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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

104331
Mwamba

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 22 September 2011

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The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OR
CERTIFICATION TO APPEAL THE
ORAL DECISIONS RENDERED ON 20 AND 21 JUNE 2011**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Rashid Rashid
Mr. Iskandar Ismail
Mr. Michael Kalisa
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Defence Counsel

Mr. Peter Herbert
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the “Chamber”);

BEING SEIZED of the “Defence Extremely Urgent Motion for Reconsideration and, Alternatively, Certification to Appeal the Trial Chamber’s Oral Decisions of 20 and 21 June 2011 (Pursuant to Article 98 *bis* of the Statute of the ICTR)”, filed confidentially on 27 June 2011 (the “Defence Motion”);

CONSIDERING the:

- i. “Prosecution’s Response to Defence Extremely Urgent Motion for Reconsideration and, Alternatively, Certification to Appeal the Trial Chamber’s Oral Decisions of 20 and 21 June 2011”, filed confidentially on 4 July 2011 (the “Prosecution Response”); and
- ii. “Defence Reply to Prosecution’s Response to Defence Extremely Urgent Motion for Reconsideration and, Alternatively, Certification to Appeal the Trial Chamber’s Oral Decisions of 20 and 21 June 2011,” filed confidentially on 8 July 2011 (the “Defence Reply”);

CONSIDERING also the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Defence Motion pursuant to Rule 73.

INTRODUCTION

1. On 20 June 2011, during its cross-examination of Defence Witness DWAN-3, the Prosecution tendered into evidence what appears to be a complaint filed by former Prosecution witness ANAX with the Gisenyi police against the witness, DWAN-3’s response thereto, and DWAN-3’s statement to the police. The Chamber collectively admitted these documents into evidence as Prosecution Exhibit 48. The Chamber ruled that these documents were relevant and could have probative value as regards the credibility of DWAN-3 (“First Oral Decision”).¹

2. On 21 June 2011, the Prosecution tendered into evidence a *Pro Justitia* statement of DWAN-3 in relation to charges against her dated 8 November 2010. The Chamber admitted this document as Prosecution Exhibit 49 in relation to the complaint that had been filed against DWAN-3 before the prosecutor’s office in Rwanda, and as regards the responses DWAN-3 gave before the prosecutor’s office to the allegations against her. The Chamber ruled that this document was relevant and may have probative value in connection with DWAN-3’s credibility (“Second Oral Decision”).²

¹ T. 20 June 2011, pp. 94-95 (CS).

² T. 21 June 2011, p. 21 (CS).

3. The Defence seeks reconsideration of these Oral Decisions, or in the alternative, certification to appeal them.

SUBMISSIONS OF THE PARTIES

Defence Motion

Reconsideration

4. The Defence invites the Chamber to reconsider its Oral Decisions because it has reasons to believe that they were erroneous or constituted an abuse of power or discretion that resulted in an injustice.³

5. The Defence takes exception to the apparent discrepancy between the procedure followed in both Oral Decisions for the admission of documents with respect to the Prosecution and the Defence. The Defence points out that when it presented prior statements to challenge the credibility of Prosecution witnesses during cross-examination, it was required to underline the perceived contradictions in the statements before they could be filed. The Prosecution, however, was not required to do so for Prosecution Exhibits 48 and 49.⁴

6. The Defence submits that the Prosecution cannot tender a document to impeach the credibility of a witness if such document has no connection to allegations in the Indictment.⁵

7. The Defence likewise faults the Chamber for not having considered that the prejudicial effect of the admission of Prosecution Exhibits 48 and 49 greatly outweighed their probative value. The Defence recalls the Chamber's Oral Decision of 9 February 2011 whereby a document sought to be tendered into evidence by the Prosecution, which *prima facie* constituted a witness statement, was denied admission as its prejudicial effect appeared to outweigh any probative value it may have. In the same vein, one of the documents comprising Prosecution Exhibit 48 was *prima facie* a statement, and therefore should not have been admitted without the Defence having had the opportunity to cross-examine its author. The Defence recalls that by way of contrast, on 31 August 2010, when it wanted to confront Prosecution Witness ANAS with a transcript of his guilty plea, it was not allowed to do so. The Defence points out that the author of Prosecution Exhibits 48 and 49 is former Prosecution witness ANAX. The Chamber did not allow her addition to the witness list, and therefore the Defence will not have the opportunity to cross-examine her.⁶

Certification to Appeal

8. The Defence submits that both Oral Decisions seriously affect the fair and expeditious conduct of the proceedings and the outcome of the trial, as the rights of the Accused to cross-examine the witnesses against him and to a fair trial have been violated. Moreover, the Defence argues that certification is necessary as it appears that the Chamber has accorded

³ Defence Motion, para. 25.

⁴ *Id.*, paras. 11, 20, 22, 41, 81-84.

⁵ *Id.*, paras. 31-33, 68-70.

⁶ *Id.*, paras. 11, 42-62.

unequal treatment to the Prosecution and the Defence. There is also the risk that DWAN-3's testimony may be disregarded if the Chamber is convinced of her lack of credibility.⁷

9. The Defence adds that granting certification to appeal will materially advance the proceedings as the Defence will not have to present evidence to refute the allegations found in Prosecution Exhibits 48 and 49. This will impact upon the number of Defence witnesses to be called, the duration of their testimonies, and the number of exhibits to be filed.⁸

10. The Defence further contends that certification to appeal should be granted as there is serious doubt as to the correctness of the legal principles at issue.⁹

Prosecution Response

Reconsideration

11. The Prosecution points out that the documents in question are not directed towards the Accused but against DWAN-3. The right of the Accused to confront the witnesses against him therefore does not apply. In this regard, the Prosecution points out that the Chamber's Oral Decision of 9 February 2011 is not binding in the present case as the statement in question directly contradicted an assertion of the Accused rather than merely one of the Defence witnesses.¹⁰

12. The Prosecution rebuts the Defence argument that the Chamber did not consider the prejudicial impact of admission of the documents in question, as these were admitted for relevancy and possible probative value, and not for their contents.¹¹

Certification to Appeal

13. The Prosecution recalls that matters concerning admissibility of evidence are best left for determination by the Trial Chamber and certification to appeal such matters must remain the absolute exception. The Prosecution argues that as the Defence has failed to demonstrate sufficient grounds for reconsideration, there is likewise insufficient basis for granting certification to appeal.¹²

Defence Reply

14. The Defence emphasizes that Prosecution Exhibits 48 and 49 could materially affect the final determination of the Accused's guilt or innocence. These documents impeach the credibility of DWAN-3. Moreover, DWAN-3 refutes an allegation made by Prosecution Witness ANAL against the Accused.¹³

15. The Defence stresses that as long as the two prongs of Rule 73 (B) are met, then certification should be granted even if relating to the admissibility of evidence.¹⁴

⁷ *Id.*, paras. 88-94.

⁸ *Id.*, paras. 97-100.

⁹ *Id.*, paras. 101-105.

¹⁰ *Id.*, paras. 21, 23.

¹¹ *Id.*, para. 24.

¹² *Id.*, paras. 9, 29, 32, 34-35.

¹³ *Id.*, para. 34.

¹⁴ *Id.* para. 14.

DELIBERATIONS

Reconsideration

16. The Chamber recalls the Tribunal's jurisprudence on reconsideration:¹⁵

...the Rules do not provide for the reconsideration of the decision. The Tribunal has an interest in the certainty and finality of its decisions, in order that parties may rely on its decisions, without fear that they will be easily altered. The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances", and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances". Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.¹⁶

17. Reconsideration is permissible when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made its original decision; or (3) 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. The burden rests upon the party seeking reconsideration to demonstrate the existence of sufficiently special circumstances.¹⁷

18. The Chamber recalls that Prosecution Exhibits 48 and 49 were tendered in order to challenge the credibility of DWAN-3.

19. The Defence contends that the Oral Decisions were erroneous or issued in abuse of the Chamber's power or discretion on essentially three grounds: (1) the apparent disparity between the procedure for tendering documentary evidence required of the Prosecution and of the Defence; (2) the alleged failure of the Chamber to consider the prejudicial effect to the Accused of admitting Prosecution Exhibits 48 and 49 despite the absence of any opportunity for the Defence to cross-examine the author thereof; and (3) the seeming inconsistency between these two Oral Decisions and the 9 February 2011 Oral Decision.

Apparent Disparity of Treatment

¹⁵ Decision on Defence Motion for Second Reconsideration of Witness Protective Measures (TC), 15 July 2010, para. 17 ("Decision of 15 July 2010"), citing Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions Rendered on 23 September 2009 (TC), 7 July 2010 ("Decision of 7 July 2010"), para. 16; Decision on Defence Motion for Reconsideration of the Decision on the Defence Motion for Protective Measures of 9 February 2010 (TC), 31 March 2010 ("Decision of 31 March 2010"), para. 21; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial" (TC), 22 February 2005, para. 17; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Prosecutor's Second 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), 14 July 2004, para. 7; *Bagosora et al.*, 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 ("*Bagosora et al.* Decision of 15 June 2004"), para. 7.

¹⁶ *Bagosora et al.* Decision of 15 June 2004, para. 7.

¹⁷ Decision of 15 July 2010, para. 18, citing Decision of 7 July 2010, para. 17; Decision of 31 March 2010, para. 22; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza (TC), 29 September 2008, para. 4; *Bagosora et al.* Decision of 15 June 2004, para. 9.

20. The Chamber in its Second Oral Decision distinguished between the present situation and that prevailing during the Defence's cross-examination of Prosecution witnesses. The Chamber noted that the purpose for requiring the Defence to underscore perceived contradictions in statements vis-à-vis Prosecution witnesses was that these individuals were being directly challenged based on their earlier statements.¹⁸ This was the situation of Prosecution Witness ANAS, who the Defence sought to challenge for omitting certain important details from his testimony which were included in a prior guilty plea before a Rwandan court. Moreover, the Chamber recalls that it admitted the transcript of the guilty plea of ANAS with respect to the alleged omissions, even if it could not be admitted for content.¹⁹

21. In contrast, DWAN-3 was not being confronted with any of her previous statements, and there were thus no perceived contradictions to be underlined.

Absence of opportunity to cross-examine

22. It is not required in all cases that the authors of written statements testify before such documents can be admitted into evidence. The Defence misinterprets the 9 February 2011 Oral Decision as imposing such an all-encompassing requirement. The import of that Oral Decision was that the documents subject thereof appeared *prima facie* to be statements which directly challenged parts of the Accused's alibi. The Chamber thereby considered that to admit such statements without the Defence having the opportunity to challenge their authors would be prejudicial to the Accused.²⁰

23. In contrast, Prosecution Exhibits 48 and 49 were tendered to establish that DWAN-3 had been charged of wrongfully denying financial assistance to genocide survivors before the Rwandan prosecutor's office, so as to impeach her credibility. These documents do not challenge the testimony of the Accused in any way, and therefore there is no prejudicial effect upon the Accused.

24. The Chamber recalls that DWAN-3 did not dispute that a complaint was lodged against her before the Rwandan prosecutor's office, as evidenced by Prosecution Exhibits 48 and 49. DWAN-3 was able to provide her own explanation as to this complaint, and the Defence did not see the need for any re-examination.²¹ The Chamber will take these into consideration, along with the absence of any opportunity for the Defence to cross-examine ANAX, when evaluating the probative value of these documents, if any, with regard to the credibility of DWAN-3 at a later stage of the proceedings.

Inconsistency with 9 Feb. 2011 Oral Decision

25. There is a clear distinction between the present situation and the 9 Feb. 2011 Oral Decision. The authors of the documents subject of the latter were effectively witnesses against the Accused, as these apparent statements contradicted portions of the Accused's alibi. There was thus a clear prejudicial effect upon the Accused which arose from the admission of such documents without the Defence having had the opportunity to cross-examine the authors thereof.

¹⁸ T. 21 June 2011, p. 21 (CS).

¹⁹ T. 31 August 2010, pp. 3-5.

²⁰ T. 9 February 2011, pp. 56-57.

²¹ T. 20 June 2011, p. 91 (CS); T. 21 June 2011, p. 22 (CS).

26. The Chamber therefore finds that the Defence has failed to establish that the admission of Prosecution Exhibits 48 and 49 was erroneous or constituted an abuse of power or discretion by the Chamber.

Certification to Appeal

27. Rule 73 (B) of the Rules requires that two criteria be satisfied before a Trial Chamber may grant an application for certification to appeal: (1) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (2) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.²²

28. Even where both requirements of the Rule are satisfied, certification is not automatic, but it remains at the discretion of the Trial Chamber. Moreover, "certification to appeal must remain exceptional."²³

29. The Chamber recalls that when determining whether to grant leave to appeal, it is not concerned with the correctness of its impugned decision. All considerations such as whether there was an error of law or abuse of discretion in the decision at stake are for the consideration of the Appeals Chamber after certification to appeal has been granted, and are therefore irrelevant to the decision for certification. Insofar as the Parties have made such arguments, the Trial Chamber will not consider them.²⁴

30. The Chamber further recalls that the Appeals Chamber has stressed that:

[i]t is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence.²⁵

31. As regards the first limb of Rule 73(B), the Defence has not established that the admission of Prosecution Exhibits 48 and 49 represents an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

²² Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision on Prosecution Motion to Vacate the Trial Date (TC), 29 June 2010 ("Decision of 29 June 2010"), para. 17, citing Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 25 March 2009 on Defence Motion to Vary Trial Date (TC), 15 April 2009 ("Decision of 15 April 2009"), para. 16.

²³ Decision of 29 June 2010, para. 19, citing Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date Rendered on 15 July 2009 (TC), 10 August 2009, para. 11; *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 24th Rule 66 Violation (TC), 20 May 2009, para. 2; Decision of 15 April 2009, para. 17.

²⁴ Decision of 29 June 2010, para. 20, citing Decision of 15 April 2009, para. 18; *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding (TC), 20 June 2005, para. 4; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicomumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material." (TC), 4 February 2005, para. 28.

²⁵ *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5.

Contrary to the Defence submissions, the Accused's right to a fair trial, including his right to examine the witnesses against him, has not been violated. DWAN-3 is not accused before this Tribunal, and the Defence does not have the right to cross-examine witnesses against her. The Defence could have addressed any perceived damage to her credibility wrought by Prosecution Exhibits 48 and 49 during re-examination, but chose not to conduct any re-examination.²⁶

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 22 September 2011



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

²⁶ T. 21 June 2011, p. 22 (CS).