

Case No. : ICTR-98-44-T

ICTR-98-44-T
23-01-2003
(5739-5734)



**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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S. Mussa

Office of the president
Bureau Du President

Before: Judge Navanethem Pillay, President

Original: English

Registrar: Mr. Adama Dieng

Date: 22 January 2003

THE PROSECUTOR

V

JOSEPH NZIRORERA

CASE NO. : ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
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**THE PRESIDENT'S DECISION ON A MOTION FILED BY THE DEFENCE
APPEALING THE REGISTRAR'S DECISION OF 16 AUGUST 2002**

Defence Counsel:

- Mr. Peter Robinson

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

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SITTING AS Judge Navanethem Pillay, President;

HAVING RECEIVED a facsimile of a motion from Joseph Nzirorera (the "accused") dated 5 September 2002, appealing the Registrar's decision of 16 August 2002, which denied the accused's request to appoint Ms. Aurea Mukangabo as legal assistant to his Defence Team (the "motion");

HAVING ALSO RECEIVED the Registrar's response dated 20 November 2002 and the decision of 16 August 2002 (the "impugned decision");

NOTES that:

- (i) the motion was not filed with the Registry by Counsel for the accused, resulting in a delay in the consideration of the said motion;
- (ii) the impugned decision was received on 20 January 2003, which further contributed to the delay in the consideration of the motion;

NOTES that:

- (i) Article 16 of the Statute¹ provides that the Registry shall be responsible for the administration and servicing of the Tribunal;
- (ii) Article 20(d) of the Statute *inter alia* guarantees legal assistance to an indigent accused where the interests of justice so require;
- (iii) Rule 19 of the Rules² states that the President shall preside at all plenary meetings of the Tribunal, coordinate the work of the Chambers and supervise the activities of the Registry, as well as exercise all other functions conferred on her by the Statute and Rules;

¹ S/RES/995 (1994) (the "Statute").

² The Rules of Procedure and Evidence (the "Rules").

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- (iv) Rule 33(A) of the Rules states that the Registrar shall assist the Chambers, the Plenary Meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President he shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication;
- (v) Articles 10 and 12 of the Directive.³

AFTER HAVING DELIBERATED,

On the admissibility of the motion

1. There are no provisions in the Rules or the Directive that grant an indigent accused the right to appeal to the President, for a reversal of a decision taken by the Registrar, with regard to the assignment of legal representation. An indigent accused may however, apply for a review of the Registrar's decision in accordance with Article 12 of the Directive. I therefore find that the impugned decision is not appealable and accordingly dismiss the motion for appeal.
2. Although the accused has not requested a review of the impugned decision, I have decided on my own accord to consider a review of this decision.
3. I note that in its decision of 14 December 2001⁴, Trial Chamber II stated:

...in view of the administrative powers and responsibilities of the Registry in organizing and appointing defence investigators, the Chamber finds that the issue of re-instatement of a suspended investigator is an administrative matter resting with the Registrar.⁵

I concur with this reasoning and maintain that reinstatement of a previously dismissed Legal Assistant is also an administrative matter resting with the Registrar.

³ The Directive on Assignment of Defence Counsel (the "Directive").

⁴ The Prosecutor v. Pauline Nyiramasuhuko & Arsene Shalom Ntahobali, case no.: ICTR-97-21-T, Decision on Ntahobali's extremely urgent motion for the re-instatement of suspended investigator, Mr. Thadde Kwitonda, dated 14 December 2001.

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4. Modern systems of Administrative Law have built in review procedures to ensure fairness when individual rights and protected interests are in issue, or to preserve the interests of justice. In the context of the Tribunal, Rules 19 and 33(A) of the Rules ensure that such review is available in appropriate cases. While the Registrar has the responsibility of ensuring that all decisions are procedurally and substantially fair, not every decision by the Registrar can be the subject of review by the President. The Registrar must be free to conduct the business of the Registry without undue interference by Presidential review.⁶
5. In all systems of administrative law, a threshold condition must be satisfied before an administrative decision may be impugned by supervisory review. There are various formulations of this threshold condition in national jurisdictions, but a common theme is that the decision sought to be challenged, must involve a substantive right that should be protected as a matter of human rights jurisprudence or public policy. An application for review of the Registrar's decision by the President on the basis that it is unfair procedurally or substantively, is admissible under Rules 19 and 33(A) of the Rules, if the accused has a protective right or interest, or if it is otherwise in the interests of justice.⁷
6. In this case, I am of the view that the assignment of a legal assistant could have a bearing on the accused's ability to prepare his defence and his right to defend himself. In the circumstance, I therefore find the impugned decision is reviewable.

On the assignment of a legal assistant

7. An indigent accused has a right to have counsel assigned to represent him. He has no right to a legal assistant. However, the Registrar acting in accordance with his

⁵ *Ibid*, page 4, paragraph 17.

⁶ The Prosecutor v. Pauline Nyiramasuhuko & Arsene Shalom Ntahobali, case no.: ICTR-97-21-T, The President's decision on the application by Arsene Shalom Ntahobali for review of the Registrar's decision pertaining to the assignment of an investigator, dated 13 November 2002; page 3, paragraph 4.

⁷ *Ibid*, page 4, paragraph 5.

discretionary powers, has assigned legal assistants to defence teams following requests from lead counsel.

8. In the present case, the Registrar in exercising this discretion, has denied Lead Counsel's request to appoint Ms. Aurea Mukangabo as legal assistant in the Defence Team, after an assessment of her suitability.
9. It appears from the documents on record that Ms. Mukangabo had been a legal assistant in the accused's Defence Team and that her contract was subsequently terminated on 11 April 2001, on the instructions of then Lead Counsel for the Defence, Andrew Mc Cartan.
10. According to the Registrar, the factual basis for his decision is that during Ms. Mukangabo's assignment as legal assistant, she and then Lead Counsel, Andrew McCartan, had been involved in a:

... fraudulent scheme of making fake claims on work allegedly performed.....when in fact such work had not been performed. The Tribunal lost a lot of money through this fraudulent scheme which was perpetrated on the legal aid funds with the active participation of Ms. Mukagambo.⁸

This was revealed in an investigation carried out by the Tribunal after the termination of Ms. Mukangabo's contract and according to the Registrar, had these facts come to light while Ms. Mukangabo was in the service of the Defence Team, she would have been dismissed.⁹

11. It is important to bear in mind that the Registrar has not declined to assign a legal assistant to the accused. The complaint of the accused is that the Registrar has declined to appoint Ms. Mukangabo as legal assistant. It is still open to Lead Counsel to submit a candidate who satisfies the criteria made known by the Registrar.
12. Bearing in mind also, the limited scope of my judicial review jurisdiction as opposed to an appeal on merits, I do not find the exercise of discretion by the Registrar in the present case to be unreasonable or *malafide* or based on irrelevant or extraneous factors. While the accused has no legal entitlement under the Tribunal's statute, to the

⁸ Registrar's Decision of 16 August 2002, page 2, paragraph 1.

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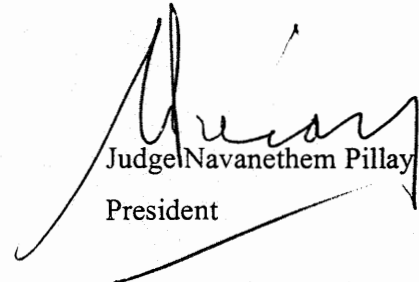
services of a legal assistant at the expense of the Tribunal, the Registrar has agreed to provide one to the accused in the present case purely on a discretionary basis. In doing so, the Registrar is fully entitled to use his discretion on a case-by-case basis to determine the criteria that any proposed candidate should meet, in order to be considered for assignment as a legal assistant for the accused. Without attempting an exhaustive enquiry into the list of criteria, I find that I cannot fault the application of the criteria used by the Registrar in the present case, to disqualify the candidate proposed by the Lead Counsel.

13. The decision of the Registrar does not result in prejudice to the accused, as Lead Counsel has been and is free to submit further names of suitably qualified and competent candidates for assignment as legal assistant. Thus, I am not inclined to interfere with the impugned decision of the Registrar.

14. Further, in taking this decision, the Registrar has not denied the accused the opportunity of benefiting from the services of a legal assistant and Lead Counsel is urged to take advantage of this situation and to propose a candidate satisfying the required criteria.

In light of the above, I confirm the Registrar's decisions of 16 August 2002,

Arusha, 22 January 2003


Judge Navanethem Pillay
President

(seal of the Tribunal)



⁹ *Ibid*