ICTR-99-52-A
14 February 2005
(2048/H-2043/H)

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

UNITED NATIONS
NATIONS UNIES

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 14 February 2005

ICTR Appeals Chamber
Date: 14 February 05
Action:
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Parties, Judicial Re
LOs, LSS

2005 FEB 15 P 12: 21
ICTR

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

DECISION ON APPELLANT HASSAN NGEZE'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE

Office of the Prosecutor

James Stewart
George Mugwanya

Counsel for the Appellant, Hassan Ngeze

Bharat B. Chadha

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: ROSETTE MUZIGO-MORRISON

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 ("Appeals Chamber" and "Tribunal", respectively);

BEING SEISED OF the "Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence", filed on 11 January 2005 ("Appellant" and "Motion for Additional Evidence", respectively);

NOTING the "Prosecutor's Response to Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence (Rule 115)", filed on 19 January 2005 ("Response");

NOTING the "Appellant's Reply to the Prosecutor's Response to Appellant Ngeze's Motion for Leave to Present Additional Evidence (Rule 115)", filed on 24 January 2005 ("Reply");

NOTING that the Trial Chamber rendered its Judgement in this case on 3 December 2003 ("Trial Judgement");

CONSIDERING that under Rule 115(A) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), "[a] party may apply by motion to present additional evidence before the Appeals Chamber" and that said motion "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";

NOTING that, while the Appellant repeatedly asked for extensions of time to file his Notice of Appeal (and consequently his Appellant's Brief)[1] – which motions were repeatedly granted[2] – he never properly asked for an extension of time to file a motion to present additional evidence[3];

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[1] "Motion of the Ngeze Defence Seeking an Extension of Time for Filing the Notice of Appeal", filed 19 December 2003; Appellant Ngeze's "Motion Seeking a Further Extension of Time for Filing the Notice of Appeal", filed on 5 February 2004; "Appellant Hassan Ngeze's Motion for the Grant of Extension of Time to File Motion for the Amendment of Notice of Appeal and Appeal Brief", filed 29 November 2004; "Appellant Hassan Ngeze's Extremely Urgent Motion for Reconsideration of the Decision of the Pre-Appeal Judge Dated 2nd December 2004 on Hassan Ngeze's Motion for Extension of Time and His Further Request for an Order of a Status Conference Pursuant to Rule 65bis of the Rules of Procedure and Evidence", filed on 6 December 2004.

[2] "Decision on Motions for an Extension of Time to File Appellant's Notices of Appeal and Briefs", issued 19 December 2003; "Decision on Ngeze's Motion for an Additional Extension of Time to File His Notice of Appeal and Brief", issued 6 February 2004; "Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order",

CONSIDERING that the Appellant has not attempted to show good cause for the eleven months delay in filing his Motion for Additional Evidence;

FINDING that the Motion for Additional Evidence was not filed in time[4] and that no good cause has been shown to justify this;

CONSIDERING FURTHER that a party seeking the admission of additional evidence on appeal must provide to the Appeals Chamber the evidence sought to be admitted to allow it to determine whether the evidence meets the requirements of Rule 115[5];

NOTING that the Appellant has not appended written statements of the witnesses whose evidence he seeks to have admitted, but merely asserts that, if called to testify, the proposed witnesses would testify in a certain manner;

CONSIDERING FURTHER that, under Rule 115 of the Rules, the Appellant is required primarily to establish that the evidence sought to be admitted was not available at trial in any form and could not have been discovered through the exercise of due diligence, which means that the Appellant must show, *inter alia*, that he made use of all of the mechanisms of protection and compulsion available to him under the Statute and Rules of the International Tribunal before the Trial Chamber[6];

CONSIDERING that evidence that was unavailable at trial and could not have been discovered through the exercise of due diligence is admissible under Rule 115 of the Rules if it is relevant to a material issue and credible and if it *could* have had an impact on the verdict[7];

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issued 2 March 2004; "Decision on Hassan Ngeze's Motion for an Extension of Time", issued 2 December 2004; Decision taken during the status conference of 15 December 2004 (T. 15 December 2004, pp. 18, 19).

[3] *See* "Order Concerning Ngeze's Motion", issued 5 May 2004; "Order Concerning Hassan Ngeze's Request to Join Co-Appellant's Motion", issued 24 May 2004; "Decision Denying Further Extension of Time", issued 25 May 2004.

[4] In this connection, see "Decision on Barayagwiza's Motion for Determination of Time Limits", issued 5 March 2004.

[5] As explained in *Prosecutor v. Kupreškić, et al.*, Case No. IT-95-16-A, "Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to Be Taken Pursuant to Rule 94(B)", 8 May 2001, at para. 5:

> [Rule 115] deals with the situation where a party *is in possession of material* that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial. *The Rule does not permit a party to simply request that a particular person be summoned to give evidence at the appellate stage* [Emphasis added]

[6] *See The Prosecutor v. Ntagerura, et al.*, Case No. ICTR-99-46-A, "Decision on Prosecution Motion for Admission of Additional Evidence", 10 December 2004 ("*Ntagerura* Rule 115 Decision"), para. 9; *M. Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, "Decision on Motion to Admit Additional Evidence" ("M. Nikolić Rule 115 Decision"), para. 21; *Prosecutor v. Krstić*, Case No. IT-98-33-A, "Decision on Applications for Admission of Additional Evidence on Appeal", 5 August 2003 ("*Krstić* Rule 115 Decision"), p. 3.

[7] *Ntagerura* Rule 115 Decision, para. 10; M. Nikolić Rule 115 Decision, para. 23.

CONSIDERING that evidence that was available at trial or could have been discovered through the exercise of due diligence is not admissible unless the moving party shows that its exclusion *would* lead to a miscarriage of justice, in that, if it had been adduced at trial it *would* have affected the verdict[8];

FINDING FURTHER that, even if the proposed witnesses were to testify as the Appellant submits they would, their evidence would still fail to be admissible under Rule 115 for the following reasons:

a) The Appellant has not shown that the additional evidence was not available at trial and that it could not have been discovered through the exercise of due diligence:

- As to witnesses Hassan Gitoki and Colonel Ephrem Setako (who, according to the Appellant, were not available at trial since their whereabouts were unknown at the time[9]), the Appellant does not show the Appeals Chamber that he ever informed the Trial Chamber of his inability to locate these witnesses[10];

- As to other witnesses mentioned by the Appellant, they were all detained at the United Nations Detention Facility in Arusha at the time of the trial and were thus clearly available during trial[11];

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[8] *Ntagerura* Rule 115 Decision, para. 11; *Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, "Decision on Defence Motion for the Admission of Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence", 28 October 2004, para. 11; *Krstić* Rule 115 Decision, p. 4.

[9] *See* Motion for Additional Evidence, para. 2. The Appellant also argues that he did not know of the existence of these witnesses at the time of trial (Motion for Additional Evidence, para. 2). However, Prosecution Witness AEU testified at length about Hassan Gitoki (*see* T. 26 June 2001, pp. 29-34, 66-81): she even testified that the Appellant and Hassan Gitoki knew each other (T. 26 June 2001, p. 31). Thus, even if the Appellant did not know Hassan Gitoki before trial, he certainly became aware of his existence during trial. As to Colonel Setako, Hassan Ngeze himself explains in a document attached to his Motion for Additional Evidence that he was brought before an "awful military court which was presided over by judges Bagosora Theonest & Colonel Ephraim Setako" (p. 1 of the "Attachment" to the Motion for Additional Evidence). In these circumstances, it is clear that the Appellant knew of Colonel Setako before his trial.

[10] As reiterated most recently in the *Ntagerura* Rule 115 Decision, at para. 9:

> "Counsel is expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question, including any problems of intimidation, and his or her inability to locate certain witnesses. The obligation to apprise the Trial Chamber constitutes not only a first step in exercising due diligence but also a means of self-protection in that non-cooperation of the prospective witness is recorded contemporaneously." (References omitted)

[11] The Appellant's argument that he requested the Trial Chamber to compel these witnesses' appearance but that the Trial Chamber refused this fails at two levels:

> 1) while the Appellant mentioned to the Trial Chamber that some witnesses refused to testify on his behalf (*See* T. of Status Conference of 17 September 2002, p. 39), the Trial Chamber explained to the Appellant that, before using its power to compel witnesses to testify at trial, it would require the Appellant to make a list of the witnesses sought to be compelled and to submit their statements in order to allow the Trial Chamber to make a determination of whether the said witnesses would

b) The Appellant has not shown that failure to admit the additional evidence *would* result in a miscarriage of justice in the sense that, if the additional evidence had been adduced at trial, it *would* have affected the verdict:

- As to witness Hassan Gitoki – whose evidence the Appellant seeks to have admitted on appeal to impugn the credibility of Prosecution Witness AEU[12] – even if he were to testify as anticipated by the Appellant[13] and to be found credible, it has not been shown that this would have any effect on the verdict, especially since the Trial Chamber already accepted that a small circle of individuals (in particular Tutsi of the Muslim faith and Tutsi close relatives) might have been saved by the Appellant's intervention[14];

- As to the other witnesses – whose evidence the Appellant seeks to have admitted to buttress his alibi defence for 6-9 April 1994 (the Appellant contends that the witnesses would testify that he was imprisoned during that period) – it has not been shown that their evidence would have been a decisive factor affecting the Trial Chamber's decision to accept the Prosecutor's evidence of the Appellant's actions for the period 6-9 April[15];

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be helpful to the Appellant's case and of whether they are reluctant to testify (T. 17 September 2002, pp. 41-43). No such steps were ever taken by the Appellant.

2) Even if the Trial Chamber had refused to compel the witnesses to appear, a motion under Rule 115 would not be the appropriate vehicle to challenge this decision; rather, the Appellant would have to challenge this on appeal.

[12] In particular, the Appellant seeks to challenge the Trial Chamber's finding that, through Hassan Gitoki, he extorted money from AEU's employer to save AEU and her children: *see* Trial Judgement, paras. 838, 839, 849 and 850.

[13] The Appellant submits that Hassan Gitoki would testify that he agreed to save AEU's life but that he did not ask for any money from AEU or take a letter from the Appellant to AEU's employer: *see* Motion for Additional Evidence, para. 8.

[14] Trial Judgement, para. 850.

[15] The Trial Chamber carefully considered the evidence of the Prosecution as to the Appellant's actions between 6 and 9 April 1994 (*see* Trial Judgement, paras. 783-801, 811-825) and the alibi evidence (*see* Trial Judgement, paras. 802-810, 826-829). In the end, the Trial Chamber was satisfied that the alibi evidence did not raise a reasonable doubt as to the Appellant's actions from 6 to 9 April 1994: *see* Trial Judgement, paras. 829, 836 and 837. In particular, the Trial Chamber found (Trial Judgement, para. 829):

> In light of the inconsistencies in Ngeze's own testimony, as well as among the Defence witnesses, and the unreliable nature and source of the information to which they testified, the Chamber finds that the defence of alibi is not credible (see paragraph 99). Four Prosecution witnesses saw Ngeze on 7 April 1994. Their eyewitness testimony under oath is not shaken by the hearsay of the Defence witnesses or the contradictory testimony of Ngeze himself. Moreover, the Chamber notes that even if Ngeze had been arrested on 6 or 7 April, depending on the time of his arrest and the length of his detention, which could have been a few hours, he would not have been precluded from participation in the events described by the Prosecution witnesses.

HEREBY DISMISSES the Motion for Additional Evidence.

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

Dated this 14th day of February 2005,
At The Hague, The Netherlands

Theodor Meron
Presiding Judge

[Seal of the Tribunal]