9/1573-H Bis

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED NATIONS
NATIONS UNIES

ICTR-95-1-A
(9-1/1573-H bis)
28.09.2000

IN THE APPEALS CHAMBER

Before: Judge Claude JORDA, Presiding
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

Registrar: Mr Agwu U OKALI

Decision of: 26 September 2000

2/10/2000

Clément Kayishema
and
Obed Ruzindana
(Appellants)
v
THE PROSECUTOR
(Cross-Appellant)

Case No: ICTR-95-1-A

DECISION

(APPELLANTS' MOTIONS FOR ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL)

Counsel for the Appellant Clément KAYISHEMA:
Mr André FERRAN
Mr Phillipe MORICEAU

Counsel for the Appellant Obed RUZINDANA:
Mr Pascal BESNIER
Mr William van der GRIEND

Counsel for the Prosecutor :
Mr Upawansa YAPA
Mr Norman FARRELL
Mr ZHU Wen-qi

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),

NOTING the Judgement of Trial Chamber II dated 21 May 1999 ("the Judgement") by which (a) Clément Kayishema ("the first Appellant") and Obed Ruzindana ("the second Appellant") were convicted on four counts of genocide and one count of genocide respectively, and (b) the first Appellant was sentenced to four terms of imprisonment for the remainder of his life and the second Appellant was sentenced to one term of imprisonment for twenty-five years;

NOTING the Notices of Appeal filed against the Judgement on 18 June 1999 by the first Appellant, the second Appellant and the Prosecutor ("the Cross-Appellant");

NOTING the motion filed by the first Appellant on 29 May 2000 ("the first Motion")[1] and the motion filed by the second Appellant on 8 May 2000 ("the second Motion")[2] both of which request the admission of new evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence ("the Rules");

NOTING the Order issued on 2 June 2000 in which the Cross-Appellant was ordered to file its response to the first Motion and the second Motion by 14 June 2000;

NOTING the "Prosecution Response to Clément Kayishema's Motion (under Rule 115) for Admission of Additional Evidence on Appeal dated 29 May 2000", filed 14 June 2000 ("the Cross-Appellant's first Response") and the "Prosecution Response to Obed Ruzindana's Motion under Rule 115 for Additional Evidence on Appeal dated 4 May 2000", filed 7 June 2000 ("the Cross-Appellant's second Response");

NOTING the first Appellant's provisional reply to the Cross-Appellant's first Response, filed on 21 June 2000, in which the first Appellant stated that he had not received the

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1 *"Mémoire pour solliciter la présentation de moyens de preuves supplémentaires devant la Chambre d'Appel (Art. 115 du RPP)"*, filed 29 May 2000.

2 *"Requête de l'Appelant Obed Ruzindana en présentation de nouveaux moyens de preuves – Article 115 du Réglement"*, filed 8 May 2000.

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Cross-Appellant's first Response in French and that he required this before he could file a full reply[3];

NOTING the order issued by the Appeals Chamber on 31 July 2000 allowing the first Appellant and the Second Appellant to file a reply to the Cross-Appellant's first Response and the Cross-Appellant's second Response respectively seven days after filing of these documents in French;

NOTING that the second Appellant filed his reply on 10 August 2000[4] ("the second Reply");

NOTING that an order was issued by the Appeals Chamber on 11 September 2000 allowing the first Appellant to file his reply to the Cross-Appellant's first Response by 22 September 2000, given the fact that he was ill and would not be well enough to instruct counsel until 20 September 2000, in respect of which an order had already been issued on 4 August 2000 ("the Order of 4 August 2000") extending the briefing schedule in part;

NOTING the motion filed by the first Appellant on 14 September 2000 ("the Motion of 14 September 2000") attaching a copy of the first Appellant's Reply to the Cross-Appellant's Response ("the first Reply") which the first Appellant states was filed with the Registry on 14 August 2000, but which in fact the Appeals Chamber had never received[5];

NOTING that the first Appellant stated that although he was in hospital his counsel was able to file this document without his detailed assistance, given that it treated mainly legal issues and that he requests that his briefing schedule, as set out in the Order of 4 August 2000, be varied so that he has one additional month in which to file the documents referred to in paragraphs two and four of the disposition of the Order of 4 August 2000, from the date he receives the French version of this decision;

CONSIDERING that the first Appellant has already had ample time to consider the contents of the outstanding briefs he has yet to file, but that nevertheless, in view of the

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3 *"Duplique à la réponse du Procureur (14.06.2000) relative à la requête de l'Appelant Clément Kayishema aux fins présentation de moyens de preuves supplémentaires devant la Chambre d'Appel".*

4 *"Réplique de L'appelant Obed Ruzindana sur la présentation de nouveaux moyens de preuve".*

5 *"Requête de Clément Kayishema aux fins de solliciter réponse à sa Requête du 29.05.2000 et des délais pour préparer sa défense en l'état de cette dernière, suite à l'ordonnance du Juge de la mise en état en date du 11.09.2000".*

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CONSIDERING in particular that all of the evidence sought to be admitted was in existence at the time of the first Appellant's trial and that the burden falls on the first Appellant to satisfy the Appeals Chamber as to why it was not adduced at that time;

CONSIDERING that the first Appellant's general assertion in both the first Motion and the first Reply, that potentially useful witnesses had fled the country or gone into hiding and even if located refused to co-operate for fear of their lives, does not suffice to discharge the burden of proof on the first Appellant and that on the contrary he must show in respect of each witness or piece of documentary evidence how this assertion applies and why he, she or it was not brought before the Trial Chamber;

CONSIDERING with regard to Witness AA (who testified in the *Bagilishema* trial) that the first Appellant states that his testimony pertains to events in the Kibuye stadium on 18 April 1994 and that the first Appellant asserts that it seeks to challenge the Trial Chamber's findings as to the first Appellant's involvement in the events in the stadium on that day;

CONSIDERING that although not expressly stated, the Appellant seems to suggest that he did not know witness AA, by his allegation that his details had not been disclosed to him by the Prosecution under Rule 68 of the Rules and that he therefore seems to infer that he became aware of his existence only during the *Bagilishema* trial;

CONSIDERING that in view of the Investigation Problems, the Appeals Chamber finds that witness AA was unknown to the first Appellant and was therefore unavailable to him at trial;

CONSIDERING with regard to Doctor C. Twagira ("witness Twagira") that his testimony pertains primarily to contacts he had with the first Appellant during the relevant time period, and that the first Appellant alleges that such testimony illustrates that he did not have the requisite genocidal intent which was found by the Trial Chamber; on the contrary he saved Tutsi; the lives of the authorities were in danger and that due to the alleged mutiny of the gendarmes, the first Appellant could not have had the authority to control them;

NOTING that in the first Motion, the first Appellant made no attempt to explain why witness Twagira, whom he knew, was not called to give evidence during the trial, but that the first Appellant states in the first Reply that as witness Twagira had disappeared he thought he was dead;

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NOTING FURTHER that witness Twagira himself has explained in his statement why he did not voluntarily come forward at the time of the trial;

CONSIDERING that in these circumstances, the first Appellant has provided a reasonable explanation as to why witness Twagira was not available to him at trial;

CONSIDERING with regard to witness AX12 that his evidence is alleged to pertain in general to the first Appellant's alibi and the issue of the alleged mutiny of the gendarmes, and that he states that: he heard that the first Appellant went into hiding during the massacres in Kibuye; as far as he knew the first Appellant did not participate in the massacres; but on the contrary others had told him that the first Appellant had tried to stop them;

CONSIDERING that the first Appellant states that witness AX12 was unknown to him until he made himself known to the investigators and that in light of the Investigation Problems, the Appeals Chamber must accept this as a reasonable explanation as to why this evidence was not available at trial;

CONSIDERING with regard to witness AX10 that his evidence is alleged to pertain in general to the climate in Kibuye, the situation of chaos and the first Appellant's position of authority in light of the alleged mutiny of the gendarmes;

CONSIDERING that witness AX10 states that he could not testify for safety reasons during the trial as his life would have been in danger and that the first Appellant states that he was unknown to him until he came forward and asked to be heard;

CONSIDERING that the Appeals Chamber must accept this as a reasonable explanation as to why this evidence was not available at trial;

CONSIDERING with regard to witness 4.1 that his statement is alleged to pertain to the climate in the area in general and to the findings of the Trial Chamber that only Tutsi were victims of Hutu attacks and that local police were not called to re-establish order;

CONSIDERING that witness 4.1 states that he left Rwanda in August 1994 and stayed in Zaire until 1999 and that the first Appellant states that he did not know the existence of this witness until he presented himself to the investigators;

CONSIDERING that the Appeals Chamber must accept this as a reasonable explanation as to why this evidence was not available at trial;

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CONSIDERING HOWEVER that the first Appellant has failed to establish that it is in the interests of justice to admit the Statements as additional evidence on appeal;

CONSIDERING that although the Statements as a whole may be relevant to material issues, nevertheless the first Appellant has failed to satisfy the Appeals Chamber that they would probably show that his conviction was unsafe and that as stated appellate proceedings are not intended to amount to a fresh trial by the unrestricted admission of additional evidence;

CONSIDERING with regard to the two documents submitted, the "*Directive du Premier Ministre aux Préfets pour l'organisation de l'auto-defense civile*" and the Circular dated 21 April 1994, other than stating that in relation to the former: "*L'accusé vient d'obtenir providentiellement copie de cette directive*" and that the document was only given to the first Appellant after his trial and in relation to the latter: "*Ce document [...] vient d'être adressée aux Conseils de la Défense en cause d'appel*", the first Appellant has put forward no explanation as to why this evidence was not available to him at trial;

CONSIDERING that contrary to the first Appellant's submissions, the burden does not rest on the Cross-Appellant to undermine these assertions, that such declarations cannot suffice to satisfy the burden on the first Appellant to show that the evidence was not available at trial and that therefore in the absence of a reasonable explanation by the first Appellant as to due diligence, or at all, in respect of this evidence, it should not be admitted;

CONSIDERING that the second Appellant requests the admission of the testimony of one witness on appeal, Monsieur Protais Uhoraningoga ("witness Uhoraningoga") and part of the transcript of a hearing which took place in the case of *The Prosecutor v. Alfred Musema*[9];

CONSIDERING that although the statement of witness Uhoraningoga is dated 6 April 2000, the testimony of the witness was in existence at the time of the second Appellant's trial and that the burden rests with the second Appellant to satisfy the Appeals Chamber as to why it was not available at trial and adduced at that time;

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NOTING that with regard to availability the witness Uhoraningoga states that he was a refugee from the end of October 1994 through August 1998;

NOTING that the second Appellant states that although he knew the witness Uhoraningoga as a person, his testimony was unknown to him because neither he nor his counsel were able to meet the witness before or during the trial proceedings as he had fled, suggesting to him that the witness had either died or disappeared and that since he could not be located in 1997 or 1998 he was unable to obtain a statement, was unaware of what the contents would be and was unaware as to whether he would agree to appear as a Defence witness;

CONSIDERING that the Appeals Chamber finds that on the contrary it is clear, given the nature of the testimony, that the second Appellant must have known what to expect from the testimony;

CONSIDERING that it must be shown by an appellant that due diligence was exercised and that full use was made of the mechanisms available under the Statute and the Rules to apply to the Trial Chamber for assistance and that the second Appellant has failed to put forward any explanation as to how he attempted to seek out this witness who was according to him so crucial, how he may have brought him to the attention of the Trial Chamber to alert it as to his importance or how he utilised the mechanisms available to him under the Statute and Rules to apply to the Trial Chamber for assistance;

CONSIDERING THEREFORE that the second Appellant has failed to provide a reasonable explanation as to why the evidence was not available and therefore not adduced at trial and has failed to provide a reasonable explanation as to any efforts he may have made to try to adduce it;

CONSIDERING that the second Appellant also requests the admission of the transcripts of testimony of two witnesses who testified in his case and in the subsequent case of *The Prosecutor v. Alfred Musema*, as he submits that the Trial Chamber in the latter case disregarded the testimony of these witnesses "for a lack of reliability", that it found discrepancies between the statements of one of the witnesses in the instant case and in *The Prosecutor v. Alfred Musema*, and that "discovery of the lack of overall credibility of a witness in a case also affects the credibility of the same witness in other cases";

CONSIDERING that although the second Appellant's trial concluded on 17 November 1998, the testimony sought to be admitted was heard on 24 and

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25 February 1999 and 4 May 1999 and that this was before Judgement was rendered in this case on 21 May 1999, the second Appellant could only have considered the issue on perusal of the Judgement and therefore it can be said that the evidence in question was not available at this time;

CONSIDERING HOWEVER that in view of the findings of the Trial Chamber on the issues in question, the second Appellant has failed to establish that it is in the interests of justice to admit these transcripts as additional evidence on appeal now and that he has failed to show that if admitted they would probably show that the conviction was unsafe;

HEREBY ORDERS AS FOLLOWS:

1. The first Motion and the second Motion are dismissed;

2. The Motion of 14 September 2000 is granted to the extent that the briefing schedule set out in the Order of 4 August 2000 is varied so that the first Appellant may file a supplement to the Brief in Response (as defined in that decision) by 2 October 2000; the Cross-Appellant may file a reply to this supplement by 17 October 2000; the first Appellant must still file his supplement to the Provisional Brief in Reply (as defined in that decision) by 5 October 2000.

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

Claude Jorda,
Presiding Judge

Dated this twenty-sixth day of September 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]