International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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IN THE APPEALS CHAMBER

Before:	**Judge Fausto POCAR, Presiding** **Judge Mohamed SHAHABUDDEEN** **Judge David HUNT** **Judge Asoka de Zoysa GUNAWARDANA** **Judge Theodor MERON**
Registrar:	**Mr. Adama DIENG**
Decision of:	**14 December 2001**

ICTR-98-44A-A
14 DECEMBER 2001
(77/H - 70/H)

Juvénal KAJELIJELI
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-98-44A-A

DECISION

(APPEAL AGAINST THE DECISION OF 2 OCTOBER 2001 DISMISSING "REQUETE EN EXTREME URGENCE DE LA DEFENSE AUX FINS D'ASSURER LES SOINS MEDICAUX AU DEFENDEUR KAJELIJELI ET D'AJOURNER LE PROCES" and "PROSECUTOR'S MOTION FOR AN EXTENSION OF TIME TO FILE A RESPONSE TO THE DEFENDANT'S APPEAL")

Counsel for the Appellant

Lennox S. HINDS
Bompaka NKEYI

Counsel for the Prosecution

Ken FLEMING QC
Ifeoma OJEMENI
Douglas M. MOORE

ICTR Appeals Chamber
Date: 14/12/2001
Action: P. Egalimier
Copied To: All the Judges, their ALOs, the parties and Arusha
Thanks.
14/12/2001.

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 1994 and 31 December 1994 ("the Appeals Chamber" and the "International Tribunal," respectively);

BEING SEIZED of the "Defence Motion For Review of a Trial Chamber II Decision" filed by Juvenal Kajelijeli on 8 October 2001 ("the Appeal" and the "Appellant," respectively) and the "Prosecutor's Motion for an Extension of Time to File a Response to the Defendant's Appeal" filed on 8 November 2001 (the "Extension Motion");

NOTING the Trial Chamber II Decision of 2 October 2001 (the "Impugned Decision"), which dismissed at trial the "Requête en extrême urgence de la défense aux fins d'assurer les soins médicaux au défendeur Juvénal Kajelijeli et d'ajourner le procès", filed by the Appellant on 31 September 2001 (the "Motion");

NOTING that the "Prosecutor's Reply to Appellant's Notice of Appeal of 6 October 2001" was filed by the Prosecutor on 8 November 2001 ("the Response");

NOTING that, pursuant to paragraph 2 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal (the "Practice Direction"), which provides that "the opposite party or parties shall file a response within fourteen days of the filing of the interlocutory appeal", the Response was filed out of time;

NOTING that the Appellant by his motion before the Trial Chamber sought relief pursuant to Article 20(4)(d) of the Statute of the International Tribunal ("the Statute") and Rules 72 and 74*bis* of the Rules of Procedure and Evidence of the International Tribunal ("the Rules");[1]

NOTING that the Appellant in the Appeal seeks relief pursuant to Article 24 of the Statute and Rule 74*bis* of the Rules;

CONSIDERING that under Rule 72(D) of the Rules, decisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right;

CONSIDERING that Rule 72(H) of the Rules provides that an objection based on lack of jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to specified elements of Articles 1 through 8 of the Statute;

CONSIDERING that the issues raised by the Appellant in the Motion rejected by the Impugned Decision do not constitute an objection based on lack of jurisdiction within the meaning of Rule 72(H) of the Rules;

CONSIDERING, therefore, that the issues raised by the Appellant do not give rise to a right of appeal under Rule 72 of the Rules;

CONSIDERING that a decision rendered on a motion under Rule 74*bis* of the Rules comes within the decisions referred to by Rule 73(A) of the Rules;

CONSIDERING that Rule 73(A) of the Rules provides that, subject to Rule 72, a party may move before a Trial Chamber for relief after the initial appearance of the accused, and that pursuant to paragraph (B) of that Rule, a Trial Chamber decision on such a motion is without interlocutory appeal;

CONSIDERING, therefore, that the issues raised by the Appellant do not give rise to a right of appeal under Rule 73 of the Rules;

CONSIDERING that, in light of the fact that the Impugned Decision is not subject to appeal, the Appeals Chamber need not consider the Extension Motion;

CONSIDERING that, in any event, the Prosecutor in her Extension Motion has not identified any basis upon which the time limit imposed by the Practice Direction should be varied in accordance with paragraph 14 thereof;

FOR THE FOREGOING REASONS,

DISMISSES the Appeal and the Extension Motion.

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

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[1] "Requête de la défense aux fins de réexamen d'une ordonnance de la Chambre II du Tribunal Pénal International pour le Rwanda" filed by Juvenal Kajelijeli, p 2.

Judge Shahabuddeen appends a Declaration to this Decision.

Fausto Pocar, Presiding

Done at The Hague,

The Netherlands,

14 December 2001.

[Seal of the Tribunal]

DECLARATION OF JUDGE SHAHABUDDEEN

1. I agree that the interlocutory appeal should be dismissed. However, I am regretfully without the satisfaction of being able to support the procedures employed to order the dismissal. This declaration tells why.

2. First, as to the applicable provisions. The decision of the Appeals Chamber mentions two Rules - Rule 72 and Rule 73. Rule 72(A) authorises the bringing of preliminary motions by either party. Rule 72(B) provides that such motions by the accused are restricted to four kinds, the first of these being preliminary motions presenting "[o]bjections based on lack of jurisdiction". Rule 72(D) states that "[d]ecisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right". Rule 72(H) later spells out exactly what matters constitute an "objection based on lack of jurisdiction"; it explains that this expression "refers exclusively to a motion which challenges an indictment on the ground that it does not relate to" any of four specified matters.

3. On the basis of Rule 72(I), if a three-member bench of the Appeals Chamber "decides that the appeal is not capable of satisfying the requirements of paragraph (H)", the "appeal shall be dismissed", a formal dismissal being usually made by the three-member bench. By implication, if the three-member bench decides that the appeal is capable of satisfying the requirements of paragraph (H), the appeal goes forward to the full bench of five. I may add that an interlocutory appeal is not made to the bench of three; it is made to the full Appeals Chamber, but only processed in a preliminary way by a bench of three.

4. Rule 73(A) provides that, "[s]ubject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused". Rule 73(B) states that "[d]ecisions rendered on such motions are without interlocutory appeal": there is no exception. By implication, it recognises that the Appeals Chamber, in its normal formation of a bench of five, has no jurisdiction to hear an interlocutory appeal which is sought to be brought in the face of this absolute prohibition and may say so by dismissing it.

5. The opening words of Rule 73(A) - "Subject to Rule 72"- would at least present some difficulty for holding that a motion may be brought both under Rule 72 and under Rule 73. If that is possible, a decision on the same issue would have to be given through two different decision-

making procedures. I apprehend that an interpretation leading to so strange a result would be discouraged by considerations of absurdity.

6. Second, as to the Rule under which the defence was acting when it brought its motion to the Trial Chamber. The proceedings began with a motion filed by the defence in the Trial Chamber on 1 October 2001. The motion asked the Trial Chamber for a certain relief "[e]n vertu … des articles 72(A) …".; it mentioned other provisions as well, but these did not concern the right to bring a motion. In the course of its oral argument on the next day, the defence repeated its reliance on Rule 72(A). (Transcript, 2 October 2001, p. 17).

7. Thus far, there was nothing in the proceedings before the Trial Chamber to suggest that they were brought under Rule 73, and much to suggest that they were brought under Rule 72. Was this position altered by any acquiescence by the defence in the stand taken by the prosecution?

8. In its oral argument before the Trial Chamber on 2 October 2001, the prosecution submitted that the motion was one which "falls squarely within the ambit of Rule 73(E). In our view, it is frivolous and it is an abuse of process, and as such, it should be dismissed". (Transcript, 2 October 2001, p. 21). Paragraph (E) of Rule 73, so referred to by the prosecution, empowers a Chamber, in "addition to the sanctions envisaged by Rule 46", to "impose sanctions against Counsel if Counsel brings a motion, *including a preliminary motion*, that, in the opinion of the Trial Chamber, is frivolous or is an abuse of process" (emphasis added). In my view, the sanction power applies also to preliminary motions of the kind mentioned in Rule 72, what is in issue being the general conduct of counsel, as referred to in Rule 46. Thus, the reference by the prosecution to the sanction power under Rule 73(E) did not necessarily mean that the prosecution was submitting that the motion should have been brought under Rule 73 and could not be brought under Rule 72.

9. In fact, in the Trial Chamber the prosecution made no reference to Rule 73(A), which provides for the bringing of motions under that Rule. It was focusing on the question of liability to be sanctioned for frivolity. So, if the defence acquiesced in the statement made by the prosecution, its acquiescence would have amounted to an admission that it was liable to be sanctioned for frivolity. Clearly, there was no such admission by the defence, and certainly no acquiescence in any proposition, if it was made, that the motion should have been or was brought under Rule 73(A) and not under Rule 72(A). If such was the proposition of the prosecution, it might have been made with the clarity and specificity proportionate to its importance and not by a side wind. Certainly, there was no argument on the point. I see nothing to suggest that the defence had moved away from its position that its motion had been brought under Rule 72(A).

10. Third, as to the Rule under which the interlocutory appeal was brought. The appeal was filed on 8 October 2001; it said that in virtue of Article 24 of the Statute and Rule 74*bis* of the Rules it was asking the Appeals Chamber to reverse the decision of the Trial Chamber and to order an independent medical examination of the appellant. The provisions referred to bore on substantive rights; they did not bear on the right to bring an interlocutory appeal.

11. However, if, as I consider was the position in this case, an accused's motion to a Trial Chamber indicates that it is brought under Rule 72 which grants a limited right of interlocutory appeal, and if he subsequently makes an interlocutory appeal from a decision given in response to his motion, he has naturally to be considered to be seeking to exercise the right of interlocutory appeal conferred by that provision. It appears to me that his position would be altered unreasonably, unfairly and to his disadvantage if, in exercise of the power of the Appeals Chamber to construe the basis of an appeal, he were to be understood as purporting to appeal under another provision - Rule 73 - which explicitly and totally prohibits interlocutory appeals.

12. In my view, the interlocutory appeal in this case falls to be regarded as having been brought under Rule 72.

13. Fourth, then, there is a question as to whether the appellant has satisfied the conditions which govern the exercise of the right to make an interlocutory appeal under Rule 72. Associated with this is a fifth question as to who is to decide that issue. Both questions may be taken together.

14. In seeking to bring an interlocutory appeal under Rule 72, the appellant is impliedly claiming that his motion before the Trial Chamber was one specified by Rule 72(H) and that he is therefore entitled to exercise the limited right of interlocutory appeal which is conferred by paragraph (D) of that Rule. On the facts, the claim is plainly not justified. But it would be for the three-member bench to decide that issue. If its decision is that the appellant's motion was not of the specified kind, "the appeal shall be dismissed" at that point without the full bench having to be troubled.

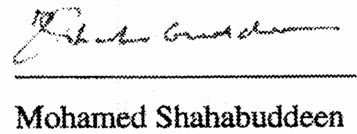
15. It does not follow that Rule 73 is irrelevant. It may be that the relief which the appellant sought in the motion which he brought before the Trial Chamber under Rule 72(A) was one which could only be granted in response to a motion brought under Rule 73(A); this may be properly pointed out in any decision. But that does not operate to convert an interlocutory appeal brought under Rule 72, which allows interlocutory appeals, into an interlocutory appeal purporting to be

brought under Rule 73, and to justify a dismissal on the ground that the latter expressly and absolutely forbids interlocutory appeals. The distinction is between using Rule 73 to explain a dismissal under Rule 72 and using Rule 73 as itself the Rule under which the dismissal is made.

16. Finally, as to the conclusion. It appears to me that today's decision means that (i) the same issue is being decided twice, namely, under Rule 72 and, again, under Rule 73; and that (ii) it is being decided in both cases by the same body, i.e., by a five-member bench, whereas, in so far as it arises under Rule 72, it has to be decided by a three-member bench. These difficulties are avoided if it is held, as I hold, that the appeal cannot be decided on the footing that it has to be construed as an appeal sought to be made under Rule 73 which forbids interlocutory appeals. It has to be decided on the footing that it is made only under Rule 72 which grants a limited right to make interlocutory appeals, the real question being whether the appellant has satisfied the stipulated conditions for exercising that limited right.

17. Under Rule 72, that question has to be answered by a three-member bench. At this stage, a five-member bench has no jurisdiction to act under that Rule. It would only have jurisdiction to act if the three-member bench found that the appellant had indeed complied with the stipulated conditions for bringing an appeal, as those conditions are prescribed by Rule 72(H); but it is clear that, on the facts, a three-member bench could not have made a finding of compliance with those conditions. Equally clearly, the Appeals Chamber, as its decision shows, is itself of the view that there was no such compliance. So, if the Appeals Chamber could act only if there was such compliance, and if it is of the view that there was no such compliance, it is difficult to see how it could act.

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



Mohamed Shahabuddeen

Dated this 14 December 2001
At The Hague
The Netherlands

[Seal of the Tribunal]