



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

**929/H**

APPEALS CHAMBER

**ICTR-2000-55C-A**

**11<sup>th</sup> Nov 2013**

**929/H--924/H**

Before: Judge Theodor Meron, Presiding

Judge Patrick Robinson

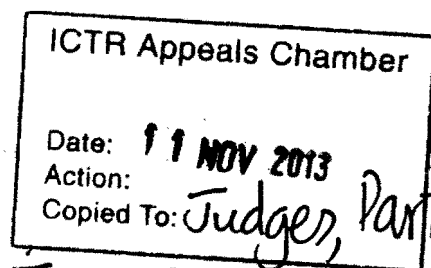
Judge Mehmet Güney

Judge Arlette Ramaroson

Judge William H. Sekule

Registrar: Mr. Bongani Majola

Date: 11 November 2013



**ILDEPHONSE NIZEYIMANA**

**V.**

**THE PROSECUTOR**

**Case No. ICTR-2000-55C-A**

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**REPLY TO PROSECUTION RESPONSE TO APPELLANT'S *CONFIDENTIAL*  
MOTION FOR FRESH EVIDENCE AND COROLLARY RELIEF  
(Rules 115, 5 and 107 of the Rules of Procedure and Evidence)**

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**Office of the Prosecutor:**

Hassan B. Jallow

James J. Arguin

**Counsel for the Defence :**

John Philpot, Lead Counsel

Sébastien Chartrand, Assistant

Melissa Kanas, Assistant

**INTRODUCTION**

1. Appellant's Brief on Appeal<sup>1</sup> was filed 5 August 2013, followed by the Prosecutor's Response Brief<sup>2</sup> on 16 September 2013. Appellant filed his Brief in Reply<sup>3</sup> on 1 October 2013.
2. On 15 October, Appellant filed his *Appellant's Confidential Motion for Fresh Evidence and Corollary Relief*, hereafter the "Motion".
3. On 6 November 2013, the Prosecution filed the *Prosecutor's Response to Appellant's Confidential Motion for Fresh Evidence and Corollary Relief* filed on 15 October 2013, hereafter the "Response".
4. To facilitate the understanding of the narrow scope of the Motion, Appellant repeats that he seeks the following:

**A. Recall of ZAV on prior inconsistent statement and related issues**

- i. Appellant requests the recall of ZAV for cross-examination on his 27-28 November 2009 statement;
- ii. the admission of the draft statement of ZAV of 27 November 2009 ZAV into the record on Appeal;<sup>4</sup>
- iii. for the Appeals Chamber to call and examine Yasmine Chubin and Jean Baptiste Nzanzimfura, to prove ZAV's 27-28 oral statement; and
- iv. disclosure to Appellant of Prosecution team member's individual interview notes of meeting with ZAV on 27-28 November 2009.
- v. If the Appeals Chamber denies Appellant's request to recall witnesses ZAV, Appellant requests that his testimony be stricken from the record.

**B. Recall of ZAV on immigration evidence**

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<sup>1</sup> *Ildéphonse Nizeyimana v. The Prosecutor*, Case No. ICTR-2000-55C-A, Ildéphonse Nizeyimana's *Confidential* on Appeal, 5 August 2013 (the "Brief")

<sup>2</sup> *Ildéphonse Nizeyimana v. The Prosecutor*, Case No. ICTR-2000-55C-A, 16 September 2013

<sup>3</sup> *Ildéphonse Nizeyimana v. The Prosecutor*, Case No. ICTR-2000-55C-A, Ildéphonse Nizeyimana's *Confidential* Brief in Reply, 1 October 2013 (the "Reply")

<sup>4</sup> See Brief, Annex E and Motion, Appendix A, Redacted Draft Statement of ZAV

- i. Appellant also requests the recall of ZAV for cross-examination on his United States immigration file, and for his testimony to be considered part of the record on Appeal.
- ii. Appellant submits that it is necessary for the Appeals Chamber to order the United States of America to disclose the complete immigration file of witness ZAV to the Defence so as to allow Appellant to effectuate an effective cross-examination.

**C. Recall of BXF, BZC and ZBJ on immigration evidence**

- i. The recall of witnesses BXF, BZC and ZBJ by the Appeals Chamber, to be examined on their statements to Canadian Immigration authorities and for this testimony to be considered part of the record on Appeal.
- ii. Further, Appellant requests the additional remedies as previously set forth in his 16 February 2012 *Confidential Nizeyimana Defence Motion to Recall Witnesses BXF, BZC and ZBJ* (the “Recall Motion”).<sup>5</sup> Specifically, he requests that the Appeals Chamber order that a transcript be prepared of the refugee hearing of BXF and ZBJ,<sup>6</sup> that WVSS be in charge of all contact with the witnesses, that there be no contact between the Office of the Prosecutor and the three witnesses, that the failure of the witnesses or any one of the three to attend hearings will result in the striking of the testimony of all three witnesses.
- iii. If the Appeals Chamber denies Appellant’s request to recall witnesses BXF, BZC and ZBJ, Appellant requests that their testimony be stricken from the record.

5. In the Response, the Prosecution uses very strong language to demean the Motion without addressing the real issues. It does not, however, dispute that the Appeals Chamber has discretion to summon a witness at the Appellate stage.<sup>7</sup>

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<sup>5</sup> Brief, Annex F

<sup>6</sup> See Recall Motion, Annex 6 paragraph 4 (c)

<sup>7</sup> See Motion, para. 8; also *Bagosora et al. v. Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva’s Motions for Admission of Additional Evidence, 21 March 2011, para. 32

6. The Prosecution repeatedly misstates both the record and the Motion. For example, at paragraph 10 of the Response, the Prosecution complains that Appellant “did not append to the Motion the immigration records for ZAV, BXF, BZC and ZBJ he seeks to admit as additional evidence,” but Appellant did not request admission of the records, only recall of the witnesses or that their testimony be stricken.<sup>8</sup> Then again, at paragraph 15, the Prosecution falsely claims that the redacted draft statement of ZAV “forms part of the record on appeal,” which ignores that the Chamber did not even allow the Defence to show it to the witness, much less admit it into the record.<sup>9</sup>

7. All of the issues raised in the Response were addressed in the Motion.

### **Admissibility and Availability at Trial**

8. According to *Nchamihigo*, on application to produce new evidence on appeal, the Appeals Chamber will verify if Appellant has used all the mechanisms available at trial. If the evidence was available at trial and the Appellant exercised due diligence at trial but the Trial Chamber refused its admission, the evidence may potentially be admitted. This is of course subject to the requirement that the evidence could have been a decisive factor in the final judgement.<sup>10</sup>

9. The Motion does not seek to relitigate his arguments regarding the errors committed by the Trial Chamber as the Prosecution contends at paragraph 12, as those arguments are contained in his Brief and Reply. Rather, the Motion is proper under Rules 115, 5 and 107 and *Nchamihigo*, as all of the evidence which Appellant seeks to introduce was erroneously excluded by the Trial Chamber.

10. In other words, Appellant argued in his Brief and Reply that the cross-examination of these witnesses was erroneously curtailed or limited. In the Motion, he asks for the testimony cross-examination of witnesses ZAV, BXF, BZC and ZBJ to be admitted as new evidence on appeal.

11. Witnesses Yasmine Chubin and Jean Baptiste Nzanzimfura will simply serve a corollary role if ZAV denies his oral statement as he did at trial.

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<sup>8</sup> See Motion, para. 54

<sup>9</sup> See Motion, paras. 19 - 23

<sup>10</sup> *Nchamihigo v. Prosecutor*, Case No. ICTR-2001-63-A, Decision on Siméon Nchamihigo’s Second Motion for Leave to Present Additional Evidence on Appeal, 28 September 2009, paras. 11-14

12. Obtaining ZAV's United States Immigration file is a simple corollary to the curtailment of his cross examination.

**“could have affected the verdict”**

13. Evidence “could have affected the verdict” if it could be shown that the conviction was unsafe.<sup>11</sup>

14. Appellant argued in his Brief that the restrictions on the cross-examination of ZAV and the failure to recall him for cross-examination on his immigration file and prior statement and the failure to recall BXF, BZC and ZBJ for cross-examination on their prior contradictory statements were errors which caused him serious prejudice since their Appellant's convictions were based on their testimony.<sup>12</sup>

15. Appellant therefore argues in the Motion that further cross-examination of these rather dubious prosecution witnesses could serve to reduce their credibility and raise reasonable doubt in favour of Appellant and therefore could affect the verdict.

16. Appellant prays the Appeals Chamber to reject Prosecution arguments and grant the orders requested.

**RESPECTFULLY SUBMITTED,**



**JOHN PHILPOT**  
**Counsel for ILDEPHONSE NIZEYIMANA**

Dated 11 November 2013  
Signed in Montreal

Word Count: 1219

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<sup>11</sup> *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Order for the Defence to File a Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence, 4 May 2004; *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence Pursuant to Rule 115, 12 January 2007, para. 8

<sup>12</sup> See Motion, paras. 13, 42



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**924/H**

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(Art. 27 of the Directive for the Registry)

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	<input type="checkbox"/> OIC, JLSD P. Besnier	<input type="checkbox"/> OIC, JPU C. K. Hometowu	<input checked="" type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison
<b>From:</b>	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence John Philpot (names)	<input type="checkbox"/> Prosecutor's Office (names) <input type="checkbox"/> Other: (names)
<b>Case Name:</b>	The Prosecutor vs. <b>Ildephonse NIZEYIMANA</b>		<b>Case Number:</b> ICTR-2000-55C-A
<b>Dates:</b>	Transmitted: <b>11 November 2013</b>		Document's date: <b>11 November 2013</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>REPLY TO PROSECUTION RESPONSE TO APPELLANT'S CONFIDENTIAL MOTION FOR FRESH EVIDENCE AND COROLLARY RELIEF</b>		
<b>Classification Level:</b>		<b>TRIM Document Type:</b>	
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Reference material is provided in annex to facilitate translation.

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## COURT MANAGEMENT ADMINISTRATION DES CHAMBRES

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[boed@un.org](mailto:boed@un.org)

### PROOF OF SERVICE TO DETAINEES PREUVE DE NOTIFICATION D'ACTES AUX DETENUS

Upon signature of the detainee, please return this sheet to the originator as proof of service.  
*Formulaire à être renvoyé à l'expéditeur dûment signé par le détenu.*

Date:	16 September 2013	Case Name / affaire:	The Prosecutor Vs. <b>Ildephonse NIZEYIMANA</b>	
		Case No / no. de l'affaire:	<b>ICTR-00-55C-A</b>	
To: A:	<b>Ildephonse NIZEYIMANA</b>	<b>TO BE FILLED IN BY THE DETAINEE A COMPLETER PAR LE DETENU</b> Signature _____ Date, Time / Heure _____  I acknowledge receipt of the documents listed below. <i>J'accuse réception des documents mentionnés ci-dessous.</i>		
Through:		Print name / nom	Signature	Date, Time / Heure
		_____	_____	_____
		_____	_____	_____
From: De:	<input checked="" type="checkbox"/> Appeals Chamber, The Hague <input type="checkbox"/> CMS, Arusha  <input type="checkbox"/> Other			
Subject Objet:	Kindly find attached the following documents / <i>Veillez trouver en annexe les documents suivants.</i>			
Documents name / titre du document		Date Filed / Date enregistré	Pages	
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