



UNITED NATIONS  
NATIONS UNIES

ICTR-97-21-T  
20-02-2004  
(1555-1550)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

**TRIAL CHAMBER II**

**Before:** Judge William H. Sekule, Presiding  
Judge Arlette Ramaroso  
Judge Solomy Balungi Bossa

**Registrar:** Mr Adama Dieng

**Date:** 20 February 2004

**The PROSECUTOR**

v.

**Pauline NYIRAMASUHUKO**

**Case No. ICTR-97-21-T**

JUDICIAL RECEPTION  
FEBRUARY 2004  
ICTR  
2004 FEB 20 P 1:30

**DECISION ON DEFENCE MOTION FOR A STAY OF PROCEEDINGS  
AND ABUSE OF PROCESS**

**Office of the Prosecutor**

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (“Tribunal”),

**SITTING** as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the “Chamber”);

**BEING SEISED** of the “Defence Motion for a Stay of Proceedings and Abuse of Process” (the “Motion”), filed on 25 June 2003;<sup>1</sup>

**CONSIDERING** the “Prosecutor’s Response to Nyiramasuhuko’s Motion for a Stay of Proceedings and Abuse of Process” (the “Response”), filed on 30 June 2003;

**NOTING** the “Decision in the Matter of Proceedings Under Rule 15bis(D)” issued by Trial Chamber II on 15 July 2003 and the “Decision in the Matter of Proceedings Under Rule 15bis(D)” issued by a full bench of the Appeals Chamber on 24 September 2003;

**NOTING** the declaration by Counsel for the Defence in open session on 26 January 2004, that the issues contained in the Motion relating to applicability of Rule 15bis have already been ruled upon by the Appeals Chamber;

**NOTING** the withdrawal of the above issues by Counsel for the Defence;

**NOTING, HOWEVER,** that the Defence maintained its submissions relating to the issues of abuse of process, violation of her rights to be informed of the reasons of her arrest and violation of her right to appear before a Judge without undue delay;

**FURTHER NOTING** the written communication by Counsel for the Defence filed on 5 February 2004, by which she maintained the submissions contained in paragraphs 21-25 and 44-218 of the Motion;

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

**NOW DECIDES** the matter, pursuant to Rule 73 (A), solely on the basis of the written briefs of the Parties.

**Submissions of the Parties:**

*Defence*

1. The Defence alleges an abuse of process. This allegation is based in turn on allegations of undue delays that occurred since the Accused’s arrest and unfairness of her Trial.
2. The Defence submissions emphasize that although the Accused has been detained since her arrest on 18 July 1997, the Prosecutor stated on 21 March 2003 that the presentation of the remainder of the Prosecution case against the Accused would take a further sixteen months. In the meantime, stresses the Defence, the Accused remains detained on remand.

<sup>1</sup> The Motion was filed in French and originally entitled: *Requête en arrêt des procédures pour abus de procédures (délais déraisonnables et procès inéquitable)*.

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3. Relying on the Decision issued on 3 November 1999 by the Appeals Chamber in the "Prosecutor v. Jean Bosco Barayagwiza" Case (the "Barayagwiza Decision of 3 November 1999"), as well as on several decisions issued by domestic Courts and the European and Inter-American Courts of Human Rights, the Defence submits that these undue delays, which violate her right to a fair and swift trial, as well as her presumption of innocence, constitute an abuse of process.

4. In support, the Defence states that neither the gravity of the charges, nor the complexity of the case or investigation, nor institutional delays, can justify the length of the proceedings in this case. It submits that none of these delays is attributable to the Accused and that she has always insisted on her right to be tried without undue delay.

5. The Defence further alleges a particular prejudice due to the fact that the Accused is the only woman in the Detention Unit; and that this has, by default, resulted in her spending forty-two months in almost complete isolation, even if she was not formally subjected to isolation rules.

6. The Defence further submits that, during the Accused's arrest in Kenya on 18 July 1997, she was not promptly informed of her rights and of the reasons for her arrest, in spite of Judge Ostrovsky's Order dated 29 May 1997. She alleges that she was informed of her rights and of the reasons for her arrest only on 30 July 1997 and 9 August 1997 respectively. The Defence refers to a document titled "Service of Indictment" which is not signed and has not been filled properly. The Defence contends that the burden of proving that her rights have been respected rests on the Prosecutor.

7. The Defence also submits that the Accused's right to be brought before a Judge without undue delay, under Rule 62, was infringed since her initial appearance occurred only on 3 September 1997, forty six days after her arrest. It relies on the *Barayagwiza* Decision of 3 November 1999 stating that the delay before initial appearance should not exceed a few days.

8. Relying on the *Barayagwiza* Decision, the Defence submits that the only remedy for these violations is a stay of proceedings, the Accused's acquittal and release under Art 9(1) of the Statute.

#### *Prosecution*

9. With respect to the delays in the proceedings, the Prosecution submits that lengthy pre-trial detention does not constitute *per se* good cause for release. The Prosecution submits that part of any delay for which the Defence is complaining is attributable to the numerous applications of doubtful relevance filed by the Defence in the course of the proceedings.

10. The Prosecution submits that the stay of proceedings is not contemplated by the Statute or the Rules to relieve an alleged prejudice to the rights of the Accused. It submits that the power to stop the proceedings should only be used in the most egregious of circumstances and not frivolously and that, in the present case, the Defence has failed to state any compelling reason, especially since no Rule has been violated.

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11. As an alternative remedy to the alleged violation of the Applicant's rights, the Prosecutor relies on the judgment *Prosecutor v. Semanza*, dated 15 May 2003, which allows the Trial Chamber, pursuant to Rule 101(D), to grant the accused credit for the period during which he was detained in custody pending transfer to Arusha and trial.

12. The Prosecution further submits that, should the arguments of the Defence be pursued to its logical conclusion—the release of the Applicant to the country of her choice—such a request would constitute a different application for provisional release pursuant to Rule 65.

**HAVING DELIBERATED,**

**(a) On the Issue of Abuse of Process**

13. In the present case, the Chamber notes that the Defence's allegation of abuse of process relies mainly on allegations of delays in the proceedings. The other issues relating to the alleged violation of the Accused's right to be promptly informed of the reasons of her arrest and of her rights and the alleged violation of her right to be brought before a Judge without undue delay, are developed by the Defence separately from the allegation of abuse of process. The Chamber will, therefore, consider the issue of abuse of process solely in light of the alleged delays that have occurred in the course of the proceedings.

14. The Chamber recalls the definition of abuse of process as developed by the Appeals Chamber in its Decision of 3 November 1999 in the *Barayagwiza Case*:<sup>2</sup>

[...] the abuse of process doctrine may be relied on its two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.

15. The Chamber recalls its reasoning in its Decision in the *Kanyabashi Case*:<sup>3</sup>

The Chamber notes that the issue of reasonable length of proceeding has been addressed by the U.N. Human Rights Committee, the European Court of Human Rights and the Inter-American Commission on Human Rights. "The reasonableness of the length of the proceedings within the scope of Article 6(1) must be assessed in each instance in each case according to the particular circumstances. The Court has to have regard, *inter alia*, to the complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities and to what was at stake for the former, in addition to complying with the 'reasonable time' requirement.[four factors]" *Zimmermann and Steiner*, 13 July 1983, Series A, No. 66, at para. 24.

16. The Chamber is aware of the length of the proceedings since the arrest of the Accused in July 1997. But it is the view of the Chamber that both the gravity of the charges and the complexity of the case do not render unreasonable the length of the proceedings in her case.

<sup>2</sup> *Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (AC), 3 November 1999, para. 77.

<sup>3</sup> *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and For Stoppage of Proceedings (TC), 23 May 2000, para. 68.

17. With respect to the issue of the delay of detention on remand, the Chamber finds that it is distinct from the issue of delays of proceeding. The Rules of Procedure and Evidence, especially Rule 65, provide ways for an Accused detained on remand to request a provisional release.

**(b) On the Issue of the Violation of the Accused's Rights to Be Promptly Informed of the Reasons of Her Arrest and of Her Rights and to Appear Promptly Before a Judge.**

18. The Defence submitted that, when arrested on 18 July 1997, the Accused's right to be promptly informed of her rights and of the reasons of her arrest was not respected. It further submitted that when the Accused was transferred to Arusha on 18 July 1997, there was a lapse of forty-six days between her transfer to Arusha and her initial appearance.

19. Before examining its merit, the Chamber notes the belatedness of this submission, contained in a Motion filed on 25 June 2003, on an alleged violation that occurred in July 1997. In particular, the Chamber emphasizes that such issue should have been raised during the Applicant's initial appearance. In this connection, the Chamber notes that the lead Defence Counsel on this Motion was Defence Counsel at the initial appearance and has been Defence Counsel throughout the proceedings against the Accused Nyiramasuhuko.

20. Pursuant to Article 19(3) of the Statute, during the initial appearance of the Accused: "The Trial Chamber shall [...] satisfy itself that the rights of the accused are respected". It is the view of the Trial Chamber that one of the main purposes of the initial appearance of an Accused is to verify the legality of his or her arrest and the respect of his or her rights before the commencement of trial proceedings.

21. Moving now to the other questions of merit of this Motion, the Chamber recalls that in the *Kanyabashi* Decision of 23 May 2000, the Trial Chamber states that Rule 5 on "Non-compliance with Rules" sets forth three principles:<sup>4</sup>

First, the party must raise an objection on the ground of non-compliance with the Rule or Regulations at the earliest opportunity. Second, the alleged non-compliance must be proved and it must cause material prejudice to that party. Third, the relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.

22. Obviously, the first two principles must be met before the third principle is engaged. None of the above principles is fulfilled in the instant case.

23. First, the objection on the ground of violation of the Accused's rights should have been raised at the earliest opportunity, which was during her initial appearance, or even earlier after her transfer to the Detention Center. It appears from the transcripts of the Accused's initial appearance on 3 September 1997 that the only issue raised by the Accused was related to the communication of a search warrant.<sup>5</sup> The Defence only raised the objection of the alleged violations of the Accused's rights in the present Motion, which was filed on 25 June 2003. That is almost six years after the alleged violations and the initial appearance.

<sup>4</sup> *Op. cit.*, para. 82.

<sup>5</sup> T. 3 September 1997, *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. 97-21-I, pp. 27-28.

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24. Since the Accused did not raise objections related to the alleged violations of her rights at the earliest opportunity and at the very moment when, pursuant to Article 19(3) of the Statute, the respect of her rights was to be verified, the Chamber finds that to raise such an issue so belatedly, in the middle of a well-advanced trial, has purely disruptive effect.

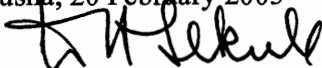
25. Secondly, the Defence fails to show, as required by the Rules and the jurisprudence, that the alleged violations, assuming that they would be clearly established, caused a material prejudice to the Accused. Not only did the Defence fail to give even a *prima facie* evidence of the Accused's prejudice, but it is also the view of the Trial Chamber that the degree of tardiness in raising the allegation related to the alleged violations of the Accused's rights militates against a finding of material prejudice. Should the alleged violations have caused a material prejudice to the Accused, the Defence would have raised these issues at the earliest opportunity and would not have waited six years before raising them.

26. Finally, it results from the above considerations that the Chamber is not persuaded that the fundamental principles of fairness have not been fully respected as alleged by the Defence. Therefore, the Chamber considers that there is no ground for granting any relief to the Accused pursuant to Rule 5.

**FOR THE ABOVE REASONS, THE CHAMBER:**

**DISMISSES** the Motion in its entirety.

Arusha, 20 February 2003



William H. Sekule  
Presiding Judge



Arlette Ramaroson



Solomy Balungi Bossa  
Judge