

ICTR-99-50-I
18/10/2000
(1193-1187)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Mehmet Güney

Registry: Agwu U. Okali

Date: 18 October 2000

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THE PROSECUTOR

v.

Justin MUGENZI

and Others

Case No. ICTR-99-50-I

DECISION ON MUGENZI'S MOTION FOR RELIEF UNDER RULE 54

The Office of the Prosecutor:

Ken Flemming
Don Webster
Ifeoma Ojemeni
Melinda Pollard

Counsel for the Accused:

Howard Morrison

18. 10. 2000

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal"),

SITTING as Trial Chamber II, composed of Judges Laïty Kama, Presiding, William H. Sekule, and Mehmet Güney;

BEING SEIZED of the Motion by the Accused Justin Mugenzi for Relief under Rule 54 filed on 18 April 2000 ("Motion");

CONSIDERING the provisions of the Statute of the Tribunal ("Statute") specifically Article 19 and 20; the Rules of Procedure and Evidence ("Rules") specifically Rules 47, 54 and 55; and the Directive for the Registry of the International Criminal Tribunal for Rwanda: Court Management Section ("Court Management Directives") specifically Article 12 and 21.

NOTING that the Accused was arrested on 6 April 1999 as a suspect under the terms of Rule 40 at Yaoundé, Republic of Cameroon, and transferred to the Detention Facilities of the Tribunal on 31 July 1999;

NOTING that the Indictment against Justin Mugenzi ("Accused") was confirmed on 12 May 1999 ("Original Indictment");

NOTING that the Accused made his initial appearance on 17 August 1999;

NOTING that on 19 August 1999, a Prosecution Motion for Amendment, a Motion for Joinder and a proposed Amended Indictment were served upon the Defense;

NOW CONSIDERS the Motion, pursuant to Rule 73 (A), solely on briefs.

SUBMISSIONS OF THE DEFENSE

1. The Defense submits that the copy of the Original Indictment served upon the Accused while in Cameroon, was not a properly certified copy of the Original Indictment and therefore the execution of the arrest warrant was not carried out in accordance with the requirements of the Rules.

2. For the Original Indictment to be considered an "Official Document" pursuant to Article 12 of the Court Management Directives, it must bear both the signature of the Prosecutor or her delegate and the Stamp of the Office of the Prosecutor. The Original Indictment does bear the signature of the Prosecutor, but it does not bear the Official Stamp of the Office of the Prosecutor.

3. The Defense submits that these are not mere peripheral formalities but that they go to the essential and mandatory requirements of the Rules. Of particular relevance is Rule 47(G), which requires that after confirmation, the Original Indictment "[s]hall be retained by the Registrar, who shall prepare certified copies bearing the Seal of the Tribunal, pursuant to Article 21 of the Directives."

4. The Original Indictment, on the basis of which the Accused was arrested and that was subsequently served upon him, bears a certification indicating that it is a "certified copy of the original." The Defense submits that this document cannot be properly described as a "copy of the original" because it fails to meet the criteria required in the Court Management



Directives, specifically Article 12, describing Official Documents of the Tribunal, and Article 21, describing certified copies of original documents issued by the Tribunal.

5. The Defense submits that certified copies are important because of the requirements of Rule 55(B), which prescribe that three sets of certified copies of the Original Indictment be transmitted to the Authorities of the State where the Accused is located, in this case, Cameroon.

6. Further, Rule 55(C) provides that the Registrar must instruct the National Authorities to serve a certified copy of the warrant of arrest, the order for the Accused surrender to the Tribunal and a statement of the rights of the Accused, upon the Accused. The Defense submits that none of these documents were ever served upon the Accused, whether certified or not.

7. The Defense submits that if the procedure of executing the warrant of arrest was not carried out in accordance with the clear and unambiguous requirements, then it was carried out unlawfully and so, was fatally flawed.

8. Because of the unlawful character of the arrest of the Accused and the fact that the Original Indictment was not an "Official Document" of the Tribunal, then the following consequences flow:

- (a) The Accused detention by the Republic of Cameroon was unlawful.
- (b) The Accused subsequent transfer to the detention facilities was unlawful.
- (c) Having been unlawfully transferred and detained at the detention facilities of the Tribunal, the Accused subsequent 'initial appearance' was unlawful.
- (d) The detention of the Accused at the detention facilities of the Tribunal was unlawful.
- (e) All proceedings since 12 May 1999, when the Indictment was confirmed, based on a series of unlawful acts should, therefore, be nullified.

9. The Defense makes reference to the French Code of Criminal Procedure ("Code") namely Articles 106 and 171 that cover improperly created documents. Further analysis of these articles was made in the book by Jean Pradel and Francis Casorla entitled Criminal Procedure Systems in the European Community, Edition 2000, Paris Dalloz 2000, page 136 wherein it is stated that pursuant to Article 171, of the Code, if a written application is made, requesting a Judge either to open an investigation or to extend the investigation on the discovery of new facts, is not dated or stamped, then it has no effect in law.

10. Jean Pradel further comments, *inter alia*, in the book; Criminal Procedure Systems in the European Community at page 133 that:

The effects of a "*nullité*" (translated to be nullity) differ according to the nature of the procedural irregularity. If the irregularity concerns the judicial organization, competence or the rights of the Defense, the whole procedure ensuing from the irregularity is annulled. If it concerns search and seizure powers, only the irregular act of investigation is annulled. In other cases, the Judge decides on the effects.

11. As a consequence of the procedural defects, which render the proceedings a nullity, the Defense prays that the Tribunal immediately release the Accused, and stay the Original Indictment with prejudice.

SUBMISSIONS OF THE PROSECUTOR

12. The Prosecutor submits that the Defense Motion and Brief misconceives the functions of the Court Management Directives and the role of certifying and sealing of documents.

On the legal authority of the Court Management Directives

13. The Prosecutor argues that all the activities of the Tribunal derive their power from the Statute. In the hierarchy of norms, therefore, the Statute, as the empowering document states, in Article 14, that Judges of the Tribunal shall adopt subordinate legislation for the purposes of proceedings before it. The Prosecutor submits that, nowhere is it stated in the Statute that subordinate legislation shall have the same force and effect as if it were part of the Statute. Rule 19(B) of the Rules provides that the President may issue Practice Directives consistent with the Statute and Rules addressing detailed aspects of the conduct of proceedings. The Prosecutor maintains that those Directives do not have the force of the Statute, but are instead, subservient to them.

14. This, the Prosecutor finally argues, means that the Court Management Directives could not and did not have the force of law to affect the operation of the Statute or the Rules.

The role of certifying and sealing documents

15. The Prosecutor submits that the Defense misconceives his entitlements under the Statute and the Rules.

16. Rule 47 deals with confirmation of the indictment, and the operative parts, as argued by the Prosecutor, are sub-rules (E) and (F) on the confirmation of the indictment by the Tribunal. This is so if reference is made to Articles 17 and 18, also on the confirmation of the indictment once the Prosecutor is satisfied that there is a *prima facie* case, she will prepare the indictment to be forwarded to a Judge of the Trial Chamber who reviews it and either confirms it or dismisses it. All the other parts of this Rule, including sub-rule (G) are administrative in character, in that the Registrar is required to affix the Seal of the Tribunal and to make certified copies and translations if necessary. Rule 47 says nothing about service of the Original Indictment on the Accused. Rule 52 specifically states that it is the confirmation of the indictment by a Judge, which triggers the public nature of an indictment. The only other mention of the Seal is in Rule 48 *bis* (D) dealing with transfer and provisional detention.

17. Rule 55 deals with arrest warrants whereby Rule 55(A) requires that the arrest warrant be accompanied by, *inter alia*, a copy of the indictment and a statement of the rights of the Accused. The Prosecutor points out that there is no mention of a certified or sealed copy of the indictment or rights. Rule 55(B) requires the Registrar to transmit three sets of certified copies of;



- (a) the warrant for arrest, which the Prosecutor points out that it already bears the Seal of the Tribunal and is accompanied by an unsealed, uncertified copy of the Original Indictment and statement of the rights;
- (b) the certified Original Indictment, which the Prosecutor points out is not the Sealed Original Indictment; and
- (c) the statement of the rights.

18. The Prosecutor argues that there is a clear distinction between the use of the "Seal of the Tribunal" and the certification of documents. Certification of documents is a device used to ensure that the Accused is accurately informed of the charges against him/ her.

19. The Prosecutor further argues that Rule 5 makes a clear distinction of non-compliance of the Rules. Non-compliance of the Rules is not a question of jurisdiction, but of procedure. Rule 5 then deals with the consequences to an accused of procedural error. The error must cause "material prejudice to a party." Something not authorized by the Statute is a nullity. There is no clause in the Statute incorporating the Rules as part of the Statute, hence the need for Rule 5.

20. The Prosecutor therefore prays that the Chamber dismiss the Motion.

DELIBERATIONS

21. The Trial Chamber considers the written submissions of the parties and reviews the issue as to whether the arrest, detention and subsequent proceedings against the Accused are a nullity because of a lack of a Stamp and Seal on the Original Indictment, which has caused material prejudice to the Accused. In considering this, the Trial Chamber will take note of the specific lack of the Seal of the Tribunal and Stamp of the Prosecutor on the Original Indictment. The Chamber will also consider the status and legal force of the Court Management Directives in the hierarchy of norms. The Trial Chamber will finally consider the non-service of documents pursuant to Rule 55(C) of the Rules.

On the nullification of the arrest, detention and subsequent proceedings against the Accused because of the lack of a Seal and Stamp on the Original Indictment which has caused material prejudice to the Accused

22. The Trial Chamber notes that the Defense seeks an annulment of the Original Indictment because it did not bear the Stamp of the Office of the Prosecutor and the Seal of the Tribunal. The Defense alleges that the Original Indictment, which they claimed to be defective because it does not bear Stamp and the Seal of the Tribunal, triggered the arrest, detention and all other proceedings against the Accused. The Prosecutor in retort submits that the lack of a Seal and Stamp on the Original Indictment would not lead to nullification of the arrest, detention and subsequent proceedings against the Accused as these are but procedural defects.

- (i) As to the Lack of the Seal of the Tribunal

23. The Defense points out that the provision for a Seal is laid out under Rule 47(G), which provides, *inter alia*, that: "The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the Seal of the Tribunal [..]" The Trial Chamber points out that the wording of this provision is that the Original Indictment

itself does not require a Seal, rather it is the certified copies of the Original Indictment, which the Registrar prepares, that require the Seal of the Tribunal. The Trial Chamber, nevertheless, holds that even if a Seal was required on the Original Indictment, absence of such Seal would not render the Original Indictment invalid for it is the act of confirmation by a Judge which gives validity and enforceability to the Original Indictment.

24. In considering this matter, the Trial Chamber recalls its decision in *Prosecutor v. Bicamumpaka*, ICTR- 99-50-I, (Decision on Motion for Defects in the Form of the Indictment (Rule 47(B) and (D) and 72(B)(ii) of the Rules) and Lack of Jurisdiction (Rules 5 and 72(B)(I) of the Rules) (8 May 2000) ("the Bicamumpaka decision"), where the Trial Chamber held that Rule 47 must be read in the light of the provisions of Rule 55 in considering whether the proceedings would be a nullity because of a lack of a seal which would cause material prejudice to the rights of the Accused. The Trial Chamber stated, *inter alia*, that; "[...] the absence of a Seal on a copy of the indictment reportedly submitted to the accused does not affect the validity of a duly confirmed indictment which is legally enforceable by such confirmation."

25. The Trial Chamber, therefore, decides that the lack of the Seal of the Tribunal on the Original Indictment does not nullify its validity.

(ii) As to the Lack of the Stamp of the Office of the Prosecutor


26. As for the lack of a Stamp of the Office of the Prosecutor on the Original Indictment, the Trial Chamber notes that the requirement for a Stamp is provided for under Article 12 of the Court Management Directives. Under this Article, an indictment prepared by the Prosecutor bearing her signature or that of her delegates as well as the Stamp of her Office would be considered an official document. In the instant case, the Original Indictment against the Accused bears the signature of the Prosecutor, but it does not bear the Stamp of the Office of the Prosecutor.

27. According to the Defense, such non-compliance with the Court Management Directives carries nullity, whereas the Prosecutor argues that no provision in the Court Management Directives should be sanctioned by nullity, as the latter are subservient to the Statute and the Rules.

28. The Trial Chamber is of the opinion that non-compliance with Article 12 of the Court Management Directives would not lead to nullification of the Original Indictment. Indeed, the Trial Chamber notes that no material prejudice was thus caused to the Accused and it makes reference to the *Bicamumpaka decision supra*, which held that the absence of the Seal of the Tribunal does not go to the validity of the confirmed indictment against the accused. The Trial Chamber is similarly persuaded that the absence of the Stamp of the Office of the Prosecutor on the Original Indictment in the instant case does not nullify its validity.

(iii) As to the Status and Legal Force of the Court Management Directives

29. The Prosecutor argues that the Court Management Directives are subservient to the Statute and the Rules. The Trial Chamber notes that in so far as the Court Management Directives are consistent with the obligations under the Statute and the Rules, requirements therein are to be complied with and accordingly, the Trial Chamber reminds the Prosecutor and the Registrar to comply with the said provisions.



(iv) As to the non-service of documents pursuant to Rule 55(C)

30. As for the Defense submission pertaining to the provisions of Rule 55(C) of the Rules that the Registrar instruct the National Authorities to serve certified copy of the warrant of arrest, the order for the Accused surrender to the Tribunal and a statement of the rights of the accused upon the Accused which the Defense submits was not complied with by the Republic of Cameroon, the Trial Chamber makes reference to its decisions in *The Prosecutor v. Ngirumpatse*, ICTR-97-44-I, (Decision on the Defense Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items) (10 December 1999), *The Prosecutor v. Karemera*, ICTR-98-44-I, (Decision on the release of the Accused) (10 December 1999) and *The Prosecutor v. Kajelijeli*, ICTR-98-44-I, (Decision on the Defense Motion concerning the arbitrary arrest and illegal detention of the accused and on the Defense Notice of Urgent Motion to expand and supplement the record of 8 December 1999 hearing) (8 May 2000). All of these decisions point out that, when the Prosecutor makes a request for the arrest of the Accused, the matter falls within the domain of the requested state and it is that State which organizes, controls and carries out the arrest in accordance with their domestic law.

31. Further, the Trial Chamber notes that, as the jurisprudence of the Tribunal has shown, the Tribunal is not competent to supervise national authorities when conducting the arrest of a suspect including serving upon the Accused with the documents specified under Rule 55(C).

32. The Trial Chamber, therefore, holds that the Original Indictment is valid and the arrest, detention and all the subsequent proceedings against the Accused have been lawful.


FOR THE FOREGOING REASONS;


THE TRIAL CHAMBER

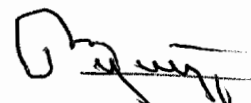
DISMISSES the instant Defense Motion.

REMINDS the Registrar and the Prosecutor to comply with the provisions of the Court Management Directives where applicable.

Arusha 18 October 2000


Lally Kama
Presiding Judge


William H. Sekule
Judge


Mehmet Güney
Judge

Seal of the Tribunal

