

ICTR-98-44-T  
6-7-2009  
(46557-46552)

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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding  
Judge G. Gustave Kam  
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 6 July 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS ARCHIVER  
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JOSEPH NZIRORERA'S MOTION FOR RECONSIDERATION  
OF DECISION ON MOTION FOR JUDGEMENT  
OF ACQUITTAL: INCITEMENT

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The Office of the Prosecutor:

Mr. Don Webster  
Mr. Saidou N'Dow  
Mr. Arif Virani

Defence Counsel:

Mr. Peter Robinson  
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera  
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera respectfully moves for reconsideration of the Trial Chamber's *Decision on Motions for Judgement of Acquittal* (19 March 2008). He contends that the Trial Chamber's recent judgement in the *Kalimanzira* case demonstrates that Mr. Nzirorera cannot be convicted for incitement to genocide as charged in Count Two of the Indictment. Therefore, in order to save time, he requests that the Trial Chamber enter a judgement of acquittal on Count Two.

### **The Underlying Decision**

2. Although Mr. Nzirorera brought a concrete and discrete challenge to the incitement charge in Count Two of the Indictment at the close of the prosecution case,<sup>1</sup> the Trial Chamber addressed incitement in combination with other genocide related charges in its "broad-brush" decision.<sup>2</sup>

3. The only evidence of alleged incitement by Mr. Nzirorera referred to by the Chamber in its decision pertained to the 30 April 1994 meeting in the Kigali prefecture office and the June 1994 swearing in ceremony for Juvenal Kajelijeli.<sup>3</sup>

### **The Kalimanzira Judgement**

4. In its judgement in the *Kalimanzira* case, this Trial Chamber held that the accused's speech to a meeting of a local "crisis committee", involving 20-30 persons who had been invited to the meeting, did not constitute incitement because the crisis committee meeting was not a "public" event.<sup>4</sup>

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<sup>1</sup> *Reply Brief: Joseph Nzirorera's Motion for Judgement of Acquittal* (8 February 2008) at paras. 24-50

<sup>2</sup> *Decision on Motions for Judgement of Acquittal* (19 March 2008) at para. 16

<sup>3</sup> *Decision on Motions for Judgement of Acquittal* (19 March 2008) at paras 24 & 25

<sup>4</sup> *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para. 636

5. The Trial Chamber found that because the meeting was not open to the public and not held in a place which was open to the general public, the “public” requirement of incitement to genocide had not been satisfied.<sup>5</sup>

#### **Incitement by Nzirorera**

6. Joseph Nzirorera is charged in Count Two of the Indictment with direct and public incitement to commit genocide.

7. One of the acts of incitement relied upon by the Trial Chamber in the Impugned Decision is the allegation that Mr. Nzirorera stated that the Tutsi is the enemy of Rwanda at a meeting of the Kigali security council at the Kigali prefecture office on 30 April 1994.<sup>6</sup>

8. Like the crisis committee meeting in *Kalimanzira*, the alleged security council meeting was not open to the public nor held in a place open to the public. Therefore, like *Kalimanzira*, Mr. Nzirorera should be acquitted of this alleged of incitement.

9. This leaves only the swearing-in ceremony of Juvenal Kajelijeli as the sole basis of incitement relied upon by the Trial Chamber in the Impugned Decision. The Trial Chamber stated that:

Prosecution Witnesses GBU and GAV and others testified that at the swearing-in ceremony of Juvenal Kajelijeli as *bourgmestre* in June 1994, Joseph Nzirorera praised the Interahamwe for their work.

10. The Trial Chamber made a critical factual error in this finding. In fact, Witness GAV testified that at no time did Nzirorera thank the Interahamwe or Amahindure, or encourage anyone to eliminate the Tutsis.<sup>7</sup> Witness ANU, who also

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<sup>5</sup> *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para. 634

<sup>6</sup> Paragraph 32.3

<sup>7</sup> Transcript of 8 October 2007 @ 45

claimed to have attended the ceremony, testified that Nzirorera had simply that said it was necessary to support the new bourgmestre, Kajelijeli.<sup>8</sup> He didn't encourage, nor condemn, the killings that had taken place in Mukingo.<sup>9</sup>

11. Because these two prosecution witnesses directly contradict the testimony of Witness GBU, rather than corroborate it as the Chamber indicated in the Decision, the Trial Chamber is respectfully requested to reconsider its decision. The decision should also be reconsidered in light of the subsequent evidence elicited from Witness GBU when recalled in May 2009 that he participated in signing a false declaration in exchange for money, and lied about it to the prison authorities, OTP, amicus curiae, and this Trial Chamber.<sup>10</sup>

12. The uncorroborated and contradicted testimony of Witness GBU could never support a conviction for incitement—therefore the prosecution case for incitement at the swearing-in ceremony has completely broken down and cannot reasonably survive a motion for judgement of acquittal.<sup>11</sup>

### **Reconsideration**

13. It is well established that a Trial Chamber may reconsider its own decisions if a new fact is discovered that was not known to the Chamber at the time, if there is a material change in circumstances, or where there is reason to believe that a previous decision was erroneous and therefore prejudicial to either party.<sup>12</sup>

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<sup>8</sup> Transcript of 13 June 2007 @45

<sup>9</sup> Transcript of 18 June 2007 @ 53

<sup>10</sup> Transcript of 5 May 2009

<sup>11</sup> To the extent the Trial Chamber now wishes to review the other allegations of incitement charged against Mr. Nzirorera in Count Two, it will find them completely without merit. See *Reply Brief: Joseph Nzirorera's Motion for Judgement of Acquittal* (8 February 2008) at paras 27-32, and 41

<sup>12</sup> *Prosecutor v Ndindliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials* (3 November 2004) at para. 21; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to*

14. The occurrence of an intervening Tribunal decision on point was recently held by this Chamber to be grounds for reconsidering its decision.<sup>13</sup> Therefore, the decision in the *Kalimanzira* case, by the same Trial Chamber, should likewise warrant reconsideration.

15. The additional testimony of Witness GBU, subsequent to the decision, coupled with the Chamber's error in not realizing that the other prosecution witnesses *contradicted* Witness GBU, rather than *corroborated* him, warrants reconsideration as well.

16. The original decision is prejudicial to Mr. Nzirorera as it requires him to answer a case for which he has no case to answer. It will require him to divert resources to rebutting the evidence of these meetings by calling witnesses from Rwanda and Europe and by arguing these issues in his closing written and oral submissions.

17. Rule 98 *bis* exists for the very reason of screening unmeritorious charges at the end of the prosecution's case. As such it contributes to the management of the case by the Chamber and avoids unnecessary time and resources to be spent on allegations which have not been proven.

18. The Trial Chamber has been vigilant in insisting that the defence reduce its witnesses and the time for the presentation of its defence. It should be equally vigilant in

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*Harmonize and Amend Witness Protection Orders* (1 June 2005) at para. 3; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecutor's Consolidated Corrigendum to Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses* (7 July 2005) at para. 7; *Prosecutor v Ndindliyiimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision of 14 September 2005 on Admissibility of Witness XXO's Testimony in the Military I Case in Evidence* (10 October 2005) at para.11; *Prosecutor v Ndindliyiimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005* (24 November 2005) at para. 18; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Urgent and Confidential Defence Motion Requesting Reconsideration of the 1 March 2007 Ruling Refusing a Subpoena for the Witness JPFR3* (20 March 2007) at para. 2

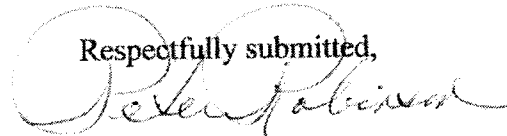
<sup>13</sup> *Decision on Nzirorera Motion for Reconsideration of Fine* (3 July 2009)

insisting that the time needed for the defence case be reduced by eliminating the need to answer a charge which no longer can be sustained.

**Conclusion**

19. The Trial Chamber is respectfully requested to reconsider its decision and grant Mr. Nzirorera's motion for acquittal as to Count Two of the indictment.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

