

ICTR-96-14-A

17 May 2004

(2492/H-2487/H)

2492/H
RNM

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:

Judge Theodor Meron, Presiding Judge
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar:

Mr. Adama Dieng

Decision of:

17 May 2004

ICTR Appeals Chamber

Date: 17 May 2004

Action: PG

Copied To: Concerned Judge

Eliézer NIYITEGEKA

Judicial Archives, Parties
LOs, LSS R [Signature]

V.

THE PROSECUTOR

Case No. ICTR-96-14-A

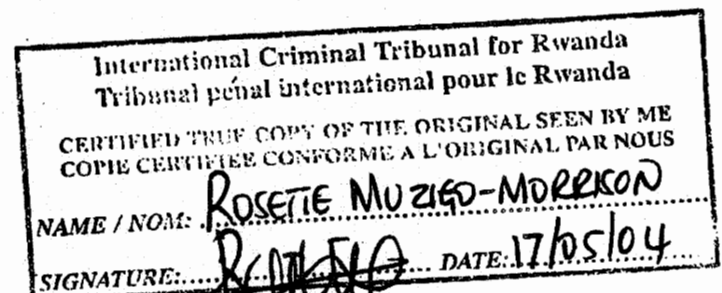
REASONS FOR ORAL DECISION RENDERED 21 APRIL 2004 ON APPELLANT'S MOTION FOR ADMISSION OF ADDITIONAL EVIDENCE AND FOR JUDICIAL NOTICE

Counsel for the Appellant

Ms. Sylvia Geraghty

Counsel for the Prosecutor

Mr. Hassan Bubacar Jallow
Ms. Melanie Werrett
Mr. James Stewart



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1. On 13 April 2004, the Appellant Eliézer Niyitegeka ("Appellant") filed a motion seeking leave to present additional evidence on appeal and requesting judicial notice ("Motion").¹ The Prosecution filed a response the next day ("Response"),² and the Appellant filed a reply on 16 April 2004 ("Reply").³ The Appeals Chamber rendered an oral decision on 21 April 2004 denying the Motion in its entirety with written reasons to follow.

A. Request for Leave to Present Additional Evidence

2. The Motion first seeks leave to admit, under Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), certain opinions and decisions of the courts of the State of New York (the "New York Documents") in the matter of disciplinary proceeding involving Melinda Pollard, who was a member of the Prosecution team that tried the Appellant's case in the Trial Chamber. The New York Documents consist of certified copies of the following:

(i) *Matter of Melinda Y. Pollard*, No. 90-00356, New York Supreme Court (Appellate Division, Second Judicial Department), Opinion & Order, 20 May 1991;

(ii) *Matter of Melinda Y. Pollard*, No. 90-00356, New York Supreme Court (Appellate Division, Second Judicial Department), Decision & Order on Motion, 26 April 1995;

(iii) *Matter of Melinda Pollard*, No. 2000-03849, New York Supreme Court (Appellate Division, Second Judicial Department), Opinion & Order, 17 December 2001;

(iv) Affidavit of Melinda Pollard, dated 19 February 2002, filed with New York Supreme Court (Appellate Division, Second Judicial Department);

(v) *Matter of Melinda Pollard*, No. 2000-03849, New York Supreme Court (Appellate Division, Second Judicial Department), Decision & Order on Motion for Reinstatement, 25 November 2003.

1. Applicable Law

3. Rule 115 of the Rules, as amended on 27 May 2003, reads in relevant part:

¹ Extremely Urgent Defence Motion Pursuant to Rule 115 / Rule 54 and Rule 94(A), (B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Seeking Leave to Present Additional Evidence and Requesting Judicial Notice, 13 April 2004.

² Prosecution Response to Appellant's Extremely Urgent Defence Motion Pursuant to Rule 115 / Rule 54 and Rule 94(A), (B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Seeking Leave to Present Additional Evidence and Requesting Judicial Notice, 14 April 2004.

³ Extremely Urgent Defence Reply to Prosecutor's Response to Defence Motion Pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, 16 April 2004.

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(A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.

(B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 118.

(C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.

4. Prior to its amendment, motions under Rule 115 of the Rules could be filed as late as fifteen days before the hearing of the appeal.⁴ Pursuant to Rule 6(C) of the Rules, an amendment "shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case."

2. Timeliness of the Motion

5. Rule 115(A) of the Rules ("Rule 115(A)") requires parties to file motions to admit additional evidence not later than seventy-five days from the date of the Judgement, unless good cause is shown for further delay. In his Reply, the Appellant contends that the earlier version of Rule 115(A) should apply, because the Judgement in his case was delivered on 16 May 2003, eleven days prior to the amendment of Rule 115(A).⁵

6. Regardless of which version of Rule 115(A) applies, however, the Appellant's request to admit additional evidence was filed out of time. The filing date of 13 April 2004 is both more than seventy-five days after the date of Judgement and later than fifteen days before the date of the hearing scheduled for 21 April 2004.

7. Rule 115(A), as well as Rule 116, grants this Chamber discretion to extend the applicable time limit "upon a showing of good cause." The Appellant presented extensive submissions intended to establish that good cause existed for his delay in filing the request for admission of the additional evidence.⁶ The Appellant argues that the Prosecution did not advise him of Counsel

⁴ See Rule 115(A) of the Rules of Procedure and Evidence (as amended 6 July 2002).

⁵ Reply, paras. 1-2.

⁶ See Motion, pp. 16-20.

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Pollard's disciplinary record in New York until 12 September 2003.⁷ However, this Chamber notes that in his Notice of Appeal dated 20 June 2003, thirty-five days after the delivery of the Judgement, the Appellant set forth three separate grounds of appeal premised on the fact that Counsel Pollard was suspended from the practice of law in her home jurisdiction.⁸ The Notice of Appeal highlights that Counsel Pollard had been suspended from the practice of law in New York on two occasions and continues as follows:

The former suspension on 20 May 1991, confirmed by the Supreme Court of New York, Appellate Division, Second Department was, *inter alia*, on grounds of fraud. The latter suspension by the Appellate Division of her Disciplinary body, commencing on 16 January 2002 for one year, was on grounds of dishonesty, deceit, fraud, misrepresentation and neglect.⁹

These submissions make plain that the Appellant was well aware of the suspension and of issues relating Counsel Pollard's disciplinary record in New York in June 2003.

8. Given that the Appellant was aware of Counsel Pollard's disciplinary record in New York, in some detail, just over a one month after the delivery of the Judgement, this Chamber considers that the Appellant was in a position to acquire and file most of the New York Documents within the seventy-five day time limit for seeking admission of additional evidence prescribed in the amended Rule 115(A) or, at the very least, earlier than fifteen days prior to the appeal hearing, as prescribed in the former Rule 115(A). Indeed, it appears that the Appellant possessed most of the New York Documents as early as 16 February 2004, when the Appellant submitted them to the Registry in support of a request for further information.¹⁰ The Appellant has not explained why he waited nearly two months after that date to bring this Motion.

9. It is recognized that the last of the New York Documents is a decision dated 25 November 2003. However, even that document was created months before the Appellant filed the Motion, and the Appellant does not suggest that it could not have been submitted earlier.

10. The Appellant has therefore not shown any good cause for his failure to bring this Motion in a timely fashion, as required under Rule 115(A). This aspect of the Motion is accordingly dismissed.

11. However, during the appeal hearing in this case, the Prosecution's conceded that Counsel Pollard was indeed suspended for the reasons set out in the decisions and opinions of the New York

⁷ Motion, p. 17.

⁸ Notice of Appeal, 20 June 2003, pp. 4-5, paras. 14-16.

⁹ Notice of Appeal, 20 June 2003, p. 5, para. 16.

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court and that she signed and filed the affidavit submitted by the Appellant. The Appellant's arguments based on the content of the New York Documents may therefore be made on the basis of the Prosecution's concession, without the need for admission of the New York Documents into evidence.

B. Request Under Rule 54 of the Rules

12. The Appellant also seeks to have the New York Documents admitted under Rule 54 of the Rules which, read together with Rule 107 of the Rules, allows the Appeals Chamber to issue such orders as may be necessary for the conduct of the appeal. Because the content of the New York Documents will be considered pursuant to the Prosecution's concessions, there is no need to consider this further request.

C. Request for Judicial Notice

13. The Motion also requests judicial notice of three additional sets of documents: United Nations Guidelines on the Role of Prosecutors; documents relating to the recruitment of trial attorneys at the Tribunal; and transcripts of evidence from the trial in the case of *Prosecutor v. Bizimungu et al.*, No. ICTR-99-50-T.¹¹

1. Applicable Law

14. Rule 94 of the Rules provides as follows:

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

2. Merits of the Request

15. The Motion does not show how United Nations documents or materials regarding recruitment of trial attorneys at the International Tribunal qualify for judicial notice under Rule 94 of the Rules. Such documents are not "facts of common knowledge" within the terms of Rule 94(A) of the Rules. Nor are they "adjudicated facts or documentary evidence from other

¹⁰ The Registrar subsequently filed this correspondence with the Appeals Chamber. See Registry's Submission Under Rule 33(B) of the Rules to the Appellant's Extremely Urgent Motion for Adjournment, 24 March 2004.

¹¹ Motion, pp. 20-23.

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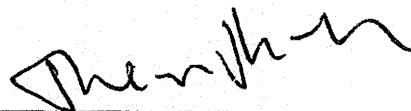
proceedings of the Tribunal" under Rule 94(B) of the Rules. Accordingly, judicial notice of such documents is inappropriate.

16. The Motion asserts, though without much detail, that the transcript from the *Bizimungu* trial constitutes "documentary evidence" from that proceeding. Even assuming that a transcript may sometimes qualify for judicial notice under Rule 94(B) of the Rules, the Appellant has not shown that the excerpts submitted relate to "the matter at issue in the current proceedings." The excerpts show that a Prosecution investigator held the view that a particular report on events in Rwanda was highly credible and persuasive. Yet the Appellant does not show that the Trial Chamber in this case made any finding to the contrary, or indeed that the Trial Chamber's findings were in any way affected by a conclusion that the report was credible or not credible. The opinion voiced in the *Bizimungu* transcript, even if accepted, is therefore not demonstrably relevant to any finding made by the Trial Chamber in this case. Judicial notice of the transcript is therefore inappropriate.

D. Disposition

17. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion in its entirety.

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



Theodor Meron
Presiding Judge

Done this 17th day of May 2004,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

