



UNITED NATIONS
NATIONS UNIES

ICTR-99-50-T
3-11-2004
(18853 — 18845)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

18853 *mmh*

OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, Presiding
Lee Gacuiga Muthoga,
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 3 November 2004

THE PROSECUTOR

v.

**CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA**

Case No. ICTR-99-50-T

JUDICIAL RECORDS/ARCHIVES
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ICTR
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**DECISION ON PROSPER MUGIRANEZA'S APPLICATION FOR A HEARING OR
OTHER RELIEF ON HIS MOTION FOR DISMISSAL FOR VIOLATION OF HIS
RIGHT TO A TRIAL WITHOUT UNDUE DELAY**

Office of the Prosecutor:

Paul Ng'arua
Ibukunolu Babajide
Justus Bwonwonga
Elvis Bazawule
George William Mugwanya
Shyamlal Rajapaksa

Counsel for the Defence:

Michelyne C. St. Laurent and Alexandra Marcil for Casimir Bizimungu
Howard Morrison and Ben Gumpert for Justin Mugenzi
Pierre Gaudreau and Michel Croteau for Jérôme-Clément Bicomumpaka
Tom Moran and Christian Gauthier for Prosper Mugiraneza

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18852

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the “Trial Chamber”);

BEING SEIZED of the “Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief,” dated 27 February 2004, in which the Appeals Chamber remitted the matter to the Trial Chamber for reconsideration;

RECONSIDERING THEREFORE

- (i) “Prosper Mugiraneza’s Motion to Dismiss the Indictment for Violation of Article 20(4)(C) of the Statute, Demand for Speedy Trial and for Appropriate Relief”, filed on 17 July 2003; (ii) the “Prosecutor’s Response to Prosper Mugiraneza’s Motion to Dismiss the Indictment for Violation of Article 20(4)(C) of the Statute, Demand for Speedy Trial and for Appropriate Relief”, filed on 28 July 2003; and
- (iii) “Prosper Mugiraneza’s Response to the Prosecutor’s Reply to Prosper Mugiraneza’s Motion to Dismiss the Indictment for Violation of Article 20(4)(C) of the Statute, Demand for Speedy Trial and for Appropriate Relief”, filed on 2 August 2003;

BEING FURTHER SEIZED of

- (i) Prosper Mugiraneza’s application for “Hearing or Other Appropriate Relief on His Motion for Dismissal for Violation of His Right to a Trial Without Undue Delay” and the Confidential Annex thereto, filed on 23 August 2004 (the “Motion”);
- (ii) The “Prosecutor’s Response to Prosper Mugiraneza’s Motion for Hearing or Other Appropriate Relief on His Motion for Dismissal for Violation of His Right to a Trial Without Undue Delay,” dated 30 August 2004 (the “Response”);
- (iii) “Prosper Mugiraneza’s Response to the Prosecutor’s Reply to Prosper Mugiraneza’s Motion for Hearing or Other Appropriate Relief on His Motion for Dismissal for Violation of His Right to a Trial Without Undue Delay,” and the Confidential Annex thereto, filed on 4 September 2004 (the “Reply”);

NOTING the Chamber’s “Decision on Prosper Mugiraneza’s Motion to Dismiss the Indictment for Violation of Article 20(4)(C) of the Statute, Demand for Speedy Trial and for Appropriate Relief,” dated 2 October 2003;

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), particularly Article 20(4)(C) of the Statute which affords accused persons the minimum guarantee of a trial “without undue delay”;

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules.



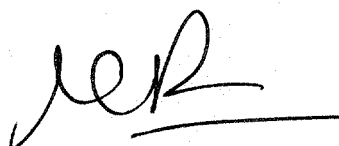
SUBMISSIONS OF THE PARTIES

Submission of the Defence

18851

1. The Defence is seeking a reconsideration of its Motion of 17 July 2003 to dismiss the Indictment against Prosper Mugiraneza (the "Accused").
2. The Defence contends that the Decision of the Appeals Chamber is an affirmation by the latter that the Defence has made out a *prima facie* case of the violation of the Accused's right to be tried without undue delay,¹ and asserts that when viewed in light of all the factors set out by the Appeals Chamber the delay was undue for the purposes of the Statute of the Tribunal. It further contends that the burden now falls on the Prosecutor to show that that right has not been violated.
3. The Defence asserts that the right to a fair trial, as mentioned in Article 20 of the Statute and other international human rights instruments, provides an accused person with the right to trial without undue delay. The Defence considers that the four and a half year period since the arrest of the accused constitutes undue delay as a matter of law. It considers further that there is no excuse for a delay of this length while a presumptively innocent man is confined in pre-trial detention.
4. The Defence argues that this case is not more complex than any other case before this Tribunal or the International Criminal Tribunal for the Former Yugoslavia (ICTY); that neither the number of charges nor witnesses is extraordinary; and that there is a "dearth of physical and original documentary evidence."
5. The Defence's position is that the actions of "relevant authorities" such as the Security Council, the General Assembly, the Registry and the Office of the Prosecutor (OTP) must all be called into question. He states that the Council failed to provide *ad litem* judges until long after such appointments were approved for the ICTY, and that the General Assembly failed to provide either adequate financial resources or the oversight to ensure that resources are utilised wisely.
6. Insofar as the conduct of the parties is concerned, the Defence argues that the OTP has lacked a sense of urgency in bringing the Accused to trial. The Defence cites the repeated complaints on the lack of disclosure and the Prosecutor's repeated promises to disclose as evidence of the Prosecutor's lack of urgency in the matter. None of the delays is directly attributable to the conduct of the Accused. Given the responsibility of the Prosecutor to bring a defendant to trial, the Prosecutor has the duty to show why the delay is not undue for purposes of the Statute and international law and why Mugiraneza has not been prejudiced by the delay.
7. Indeed the Defence submits that the Accused has suffered prejudice as a result of the delay that has been occasioned in the proceedings against him. The Defence contends that the most obvious prejudice suffered by the Accused is the continuous incarceration which he has been subject to, during which time he has been unable to lead a normal life or and to support his family. This alone, the Defence submits, should be sufficient prejudice to "make a *prima*

¹ Prosper Mugiraneza was arrested in Cameroon on 6 April 1999 pursuant to a request by the Prosecutor. The indictment was confirmed on 13 May 1999. He was transferred to the United Nation Detention Facilities on 31 July 1999.



18850

facie” case for dismissal of the charges against him. Further prejudice has been suffered as a result of the death of a witness with exculpatory information, GKT, in February 2004. Three other witnesses, GJS, GNN and GNH cannot be located by Witnesses and Victims Support Section.²

8. The Defence submits that it has called for a speedy trial on several occasions and requests that, for the above-mentioned reasons, the Trial Chamber should order the indictment against Mugiraneza dismissed with prejudice and that he be released from custody.

Prosecutor's Response

9. The Prosecutor contends that the Appeals Chamber's Decision in remitting the matter back to the Trial Chamber is limited to the conduct of the Prosecutor, as opposed to a complete re-opening of question as to whether there has been undue delay. Equally, the said Decision does not prescribe a new test for the finding of undue delay. In the Prosecutor's submission, the question facing the Trial Chamber is simply whether or not the Prosecutor has by his conduct “contributed to any delay in the trial of the Accused.”

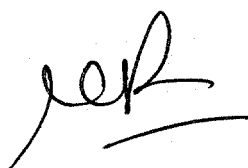
10. The Prosecutor's contention is that the Accused is in lawful detention having made an initial appearance before the court and pleaded not guilty to the charges against him, and the Prosecutor has not in any way “aided or impeded his trial.” He further maintains that the responsibility for any delay cannot be attributed to his office. Moreover, the Prosecutor submits that the conduct of the Defence “as a whole has contributed significantly to the length of the instant proceedings.” The filing of pre-trial motions and appeals against interlocutory decisions necessarily influences the expeditiousness of the proceedings. The Prosecutor further adds that the “delay, if any, [...] arises from the incessant and unmitigated number of worthless motions of frivolous and unnecessary issues that the Defendant files...”

11. It is submitted that the Chamber had, in its vacated Decision, relied heavily on its Decision in respect of Justin Mugenzi's application for a Stay of Proceedings or Provisional Release wherein the “Defence absolved the Prosecutor of delay.”³ At no stage of the status conferences did any party have cause to behave in a way that is tantamount to an abuse of process such as to necessitate a stay of proceedings against any of the accused.

12. Concerning the diligence exercised by his Office, the Prosecutor recalls that at the Status Conference of 6 September 2002, the Defence agreed that the Prosecutor had fulfilled his disclosure obligations pursuant to Rules 66, 67 and 68; so that the only issue outstanding at the time was that of translation of material into the working languages of the Tribunal. The Prosecutor argues that it has never been canvassed that the Tribunal was not in a position to prosecute due to a backlog of cases, nor has the Chamber said that a trial date could not be set because the judicial calendar was full. The Prosecutor further maintains that no delay is attributable to his Office, the Chamber, the judicial calendar, the Statute, the Rules or the facilities and resources provided by the United Nations.

² See Memorandum from David G. Chappel to Roger Kouambo-Tchinda, 19 April 2004, Re: Request by Defence Counsel (Mr. Tom Moran) to visit witnesses.

³ *Prosecutor v. Justin Mugenzi et al.*, Case No. ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), TC, 8 November 2002.



18849

13. The Prosecutor submits that the dismissal of an Indictment against an accused person with prejudice, a stay of proceedings or a halting of the proceedings altogether is only warranted in exceptionally grievous cases. It is argued that genocide is so heinous a crime that a stay would only be considered in the most exceptional circumstances and must, at any rate, be attended by proven egregious behaviour on the part of the Prosecutor. It must as such be confined to case in which the Prosecution has been so delayed as to prevent a fair trial of the accused.

14. The Prosecutor submits that the burden of proving delay and for establishing "entitlement" to the relief sought rests squarely on the Defence, as the moving party. Further, on the issue of whether prejudice has been suffered by the Accused, the Prosecutor cites the case of Joseph Kanyabashi in which the detention of the accused person for over four years did not warrant a stay of proceedings.⁴ Pursuant to Rules 5(A) and (B), relief should only be granted if the Trial Chamber "finds that the alleged non-compliance is proved and that it has caused material prejudice to that party." The Prosecutor argues that not only has he not violated any of the Rules, the Defence has also failed to show that material prejudice has been caused to the accused. The remedy being sought is therefore disproportionately inordinate.

15. Having submitted that the reconsideration of the present matter relates to the conduct of the Prosecutor and further submitting that the Prosecutor has done all in his power to diligently prosecute the case, the Prosecutor prays that the Motion be dismissed in its entirety.

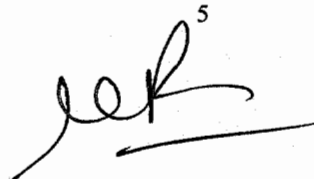
Defence Reply to the Prosecutor's Response

16. Contrary to the Prosecutor's contention, the Defence asserts that the Decision of the Appeals Chamber was based on five different factors, all of which must be taken into account in the Trial Chamber's reconsideration. These factors are set out as follows:

- i. A five part test to determine whether there has been a violation of the accused's right to a trial without undue delay;⁵
- ii. That the Chamber erred in including the fundamental purpose of the Tribunal as a determining factor;
- iii. That one of the central factors to be considered is the conduct of the Parties including that of the Prosecutor;
- iv. That the Chamber erred in failing to consider the conduct of the Prosecutor and thereby failed to take into account a "necessary factor to determine whether there was undue delay";
- v. That the Chamber used an incorrect legal standard to determine whether Mugiraneza's right to trial without undue delay was violated.

⁴ *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Decision on the Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings, TC, 23 May 2000.

⁵ This "five part test" derives from the Appeals Chamber's statement that in determining whether there has been a violation of the right of the accused to be tried without undue delay, the Appeals Chamber takes the view that it is necessary to consider, *inter alia*, the following factors: (1) The length of the delay; (2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;(3) The conduct of the parties;(4) The conduct of the relevant authorities; and (5) The prejudice to the accused, if any.

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18848

The Defence warns that for the Trial Chamber to limit the scope of its reconsideration of the present matter solely to an inquiry into the conduct of the Prosecutor, without consideration of all of the other factors set out by the Appeals Chamber, would be erroneous. There is nothing in the said Decision to limit the Trial Chamber's reconsideration to the actions of the Prosecutor.

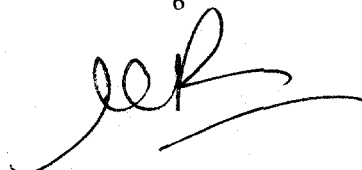
17. Responding to the Prosecutor's submission that one of the reasons for delay in the instant proceedings is the Defendant's filing of "worthless motions" and "pre-trial motions and appeals against interlocutory decisions," the Defence points out that of the six interlocutory appeals that have been certified by the Chamber, four were filed by the Prosecutor. Besides, by their very nature interlocutory appeals take little of the Trial Chamber's resources. The Defence also argues that the Prosecutor has failed to identify any of the "unmitigated number of worthless motions of frivolous and unnecessary issues" purportedly filed by the accused, nor has the Prosecutor shown how the commencement of the trial was delayed by the filing of Defence motions.

18. The Defence argues that it is wrong for the Prosecutor to rely on the Mugenzi Decision to justify the Chamber's failure to consider the Prosecutor's actions, having already decided upon the same in the latter case. Indeed in that case, a consideration of the "fundamental purpose of the Tribunal" was held to be a factor in assessing undue delay. This position has been specifically rejected by the Appeals Chamber decision in the present matter. The Defence further contends that whether or not the defence in *Mugenzi* had absolved the Prosecutor of delay is irrelevant given that the Prosper Mugiraneza was not a party to that motion.

19. The Defence also refutes the Prosecutor's contention that the backlog of cases in the Tribunal has not caused delay in the instant case. The Defence relies on official documents of the United Nations such as the 2001 report of the President of the Tribunal to the General Assembly and the Security Council in which a compelling case was made out for the appointment of *ad litem* judges to expeditiously try cases which were being delayed by backlogs.

20. Regarding other systemic delays, the Defence also refutes the Prosecutor's position on his responsibility *vis-à-vis* the translation of documents. The Defence contends that disclosure material does not fall within the definition of "official documents" in Article 12 as cited by the Prosecutor. The Registry therefore has no obligation to translate anything not filed with it, including documents disclosed pursuant to Rules 66 and 68. In this regard, the Defence submits that the Prosecutor seems to have shown little sense of urgency in ensuring that documents are translated in a timely manner.

21. With regard to responsibility for delay, the Defence points to examples of "some delays during the trial that are fully attributable to the Prosecutor." The Defence cites the transcript of proceedings of 10 February 2004 in which the Prosecutor told the Court that it was out of witnesses and will not be ready until Friday, 13 February. However, the next witness to testify, GJV, informed the Court that he had been in Arusha since 9 February, and would have been ready to testify had he been called. The Defence also asserts that the Prosecutor did not exercise diligence in complying with his disclosure obligations and submits that the record does reflect this lack of diligence. The Prosecutor has disclosed documents which are three or four years old, which have been in his possession for two years or more, and more than three years after the initial appearance of the Accused.



18847

22. The Defence urges the Chamber to consider both the "in-trial delays" as well as that of the length of the trial itself in determining whether the Accused's right to a trial without undue delay has been violated.

23. The Defence maintains that the burden lies with the Prosecutor to disprove undue delay. The Defence holds the view that at some point delay must become undue for the purposes of Article 20(4)(C) of the Statute and that wherever the line is drawn it is less than four years, six months and 28 days which in the instant case is the time between his arrest and the scheduled start of the trial.

24. The Defence also argues that no showing of material prejudice is necessary, as the Tribunal's Statute specifically affords accused persons the right to be tried without undue delay. The Defence submits that relief for violation of that right is available and is distinct from the question of whether the delay violated the right to a fair trial. Be that as it may, the accused has shown his pre-trial detention, and the death and unavailability of witnesses have caused him prejudice.

25. In light of the arguments set out in the original motion, the present motion and Reply, the Defence submits that there is no effective remedy other than a dismissal of the indictment against Mugiraneza with prejudice for the violation of his right to a trial without undue delay.

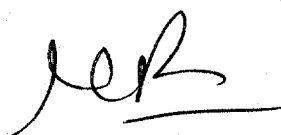
DELIBERATIONS

26. The Appeals Chamber has directed the Trial Chamber to reconsider its Decision of 2 October 2003 because the Trial Chamber erred in applying the correct legal standard. In so doing, the Appeals Chamber considered that the Trial Chamber erred in considering the "fundamental purpose of the Tribunal" in determining whether there was undue delay. The Appeals Chamber took the view that a determination of whether the Accused's right to be tried without undue delay has been violated must necessarily include a consideration of, *inter alia*, the following factors:

- (1) The length of the delay;
- (2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;
- (3) The conduct of the parties;
- (4) The conduct of the relevant authorities; and
- (5) The prejudice to the accused, if any.

27. In considering that "one of the central factors to consider is the conduct of the parties, including that of the Prosecutor," the Appeals Chamber found "that the Trial Chamber, by stating, '(t)hat there is no need to inquire into any role that the Prosecutor might have played about the alleged undue delay,' has failed to conduct a full enquiry and thus failed to take into account a necessary factor to determine whether there has been undue delay."

28. The Trial Chamber understands the Appeals Chamber's Decision as indicating that there cannot be a determination of whether the right to trial without undue delay was violated without considering the totality of the five criteria laid out in paragraph 26 above.



18846

29. To dispose of this matter, recourse must be had to articles 19 and 20(4)(c) of the Statute of the Tribunal. They provide as follows:

Article 19

The Trial Chamber shall ensure that a trial is fair and expeditious, and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the right of the accused and due regard for the protection of victims and witnesses.

Article 20 (4) (c)

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

[...]

(c) To be tried without undue delay

30. The abovementioned provisions require the Trial Chamber to ensure that an Accused person's right to be tried without undue delay is guaranteed. But in doing this, the Trial Chamber must also be vigilant to ensure that the right to a trial without undue delay is balanced with the need to ascertain the truth about the serious crimes with which the Accused is charged.⁶ The Chamber recalls that in this regard, the need for such a balancing exercise was categorically stated in both the *Mugenzi* Decision as well as in the Decision which is presently being reconsidered.

31. In assessing whether the Accused's right to be tried without undue was violated, regard was indeed had to the complexity of the case and the conduct of the relevant authorities vis-à-vis the length of time that had passed between the time of arrest and the commencement of trial. The Chamber recalls that it cited the case of *Kanyabashi*⁷ and held that a finding of undue delay depends on the circumstances of the case. Having regard 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," the Chamber considered that the time between the arrest of the accused and the "imminent commencement of his trial" was not to be assessed as being undue.

⁶ *Prosecutor v. Justin Mugenzi et al.*, Case No. ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), TC, 8 November 2002, para 32.

⁷ *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Decision on the Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings, TC, 23 May 2000.

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 period cannot be translated into a fixed number of days, months or years, since it is dependent on other elements which the judge must consider". In the opinion of the European Court of Human Rights, "the reasonableness of the length of proceedings coming within the scope of Article 6(1) must be assessed 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]". [Footnotes omitted]



18845

32. As regards the conduct of the Parties, the Chamber has examined the arguments put forward by both the Defence and the Prosecution, and as guided by the Appeals Chamber, has particularly enquired into the conduct of the Prosecutor. While the Chamber disagrees with the Prosecutor's contention that delay, if any, has arisen from the filing of "incessant and unmitigated number of worthless motions of frivolous and unnecessary issues" by the Defence, the Chamber does accept, on the basis of the facts put forward by the Prosecutor that the delay in this case, if any, is not attributable to the OTP.


33. As far as prejudice to the Accused is concerned, the Chamber notes that the Defence has failed to show how the delay of four years, six months and 28 days has prejudiced Accused such as to prevent a fair trial and necessitate a dismissal of the Indictment against him. The burden for proving prejudice does indeed lie with the Defence.

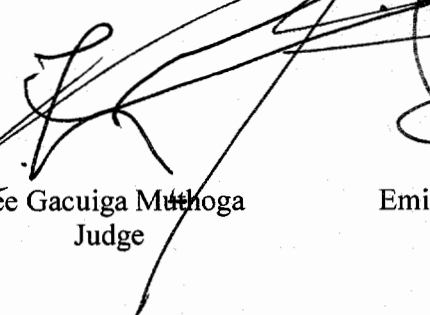
34. In light of the above, the Chamber finds that Article 20(4)(c) has not been violated. The present Motion, therefore, falls to be dismissed.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISMISSES the Defence Motion.

Arusha, 3 November 2004


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


Emile Francis Short
Judge

[Seal of the Tribunal]