

ICTR-98-44-T  
8-8-2008  
(36990-36986)

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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: 8 August 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES  
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*[Signature]*

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JOSEPH NZIRORERA'S MOTION TO DISMISS  
FOR ABUSE OF PROCESS:  
PAYMENTS TO PROSECUTION WITNESSES

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The Office of the Prosecutor:

Mr. Don Webster  
Ms. Allayne Frankson-Wallace  
Mr. Iain Morley  
Ms. Gerda Visser  
Mr. Saidou N'Dow

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 an order dismissing the indictment on the grounds that the prosecution's payment of huge sums of money to genocidaires to implicate him in the Rwandan genocide is an abuse of process.

2. On 29 May 2008, the Trial Chamber issued its *Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T and Motion for Admission of Exhibit: Payments Made for the Benefit of Witness G*. As a result of that decision, it was disclosed that the prosecution has paid huge sums of money for the benefit of Witness G, an Interahamwe leader, in exchange for his testimony against the accused.

3. On 6 August 2008, the Trial Chamber issued a decision in which it ordered disclosure of payments for the benefit of Witness T, another Interahamwe leader, by the prosecution. Those payments also involved huge sums of money.

4. The prosecution is also known to have paid another huge sum of money for the benefit of Michel Bagaragaza, a member of the MRND prefectural committee in Gisenyi, who it hoped to persuade to plead guilty and testify against Mr. Nzirorera.

5. Another convicted genocidaire, Omar Serushago, has admitted receiving "thousands of dollars" from the prosecution.<sup>1</sup> He too was recruited as a witness against Joseph Nzirorera.

6. In its *Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses* (23 August 2005), the Trial Chamber declined to address the issue of a remedy for the prosecution's payment to witnesses because it concluded that the defence had not established that the prosecution

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<sup>1</sup> *Prosecutor v Nahimana et al*, No. ICTR-99-52-T (Transcript of 26 November 2001 at pg 10; Exhibit #3D73 admitted on 19 November 2001)

had paid witnesses other than that reasonably required for the management of witnesses and victims.<sup>2</sup>

7. That situation has now changed. The Trial Chamber has now found that the benefits to Witness T went beyond that reasonably required. Therefore, it must now address the issue of what consequences such payments should have upon the trial.

8. The Senior Trial Attorney in this case is a member of the bar of a state of the United States. In *Mataya v Kingston*, 371 F.3d 353,359 (7<sup>th</sup> Cir. 2004), the United States Court of Appeals held that “to pay a witness, other than an expert witness, for his testimony is irregular and in fact is unlawful in federal trials.”

9. The American Bar Association Canons of Professional Responsibility provide that a lawyer cannot induce favorable testimony from a witness in exchange for something of value.<sup>3</sup>

10. In *The Florida Bar v Jackson*, 490 So.2d 935,936 (Florida 1986), the Florida Supreme Court said:

“The very heart of the judicial system lies in the integrity of the participants. . . . Justice must not be bought or sold. Attorneys have a solemn responsibility to assure that not even the taint of impropriety exists as to the procurement of testimony before courts of justice.”

11. In *Golden Door Jewelry v Lloyds*, 865 F.Supp 1516, 1526 (S.D. Florida 1994), a United States District Judge held:

“Rule 4-34(b) of the Rules of Professional Conduct, *The Florida Bar v Jackson*, *supra*, and the aforementioned cases clearly prohibit a lawyer from paying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful or not, because it violates the

<sup>2</sup> Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses (23 August 2005) at para. 7

<sup>3</sup> DR 7-109(c), Model Code of Professional Responsibility

integrity of the justice system and undermines the proper administration of justice. Quite simply, a witness has the solemn and fundamental duty to tell the truth. He or she should not be paid for doing so.”

12. This rule is not confined to the United States. In civil law jurisdictions, it is unlawful for anyone, prosecutors included, to make payments or gifts to a witness in a case.<sup>4</sup>

13. The ICTR or ICTY has never directly confronted the issue of payments to witnesses by the prosecution. However, the Appeals Chamber has recognized the existence of the “abuse of process” doctrine. That doctrine has been defined as “something so unfair and wrong that the Court should not allow a prosecutor to proceed.”<sup>5</sup>

14. Another ICTR Trial Chamber has observed that the abuse of process doctrine may be relied on its two distinct situations: (1) where delay has made a fair trial for the accused impossible; or (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court’s sense of justice, due to impropriety or misconduct.<sup>6</sup>

15. Mr. Nzirorera contends that the payments of huge sums of money to leaders who have admitted their participation in the genocide, in order to induce them to testify against Mr. Nzirorera, falls squarely within the second category for abuse of process. The prosecution’s misconduct in paying these vast sums contravenes a reasonable court’s sense of justice.

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<sup>4</sup> See, for example, German Code of Criminal Procedure, in the American Series of Foreign Penal Codes (1965), sections 136aI and 163aV; French Penal Code section 434-15

<sup>5</sup> *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 339

<sup>6</sup> *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Decision for a Stay of Proceedings and Abuse of Process* (20 February 2004) at para. 14

17. In its case against Leonidas Nchogoza, a defence investigator, the prosecution has indicted him for paying 20,000 Rwandan francs (\$40) to a witness as an inducement to exculpate an accused.<sup>7</sup> To allow the prosecution to get away with paying huge sums of money to its witnesses as inducements to incriminate Mr. Nzirorera would be contrary to the interests of justice.

18. The prosecution never sought judicial approval to buy testimony against Mr. Nzirorera. For many years, it resisted disclosing the extent and amounts of the payments, with various arguments such as “disclosure of the amounts would reveal the location of the witness due to the cost of living” or “other potential informants might use the disclosure of the amounts as a bargaining tool in their own negotiations.”

19. Now that the prosecutor’s payment of these vast sums of money have been disclosed, the Trial Chamber is obligated to rule on whether the prosecutor’s unilateral payment of these sums to its witnesses is so fundamentally wrong as to not allow the prosecutor to proceed in this trial.

20. Mr. Nzirorera respectfully contends that a trial on which one party can pay huge sums of money to procure testimony in its favour is not only an unfair trial, but an unsavory one. The Trial Chamber should not further involve itself, or this institution, in such dirty games. The indictment against Mr. Nzirorera should be dismissed.

Respectfully submitted,



PETER ROBINSON  
Lead Counsel for Joseph Nzirorera

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<sup>7</sup> *Prosecutor v Nchogoza*, No. ICTR-07-91-I, *Indictment* (7 January 2008) at para. 21



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<b>Case Name:</b>	The Prosecutor vs. <b>Joseph Nzirorera</b>		<b>Case Number:</b> ICTR-98-44-T	
<b>Dates:</b>	Transmitted: <b>8 August 2008</b>		Document's date: <b>8 August 2008</b>	
<b>No. of Pages:</b>	<b>5</b>	<b>Original Language:</b> <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
<b>Title of Document:</b>	<b>JOSEPH NZIRORERA'S MOTION TO DISMISS FOR ABUSE OF PROCESS: PAYMENTS TO PROSECUTION WITNESSES</b>			
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