

ICTR-98-44-AR91.3

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-AR91.3

IN THE APPEALS CHAMBER

Before: An Appeals Chamber

Registrar: Mr. Adama Dieng

Date Filed: 19 April 2010

EDOUARD KAREMERA,
MATHIEU NGIRUMPATSE, and
JOSEPH NZIRORERA

v.

THE PROSECUTOR

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JOSEPH NZIRORERA'S APPEAL FROM DECISION
REFUSING TO INVESTIGATE WITNESSES GAP AND
BDW FOR FALSE TESTIMONY

The Office of the Prosecutor:

Mr. Don Webster
Mr. Saidou N'Dow
Mr. Takeh Sendze

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ndirumpatse

Introduction

1. Joseph Nzirorera hereby appeals, pursuant to Rule 91(I), the Trial Chamber's *Decision on Joseph Nzirorera's Motions to Appoint an Amicus Curiae to Investigate GAP for False Testimony and to Appoint an Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony* (6 April 2010) (hereinafter "the Impugned Decision").

2. In the Impugned Decision, the Trial Chamber refused to order investigations into the false testimonies of Witnesses GAP and BDW. Mr. Nzirorera contends that the Trial Chamber erred in its exercise of discretion by refusing to appoint *amicus curiae* to investigate the witnesses' conduct. Consequently, Mr. Nzirorera respectfully requests that the Trial Chamber's decision be reversed in its entirety.

I. Witness GAP

A. Procedural History

3. Paragraph 32.1 of the Amended Indictment, relating to the incitement to genocide count, charges that:

On or about the evening of 6 April and the morning of 7 April 1994 **Joseph NZIRORERA** engaged in communications with *Interahamwe* militiamen in Mukingo and Nkuli *communes* and exhorted them to start killing the Tutsi population in Ruhengeri. **Joseph NZIRORERA** went so far as to instruct that the killings should begin with one of his own children born of KIBERWA, a Tutsi woman, to instigate militiamen and armed Hutu residents in Mukingo to kill all Tutsi without exception, and instructed that this message be widely circulated.

4. Paragraph 62.8 of the Amended Indictment, relating to the complicity to genocide count, charges that:

Joseph NZIRORERA participated in decisions taken at a meeting at his mother's Busogo *secteur* residence on the evening of 6 April 1994 or the morning of 7 April 1994 or both. Other participants at one or the other of those meetings were Casimir BIZIMUNGU, Augustin BIZIMUNGU, and Juvenal KAJELIJELI. During the meeting that took place on or about the early morning of 7 April 1994 **Joseph NZIRORERA** agreed with the other participants and ordered that *Interahamwe* militias and locally recruited armed civilians should attack and kill the Tutsi population in Mukingo and Nkuli *communes*.

5. During the prosecution's case, Witnesses BTH and GBU testified that on the morning of 7 April 1994, a meeting of authorities was held at Joseph Nzirorera's

mother's house in Mukingo commune. At the conclusion of the meeting, orders were given to kill the Tutsis. Thereafter, a large number of Tutsis were massacred in Mukingo commune.¹

6. Witness BTH later recanted his testimony, testifying that the story of the meeting at Mr. Nzirorera's mother's house was a fabrication concocted by prisoners in Ruhengeri prison with the encouragement of Rwandan authorities.²

7. On 14 May 2008, the Trial Chamber ordered the appointment of an *amicus curiae* to investigate Witness BTH for false testimony, finding strong grounds to believe that he had testified falsely as to a material matter—"the alleged involvement of Joseph Nzirorera in the events in Mukingo commune."³

8. During Mr. Nzirorera's defence case, he called a number of witnesses to testify that no meeting of authorities took place at his mother's house on the morning of 7 April 1994,⁴ and that the Rwandan authorities had encouraged prisoners in Ruhengeri prison to fabricate such stories.⁵

9. Mr. Nzirorera then called Witness GAP, a policeman in Mukingo commune, who had testified as a prosecution witness in four trials at the ICTR. On 19 November 2009, Witness GAP had told Mr. Nzirorera's lead counsel that he had remained at the commune office all day on 7 April and that his testimony in previous trials about having attended a meeting at Mr. Nzirorera's house was a fabrication engaged in with other

¹ Transcript of 8 June 2006 @ 56-57 (BTH); Transcript of 4 December 2006 @ 23-24 (GBU)

² Transcript of 10 April 2008 @ 36

³ *Decision on Prosecutor's Confidential Motion to Investigate BTH for False Testimony* (14 May 2008)

⁴ Transcript of 20 January 2010 @ 31-32 (Claire Nyarabutsitsi); Transcript of 3 November 2009 @ 7 (Epimaque Nshizingiru); Transcript of 4 November 2009 @ 8-9, 14 (Witness 17); Exhibit #DNZ-511, *Ndindiliyimana* transcript of 12 June 2007 @ 38 (Witness DB11-2); Transcript of 20 October 2009 @ 3 (Witness 2); Transcript of 23 November 2009 @ 23 (Assiel Ndisetse); Transcript of 21 October 2009 @ 46; Transcript of 27 October 2009 @ 38 (Witness 6); Transcript of 1 February 2010 @ 32 (Juvenal Kajelijeli); Transcript of 8 February 2010 @ 46 (General Augustin Bizimungu); Transcript of 16 November 2009 @ 34 (Joseph Karorero); Exhibit DNZ-688; *Ndindiliyimana* transcript of 5 June 2007 @ 74 (Witness DE9-7)

⁵ Transcript of 11 November 2009 @ 5-13 (Reverien Uwurukundo); Transcript of 12 November 2009 @ 11-15 (Witness 16); Transcript of 22 October 2009 @ 18-27 (Witness 6); Transcript of 20 October 2009 @ 14-21 (Witness 2); Transcript of 4 November 2009 @ 20-23 (Witness 17); Transcript of 26 March 2009 @ 28 (Witness UOW); Exhibit #DNZ-511; *Ndindiliyimana* transcript of 12 June 2007 @ 42-43 (Witness DB11-2); Transcript of 23 November 2009 @ 28-30 (Assiel Ndisetse); Transcript of 19 November 2009 @ 18-19 (Jean Damascene Niyoyita); Transcript of 18 November 2009 @ 21-22 (Dismas Nzanana); Transcript of 19 January 2010 @ 59 (Witness 11a)

prisoners, such as Witnesses BTH and GBU, as well as Ruhengeri prosecutorial and prison officials.⁶

10. However, when called to the stand, Witness GAP announced that he was there as a prosecution witness.⁷ He testified that he had indeed attended a meeting of authorities at Mr. Nzirorera's mother's house on the morning of 7 April 1994.⁸

11. During his cross examination, the prosecution attempted to question Witness GAP about what was said at the meeting. Mr. Nzirorera objected as being beyond the scope of his direct examination. The prosecution responded that:

The Defence contention is that there was no such meeting. And if their defence is that there was no such meeting and the witness said there was a meeting, then certainly, the Court would be interested to know more -- have more information so that they can make a factual finding of whether there was a meeting or not. It's not just an issue of credibility of the witness. We are dealing with substance of evidentiary issues and factual issues in the case.⁹

12. The Trial Chamber agreed. Witness GAP then testified that at the meeting at Mr. Nzirorera's mother's house on the morning of 7 April there was discussion about getting the Interahamwe to start attacking the Tutsi population of Mukingo.¹⁰

13. On redirect examination, Witness GAP claimed that Joseph Nzirorera chaired the meeting on the telephone and was not physically present.¹¹

14. This testimony was demonstrably false.

15. Witness GAP had described this meeting in four signed statements given to the Office of the Prosecutor. In each of those instances, when describing the meeting, he stated that Joseph Nzirorera had been present.¹²

16. Witness GAP had testified about this meeting as a prosecution witness in four previous trials at the ICTR. In each of those instances he had testified that Nzirorera was present, testifying to have observed Nzirorera "arrive", "leave", and "take the floor" at

⁶ Transcript of 26 January 2010 @ 33; Exhibit DNZ-720 (audio recording of interview); Exhibit IDNZ-73B (transcript of audio recording) at p. 1, 11-15 (attached to this appeal as Annex "A")

⁷ Transcript of 21 January 2010 @ 23

⁸ Transcript of 21 January 2010 @ 34

⁹ Transcript of 21 January 2010 @ 58

¹⁰ Transcript of 21 January 2010 @ 58

¹¹ Transcript of 25 January 2010 @ 12

¹² Transcript of 25 January 2010 @ 12-20

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the meeting,¹³

17. Witness GAP also indicated in a will-say statement which he signed before giving his testimony that he remained at the commune office on 7 April 1994 and did not go to the area where Mr. Nzirorera's mother lived on that day.¹⁴

18. Witness GAP also testified that it was Lead Counsel for Mr. Nzirorera who had said the things attributed to him in the will-say statement and that Lead Counsel had offered to pay him a \$500 bribe upon signing the document and another \$500 after he testified.¹⁵ When confronted with the fact that the interview had been recorded, Witness GAP claimed that he had indeed made the statements on the recording, but that those statements were dictated to him in advance by Lead Counsel and part of the agreement by which he would be paid money.¹⁶

19. On 26 January 2010, Mr. Nzirorera made an oral motion, pursuant to Rule 91, for appointment of an *amicus curiae* to investigate Witness GAP for false testimony.¹⁷ In response, the prosecution indicated that although the issue of Mr. Nzirorera's presence at the meeting of 7 April 1994 was "central in this trial", the issue should be addressed in written submissions.¹⁸

20. The Trial Chamber deferred its decision on the motion at that time.¹⁹ It then issued the Impugned Decision on 6 April 2010 holding that:

Nonetheless, the Chamber notes that the Indictment merely alleges that Nzirorera held meetings at his mother's home, without specifically referring to presence either by phone or in person. Moreover, the Prosecution has elected to not attempt to prove Nzirorera's presence either by phone or in person at that 7 April 1994 meeting. As such, the testimony alleged to be false is not relevant to a material matter in the case. Instead, it goes to the credibility of the witness and that is a determination to be made by the Chamber which will not be aided by the appointment of an *amicus curiae*. Therefore, the motion must be denied.²⁰

21. Mr. Nzirorera now timely appeals pursuant to Rule 91(I).

¹³ Transcript of 25 January 2010 @ 12-32; Exhibits DNZ-712 thru 717

¹⁴ Exhibit DNZ-711

¹⁵ Transcript of 25 January 2010 @ 34

¹⁶ Transcript of 25 January 2010 @ 36

¹⁷ Transcript of 26 January 2010 @ 47

¹⁸ Transcript of 26 January 2010 @ 47

¹⁹ Transcript of 26 January 2010 @ 50

²⁰ Impugned Decision at para. 7

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B. Admissibility of the Appeal

22. Rule 91 (I) provides, in pertinent part, that “any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision.” The Appeals Chamber has held that a decision not to order the appointment of an *amicus curiae* to conduct an investigation into alleged false testimony may be the subject of a direct appeal pursuant to Rule 91(I).²¹

C. Standard of Review

23. The standard of review of a Trial Chamber’s exercise of discretion under rule 91 is whether it committed a discernible error based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or where the Impugned Decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.²²

D. Ground of Appeal

24. The Trial Chamber made an incorrect interpretation of governing law by concluding that Witness GAP’s testimony was not material to the case.

E. Argument

25. Rule 91 provides in pertinent part:

- (B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:
 - (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or
 - (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as

²¹ *Prosecutor v. Karemera et al.*, No. ICTR-98-44-AR91, *Decision on Joseph Nzirorera’s Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony and on Motion for Oral Arguments* (22 January 2009), at para. 15; *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR91.2, *Decision on Joseph Nzirorera’s and the Prosecutor’s Appeals of Decision Not to Prosecute Witness [] for False Testimony* (16 February 2010) (Confidential).

²² *Prosecutor v. Karemera et al.*, No. ICTR-98-44-AR91, *Decision on “Joseph Nzirorera’s Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony” and on Motion for Oral Arguments* (22 January 2009) at para. 13; *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR91.2, *Decision on Joseph Nzirorera’s and the Prosecutor’s Appeals of Decision Not to Prosecute Witness [] for False Testimony* (16 February 2010) (Confidential) at para. 13.

to whether there are sufficient grounds for instigating proceedings for false testimony.

26. Mr. Nzirorera acknowledges that “there must be a relevant connection between the statement and a material issue in the case”.²³ This materiality criterion is expressly mentioned to reflect the practices of representative municipal legal systems, including the United States, France, the United Kingdom and India.²⁴ These legal systems impose an obligation upon a party to demonstrate “the possible bearing of the said statements upon the Judge’s decision”.²⁵ Mr. Nzirorera contends that Witness GAP’s testimony on the 7 April 1994 meeting bears upon the Trial Chamber’s decision in his case and therefore goes to a material issue in the case.

27. The Trial Chamber’s finding on the immateriality of Witness GAP’s testimony on the meeting was based on its conclusion that the Indictment did not demand proof of Mr. Nzirorera’s physical presence at the meeting and therefore whether he participated by phone or in person was not a material issue in the case. Mr. Nzirorera respectfully submits that the Trial Chamber has made an incorrect interpretation of the principle of “materiality”.

28. It is the very existence of the meeting of 7 April 1994 which, in the words of the prosecution, is “central in this trial”.²⁶ The prosecution alleges that the meeting took place and brought two witnesses to prove it. Mr. Nzirorera denies the existence of this meeting and brought 11 witnesses to refute the existence of that meeting. Therefore, it is beyond dispute that the existence of this meeting is a material issue in the trial.

29. The testimony of Witness GAP went directly to this material issue. After denying to Mr. Nzirorera’s lead counsel that the meeting took place, he provided sworn testimony of the existence of this meeting and claimed to have been a participant. Therefore, his testimony went directly to a material issue in the case.

30. While it was further evidence of the falsity of his testimony that Witness GAP

²³ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, *Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness “R”* (9 March 1998), at page 3.

²⁴ *Prosecutor v. Bagosora et al*, No ICTR-98-41-T, *Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO* (3 October 2003), at para.8.

²⁵ *The Prosecutor v. Akayesu*, No. ICTR-96-4-T, *Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness “R”* (9 March 1998), at page 4.

²⁶ Transcript of 26 January 2010 @ 47

now claimed that Mr. Nzirorera was present by telephone after having testified under oath in four previous trials to have observed him “arrive”, “leave”, and “take the floor”, the testimony went directly to the issue of the existence of the meeting, a material issue. The Trial Chamber erred by framing the issue as one of the type of presence of Mr. Nzirorera—in person or by telephone--at that meeting. That meeting never took place.

31. The Trial Chamber’s finding on “materiality” contradicted its own ruling during the course of the testimony of Witness GAP that the meeting was relevant. When seeking to question Witness GAP about that meeting, the prosecution stated:

“It’s not just an issue of credibility of the witness. We are dealing with substance of evidentiary issues and factual issues in the case.”²⁷

32. The Trial Chamber agreed.²⁸ Now, in the Impugned Decision, it claims that the testimony was only relevant to credibility.

33. Witness GAP’s testimony is not comparable to other testimonies that have been found to be insufficiently connected to a “material issue”. For example, in the *Bagosora et al* trial, the Trial Chamber considered that Witness DO’s incorrect account did not relate to a matter material to the case and declined to authorise a prosecution under Rule 91.²⁹ In that case, Witness DO had denied having met Prosecution counsel prior to the trial, despite having spent two days being interviewed by a Prosecution trial attorney.³⁰ That denial in no way related to the charges listed in the *Bagosora et al* Indictment. This can be contrasted with the present case, where the testimony of Witness GAP related to a meeting alleged in two places in the Indictment and which is a central feature of the Prosecution’s case against Mr. Nzirorera.

34. The Appeals Chamber has already deemed this Trial Chamber’s approach in preferring to address the issue of false testimony through credibility deliberations rather than prosecution to be erroneous in this very case.³¹ As has been reiterated by both

²⁷ Transcript of 21 January 2010 @ 58

²⁸ Transcript of 21 January 2010 @ 58

²⁹ *Prosecutor v. Bagosora et al*, No ICTR-98-41-T, *Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO* (3 October 2003), at para. 11.

³⁰ *Prosecutor v. Bagosora et al*, No ICTR-98-41-T, *Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO* (3 October 2003), at para. 10.

³¹ *Karemera et al v Prosecutor.*, No. ICTR-98-44-AR91.2, *Decision on Joseph Nzirorera’s and the Prosecutor’s Appeals of Decision Not to Prosecute Witness [] for False Testimony* (16 February 2010), (Confidential) at para. 20.

Appeals and Trials Chambers alike, an assessment of a witness' credibility is an issue separate from the prosecution of that same witness for false testimony.³²

35. Accordingly, the Trial Chamber's failure to recognise the connection between Witness GAP's false testimony and a material issue in the case and its deferral of the issue until its credibility assessment constitutes an incorrect application of governing law. The matter should be reversed and remanded to the Trial Chamber for a determination of whether to appoint an *amicus curiae* to investigate the false testimony by Witness GAP using the correct legal standard.

II. Witness BDW

A. Procedural History

36. On 14 November 2007, Prosecution Witness BDW testified that in June 1993, he attended an MRND rally in Kibuye.³³ He claimed that Joseph Nzirorera attended as well as Prefet Clement Kayishema and two Members of Parliament from Kibuye—Cyprien Munyampundu and Donatille Niyitegeka.³⁴ He also testified that Bourgmestre Augustin Karera of Gitesi commune as well as a named conseiller from Bwakira commune also attended this meeting.³⁵

37. Witness BDW testified that Mr. Nzirorera said that the Interahamwe in his region in Mukingo were capable of confronting the Tutsi whereas the people of Kibuye were lagging behind.³⁶ He castigated the wickedness of the Tutsi and said the enemy which had attacked the country was none other than the Tutsi. He used the term "Tutsi" explicitly.³⁷ Nzirorera also said that in his native commune Interahamwe had already started training and that young people there could even go and help soldiers at the war

³² *Prosecutor v. Georges Rutuganda*, No. ICTR-96-3-A, *Decision on Appeals of the Decisions by Trial Chamber I Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses "E" and "CC"* (8 June 1998), at para. 28; *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR91.2, *Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision Not to Prosecute Witness [] for False Testimony* (16 February 2010) (Confidential) at para. 20; *Prosecutor v. Kvočka et al.*, No. IT-98-3011-A, *Judgement*, (28 February 2005), at para. 659; *Simba v. Prosecutor*, No. ICTR-01-76-A, *Judgement* (27 November 2007), at para. 31; *Prosecutor v. Niyitegeka*, No. ICTR-96-14-R, *Decision on Third Request for Review* (23 January 2008), at para. 32.

³³ Transcript of 14 November 2007 @ 44

³⁴ Transcript of 14 November 2007 @ 47; Transcript of 29 November 2007 @ 15

³⁵ Transcript of 8 April 2008 @ 42

³⁶ Transcript of 14 November 2007 @ 46-47

³⁷ Transcript of 8 April 2008 @ 48-49

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front. He criticized the people in Kibuye because they had not yet organized the Interahamwe in the prefecture.³⁸

38. This was the same story that Witness BDW had told the Office of the Prosecutor when he had been interviewed while in Ruhengeri prison in May 2005.³⁹

39. After being confronted during his testimony in November 2007 with the allegation that he had only first mentioned Mr. Nzirorera when he was in Ruhengeri prison, Witness BDW returned in April 2008 and produced a three page handwritten document dated 20 December 2002 and bearing the stamp of the Kibuye prison on the first page.⁴⁰ He told defence counsel that “this entirely demolishes your case according to which I came to an agreement with co-detainees at Ruhengeri prison.”⁴¹

40. The testimony of Witness BDW is refuted by a mountain of evidence.

41. First, all of the authorities who Witness BDW claimed were in attendance at the meeting have denied that any such meeting ever took place. This includes Prefet Clement Kayishema,⁴² Bourgmestre Augustin Karera,⁴³ the two Members of Parliament—Cyprien Munyampundu⁴⁴ and Donatille Niyitegeka,⁴⁵ the conseiller from Bwakira commune,⁴⁶ as well as Mr. Karemera⁴⁷ and Mr. Nzirorera.⁴⁸

42. Second, Mr. Nzirorera has produced evidence that Witness BDW intentionally lied about him. In a tape-recorded interview with Witness BDW after he had concluded his testimony, he told Mr. Nzirorera’s investigator, Dick Prudence Munyeshuli, that while at Ruhengeri prison he had received criticism from relatives of Mr. Nzirorera and therefore decided to include Nzirorera in his statement to the Office of the Prosecutor.⁴⁹

43. This was corroborated by former Prosecution Witness BGD. Witness BGD provided a signed statement indicating that he, too, falsely stated to the Office of the

³⁸ Transcript of 8 April 2008 @ 49

³⁹ Exhibit DK-48

⁴⁰ Exhibit DNZ-445

⁴¹ Transcript of 9 April 2008 @ 16

⁴² Exhibit DNZ-647

⁴³ Exhibit DNZ-469

⁴⁴ Annex 91 to *Joseph Nzirorera’s Motion to Admit Written Statements and Witness Testimony* (8 December 2008)

⁴⁵ Exhibit DNZ-679

⁴⁶ Witness XCU—Transcript of 14 November 2008 @ 9

⁴⁷ Transcript of 20 May 2009 @ 39-40

⁴⁸ *Joseph Nzirorera’s Final Pre-Defence Brief: Kibuye Events* (15 December 2009) at para. 51

⁴⁹ Transcript of 27 January 2010 @ 36; Annex A to *Joseph Nzirorera’s Motion to Recall Prosecution Witness BDW* (3 June 2009)

Prosecutor that Joseph Nzirorera attended this meeting when he was interviewed on the same day as Witness BDW in Ruhengeri. Witness BGD stated that he did so at the request of Witness BDW, who was angry at some of Mr. Nzirorera's relatives.⁵⁰

44. Third, in addition to intentionally giving false testimony, Witness BDW has been shown to have created false documents which he presented to the Trial Chamber. Forensic Document Examiner Kim Hughes testified that pages 2 and 3 of the document produced by Witness BDW⁵¹—the only ones that mention Mr. Nzirorera—were written on different paper and different ink than page 1 of the same document and that the word "1993" appearing in the subject line on page 1, was written in different ink than the rest of that page.⁵² Page one otherwise makes no reference to 1993 events, while pages 2 and 3 do.

45. On 3 February 2010, after the testimony of expert witness Kim Hughes, Mr. Nzirorera filed a written motion contending that the totality of this evidence provided strong grounds for believing that Prosecution Witness BDW had given intentionally false testimony and requesting the appointment of an *amicus curiae*, pursuant to Rule 91, to investigate the false testimony.⁵³

46. On 6 April 2010, the Trial Chamber denied the motion in the Impugned Decision. It held that strong grounds did not exist to believe that Witness BDW had intentionally provided false testimony because:

(1) Witness BDW's contradictory testimony could not be considered in assessing whether "strong grounds" for appointing an *amicus curiae* exist, as contradictory testimony is an inadequate foundation for an investigation and more properly considered in judgement deliberations;

(2) Investigator Munyeshuli's affidavit alone was insufficient to establish "strong grounds" as it was an uncorroborated statement by an interested third party;

⁵⁰ Confidential Annex "C", *Joseph Nzirorera's Motion in Limine: Witness 57 (25 January 2010)* (attached as Annex "B" to this appeal)

⁵¹ Exhibit DNZ--445

⁵² Transcript of 1 February 2010 @ 11-13

⁵³ *Joseph Nzirorera's Motion for Appointment of Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony* (3 February 2010)

(3) Witness BGD's corroborating statement did not *per se* impact the truthfulness of Witness BDW's testimony on the issue of Mr. Nzirorera's presence at the Kibuye rally; and

(4) Mr. Hughes' evidence was inconclusive and unhelpful.⁵⁴

47. Mr. Nzirorera filed a timely appeal from this decision.

B. Grounds of Appeal

48. Mr. Nzirorera presents the following grounds of appeal with respect to the Trial Chamber's decision not to appoint an *amicus curiae* to investigate the false testimony by Witness BDW:

(1) The Trial Chamber made an incorrect interpretation of governing law by holding that contradictory evidence cannot be considered when determining whether strong grounds exist to believe that a witness has provided false testimony.

(2) The Trial Chamber made an incorrect interpretation of governing law by considering each of the pieces of evidence relating to Witness BDW's testimony in isolation.

(3) The Trial Chamber made patently incorrect conclusions of fact when (a) characterising Investigator Munyeshuli's evidence as uncorroborated; (b) assessing the value of Witness BGD's evidence; and (c) discounting Mr. Hughes' evidence.

C. Argument

(1) Contradictory Evidence

49. The Trial Chamber held that:

The conflicting testimony between BDW and the witnesses listed by Joseph Nzirorera is insufficient, in itself, to constitute strong grounds for ordering an investigation under Rule 91(B). Also, the Prosecution correctly points out that because the six witnesses identified by Nzirorera who contradict BDW's testimony are alleged participants in Kibuye rally, the proper venue for making credibility determinations among them is in judgement deliberations, not a decision concerning whether to appoint an *amicus curiae*. Therefore, the Chamber considers that contradictory testimony will not be considered whether strong grounds exist.⁵⁵

⁵⁴ Impugned Decision at paras. 10-13.

⁵⁵ Impugned Decision at para. 10

50. The Trial Chamber confused “sufficiency” with “consideration”. While contradictory testimony among witnesses may, of itself, be insufficient to constitute “strong grounds” under Rule 91, it was error not to consider the contradictory evidence at all.

51. By completely discounting the fact that six witnesses provided evidence that no such meeting took place in Kibuye as testified to by Witness BDW, the Trial Chamber misinterpreted governing law.

52. The Appeals Chamber itself, in this very case, has noted that in finding strong grounds to believe that false testimony had been given in the *Kamuhanda* trial, “the Appeals Chamber “took into account significant discrepancies in testimony given by witnesses”.⁵⁶ The Trial Chamber itself, on a previous occasion, recognized that in the *Kamuhanda* case, the Appeals Chamber had “noted significant discrepancies given by the witnesses which may amount to false testimony.”⁵⁷

53. The Appeals Chamber has also initiated an investigation on the basis of contradictory testimony, without the relevant witness’ recantation, on at least two previous occasions.⁵⁸ As emphasised by the Appeals Chamber in one of these decisions, “it is precisely in the interest of justice to shed light on the justifications underpinning such discrepancies given the crucial importance of the truthful testimony of witnesses and their protection.”⁵⁹

54. Because of the need to also establish an intent to mislead and cause harm on the part of the witness, it may well be in a given case that contradictory evidence alone falls short of meeting that standard. However, the Trial Chamber erred in refusing to even “consider” contradictory evidence. The evidence that six witnesses contradicted the testimony of Witness BDW, while not dispositive, should have been considered.

⁵⁶ *Prosecutor v. Karemera et al.*, No. ICTR-98-44-AR91, *Decision on “Joseph Nzirorera’s Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony” and on Motion for Oral Arguments* (22 January 2009) at para. 20

⁵⁷ *Prosecutor v. Karemera et al.*, No. ICTR-98-44-T, *Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonkiza for False Testimony* (29 December 2006), at para. 8

⁵⁸ *Prosecutor v. Kamuhanda*, No. ICTR-99-54A-A, *Oral Decision on Rule 115 and Contempt of False Testimony* (19 May 2005); *Prosecutor v. Ngeze*, No. ICTR-99-52-A, *Order Directing the Prosecution to Investigate Possible Contempt and False Testimony* (6 September 2005), at pages 3-4.

⁵⁹ *Prosecutor v. Ngeze*, No. ICTR-99-52-A, *Order Directing the Prosecution to Investigate Possible Contempt and False Testimony* (6 September 2005), at pages 3-4.

55. The Trial Chamber committed an incorrect interpretation of governing law by failing to consider contradictory evidence in its determination of whether strong grounds existed to appoint an *amicus curiae*.

(2) Considering Evidence in Isolation

56. The Trial Chamber made an incorrect interpretation of governing law by failing to consider the totality of the circumstances when determining whether strong grounds existed. It is well established that when making a factual finding, a Trial Chamber must consider the “totality of the circumstances.”⁶⁰

57. In the Impugned Decision, the Trial Chamber compartmentalized the four categories of evidence showing that Witness BDW had given intentionally false testimony: (1) evidence from six persons who refuted BDW’s testimony that they attended the meeting; (2) evidence from the defence investigator that BDW admitted having lied; (3) evidence from Witness BGD that BDW had falsely implicated Nzirorera as a form of revenge; (4) evidence from an expert witness that indicated that BDW may have submitted false documents during his testimony.

58. The Trial Chamber went on to consider each category of evidence in isolation, finding each insufficient, by itself, to constitute strong grounds. This was error.

59. For example, the testimony of the defence investigator, Dick Prudence Munyeshuli, was corroborated by the statement from Witness BGD. Mr. Munyeshuli’s evidence established that BDW had told him he had included Mr. Nzirorera that while at Ruhengeri prison he had received criticism from relatives of Mr. Nzirorera and therefore decided to include Nzirorera in his statement to the Office of the Prosecutor.⁶¹

60. The Trial Chamber held that this was “insufficient, by itself to establish strong grounds for appointing an *amicus curiae*.”⁶² It failed to consider this evidence in light of the statement of Witness BGD which independently corroborated Mr. Munyeshuli when

⁶⁰ *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 896; *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 221; *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 172

⁶¹ Transcript of 27 January 2010 @ 36; Annex A to *Joseph Nzirorera’s Motion to Recall Prosecution Witness BDW* (3 June 2009)

⁶² Impugned Decision at para. 11

stating that Witness BDW had asked him to include Nzirorera in his statement because he “was angry at some of Mr. Nzirorera’s relatives”.⁶³

61. The Trial Chamber considered that the evidence of the expert witness provided “indicia of the possibility of false testimony on the part of Witness BDW but makes no ultimate determination that BDW intended to knowingly and willfully mislead or deceive the Chamber.”⁶⁴ Again, by requiring that each category of evidence be conclusive in and of itself, the Trial Chamber erred.

62. The evidence of implicating someone for revenge and creating false documents to support one’s testimony is strong evidence of an intent to mislead and cause harm. The Trial Chamber made an incorrect interpretation of governing law in considering evidence in isolation and failing to consider the totality of the evidence.

(3) Factual Errors

(a) Investigator’s Evidence

63. Besides the legal error in evaluating the evidence, the Trial Chamber made several factual errors in its consideration of each category of evidence.

64. In discounting the sworn testimony of Mr. Munyeshuli that Witness BDW had admitted to him that he had while at Ruhengeri prison he had received criticism from relatives of Mr. Nzirorera and therefore decided to include Nzirorera in his statement to the Office of the Prosecutor,⁶⁵ the Trial Chamber said that:

The Chamber considers that investigator Munyeshuli is not a disinterested third-party and there is no independent corroboration of this alleged recantation on the part of Witness BDW.⁶⁶

65. This was a factual error. First, the testimony was corroborated by Witness BGD, as explained above. And second, Mr. Munyeshuli testified that he had tape recorded Witness BDW’s statement.⁶⁷ Therefore, two pieces of independent corroboration exist.

⁶³ Confidential Annex “C”, *Joseph Nzirorera’s Motion in Limine: Witness 57* (25 January 2010)

⁶⁴ Impugned Decision at para. 13

⁶⁵ Transcript of 27 January 2010 @ 36; Annex A to *Joseph Nzirorera’s Motion to Recall Prosecution Witness BDW* (3 June 2009)

⁶⁶ Impugned Decision at para. 11

⁶⁷ Transcript of 27 January 2010 @ 3

66. The Trial Chamber made a patently incorrect conclusion of fact when stating that there was no independent corroboration of Mr. Munyeshuli's evidence.

67. It should also be noted that a Trial Chamber of the ICTY has previously relied upon the affidavit of an Investigator in a Rule 91 motion, without any additional evidence. In *Prosecutor v. Tadic*, the Trial Chamber launched a Rule 91 investigation on the basis of Prosecution Investigator Robert Reid's testimony that Witness Dragan Opacic had admitted to lying to the Trial Chamber under oath.⁶⁸ This was despite the fact that Investigator Reid was not a so-called "disinterested third-party". Accordingly, the Trial Chamber also erred in discounting the evidence of Investigator Munyeshuli for lack of corroboration.

(b) Witness BGD

68. The Trial Chamber said the following about the statement of Witness BGD:

[A]ccepting as true that BGD did recant his sworn testimony and claim that he falsely accused Joseph Nzirorera at the behest of BDW in a statement made to Investigator Munyeshuli, this would tend to show false testimony on the part of BGD or possibly contempt of the Tribunal on the part of Witness BDW. However, it does not show strong grounds for believing that BDW's testimony is false. BDW's recruitment of BGD to give false testimony does not per se impact the truthfulness of BDW's testimony as to the live or material issue; namely Nzirorera's presence at the Kibuye rally in June of 1993.⁶⁹

69. The Trial Chamber completely misunderstood Witness BGD's evidence. First, Witness BGD never gave sworn testimony, he only provided the information in a statement to investigators of the Office of the Prosecutor in Ruhengeri on the same day as Witness BDW did. Second, the import of Witness BGD's evidence was not only that Witness BDW had solicited false testimony from BGD, but that Witness BDW had acknowledged to BGD that his own statement was false and that he was including Nzirorera in the Kibuye rally because he was angry at some of Mr. Nzirorera's relatives.⁷⁰

⁶⁸ *Prosecutor v. Tadic*, No. IT-94-1-T, *Order for the Prosecution to Investigate the False Testimony of Dragan Opacic* (10 December 1996) at page 2. See also *Prosecutor v. Tadic*, No. IT-94-1-T, *Decision on Prosecution Motion to Withdraw Protective Measures for Witness L* (5 December 1996), at para. 4.

⁶⁹ Impugned Decision at para. 12

⁷⁰ Confidential Annex "C", *Joseph Nzirorera's Motion in Limine: Witness 57* (25 January 2010)

70. The evidence from Witness BGD therefore went directly to the issue of whether the testimony of Witness BDW that Nzirorera attended the meeting in Kibuye was false. The Trial Chamber made a factual error in believing that the evidence only related to BDW's attempt to solicit false testimony by BGD.

(c) Expert Witness

71. The Trial Chamber found that the evidence of Forensic Document Examiner Kim Hughes "shows that there are indicia of the possibility of false testimony on the part of BDW but makes no ultimate determination that BDW intended to knowingly or wilfully mislead or deceive the Chamber."⁷¹

72. This indicates a failure on the part of the Chamber to comprehend the purpose of Mr. Hughes' evidence. An expert is not allowed to make an ultimate determination on the intent of a witness or an accused.⁷² That is for the Chamber. The evidence of Mr. Hughes established the likelihood that Witness BDW had presented false documents to the Chamber in an effort to bolster his false testimony on the Kibuye meeting. This is evidence which the Chamber was obliged to consider in its determination whether strong grounds existed to believe that Witness BDW had given false testimony and had the intent to mislead the Chamber. The Trial Chamber made a factual error by misunderstanding the nature and purpose of Mr. Hughes' evidence and in failing to consider it.

III. General Observations and Conclusion

73. The Trial Chamber not only made a host of legal and factual errors in its decision, but it misapprehended the purpose of Rule 91. The Impugned Decision concluded by stating that:

The Chamber additionally notes that even if strong grounds were to be found which would support the appointment of an amicus curiae, on a practical level the proceedings would not benefit from the resulting report. The Chamber recalls that Witness BDW has been thoroughly examined and cross-examined on multiple occasions,

⁷¹ Impugned Decision at para. 13

⁷² *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali and Nyiramasuhuko's Extremely Urgent Motions to Limit the Extent and Nature of the Report and Testimony of Filip Reyntjens* (18 September 2007); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Norwojee* (8 July 2005) at para. 12; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe* (2 September 2005) at para. 13

Witness BGD has given sworn testimony and was scheduled to testify for the Defence before his name was withdrawn by Joseph Nzirorera, and that Kim Hughes' expert report is in evidence. It is unclear what additional evidence would be adduced by having an amicus curiae re-interview those people.⁷³

74. The Appeals Chamber has made it clear that “an assessment of a witness’ credibility is a separate inquiry from that of the prosecution of a witness for false testimony.”⁷⁴ Only two months ago, it reversed the Trial Chamber on this very point. Yet the Trial Chamber continues to misunderstand that the purpose of a prosecution for false testimony under Rule 91 is not to assist it in its deliberations on a final judgement, but to punish and deter liars from polluting the fact finding process of this Tribunal.

75. The detrimental effect of the commission of the offences of false testimony and contempt on the achievement of the Tribunals’ mission and the necessity of deterring such conduct have been observed in other cases. In regards to false testimony, the Appeals Chamber in *Kamuhanda v Prosecutor* indicated that:⁷⁵

“The Chamber wishes to make it very clear.....that the Tribunal will not tolerate such occurrences. The giving of false testimony before the Court, as well as the interference with the testimony of other witnesses who may appear before the Court, are unacceptable practices, both for the impact that they have on the trial as well as the impact that they have on the Tribunal's mission to seek justice and establish the truth.”

76. Similarly, the Trial Chamber in *Prosecutor v GAA* stated that:⁷⁶

“The Chamber considers false testimony under solemn declaration and contempt of the Tribunal as very grave offences, as they constitute a direct challenge to the integrity of the trial process. Maintaining the integrity of the administration of justice is particularly important in trials involving serious criminal offences. It is therefore necessary for general deterrence and denunciation to be given high importance in sentencing policies.”

77. Mr. Nzirorera’s case has been plagued by perjury. The Trial Chamber has done nothing to prevent, discourage, or punish it. Instead, in the course of a very short

⁷³ Impugned Decision at para. 14

⁷⁴ *Karemera et al v Prosecutor*, No. ICTR-98-44-AR91.2, *Decision on Joseph Nzirorera’s and the Prosecutor’s Appeals of Decision Not to Prosecute Witness [] for False Testimony* (16 February 2010), (Confidential) at para. 20

⁷⁵ *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Oral Ruling on Rule 115 and Contempt of False Testimony*, (19 May 2005)


⁷⁶ *Prosecutor v GAA*, No. ICTR-07-90-R77-I, *Judgment and Sentence*, (4 December 2007) at para 10.

decision, the Trial Chamber made a large number of legal, factual, and conceptual errors in its evaluation of whether an *amicus curiae* should be appointed to investigate the false testimony of Witnesses GAP and BDW.

78. The Appeals Chamber is respectfully requested to reverse the Impugned Decision and remand the matter to the Trial Chamber for a reasoned decision in accordance with the correct application of the law and facts.⁷⁷

Word count: 5308

Respectfully submitted,


PETER ROBINSON
Lead Counsel for Joseph Nzirorera

⁷⁷ The assistance of Legal Intern Belinda McRae of Australia to the research and drafting of this appeal is gratefully acknowledged.



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