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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

ICTR-99-54-T
23-07-2012
(111569-111563)

Registrar: Mr. Adama Dieng

Date: 23 July 2012

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The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

DECISION ON PROSECUTION MOTION FOR RECONSIDERATION OF
DECISION ON PROSECUTION MOTION FOR ADMISSION OF
DOCUMENTARY EVIDENCE

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Iskandar Ismail
Mr. Kristian Douglas
Ms. Sonja Sun
Ms. Mankah Fombang
Ms. Faria Rekkas

Defence Counsel

Ms. Mylène Dimitri
Mr. Claver Sindayigaya
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
Mr. Gregg Shankman
Mr. Philippe Plourde

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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 “Prosecution Motion for Reconsideration of the Trial Chamber’s Decision on Prosecution Motion for Admission of Documentary Evidence, Dated 4 July 2012”, filed confidentially on 10 July 2012 (the “Prosecution Motion”);

CONSIDERING:

- (a) The “Defence Response to the Prosecution Motion for Reconsideration of the Trial Chamber’s Decision on Prosecution Motion for Admission of Documentary Evidence, Dated 4 July 2012”, filed confidentially on 13 July 2012 (the “Defence Response”); and
- (b) The “Prosecution Reply to Defence Response to the Prosecution Motion for Reconsideration of the Trial Chamber’s Decision on Prosecution Motion for Admission of Documentary Evidence, Dated 4 July 2012”, filed confidentially on 16 July 2012 (the “Prosecution Reply”);

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

NOW DECIDES the Motion pursuant to Rule 54 of the Rules.

INTRODUCTION

1. On 19 March 2012, the Prosecution filed a motion seeking the admission of several documents into evidence.
2. On 4 July 2012, the Chamber rendered a Decision (the “Impugned Decision”), denying the Prosecution request in its entirety.¹ On that same day, the Chamber also rendered its Decision on the Third Defence Motion for the Admission of Documentary Evidence.²
3. On 10 July 2012, the Prosecution filed the present motion, seeking reconsideration of the Impugned Decision insofar as it relates to the criminal records of Faustin Bagango.

¹ Decision on Prosecution Motion for Admission of Documentary Evidence (TC), 4 July 2012.

² Decision on the Third Defence Motion for Admission of Documentary Evidence (TC), 4 July 2012 (“Decision on the Third Defence Motion”).

SUBMISSIONS OF THE PARTIES***Prosecution Motion***

4. The Prosecution seeks reconsideration of the Impugned Decision, insofar as it relates to the admission of the criminal records of Faustin Bagango, under two limbs of the test for reconsideration.³

Erroneous Decision

5. According to the Prosecution, in paragraph 36 of the Impugned Decision the Chamber failed to apply the appropriate standard when considering the admission of the documents in question; namely, their probative value and the need to ensure a fair trial. Instead, the Prosecution alleges that the Chamber erroneously found that the admission of documentary evidence was limited to the scope of rebuttal evidence.⁴

6. The Prosecution further observes that documents it seeks to admit are similar to others accepted by the Chamber, and argues that the documents at issue must be admitted in order to properly assess the evidence of Prosecution witnesses and thereby ensure a fair trial.⁵

7. Concerning paragraph 37 of the Impugned Decision, the Prosecution first submits that it is erroneous because it applies an incorrect standard for the admission of documents under Rule 89(C) in finding that the Prosecution ought to have introduced the documents during its cross-examination of the Accused or any other Defence witness.⁶

8. In any event, the Prosecution highlights the fact that not all of the documents in question were in its possession at that time, and that the criminal records of Bagango were put to Defence witnesses where possible. As such, the Prosecution avers that the requirements of *Karemera et al.* cited in the Impugned Decision have been met.⁷

Material Change in Circumstances

9. The Prosecution also alleges a material change in circumstances since the Chamber rendered the Impugned Decision; namely, the admission of a document pursuant to the Decision on the Third Defence Motion. The Prosecution submits that the documents sought to be admitted form part of the same records, have the same probative value and bear the same indicia of reliability and authenticity as the records admitted in the Decision on the Third Defence Motion.⁸

³ Prosecution Motion, paras. 13-14, 35.

⁴ *Id.*, paras. 16-19.

⁵ *Id.*, paras. 19-21.

⁶ *Id.*, paras. 22-23.

⁷ *Id.*, paras. 24-29, citing *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution's Motion for Admission of I-P-32 into Evidence Pursuant to Rule 89(C) (TC), dated 2 September 2009.

⁸ Prosecution Motion, paras. 30-34.

Defence Response

10. The Defence disputes that the Impugned Decision is erroneous and that a material change of circumstances has occurred.

Erroneous Decision

11. The Defence observes that the Prosecution did not, in its original motion, plead the principle of fresh evidence. According to the Defence, the principle of fresh evidence is unavailable since the records in question have long been available to the Prosecution, thereby rendering the fresh evidence test in *Karemera et al.* to be inapplicable to the instant case.⁹

12. The Defence furthermore distinguishes the instant case from the Decision on the Third Defence Motion, recalling that the Chamber's reasoning to deny the admission of the documents in question was based on a failure to seek admission in a timely manner and not for a lack of reliability and probative value.¹⁰ The Defence maintains that, even if the Prosecution was not in possession of all of the documents in question before the close of its case, this does not excuse the Prosecution's delay in seeking their admission into evidence.¹¹

13. The Defence also disputes the allegation that a failure to admit the documents in question raises fair trial concerns, and that this allegation remains unsubstantiated by the Prosecution.¹²

14. Finally, the Defence submits that the Prosecution was negligent in failing to try to have the documents in question admitted during Witness DWAN-12's testimony, and agrees with the Chamber's finding in the Impugned Decision that documents can be admitted even if they are not tendered through witnesses.¹³

Material Change in Circumstances

15. The Defence asserts that the allegation of a material change in circumstance is frivolous, as the Chamber would be aware of the content of its Decision filed only two hours earlier.¹⁴

16. Nonetheless, the Defence submits that it is impossible to draw comparisons between the Decision on the Third Defence Motion and the instant case for the same reasons listed above, namely the inapplicability of fresh evidence principle and the failure of the Prosecution to request the admission of the documents in a timely manner.¹⁵

⁹ Defence Response, paras. 11-13, 19-20, 22-23.

¹⁰ *Id.*, paras. 16-18.

¹¹ *Id.*, paras. 25-27.

¹² *Id.*, paras. 14-15, 21.

¹³ *Id.*, paras. 28-30.

¹⁴ *Id.*, paras. 33-35.

¹⁵ *Id.*, paras. 34, 36-38.

Prosecution ReplyErroneous Decision

17. The Prosecution reiterates that the documents sought to be admitted possess the requisite probative value and indicia of reliability for admission into evidence under Rule 89(C).¹⁶

18. The Prosecution submits that the records in question constitute fresh evidence according to the test stated by the Trial Chamber in *Nsengimana*, and explains that this test was not pleaded in the Prosecution Motion because the Impugned Decision did not rely upon it. The Prosecution argues that it has met the diligence requirement of that test, and appends Annex A in support of this argument.¹⁷

19. In reply to the Defence assertion that the evidence should have been introduced earlier, the Prosecution repeats that many of the documents in question were not in its possession during the Prosecution case-in-chief. The Prosecution furthermore avers that the admission of the documents into evidence would not unduly prejudice the Accused because: the Defence will have the opportunity to address the documents in closing submissions; Dr. Augustin Ngirabatware's name is not mentioned therein; the Chamber will assess the relative weight to be attached to the evidence; and the probative value of the documents outweigh any prejudice that might be suffered by the Defence.¹⁸

Material Change in Circumstances

20. Finally, the Prosecution considers the time difference between the filing of the Impugned Decision and the Decision on the Third Defence Motion is irrelevant to determining whether a material change in circumstances took place.¹⁹

DELIBERATIONS

21. The Chamber recalls the Tribunal's jurisprudence on reconsideration:²⁰

... 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

¹⁶ Prosecution Reply, para. 9.

¹⁷ *Id.*, paras. 13-15, citing *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-2001-69-I, Decision on Defence Requests Concerning New Evidence (TC), 31 August 2009 ("*Nsengimana* Decision").

¹⁸ Prosecution Reply, paras. 17-21.

¹⁹ *Id.*, para. 22.

²⁰ *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.

“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.²¹

22. 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 the 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.²²

Erroneous Decision

23. The Chamber recalls that, in the Impugned Decision, the reason for denying the admission of the documents in question was because the Prosecution had failed to introduce them during the appropriate stage of the proceedings. With regards to the *Nsengimana* decision, cited in the Prosecution Reply, the main consideration is “whether, with reasonable diligence, the evidence could have been identified and presented during the case of the party making the application”,²³ and only when this is answered in the negative will the Chamber exercise its discretion to admit the evidence under Rule 89(C) taking into account the probative value and the need to ensure a fair trial. The Chamber recalls that it is the moving party that bears the burden of making an application for fresh evidence, and that the Prosecution failed to do so in the original motion.

24. In any event, even if the Prosecution chose not to seek the admission of these documents through a witness, it did not demonstrate why it failed to seek their admission from the bar table at the relevant time. The Chamber observes that the Prosecution has been in possession of all the documents in question since at least October 2011.²⁴

25. The Chamber accordingly dismisses the Prosecution Motion insofar as it seeks reconsideration on the grounds of an erroneous decision.

Material Change in Circumstances

26. The Chamber finds that the Prosecution Motion also fails to demonstrate how the Decision on the Third Defence Motion constitutes a material change in circumstances. The fact that documents admitted in the latter decision form part of the same record as the documents sought to be admitted, even if true, does not change the untimeliness of the request by the Prosecution to have these documents admitted. The Chamber further notes that each motion is to be decided on its own merits.

²¹ *Bagosora et al.* Decision of 15 June 2004, para. 7.

²² *Id.*, para. 9; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera’s Motion for Inspection: Michel Bagaragaza (TC), 29 September 2008, para. 4.

²³ *Nsengimana* Decision, para. 7.


²⁴ See Prosecution Motion, Appendix A.

27. The Chamber accordingly dismisses the Prosecution Motion insofar as it seeks reconsideration on the grounds of a material change in circumstances.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecution Motion.

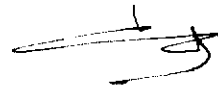
Arusha, 23 July 2012



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

