 2011, Annex B, para. 4.

issue.³⁷ However, the Chamber notes that the jurisprudence is clear that a request for recall will only be granted in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature.

8533

23. Bearing this high threshold in mind, the Trial Chamber finds that given the Prosecution's denial that it does not possess the records in question and in view of the impending inspection of any relevant documents that may be in the possession of the Finance Section of the Tribunal, the Chamber finds the present Defence request for the recall of eight Prosecution witnesses to be premature, as it lacks a sufficient evidentiary basis at this time.

FOR THESE REASONS, THE TRIAL CHAMBER

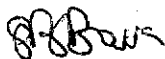
GRANTS the Defence Motion in part; and

DIRECTS the Registry to permit the Defence to inspect any books or documents relating to the 245,000 Rwandese Francs disbursed by the Tribunal on 25 August 1998 in relation to the treatment of Prosecution witnesses in the instant proceedings that may be in the custody or control of the Finance Section of the Tribunal;

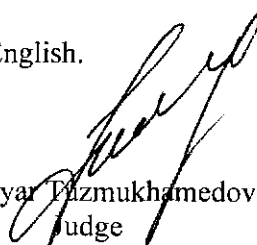
FURTHER DIRECTS that should any such documents be in the possession of the Finance Section of the Tribunal, that the Defence be provided with as detailed a breakdown as possible as to how the said 245,000 Rwandese Francs were disbursed; and

DENIES the remainder of the Defence Motion.

Arusha, 23 August 2011, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge



Mparany Rajohnson
Judge



³⁷ T. 27 May 2010, p. 1.