



UNITED NATIONS
NATIONS UNIES



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

18165/H

IN THE APPEALS CHAMBER

ICTR-98-42-A

27th March 2015

{18165/H - 18158/H}

Before: Judge Fausto Pocar, Presiding
Judge Liu Daqun
Judge Carmel Agius
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. Bongani Majola

Decision of: 27 March 2015

The PROSECUTOR

v.

**Pauline NYIRAMASUHUKO
Arsène Shalom NTAHOBALI
Sylvain NSABIMANA
Alphonse NTEZIRYAYO
Joseph KANYABASHI
Élie NDAYAMBAJE**

Case No. ICTR-98-42-A

**DECISION ON NTEZIRYAYO'S MOTION TO PRESENT
ADDITIONAL EVIDENCE**

Counsel for Pauline Nyiramasuhuko

Nicole Bergevin and Guy Poupard

Counsel for Arsène Shalom Ntahobali

Normand Marquis and Mylène Dimitri

Counsel for Sylvain Nsabimana

Josette Kadji and Pierre Tientcheu Weledji

Counsel for Alphonse Nteziryayo

Titinga Frédéric Pacere and
Gershom Otachi Bw'Omanwa

Counsel for Joseph Kanyabashi

Michel Marchand and Alexandra Marcil

Counsel for Élie Ndayambaje

Pierre Boulé and Claver Sindayigaya

Office of the Prosecutor

Hassan Bubacar Jallow

James Arguin

Deborah Wilkinson

ICTR Appeals Chamber

27 MAR 2015

Date:

Action:

Copied To:

Yvonne R.
Chambes. Defeur
OTI-ARAD8 JKAS

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS

NAME / NOM:

SIGNATURE:

ROSETTE MUZIGO-MORRISON

DATE:

27 MAR 2015

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively) is seised of a motion filed by Alphonse Nteziryayo (“Nteziryayo”) on 21 October 2013 pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), in which he requests the admission as additional evidence on appeal of excerpts of the transcript of the testimony given on 20 May 2009 in the *Ntawukulilyayo* case by Witness AYD, who testified in the present case in April 2004 as Witness QBY.¹ The Prosecution objected to the Motion on 20 November 2013 on the ground that Nteziryayo has not shown that Witness AYD’s Testimony meets the requirements for admission as additional evidence on appeal.² Nteziryayo filed his reply on 4 December 2013.³

A. Background

2. On 24 June 2011, Trial Chamber II of the Tribunal (“Trial Chamber”) convicted Nteziryayo of direct and public incitement to commit genocide and sentenced him to 30 years of imprisonment.⁴ The Trial Chamber convicted him, notably, on account of its finding based on the evidence of Prosecution Witnesses QBY and FAB that, around mid-June 1994, Nteziryayo attended a public meeting in Muyaga Commune, Mamba Sector, at which he incited the population to kill Tutsis by urging the audience to “hunt down, flush out and kill Tutsis without any distinction”.⁵

3. Nteziryayo filed his initial notice of appeal against the Trial Judgement on 26 April 2012.⁶ The filing of the appeal submissions related to his appeal was completed on 20 September 2013 by the filing of his brief in reply.⁷

¹ Nteziryayo’s Motion for Additional Evidence, 21 October 2013 (“Motion”), paras. 1, 2, 4, 19. *See also ibid.*, Annex, *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Witness AYD, T. 20 May 2009 pp. 27-72 (“Witness AYD’s Testimony”).

² Response to Nteziryayo’s Motion for Additional Evidence, 20 November 2013 (“Response”), paras. 1, 17.

³ Reply: Nteziryayo’s Motion for Additional Evidence, 4 December 2013 (“Reply”).

⁴ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, pronounced on 24 June 2011, issued in writing on 14 July 2011 (“Trial Judgement”), paras. 6186, 6271. *See also ibid.*, para. 6234.

⁵ Trial Judgement, paras. 3674, 5945, 6022-6025, 6036.

⁶ Alphonse Nteziryayo’s Notice of Appeal, 26 April 2012.

⁷ Reply Brief on Behalf of Alphonse Nteziryayo, 20 September 2013.

B. Applicable Law

4. Rule 115 of the Rules provides for the admission of additional evidence on appeal where a party is in possession of material that was not before the trial chamber and which represents additional evidence of a fact or issue litigated at trial.⁸ The moving party must file its motion for admission of additional evidence no later than 30 days from the date of filing of the brief in reply unless good cause is shown for a delay.⁹ According to Rule 115(A) of the Rules, a motion for admission of additional evidence shall clearly identify with precision the specific finding of fact made by the trial chamber to which the additional evidence is directed. Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial in any form, or discoverable through the exercise of due diligence. The applicant must also show that the additional evidence is relevant and credible.¹⁰

5. When determining the availability of evidence at trial, the Appeals Chamber will consider whether the party tendering the evidence has shown that it sought to make “appropriate use of all mechanisms of protection and compulsion available under the Statute [of the Tribunal] and the Rules [...] to bring evidence [...] before the Trial Chamber”.¹¹ The applicant is therefore expected to apprise the trial chamber of all difficulties that he encountered in obtaining the evidence in question.¹² Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine in accordance with Rule 115(B) of the Rules whether it *could* have been a decisive factor in reaching the decision at trial.¹³

6. Furthermore, in accordance with established jurisprudence, where the evidence is relevant and credible, but was available at trial or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving

⁸ See, e.g., *Augustin Ndingiyimana et al. v. The Prosecutor*, Case No. ICTR-00-56-A, Decision on Augustin Bizimungu’s Rule 92bis Motion and on his Rule 115 Motion for Admission of Additional Evidence, 11 June 2012 (“*Ndingiyimana et al. Decision*”), para. 8; *Ildephonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Decision on Ildephonse Hategekimana’s Motion for the Admission of Additional Evidence on Appeal, 8 December 2011 (confidential status lifted on 2 March 2012, see *Ildephonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Decision on Ildephonse Hategekimana’s Motion to Lift Confidentiality, 2 March 2012) (“*Hategekimana Decision*”), para. 7; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva’s Motions for the Admission of Additional Evidence, 21 March 2011 (“*Bagosora et al. Decision*”), para. 5; *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-01-70-A, Decision on Rukundo’s Motion for the Admission of Additional Evidence on Appeal, 4 June 2010 (“*Rukundo Decision*”), para. 5.

⁹ Rule 115(A) of the Rules.

¹⁰ See, e.g., *Ndingiyimana et al. Decision*, para. 8; *Hategekimana Decision*, para. 7; *Bagosora et al. Decision*, para. 5.

¹¹ *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9 (internal reference omitted). See also *Ndingiyimana et al. Decision*, para. 9; *Hategekimana Decision*, para. 8; *Bagosora et al. Decision*, para. 6; *Rukundo Decision*, para. 6.

¹² See, e.g., *Ndingiyimana et al. Decision*, para. 9; *Hategekimana Decision*, para. 8; *Bagosora et al. Decision*, para. 6; *Rukundo Appeal Decision*, para. 6.

¹³ See, e.g., *Ndingiyimana et al. Decision*, para. 9; *Hategekimana Decision*, para. 8; *Bagosora et al. Decision*, para. 6; *Rukundo Decision*, para. 6.

party can establish that its exclusion *would* amount to a miscarriage of justice.¹⁴ That is, it must be demonstrated that, had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.¹⁵

7. In both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the trial chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the trial chamber's verdict. A party which fails to do so runs the risk that the tendered material will be rejected without detailed consideration.¹⁶

8. Finally, the Appeals Chamber has repeatedly recognised that the significance and potential impact of the tendered material is not to be assessed in isolation, but in the context of the evidence presented at trial.¹⁷

C. Submissions

9. Nteziryayo submits that Witness AYD's Testimony was neither available at trial nor discoverable through the exercise of due diligence as it "did not exist" when the trial in the present case "formally closed on 2 December 2008 and closing arguments were completed on 25 February 2009".¹⁸ He notes that the document confirming that Witnesses AYD and QBY were the same person was disclosed to him on 1 September 2011 by the Prosecution.¹⁹

10. Nteziryayo further argues that Witness AYD's Testimony is relevant as it relates to the credibility of Prosecution Witness QBY and to Ground 5 of his appeal.²⁰ In particular, he points out that, whereas in the present case the witness testified to a meeting at Mamba sector office, Muyaga Commune,²¹ where Nteziryayo "'urged the crowd to hunt down, flush out and kill Tutsi without distinction', using a metaphor about lice and eggs",²² in the *Ntawukulilyayo* case the witness testified to the same meeting without attributing to Nteziryayo "any of the incriminating words

¹⁴ See, e.g., *Ndindiliyimana et al.* Decision, para. 10; *Hategekimana* Decision, para. 9; *Bagosora et al.* Decision, para. 7; *Rukundo* Decision, para. 7.

¹⁵ See, e.g., *Ndindiliyimana et al.* Decision, para. 10; *Hategekimana* Decision, para. 9; *Bagosora et al.* Decision, para. 7; *Rukundo* Decision, para. 7.

¹⁶ See, e.g., *Ndindiliyimana et al.* Decision, para. 11; *Hategekimana* Decision, para. 10; *Bagosora et al.* Decision, para. 8; *Rukundo* Decision, para. 8.

¹⁷ See, e.g., *Ndindiliyimana et al.* Decision, para. 12; *Hategekimana* Decision, para. 11; *Bagosora et al.* Decision, para. 9; *Rukundo* Decision, para. 9.

¹⁸ Motion, paras. 2, 9, 10.

¹⁹ Motion, para. 4.

²⁰ Motion, para. 11.

²¹ Motion, para. 5.

²² Motion, para. 7, *referring to* Trial Judgement, para. 3671.

which he had done in his testimony in this case”.²³ Nteziryayo also contends that Witness AYD’s Testimony is credible because it was given under oath in proceedings before this Tribunal.²⁴

11. Nteziryayo claims that Witness AYD’s Testimony could have been a decisive factor in reaching the decision at trial.²⁵ Specifically, he argues that, had Witness AYD’s Testimony been accepted into evidence, the witness’s evidence could not have been relied upon by the Trial Chamber to convict him in this case “because it did not support the allegation that Nteziryayo incited the population at a meeting in Muyaga.”²⁶ He contends that the conviction “would have been unlikely to stand”²⁷ on the basis of the sole uncorroborated evidence of Witness FAB, a detained witness whose evidence presented several significant features suggesting that he was not reliable.²⁸

12. The Prosecution responds that the evidence Nteziryayo seeks to have admitted on appeal was available at trial as Witness AYD testified publicly over two years before the verdict was rendered in the present case and that Nteziryayo failed to exercise due diligence to obtain and introduce it at trial.²⁹ It argues that Nteziryayo’s suggestion that he could not know that Witnesses QBY and AYD were the same person until 1 September 2011 is contradicted by the unambiguous and public notice he received on that issue through the *Ntawukulilyayo* Trial Judgement issued on 6 August 2010 and Witness AYD’s public transcript.³⁰ The Prosecution further argues that Witness AYD’s Testimony is irrelevant as it relates to a different meeting in Muyaga Commune than the one for which Nteziryayo was convicted.³¹ According to the Prosecution, the admission of Witness AYD’s Testimony at trial neither could nor would have undermined Witness QBY’s credibility or affected the verdict,³² in particular since the witness’s testimonies in both cases are largely consistent concerning Nteziryayo’s instructions to kill Tutsis at a meeting in Muyaga Commune and since Witness FAB’s credible evidence supported Nteziryayo’s conviction.³³

13. Nteziryayo replies that the information contained in Witness AYD’s Testimony was unavailable and undiscoverable at trial given that Witness AYD’s identity was not discernable from

²³ Motion, para. 1. *See also ibid.*, para. 7.

²⁴ Motion, paras. 2, 12. *See also ibid.*, paras. 13, 14.

²⁵ Motion, para. 2. *See also ibid.*, para. 15.

²⁶ Motion, para. 16. *See also ibid.* paras. 2, 3, 18.

²⁷ Motion, para. 18.

²⁸ Motion, para. 17.

²⁹ Response, paras. 2-9, 17.

³⁰ Response, paras. 7, 8, referring to *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Judgement and Sentence, 6 August 2010 (“*Ntawukulilyayo* Trial Judgement”).

³¹ Response, paras. 10, 11.

³² Response, paras. 1, 10-12, 16, 17.

³³ Response, paras. 1, 13-16.

the public transcripts and was only provided through the Prosecution's disclosure on 1 September 2011.³⁴ Nteziryayo also argues that his own words recounted in Witness AYD's Testimony "must relate to the Muyaga meeting at issue in this appeal" given the similarities between the two meetings described.³⁵

D. Discussion

14. Turning first to the alleged unavailability of the proposed additional evidence, the Appeals Chamber observes that, while the evidentiary phase in the *Nyiramasuhuko et al.* trial concluded on 30 April 2009, before Witness AYD's Testimony was elicited in the *Ntawukulilyayo* trial in May 2009, this testimony was however given in open session more than two years before the Trial Judgement was rendered in this case and was thus accessible to Nteziryayo at trial.³⁶

15. The Appeals Chamber rejects Nteziryayo's argument that he could not have appreciated the significance of Witness AYD's Testimony at the time it was given.³⁷ Considering that Dominique Ntawukulilyayo was expressly identified in this case as one of the authorities attending meetings at the Muyaga commune office together with Nteziryayo,³⁸ Nteziryayo and his counsel should have been aware of the potential relevance of the proceedings in the *Ntawukulilyayo* case to his own case and, should have been prompted to carefully review the evidence adduced therein, had they exercised due diligence. In light of the information provided in Witness AYD's Testimony and the *Ntawukulilyayo* Trial Judgement, the Appeals Chamber is also not persuaded by Nteziryayo's argument that Witness AYD's identity was not discernable prior to the disclosure of his identification sheet by the Prosecution on 1 September 2011.³⁹ Accordingly, in the specific

³⁴ Reply, paras. 5-12. Nteziryayo highlights that the document identifying Witnesses QBY and AYD as the same witness "fell within the purview of the Rule 68 disclosure obligation" and was not disclosed to him as soon as practicable. *See ibid.*, paras. 6, 7.

³⁵ Reply, paras. 13-17.

³⁶ The Appeals Chamber has held that it considers that "evidence is 'available at trial' if it becomes available at a stage when it is still reasonably possible for the relevant party to seek to introduce it before the Trial Chamber." *See Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011, para. 34, quoting *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Appellant Vidoje Blagojević's Motion for Additional Evidence Pursuant to Rule 115, 21 July 2005, para. 10.

³⁷ *See* Reply, para. 12.

³⁸ *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Witness QBY, T. 19 April 2004 p. 57, Nteziryayo, T. 5 June 2007 p. 32, Witness AND-60, T. 14 March 2007 p. 27. *See also* Trial Judgement, paras. 3537, 3561, 3578.

³⁹ The Appeals Chamber notes that: (i) Witness AYD indicated that he had already testified before the Tribunal in April 2004 "in Alphonse Nteziryayo's case"; (ii) Dominique Ntawukulilyayo's counsel cross-examined Witness AYD on his 20 April 2004 testimony in the *Nyiramasuhuko et al.* case; and (iii) Ntawukulilyayo's counsel extensively questioned Witness AYD on the content of his previous statements to Tribunal investigators which were the same as those admitted in the *Nyiramasuhuko et al.* case. *See* Witness AYD's Testimony, pp. 42-47, 50, 51, 56-59, 61, 62. In addition, in the *Ntawukulilyayo* Trial Judgement, which was delivered almost one year before the Trial Judgement in the present case, the trial chamber expressly referred to Witness AYD's testimony in the *Nyiramasuhuko et al.* case, the content of his previous statements, and his accounts of Nteziryayo referring to lice. *See Ntawukulilyayo* Trial Judgement, paras. 370-373.

circumstances of this case, the Appeals Chamber considers that Nteziryayo has failed to demonstrate that Witness AYD's Testimony was unavailable at trial or could not have been discovered through the exercise of due diligence and will therefore now determine whether the additional evidence *would* have had an impact on the verdict, had it been adduced at trial.

16. With respect to the relevance of Witness AYD's Testimony, which is disputed by the Prosecution,⁴⁰ the Appeals Chamber finds it unclear whether the excerpts pointed out by Nteziryayo relate to the same meeting as the one in relation to which he was convicted, given that the witness testified to having attended several meetings in Muyaga Commune in May and June 1994 presenting similar features.⁴¹ However, and contrary to the Prosecution's assertion, the Appeals Chamber cannot exclude the possibility that the information contained in Witness AYD's Testimony is relevant to the meeting in Muyaga Commune in mid-June 1994 in relation to which Nteziryayo was convicted.

17. In any event, even assuming that the witness's testimonies in both cases relate to the same meeting, the Appeals Chamber is of the view that Nteziryayo has failed to demonstrate that, had Witness AYD's Testimony been adduced at trial, it *would* have had an impact on the verdict. Indeed, as emphasised by Nteziryayo, Witness AYD testified in the *Ntawukulilyayo* trial to a meeting held at the Mamba sector office where Nteziryayo, as the second speaker, stated "I am Alphonse Nteziryayo. I am the new *préfet* of Butare. [...] My name is Alphonse Nteziryayo, *préfet* of Butare".⁴² However, while Witness AYD did not mention any incitement by Nteziryayo at this meeting, it bears noting that the witness indicated that Nteziryayo, among others, introduced himself when the witness was asked who addressed the population during the meeting⁴³ and was never questioned as to whether Nteziryayo said anything else or gave any speech during that meeting.⁴⁴ In these circumstances, the fact that Witness AYD's Testimony only indicated that Nteziryayo presented himself at the meeting cannot reasonably be seen as contradicting the more detailed account of Nteziryayo's address at the meeting that the witness gave in the present case.

⁴⁰ The Appeals Chamber notes that the Prosecution does not challenge the credibility of Witness AYD's Testimony.

⁴¹ Compare Witness AYD's Testimony, pp. 31-35, 47-55 with *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Witness QBY, T. 19 April 2004 pp. 49, 52-57, T. 20 April 2004 pp. 8, 11, 14-16, 23.

⁴² Witness AYD's Testimony, pp. 31, 32.

⁴³ See Witness AYD's Testimony, p. 32 ("Q. And can you tell us those who addressed the population at that meeting?"). See also *ibid.*, p. 34 ("Q. I'm talking about the meeting of late May and early June; did any other persons speak at that meeting?").

⁴⁴ Witness AYD's Testimony, pp. 31-34. See also *ibid.*, pp. 49 ("Witness, you mentioned Alphonse Nteziryayo's name. What was his status during that fourth meeting? A. He was *préfet*. [...] This was in 1994, and I believe that it was around the 20th. He said that he had replaced Sylvain, who was useless. Q. It was around the 20th of what? A. I cannot recall the month. But he told us that he had been appointed *préfet* of Butare and that he was replacing Sylvain."), 53 ("Q. [...] You said Nteziryayo introduced himself as a *préfet* at that meeting of the 4th and 5th of June 1994. Is that correct? A. That is correct.").

18. In addition, Nteziryayo fails to appreciate that Witness AYD testified in the *Ntawukulilyayo* trial that the meeting in question was held so that the authorities could check if the population “had operated properly” and whether they “had killed all the Tutsis”.⁴⁵ Witness AYD further testified in the *Ntawukulilyayo* trial that Muvunyi “said [that] he had also come to introduce to us the new *préfet* of Butare, who would introduce himself to us and then *tell us what we were expected to do*.”⁴⁶ These aspects of Witness AYD’s Testimony are largely consistent with the witness’s testimony in this case.⁴⁷

19. Accordingly, the Appeals Chamber finds that Nteziryayo has failed to demonstrate that Witness AYD’s Testimony satisfies the requirements for admission as additional evidence on appeal. The Appeals Chamber emphasises that the present conclusion pertains merely to the admissibility of the proposed additional evidence and is in no way indicative of the Appeals Chamber’s consideration of the merits of Nteziryayo’s appeal.

E. Disposition

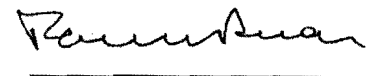
20. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion in its entirety.

Done in English and French, the English version being authoritative.

Done this twenty-seventh day of March 2015,
at The Hague,
The Netherlands.



[Seal of the Tribunal]



Judge Fausto Pocar
Presiding

⁴⁵ Witness AYD’s Testimony, p. 31.

⁴⁶ Witness AYD’s Testimony, p. 32 (emphasis added).

⁴⁷ See *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Witness QBY, T. 19 April 2004 pp. 52-57, T. 20 April 2004 pp. 12-15. See also Trial Judgement, paras. 3557-3561.