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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-99-50-T
13-06-2005
(21453-21448)

OR: ENG

TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan, Presiding
Judge Lee Gacuiiga Muthoga,
Judge Emile Francis Short

Registrar: Mr Adama Dieng

Date: 13 June 2005

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ICTR
MUGIRANEZA

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

DECISION ON THE PROSECUTOR'S REQUEST PURSUANT TO RULE 73 FOR
CERTIFICATION TO APPEAL THE ORAL DECISION OF 24 MARCH 2005
REFUSING TO QUALIFY AND ADMIT JEAN RUBADUKA AS AN EXPERT
WITNESS

Rule 73 of the Rules of Procedure and Evidence

Office of the Prosecutor:

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

Counsel for the Defence:

Ms Michelyne C. St. Laurent and Ms Alexandra Marcil for *Casimir Bizimungu*
Mr Ben Gumpert for *Justin Mugenzi*
Mr Pierre Gaudreau and Mr Michel Croteau for *Jérôme-Clément Bicamumpaka*
Mr Tom Moran for *Prosper Mugiraneza*

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

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

BEING SEIZED of the “Prosecutor’s Request Pursuant to Rule 73 For Certification to Appeal the Oral Decision of 24 March 2005 Refusing to Qualify and Admit Jean Rubaduka as an Expert Witness” filed on 30 March 2005 (the “Motion”);

HAVING CONSIDERED

- i.) “Justin Mugenzi’s Reply to the Prosecutor’s Request for Rule 73 Certification in Respect of the Decision Concerning Jena Rubaduka,” filed on 2 April 2005;
- ii.) “Casimir Bizimungu’s Response to the Prosecutor’s Request for Certification to Appeal from the Ruling of 24 March 2005,” filed on 5 April 2005;
- iii.) “Prosper Mugiraneza’s Response to the Prosecutor’s Request Pursuant to Rule 73 For Certification to Appeal the Oral Decision of 24 March 2005 Refusing to Qualify and Admit Jean Rubaduka as an Expert Witness,” filed on 5 April 2005;
- iv.) “Bicamumpaka’s Response to the ‘Prosecutor’s Request Pursuant to Rule 73 For Certification to Appeal the Oral Decision of 24 March 2005 Refusing to Qualify and Admit Jean Rubaduka as an Expert Witness’”, filed on 6 April 2005.

RECALLING the Chamber’s Oral Ruling of 24 March 2005 (the “Impugned Ruling”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

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

The Prosecutor’s Motion

1. The Prosecutor, pursuant to Rule 73 (B), moves the Chamber to grant him certification to appeal the Chamber’s Oral Ruling of 24 March 2005, in which the Chamber declined to admit Prosecution Witness Jean Rubaduka as an Expert Witness.
2. The Prosecutor contends that the present Motion meets the requirement of Rule 73 (B). The Prosecutor submits that the Impugned Decision denies the Prosecutor the opportunity to lead expert opinion evidence on matters that are paramount and crucial to his case. The impugned ruling therefore significantly affects the fair and expeditious conduct of the proceeding or the outcome of the trial, and is one that merits the exercise of the Trial Chamber’s discretion for an immediate resolution by the Appeals Chamber in order to materially advance the proceedings.
3. The Prosecutor submits that the Chamber erred in law, and in fact, in its reasoning and misdirected itself as to the law relevant to the exercise of its discretion, thereby giving weight to extraneous considerations. The Chamber further erred as to the facts upon which it exercised its discretion.



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The Defence Submissions

The Defence for Justin Mugenzi

4. The Defence for Justin Mugenzi submits that the Chamber has no jurisdiction, under Rule 73 (B) or any other Rule, to grant certification at the Prosecutor's request. The rule states without ambiguity that the decision to which it relates are those which are rendered on motions brought before the Chamber. In the instant case, the Chamber was exercising its jurisdiction under Rule 89 (C) on the admissibility of evidence in deciding whether or not Mr. Jean Rubaduka's qualifications and experience were such as to qualify him to give expert opinion evidence, which is both relevant and of probative value, on matters pertaining to the Rwandan Constitution. The Impugned Decision, therefore, is one from which there is no interlocutory appeal.
5. Should the Chamber reject the Defence argument on the point of jurisdiction, the Defence further submits that the Prosecutor has not demonstrated that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence contends that the Prosecutor also has not shown that an immediate resolution by the Appeals Chamber would not materially advance the proceedings. The Defence submits that indeed an Appeal of the matter would set the proceedings back, rather than advance it.
6. Finally, the Defence for Justin Mugenzi submits that the Impugned Decision is one which was well within the discretion of the Chamber, was based on sound and careful reasoning and cannot be said to have taken into account matters which are irrelevant or extraneous. The likelihood of an Appeal on the same being successful is negligible.

The Defence for Casimir Bizimungu

7. The Defence for Casimir Bizimungu submits that the Impugned Decision was rendered within the broad discretion afforded to the Chamber by Rule 89 (C). A certification for appeal is an exception to that Rule. Accordingly, it is argued that the Prosecutor has not met the criteria stipulated in Rule 73 (B) in that the Impugned Decision is "discretionary, correct, reasonable and unlikely to be overturned". The Chamber rendered a discretionary ruling based on a reasonable appreciation of the facts put into evidence during the course of the *voir dire* on the qualifications of Mr. Rubaduka to testify as an expert witness.
8. The Defence argues that the Prosecutor has failed to show how the Impugned Decision is unfair so that it could be said to significantly affect the "fairness" of the proceedings as stipulated in Rule 73 (B).
9. The Defence contends that there would be little to be gained from an Appeal of the Impugned Decision because matters on which the Prosecutor sought to lead Mr. Rubaduka may not even be useful and relevant. It is submitted that most of the matters submitted by the Prosecutor as being "paramount and crucial" to his case are either outside the scope of constitutional law, irrelevant or inadmissible. Further, the Defence submits, granting the Prosecutor leave to appeal at this stage of the proceedings would significantly affect the expeditious conduct of the same.

The Defence for Prosper Mugiraneza

10. The Defence for Prosper Mugiraneza adopts the arguments submitted by the Defence for Justin Mugenzi. The Defence contends that granting certification would cause



undue delay. It is further submitted that the Chamber's ruling on the merits was correct.

11. It is argued that the Prosecutor's Motion should be dismissed because not only has the latter failed to argue that certification of appeal would lead to a more expeditious trial, he has also failed to demonstrate how the Chamber has abused its discretion in ruling as it did in the Impugned Decision.

Defence for Jerome Bicamumpaka

12. The Defence for Jerome Bicamumpaka submits that the Chamber lacks jurisdiction, pursuant to Rule 73 (B) to certify the appeal of the Impugned Decision because it is not a Decision on a motion.
13. The Defence further submits that the Prosecutor has failed to meet the burden of qualifying his Motion in respect of the requirements of Rule 73 (B) for the certification of an appeal. The Defence contends that the Prosecutor's Motion concerns a matter that does not significantly affect the conduct of the proceedings and the outcome of the trial, and the resolution of the question will not materially advance the proceedings.
14. The Defence also makes the point that any argument on the merits of the appeal, as set out in paragraphs 11 to 18 of the instant Motion, is untimely.

DELIBERATIONS

15. Rule 73, in relevant part, provides:

(A) Subject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Trial Chamber, or a Judge designated by the Chamber from among its members, may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the motion in open Court.

(B) Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

16. In the instant case, the question before the Chamber was whether or not it should allow the opinion testimony of Mr. Rubaduka as an expert on matters pertaining to the Rwandan Constitution.
17. All Defence teams filed their respective notices of challenge indicating that they did not accept Mr. Rubaduka to be an expert in the stated area, in compliance with Rule 94 bis. The Chamber elected to enter into *voir dire* proceedings to determine the preliminary question as to whether or Mr. Rubaduka is an expert in the stated area. Having heard the Parties on the matter, the Chamber ruled that it was not satisfied that



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“Mr. Jean Rubaduka possesses sufficient knowledge and expertise on the Rwandan constitutional law to enable him to testify as an expert witness in that area” and accordingly, found that he was not “qualified to testify as an expert witness”.¹ The transcript of 8 March 2005 makes it very clear that the Chamber was not treating the Defence’s notices of challenge, pursuant to Rule 94 *bis*, as Motions.²

18. At the outset, the exceptional nature of certification for appeal of interlocutory decisions is worthy of emphasis. In this regard, the Chamber recalls, with approval, the reasoning of the Trial Chamber in the *Nyiramasuhuko* case:

As a general observation, it must be noted that the general rule in Rule 73(B) remains this: ‘Decisions rendered on such motions are without interlocutory appeal.’ This general rule is consistent with some important national jurisdictions around the world in which interlocutory appeals are not allowed in criminal cases, or allowed only in very limited circumstances. Rule 73(B) of the Rules provides, however, that in exceptional circumstances,³ the Trial Chamber may - not must - allow interlocutory appeals of such decisions.³

19. Furthermore, it is settled law that the determination of what evidence it should or should not admit rests primarily with the trier of fact, and that is the Trial Chamber. The Chamber makes this determination pursuant to the broad discretionary power, afforded to it by Rule 89 (C), to “admit any relevant evidence which it deems to have probative value”.

20. A case in point is the Appeals Chamber’s Decision in *Nyiramasuhuko v. The Prosecutor* which restated the conditions of Rule 73(B):

It is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence.⁴

21. For the Chamber to exercise its discretion in favour of certification, the applicant must show that “the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.” The Chamber considers that the use of the word “significantly” implies that the drafters of the Rule intend to exclude minor or trivial issues that may arise in the course of a trial from certification to appeal. Examples of “significant” issues within the meaning of Rule 73(B) include those that affect the rights of the Accused to a fair trial or, upon which a decision whether or not to certify an appeal may lead to a different result at the end of the trial.

¹ T. 24 March 2005, pp. 15-16.

² T. 8 March 2005, pp. 42-43.

³ *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali’s and Nyiramasuhuko’s Motion for Certification to Appeal the ‘Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible’, 18 March 2004, at para. 14.

⁴ *Nyiramasuhuko v. The Prosecutor*, Case No ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on Admissibility of Evidence [AC], 4 October 2004, par.5, footnote omitted.



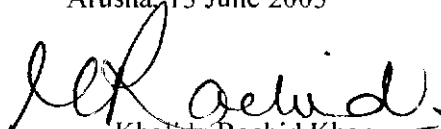
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22. The Chamber has considered the Prosecutor's submissions on this first limb of the test and is not persuaded that the subject matter of this application is one which will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Chamber has already taken judicial notice of the Rwandan Constitution, and in the opinion of the Chamber, is not a matter on which expert testimony is required. Indeed, the Chamber was not satisfied that Prosecutor's chosen witness possessed the expertise to provide the Chamber with opinion testimony on matters pertaining to the Rwandan Constitution. The "fair" conduct of the proceedings therefore cannot be said to have been "significantly" affected. The Chamber is therefore not persuaded that the Impugned Ruling involves an issue "that would significantly affect the fair and expeditious conduct of the proceedings."
23. Second, the Trial Chamber must be satisfied that immediate resolution by the Appeals Chamber of the issue involved in the decision "may materially advance the proceedings". The Chamber considers that the use of the word "and" in Rule 73(B) implies that the two conditions set out above are cumulative and an applicant needs to satisfy both of them in order for the Chamber to exercise its discretion in favour of certification.
24. Under the circumstances of the present case, the Chamber finds that appellate resolution of the matter will not materially advance the proceedings but rather serve to cause further delays in the process.
25. These are the only two conditions it must consider in deciding whether or not to certify an appeal. All other considerations such as whether there was an error of law or abuse of discretion in the Impugned Decision are for the consideration of the Appeals Chamber after certification to appeal has been granted by the Trial Chamber. The Prosecutor's submissions on the merits of his appeal are therefore untimely and irrelevant to the decision for certification and will not be considered by the Chamber.
26. Having found that the Prosecution has failed to meet the conditions set out in Rule 73 (B) for certification to appeal the Impugned Ruling of 24 March 2005, the Chamber does not find it necessary to consider whether the Impugned Ruling relates to a Motion brought before the Chamber.

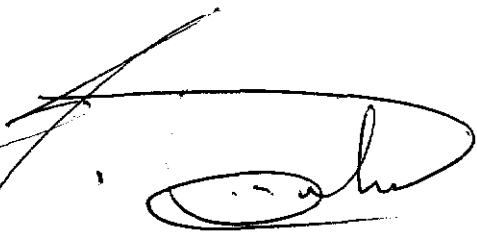
FOR THE FOREGOING REASONS, THE CHAMBER

DISMISSES the Motion in its entirety.

Arusha, 13 June 2005


Khalida Rachid Khan
Presiding Judge


Lee Gachiga Muthoga
Judge


Emile Francis Short
Judge

[Seal of the Tribunal]