



Mechanism for International Criminal Tribunals

Case No: MICT-15-90 ✓  
          MICT- 13-34  
          MICT- 12-04  
Date: 06 April 2017  
  
Original: English

**THE SINGLE JUDGE**

**Before: Judge Mparany Mamy Richard Rajohnson**

**Registrar: Mr. Olufemi Elias**

**The Prosecutor**

**v.**

**Nyiramasuhuko et al.**

**Dominique Ntawukuriryayo**

**Callixte Kalimanzira**

**PROSECUTION SUBMISSIONS ON DEMANDE DES  
DECLARATIONS DES TEMOINS DANS LES AFFAIRES ELIE  
NDAYAMBAJE, DOMINIQUE NTAWUKURIRYAYO, CALLIXTE  
KALIMANZIRA AND ALPHONSE NTEZIRYAYO AINSI QUE LA  
LEVEE DES DISPOSITIONS DE LA PROTECTION DE CES  
TEMOINS**

**Office of the Prosecutor**  
Richard Karegyesa  
Sunkarie Ballah-Conteh

**The Applicant**  
Emmanuel Mbarushimana Kunda

**Received by the Registry  
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**06/04/2017 15:51**

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## I. INTRODUCTION

1. Mbarushimana's "Demande des déclarations des témoins dans les affaires Elie Ndayambaje, Dominique Ntawukuriryayo, Callixte Kalimanzira Alphone Nteziryayo..."<sup>1</sup> should be dismissed for failing to meet the threshold for access to confidential material pursuant to Rule 86(H).

2. In his application, Mbarushimana requests access to all witness statements in the *Ntawukuriryayo*, *Kalimanzira*, and *Nyiramasuhuko et al* cases. In addition, he requests that the protective measures granted to the witnesses in these cases be rescinded to allow him access to their confidential material.

3. Mbarushimana submits that many of the witnesses who testified in the cases mentioned above are also expected to testify as witnesses in his own case in Rwanda,<sup>2</sup> and that the events at the Gisagara sub-prefecture in Rwanda, for which he is being prosecuted, particularly the establishment of roadblocks and killings of Tutsi in Kabuye, were also a central feature of the cases from which the material is sought. Mbarushimana argues that it is therefore important for him to have access to the statements of the witnesses in those cases to enable him to prepare and present a full and effective defence.

## II. SUBMISSIONS

4. First, Mbarushimana is entitled to access all unclassified and open session material from the cases concerned without an application to the Chamber. His motion does not demonstrate that he has availed himself of this right, and should be dismissed in that regard.

5. Second, Mbarushimana lacks standing to request a variation of protective measures and access to confidential material. His application is not authorized by an appropriate judicial authority as required by Rule 86(H) of the Rules<sup>3</sup> and, as such, his application should be summarily dismissed.

<sup>1</sup> "Demande des déclarations des témoins dans les affaires Elie Ndayambaje, Dominique Ntawukuriryayo, Callixte Kalimanzira Alphone Nteziryayo ainsi que la levée des dispositions de la protection des témoins dans lesdites affaires devant le TPIR à Arusha", 7 March 2017, (Motion for Access to Witness Statements)

<sup>2</sup> *Ibid.* para. 3

<sup>3</sup> *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 14; *Justin Mugenzi and Prosper Mugiraneza v. the Prosecutor*, Case No. ICTR-98-50-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 8

6. In any event, Mbarushimana fails to establish a legitimate forensic purpose for access to all the confidential witness material in the cases mentioned. While there may be some similarities between Mr. Mbarushimana's case and the cases from which the confidential material is sought, this overlap alone is not sufficient to justify Mbarushimana's access to all of the material requested. The mere fact that both cases may share common witnesses is, without further information, insufficient to establish a link between the Applicant's case and the cases mentioned that would warrant disclosure of all the confidential witness statements from those cases to Mr. Mbarushimana. Merely stating that there is a geographical, temporal and material relationship between his case and the cases from which the material is sought, without specifying the link and identifying the witnesses and material that is likely to materially assist his case is insufficient to establish a legitimate forensic purpose for the disclosure.<sup>4</sup>

7. Where a party requests access to confidential material from another case, such material must be identified or described by its general nature and a legitimate forensic purpose for the access must be demonstrated.<sup>5</sup> In determining whether this standard has been met a chamber must consider the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the applicant's case and the case from which the material is sought.<sup>6</sup> Such a factual nexus may be established if the cases stem from events alleged to have occurred in the same geographic area, at the same time, although this may not always be sufficient. A case specific analysis is required each time.<sup>7</sup> The applicant must further establish that the material sought is likely to assist the case materially or at least that there is a good chance that it would."<sup>8</sup>

<sup>4</sup> *Rutaganda v. the Prosecutor*, Case No. ICTR96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Material in the Karemera et al. Case, 10 July 2009, para. 13; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 17; *Mugenzi et al. v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Ndindiliyimana v. Prosecutor*, Case No. ICTR-00-56-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Karemera et al. v. Prosecutor*, Case No. ICTR-98-44-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 31 May 2012, para. 10.

<sup>5</sup> *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 17; *Mugenzi et al. v. Prosecutor*, Case No. ICTR-99-50-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Ndindiliyimana v. Prosecutor*, Case No. ICTR-00-56-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 24 May 2012, para. 9; *Karemera et al. v. Prosecutor*, Case No. ICTR-98-44-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 31 May 2012, para. 10.

<sup>6</sup> *Ibid*

<sup>7</sup> *Rutaganda v. the Prosecutor*, Case No. ICTR96-3-R, Decision on Rutaganda's Appeal Concerning Access to Confidential Material in the Karemera et al. Case, 10 July 2009, para. 13.

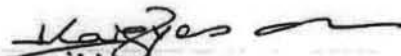
<sup>8</sup> *Ibid*

8. As Mbarushimana himself admits in his application, not all of the witnesses who testified in the cases listed above are expected to also testify in his own case.<sup>9</sup> There is therefore, undoubtedly, witness material in those cases that has no relevance to Mbarushimana's case and which is not likely to materially assist his case in any way.

9. Jurisprudence from the Appeals Chamber has established that where the requesting party seeks access to *all* confidential material in a case, but can show a nexus only for part of it, the request will be rejected.<sup>10</sup>

10. The Prosecutor submits that Mbarushimana's motion is inadmissible in its current form for failure to meet the strict requirements of Rule 86(H) and should be dismissed.

Dated at Arusha this 06<sup>th</sup> day of April 2017

  
Richard Karegyesa  
Senior Legal Officer

  
Suskarie Ballah-Conteh  
Legal Advisor

Word Count  
1079

<sup>9</sup> Motion for Access to Witness Statements, 7 March 2017, para. 3

<sup>10</sup> *Prosecutor v. Protais Zigiranyirazo*, case no. ICTR-01-73-A, Decision on Michel Bagaragaza's Motion for Access to Confidential Material, 14 May 2009, para. 8.



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