



International Criminal Tribunal for the
Prosecution of Persons Responsible for
Genocide and Other Serious Violations of
International Humanitarian Law Committed
in the Territory of Rwanda and Rwandan
Citizens responsible for genocide and other
such violations committed in the territory of
neighbouring States between 1 January and
31 December 1994

Case No: ICTR-96-8-A

Date: 2 November 1999

Original: English

IN THE APPEALS CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: Mr. Agwu U. Okali

Decision of: 2 November 1999

ELIE NDAYAMBAJE

v.

THE PROSECUTOR

1999 NOV 29 P 5:35
COPIES
RECEIVED

DECISION REJECTING NOTICE OF APPEAL

Counsel for the Appellant:
Ms. Véronique Laurent

The Office of the Prosecutor:
Mr. Japhet D. Mono
Mr. Ibukunolu A. Babajide
Mrs. Céline Tonye
Mr. Robert Petit
Ms. Nadira Bayat
Mr. Matthias Marcussen

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR MOI

NAME / NOM: *Féliçité T. Ndayambaje*
SIGNATURE: *[Signature]* DATE: *20/11/99*

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively), hereby issues its decision with respect to the "Notice of Appeal Relating to an Objection Based on Lack of Jurisdiction" filed on 10 August 1999 ("the Notice of Appeal"), by the accused, Elie Ndayambaje ("the Accused"), seeking to appeal the oral decision of 10 August 1999 by Trial Chamber II granting the "Prosecutor's Request for Leave to File an Amended Indictment" against the Accused, which decision was issued in writing on 2 September 1999 ("the Decision"), and the "Prosecutor's Motion for Summary Rejection of the Defence's Notice of Appeal Relating to an Objection Based on Lack of Jurisdiction" filed on 7 September 1999 ("the Motion").

2. The Notice of Appeal is filed pursuant to Rule 72 (D) of the Rules of Procedure and Evidence of the Tribunal ("the Rules").

II. PROCEDURAL HISTORY

3. On 10 August 1999, Trial Chamber II delivered its oral decision on the "Prosecutor's Request for Leave to File an Amended Indictment" filed on 17 August 1998 ("the Request"). In its oral decision, the Trial Chamber explained that a written decision outlining its reasons would follow.

4. The Notice of Appeal was filed on the same day as the hearing, 10 August 1999. On 7 September 1999 the Prosecutor filed her Motion.

5. On 2 September 1999 the written Decision was issued by the Trial Chamber. On 13 September, in view of Rules 72 (E) and 108 (B), as amended 1 July 1999, the Appeals Chamber issued a Scheduling Order allowing the Appellant 7 days from the delivery of the written judgement in both English and French, to file any further grounds of appeal. The French Decision was issued on 8 October 1999, so this deadline expired on 15 October 1999. No further grounds of appeal have been filed.

III. SUBMISSIONS OF THE PARTIES

1. The Appellant

6. The Notice of Appeal raises two issues. In the first place, it challenges the procedure by which the Trial Chamber reached its Decision. The Appellant requested the Trial Chamber to order disclosure to him of the supporting material contained in Annex B to the Prosecutor's Request. The Trial Chamber neither considered this material itself, nor ordered its disclosure to the Defence. The Appellant contends that failure to order the disclosure of Annex B to the Defence violated the principle of *audi alteram partem*, as it prevented the Defence from participating fully in the hearing on the Request.

7. The Appellant goes on to qualify this action of the Trial Chamber as a miscarriage of justice which gives rise to an objection based on lack of jurisdiction. He requests the Appeals

Chamber to order disclosure of the material and a resumption of hearings in order to reconsider the Request.

8. As a second issue, the Notice of Appeal challenges the Trial Chambers' act in scheduling a hearing on the Prosecutor's Motion for Joinder based on Rule 48 of the Rules. The Appellant contends that this matter has been scheduled to be heard as an application under Rule 48*bis*, whereas this provision was not in force at the relevant time, so violating Rule 6(C) of the Rules. It would appear that the Appellant raises this issue for the first time before the Appeals Chamber.

9. The Appellant does not characterise the joinder issue as an appeal from a dismissal of an objection based on lack of jurisdiction. He does, however, request the Appeals Chamber to order that the hearing of the Prosecutor's Motion for Joinder be suspended.

2. The Respondent

10. The Prosecutor has filed a "Motion for Summary Rejection of the Defence's Notice of Appeal". The Appeals Chamber notes that appeals made pursuant to Rule 72 (D) are governed by Rule 117 of the Rules which provides for an expedited appeals procedure. Under the expedited appeals procedure, there is no necessity of any brief, and all delays and other procedural requirements shall be fixed by an order of the President. There is thus no requirement that a response to the Notice of Appeal be filed. No application for an order permitting the filing of a motion in the proceedings has been made by the Prosecutor. Nonetheless, given the nature of the arguments contained in the Prosecutor's Motion, the Appeals Chamber has decided to treat the Motion as a Response to the Notice of Appeal.

11. The Prosecutor replies that the Notice of Appeal is inadmissible as it is not directed at a dismissal of an objection based on lack of jurisdiction, but rather at a Trial Chamber ruling on a procedural matter. With regard to the Motion for Joinder, the Prosecutor submits that no decision at all having been issued on that motion, there is no decision against which to appeal.

12. In the alternative, the Prosecutor submits that the Notice of Appeal is filed out of time. She claims that there is an obligation on the Defence to raise objections based on lack of jurisdiction at the earliest possible opportunity; as the original refusal to disclose Annex B to Case No. ICTR-96-8-A

2 November 1999

3
the Defence came in the ruling of Trial Chamber I on 30 September 1998 the Appellant has not complied with this obligation.

13. The Prosecutor thus requests the Appeals Chamber summarily to reject the appeal.

IV. APPLICABLE PROVISIONS

14. The provisions of the Statute and Rules of the Tribunal which are applicable to the decision of the Appeals Chamber are as follows:

A. THE STATUTE

Article 24

Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
 - a) An error on a question of law invalidating the decision; or
 - b) An error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

B. THE RULES

Rule 72

Preliminary Motions

- (A) Preliminary motions by either party shall be brought within sixty days following a disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66 (A) (i), and in any case before the hearing on the merits.
- (B) Preliminary motions by the accused are:
 - i) objections based on lack of jurisdiction;
 - ii) objections based on defects in the form of the indictment;

- 3
- iii) applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82 (B);
 - iv) objections based on the denial of request for assignment of counsel.
- (C) The Trial Chamber shall dispose of preliminary motions *in limine limitis*.
 - (D) Decisions of preliminary motions are without interlocutory appeal, save in the case of objections based on lack of jurisdiction, where an appeal will lie as of right.
 - (E) Notice of appeal envisaged in Sub-Rule (D) shall be filed within seven days from the impugned decision.
 - (F) Failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.

Rule 108

Notice of Appeal

- (A) Subject to Sub-Rule (B), a party seeking to appeal a judgement or sentence, not more than thirty days from the date on which the full judgement and sentence are delivered in both English and French, shall file with the Registrar and serve upon the other parties a written notice of appeal, setting forth the grounds.
- (B) In an appeal from a judgement dismissing an objection based on lack of jurisdiction or a decision rendered under Rule 77 or Rule 91, such delay shall be fixed at seven days from the date on which the full judgement or decision is delivered in both English and French.

Rule 117

Expedited Appeals Procedure

- (A) An appeal under Rule 108 (B) shall be heard expeditiously on the basis of the original record of the Trial Chamber and without the necessity of any brief.

- (B) All delays and other procedural requirements shall be fixed by an order of the President issued on an application by one of the parties, or *proprio motu* should no such application have been made within fifteen days after the filing of the notice of appeal.
- (C) Rules 109 to 114 shall not apply to such appeals.

V. DISCUSSION

15. The Appeals Chamber notes that, under Article 24 of the Statute of the Tribunal, it has power to hear appeals from persons convicted by the Trial Chambers or from the Prosecutor. Clearly the Appellant does not fall into either category.

16. However, even in cases when a person is not appealing from a conviction, the Appeals Chamber has jurisdiction to hear certain matters which are interlocutory in nature, pursuant to the Rules of the Tribunal. One such provision is Rule 72 (D), upon which the Appellant bases his appeal.

17. Rule 72 provides for preliminary motions to be brought by either party before the hearing on the merits. The four types of preliminary motion that an accused may bring are defined in paragraph (B) of the Rule. One such motion is an objection based on lack of jurisdiction. Paragraph (D) of the Rule provides that preliminary motions are without interlocutory appeal, save in the case of a dismissal of an objection based on lack of jurisdiction. In these cases, an appeal lies as of right.

18. The Appeals Chamber understands this to mean that where an accused files an objection based on lack of jurisdiction, as a preliminary motion before the Trial Chamber, and this motion is dismissed, the accused has a right of appeal. In the current case, the Appellant made no preliminary motions before the Trial Chamber objecting to a lack of jurisdiction. The impugned decision in this matter is the Decision of the Trial Chamber upon the Prosecutor's Request For Leave To Amend The Indictment. Since there was no dismissal of an objection based on lack of jurisdiction, there can be no appeal.

19. There is also a request in the Notice of Appeal that the Appeals Chamber suspend the Trial Chamber hearing on the Prosecutor's Motion for Joinder. Again, the Appeals Chamber fails to see how it could act on this request as no preliminary motion on the matter has been made by the accused, and so, naturally, there has been no dismissal of such a motion.

20. The Appeals Chamber does not find it necessary to consider the other arguments put forward by the Prosecutor in her Motion.

21. The Appeals Chamber therefore rejects the Notice of Appeal.

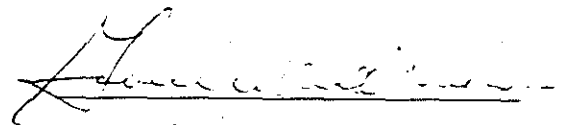
33

VI. DISPOSITION

THE APPEALS CHAMBER for the foregoing reasons:

REJECTS the Defence's "Notice of Appeal Relating to an Objection Based on Lack of Jurisdiction".

Done in both English and French, the English text being authoritative.



Gabrielle Kirk McDonald
Presiding Judge

Dated this second day of November 1999
At The Hague
The Netherlands

[Seal of the Tribunal]

