

ICTR-98-44-PT
26-5-2005
(19930-19927)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 26 May 2005

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THE PROSECUTOR

v.

**Edouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-PT

**DECISION ON JOSEPH NZIRORERA'S APPLICATION FOR CERTIFICATION
TO APPEAL THE DECISION DENYING HIS MOTION TO VACATE SANCTIONS**

Rule 73(B) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Holo Makwaia
Dior Fall
Gregory Lombardi
Bongani Dyani
Sunkarie Ballah-Conteh
Tamara Cummings-John
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson

[Signature]

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of "Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Vacate Sanctions" ("Motion"), filed by the Defence for Nzirorera ("Defence") on 1 March 2005;

CONSIDERING that the Prosecution has not filed its Response within the time-limit prescribed by Rule 73(E) of the Rules of Procedure and Evidence ("Rules");

CONSIDERING the Application to intervene in Joseph Nzirorera's Motion, filed by the Defence for Ngirumpatse ("Defence") on 14 March 2005;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules.

INTRODUCTION

1. The Appeals Chamber Decision of 28 September 2004¹ made it necessary for the rehearing of this case. The commencement of the trial is scheduled on 6 September 2005. On 23 February 2005, the Chamber denied Nzirorera's Motion to vacate sanctions ordered by the prior Bench ("Decision of 23 February 2005").²

2. The Chamber is now seized of a Motion seeking certification to appeal the impugned Decision pursuant to Rule 73(B) of the Rules.

ARGUMENTS OF THE PARTIES

3. The Defence for Nzirorera raises three arguments, which it contends meet the criteria set out by Rule 73(B) of the Rules. First, it contends that the Presiding Judge of Trial Chamber III exercises supervisory authority over the Chamber and a reasonable observer would conclude that the appearance of bias found by the Appeals Chamber Decision of 22 October 2004³ in respect of the Presiding Judge extends to Decisions of Judges who are answerable to, and overseen by her. It argues that this issue could affect the fair and expeditious conduct of the proceedings or the outcome of the trial within the meaning of Rule 73(B) of the Rules, since the right to a trial by Judges free from the appearance of bias is a fundamental right guaranteed under Article 20 of the Statute of the Tribunal ("Statute"). Second, the Defence for Nzirorera submits that the Chamber erred in giving effect to the Decisions of the former Bench in light of the findings of the Appeals Chamber Decision of 22 October 2004,⁴ and of its own Decision not to give effect to the prior Bench's Decision on

¹ *Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44 (*Karemera et al.*), Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004.

² *Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste and Joseph Nzirorera*, Case No. ICTR-98-44-PT, Decision on Motion to Vacate Sanctions (TC), 23 February 2005.

³ *Karemera et al.*, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004, par. 67.

⁴ *Ibidem*.

leave to amend the Indictment.⁵ Finally, the Defence for Nzirorera contends that the Chamber erred in finding that Rule 73(F) of the Rules “as written” and “as applied” does not constitute discrimination between Defence and Prosecution Counsel. It refers to a list to demonstrate that the Defence has been sanctioned many times, whereas the Prosecutor has never been. This alleged one-sided application of Rule 73(F) at the Tribunal would put the Defence at a serious disadvantage when presenting its case since it would be penalized when bringing motions that the Chamber disapproves of, thus discouraging the Defence from asserting its rights during the trial and jeopardizing its ability to preserve trial issues for appellate review. It is submitted that such issues go directly to the fairness of trial.

4. The Defence for Ngirumpatse contends that the impugned Decision seems to consider as valid certain decisions made by the prior Bench. Pursuant to the Appeals Chamber's statement of apprehension of bias affecting the previous Bench, it requests that the Chamber holds that all Decisions taken by the prior panel should have no effect. It also submits that there is a need to harmonize the ruling of the Chamber that certain evidentiary Decisions by the prior panel are of no force and effect, while the impugned Decision would hold the prior rulings on imposing sanctions.

DELIBERATIONS

5. In accordance with Rule 73(B) of the Rules, Decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for very limited circumstances. Certification to appeal may be granted if both conditions set by Rule 73(B) of the Rules are satisfied: the applicant must show (i) how the impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an “immediate resolution by the Appeals Chamber may materially advance the proceedings”. Both of these conditions require a specific demonstration, and are not determined on the merits of the appeal against the impugned Decision.

6. Having reviewed the applicant's Motion, the Chamber considers that the Defence has failed to show how the Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial. In addition, the Chamber has already found that the orders for sanctions have no bearing on or relevance to the rehearing.⁶ For the same reason, an immediate resolution by the Appeals Chamber will not materially advance the proceedings.

7. As regards the supervisory power of the Presiding Judge of Trial Chamber III over the Chamber and the alleged appearance of bias, the Chamber notes that the issue has been resolved by a Decision delivered by the President, finding that

Nothing in the memorandum of Judge Vaz, nor in any rule or practice of the Tribunal concerning the position of a Presiding Judge of a Trial Chamber, could reasonably be construed as interfering with the judicial independence and impartiality of the judges in Karemera et al. It is significant, in this regard, that the Defence does not suggest that Judge Vaz had any role to play in the appointment of these judges and, furthermore, requests that they continue to sit on the case.⁷

⁵ *Karemera et al.*, Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004.

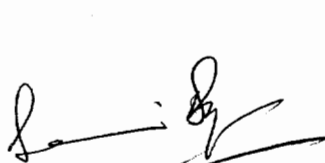
⁶ See *Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste and Joseph Nzirorera*, Case No. ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for Order Finding Prior Decisions to Be of “No Effect” (TC), 24 May 2005.

⁷ *Karemera et al.*, Decision on Motion to Reassign Case to Different Trial Chamber (Pres.), 22 March 2005, par. 2.

8. The Chamber considers therefore that the requirements set out by Rule 73(B) of the Rules are not met.

**FOR THE ABOVE MENTIONED REASONS, THE CHAMBER
DENIES the Motion.**

Arusha, 26 May 2005, done in English.



Dennis C. M. Byron
Presiding Judge



Emile Francis Short
Judge



Gberdao Gustave Kam
Judge

[Seal of the Tribunal]

