



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

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IN THE APPEALS CHAMBER

ICR-98-44A-A
07-03-2005
(3483/A - 3478/A)

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 7 March 2005

JUVÉNAL KAJELIJELI
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-98-44A-A

JUDICIAL RECORDS/ARCHIVES
ICTR
2005 MAR -6 P 10:17

**DECISION ON SECOND DEFENCE MOTION FOR THE ADMISSION OF ADDITIONAL
EVIDENCE PURSUANT TO RULE 115 OF THE RULES OF PROCEDURE AND
EVIDENCE**

Counsel for the Prosecution

Mr. James Stewart
Mr. George Mugwanya
Mr. Francois-Xavier Nsanzuwera

Counsel for the Appellant

Prof. Lennox S. Hinds

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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 (“International Tribunal”);

BEING SEISED OF the “Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence” (“Second Rule 115 Motion”),¹ filed by Juvénal Kajelijeli (“Appellant”) on 15 February 2005, in which the Appellant seeks to have the following items admitted as additional evidence on appeal:

- a. The Judgement of the Special Trial Chamber of the Ruhengeri Court for Genocide and Other Crimes against Humanity in the case of the *Prosecutor v. Augustin Habiyambre et al.*,² (“Judgement of the Special Trial Chamber”);
- b. Contents of a file showing the criminal charges and interviews concerning a certain Dominique Gatsimbanyi before the Prosecutor-General of the Supreme Court of the Ministry of Justice of Kigali (“Prosecutor-General’s Investigation file”);

NOTING the “Prosecutor’s Response to ‘Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Evidence and Procedure’” (“Response”), filed by the Office of the Prosecutor (“Prosecution”) on 24 February 2005, in which the Prosecution objects to the admission of additional evidence under the Second Rule 115 Motion for the following reasons:

- a. the Second Rule 115 Motion was filed 403 days after the Trial Judgement was rendered and the Appellant does not show good cause for the late filing;³
- b. the proposed evidence was available at trial, as conceded by the Appellant;⁴
- c. the Appellant fails to demonstrate that any of the proposed additional evidence would have had an impact on the verdict;⁵

NOTING the “Appellant’s Reply to Prosecutor’s Response to ‘Defense Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Evidence and Procedure’” (“Reply”), filed by the Appellant on 2 March 2005, two days after the deadline without any justification;⁶

¹ This is the second motion for additional evidence filed by the Appellant. The first “Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence” was filed on 16 February 2004 (“First Rule 115 Motion”).

² *The Prosecutor v. Augustin Habiyambre, Schadrack Sendugo, Schadrack Nikobasanze, Aron Basabose, Ntahontuye alias Giponda, Augustin Nduhuye, Mburanumwe alias Habimana, Peter Makuza, Mpozembizi alias Baramira, Andre Barera and Haganirimfura*, Case File RP:030/R1/99, 12 May 2000.

³ Response, paras 3-6.

⁴ Response, paras 7-10.

NOTING that the Trial Chamber rendered its Judgement in this case on 1 December 2003 (“Trial Judgement”);

CONSIDERING that under Rule 115(A) of the Rules of Procedure and Evidence of the International 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 the Judgement of the Special Trial Chamber was issued on 12 May 2000⁷ and that the Appellant has not indicated when the Prosecutor-General’s Investigation file came into existence;

NOTING that the Appellant submits that he only became aware of both documents in October 2004, but received the documents in January 2005 when he had them informally translated;⁸

CONSIDERING however, that the Appellant has conceded that the documents were available at trial and that they could have been discovered through the exercise of due diligence,⁹ which concession is inconsistent with a claim of good cause for the delay in submitting the Second Rule 115 Motion;

FINDING, therefore, that the Second Rule 115 Motion was not filed on time¹⁰ and that the Appellant has failed to establish good cause to justify the delay;

CONSIDERING, in any event, that evidence that was unavailable at trial and could not have been discovered through the exercise of due diligence¹¹ is admissible under Rule 115 of the Rules if it is relevant to a material issue, is credible and if it *could* have had an impact on the verdict;¹²

⁵ Response, paras 13-17, 33.

⁶ The Reply was due on 28 February 2005. See Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 16 September 2002, para. 12.

⁷ Second Rule 115 Motion, para. 15.

⁸ *Ibid.*, footnotes 1 and 2. See also Reply, para. 5.

⁹ *Ibid.*, para. 4.

¹⁰ Because the Judgement in this case was delivered on 1 December 2003, any motions for additional evidence were due no later than 14 February 2004 (although as this was a Saturday, the motions could be filed as late as 16 February 2004); see also *Prosecutor v. Ferdinand Nahimana et al*, Case No. ICTR-99-52-A, “Decision on Barayagwiza’s Motion for Determination of Time Limits”, 5 March 2004.

¹¹ See *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,” 9 December 2004 (“*M. Nikolić* Rule 115 Decision”), para. 21; *Prosecutor v. Blaškić*, Case No.: IT-95-14-A, “Decision on Evidence,” 31 October 2003, p. 3 (“*Blaškić* Decision on Evidence”); *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.

¹² *Ntagerura* Rule 115 Decision, para. 10; *M. Nikolić* Rule 115 Decision, para. 23.

NOTING that the Appellant argues that the proposed evidence *could* impact on the Trial Chamber's findings relevant to Counts 2 (genocide) and 6 (crimes against humanity) that the Appellant played a central role in convening a meeting on the evening of 6 April 1994 for planning massacres in Nkuli commune and in organizing their commission the following morning,¹³ which findings, according to him, were solely based on evidence provided by Witness GDD;¹⁴

FINDING, however, that the proposed evidence was available at trial in light of the Appellant's concession of the same and that it is therefore inadmissible on that ground even if it could have affected the verdict;¹⁵

CONSIDERING that evidence that was available at trial or could have been discovered through the exercise of due diligence is nevertheless admissible if the moving party shows that its exclusion *would* lead to a miscarriage of justice, in that, if it had been admitted at trial it *would* have affected the verdict when assessed in the context of the evidence admitted at trial and not in isolation;¹⁶

NOTING the Appellant's submission that the Judgement of the Special Trial Chamber contains findings concerning massacres and killings that occurred in Nkuli commune in 1994,¹⁷ in which of the fifty-two witnesses referred to therein, not a single witness accused the Appellant of committing or being involved in the killings;¹⁸

NOTING the Appellant's submission that a review of the Prosecutor-General's Investigation file reveals that none of the twenty-five witnesses who were interviewed and interrogated in connection with the prosecution of the former *bourgmestre* of Nkuli commune named the Appellant as having participated in killings and massacres that occurred in Nkuli in April 1994;¹⁹

NOTING the Appellant's contention that the proposed evidence underscores the unreliability and falsity of Witness GDD's testimony and its admission is therefore required to prevent a miscarriage of justice;²⁰

NOTING the Prosecution's submission that the fact that the Appellant's name has not been mentioned by witnesses in both the Judgement of the Special Trial Chamber and the Prosecutor-General's Investigation file is irrelevant because:

¹³ Second Rule 115 Motion, paras 13, 26, 33.

¹⁴ *Ibid.*, paras 13-18.

¹⁵ *Ibid.*, para. 4.

¹⁶ *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 ("*Kajelijeli* Rule 115 Decision"); *Blaškić* Decision on Evidence, p. 3; *Krstić* Rule 115 Decision, p. 4.

¹⁷ Second Rule 115 Motion, para. 11.

¹⁸ *Ibid.*, para. 12.

¹⁹ *Ibid.*, para. 21.

²⁰ *Ibid.*, para. 23.

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- a. the focus was not on the Appellant;²¹
- b. the Second Rule 115 Motion does not claim or demonstrate that any of the witnesses in any way exculpates the Appellant;²²
- c. the Second Rule 115 Motion does not explain whether the witnesses gave evidence in respect of the same crime or criminal events in Nkuli that were the subject of the Appellant's convictions;²³
- d. the Appellant misreads the Judgement of the Special Trial Chamber;²⁴

CONSIDERING that subparagraphs a., b. and c. above are self-explanatory and that the Appeals Chamber's reading of the Judgement of the Special Tribunal confirms sub-paragraph d.;

CONSIDERING this Appeals Chamber's Decision on the Appellant's First Rule 115 Motion²⁵ in which it was noted that there were findings of fact, other than the evidence of Witness GDD, to support the finding of guilt against the Appellant on Counts 2 and 6;

CONCLUDING therefore that:

- (i) the Second Rule 115 Motion was filed out of time and that the Appellant has not met his burden to show good cause for the late filing;
- (ii) in any event, the proposed evidence was available at trial and is therefore inadmissible on that ground; and
- (iii) the Appellant has failed to meet the burden of demonstrating that evidence that was available to him at trial is nevertheless admissible on appeal because it *would* have affected the verdict when assessed in the context of the evidence admitted at trial and not in isolation;

HEREBY DISMISSES the Second Rule 115 Motion.

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

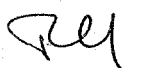
²¹ Response, paras 19, 21 and 28.

²² Response, paras 20, 22, 23 and 30.

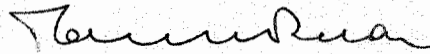
²³ Response, paras 24 and 25.

²⁴ Response, para. 27.

²⁵ See *Kajelijeli* Rule 115 Decision, para. 14, in which the additional evidence proffered by the Appellant with his First Rule 115 Motion was intended to disprove the testimony of Witness GDD. See also Trial Judgement, paras 826-828 and 896-904, where the Trial Chamber made a finding, *inter alia*, that the Appellant directed and participated in the killings in Nkuli, Mukingo and Kigombe Communes on the basis of the testimonies of Witnesses GDQ and GBH.



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Judge Fausto Pocar
Presiding Judge

Done this 7th day of March 2005,
At Arusha,
Tanzania.

[Seal of the International Tribunal]