



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

598  
Uwanga

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding  
Judge Arlette Ramaroson  
Judge Solomy Balungi Bossa

ICTR-96-8-T  
05 - 10 - 2006  
(598 - 594)

Registrar: Mr Adama Dieng

Date: 5 October 2006

The PROSECUTOR v. **Élie NDAYAMBAJE**  
Case No. *ICTR-96-8-T*  
Joint Case No. *ICTR-98-42-T*

~~DECISION ON ELIE NDAYAMBAJE'S MOTION FOR CERTIFICATION TO APPEAL~~  
~~THE DECISION ON NDAYAMBAJE'S MOTION FOR EXCLUSION OF EVIDENCE~~  
ISSUED ON 1<sup>st</sup> SEPTEMBER 2006

Office of the Prosecutor  
Ms Silvana Arbia  
Ms Adelaide Whest  
Mr Gregory Townsend  
Ms Holo Makwaia  
Ms Althea Alexis-Windsor  
Ms Astou Mbow, Case Manager

Defence Counsel for Ndayambaje  
Mr Pierre Boulé

JUDICIAL RECORDS ARCHIVES  
UNICTR  
2006 OCT - 5 1 P 5 28

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

**SITTING** as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

**BEING SEIZED** of the "*Requête d'Élie Ndayambaje aux fins de certification d'appel de la décision intitulée: Decision on Ndayambaje's Motion for Exclusion of evidence, of 1 September 2006,*" filed on 6 September 2006 (the "Motion");

**CONSIDERING** the "Prosecutor's Response to the *Requête d'Élie Ndayambaje aux fins de certification d'appel de la décision intitulée: Decision on Ndayambaje's Motion for Exclusion of evidence, of 1 September 2006,* filed on 11 September 2006 (the "Prosecutor's Response");

**CONSIDERING** the "*Replique de Élie Ndayambaje à la Réponse du Procureur à sa Requête d'Élie Ndayambaje aux fins de certification d'appel de la décision intitulée: Decision on Ndayambaje's Motion for Exclusion of Evidence, of 1 September 2006,* » of 18 September 2006 (« Ndayambaje's Reply ») ;

**NOTING** the Chamber's "Decision on Ndayambaje's Motion for Exclusion of evidence" of 1 September 2006 (the "Impugned Decision");

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rule 73 (B) of the Rules;

**CONSIDERING** that pursuant to Rule 73(A) of the Rules, the Motion will be decided on the basis of the written briefs only, as filed by the Parties.

## **SUBMISSIONS OF THE PARTIES**

### *The Defence*

1. The Defence moves under Rule 73(B) for certification to appeal the Impugned Decision.

### The issues involved significantly affect the fairness of the trial and its expeditiousness

2. The Defence submits that a large amount of evidence admitted against the Accused is evidence for which the Accused has not been charged with. If this evidence were to be expunged from the record, the Accused would not need to bring evidence to counter it and this will significantly affect the fairness and expeditiousness of the trial.
3. The Defence submits that the expression "Some of the matters raised may be considered at a later stage of the proceedings" used at para. 25 of the Impugned Decision renders the whole Decision vague and ambiguous regarding which of the matters the Defence ought to respond to when preparing its defence.<sup>1</sup> The Defence argues that it is not in the interests of justice for the Chamber to delay its decision to

<sup>1</sup> Para. 16 of the Motion



reject evidence which it knows was admitted contrary to the jurisprudence of the Tribunal.<sup>2</sup>

The issues involved significantly affect the conduct of the proceedings

4. The Defence makes reference to the Chamber's Decision of 18 March 2004 and argues that if the Chamber admits so much evidence which is outside of the scope of the indictment, it could unjustly condemn the Accused on the basis of this evidence, and therefore significantly affect the outcome of the trial.<sup>3</sup> For this reason, if the Chamber were to rule this evidence inadmissible at this stage of the proceedings, the Defence case would be simplified.

An immediate resolution by the Appeals Chamber may materially advance the proceedings

5. The Defence submits that an immediate resolution of the matter will materially advance the proceedings for the following reasons: 1) The Defence will need less preparation and presentation time; 2) The Prosecution's task will also be reduced; and 3) The Chamber will not be required to analyze evidence which is outside of the Indictment.<sup>4</sup>

*The Prosecution*

6. The Prosecution notes the provisions of Rule 73(B) and submits that the standard of proof that is required to warrant certification to appeal a Decision is very high,<sup>5</sup> so as to ensure finality of trials.
7. The Prosecution, making reference to the jurisprudence of the Tribunal,<sup>6</sup> argues that none of the grounds proffered by the Defence are sufficient to move the Chamber to grant certification of the Impugned Decision. It argues that a grant of the Motion would lead to a delay of the proceedings.
8. The Prosecution argues that the Defence merely repeats its arguments made in the motion which gave rise to the Impugned Decision and thus attempts to re-litigate the issues. In any case, the Prosecution objects to the Defence contention that the Impugned Decision is vague and ambiguous and rather argues that the Chamber is consistent in its jurisprudence that admissibility of evidence and the weight to be attached to it are two separate issues. The Prosecution argues that the Chamber's practice cannot raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

<sup>2</sup> Para. 17 of the Motion

<sup>3</sup> Para. 19, 20 of the Motion, quoting *Prosecutor v. Nyiramasuhuko et al.* ICTR-97-21-T, (TC) Decision on Ntahobali and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible," of 18 March 2004 (the *Ntahobali and Nyiramasuhuko* Decision of 18 March 2004") at para. 25

<sup>4</sup> Paras. 23 - 29 of the Motion

<sup>5</sup> The Rule provides that certification may be granted if the decision involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

<sup>6</sup> the *Ntahobali and Nyiramasuhuko* Decision of 18 March 2004



9. Regarding the Defence argument that the evidence admitted is outside the scope of the indictment, the Prosecution recalls the provisions of Rule 93 which allows the admission of evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law in the interests of justice and the jurisprudence of the Tribunal.
10. The Prosecution recalls the Appeals Chamber Decision of 4 October 2004 in *Nyiramasuhuko*<sup>7</sup> and argues that the admissibility of evidence is within the sole precinct of the Trial Chamber and that issues of admissibility are not fit for certification. It argues that the Defence is in fact requesting the Appeals Chamber to intervene in a matter which is at the discretion of the Trial Chamber, and thus in the absence of exceptional circumstances and clear reasons indicating that a discretion was wrongly exercised or that the Trial Chamber did not consider a material fact, the Appeals Chamber would not usually determine issues touching upon the exercise of judicial discretion by the Trial Chamber.

*The Defence Reply*

11. The Defence reiterates its submissions and denies the Prosecution's allegations that the Motion is an attempt to re-litigate the Defence's earlier Motion which gave rise to the Impugned Decision.
12. The Defence opposes the Prosecution's reliance on the Appeals Chamber Decision of 4 October 2004 in *Nyiramasuhuko*<sup>8</sup> arguing that there is a difference between admissibility of witness testimonies and admissibility of other pieces of evidence. The Defence recalls that, in the *Nyiramasuhuko* Decision of 18 March 2004, certification to appeal the Chamber's Decision on the admissibility of the testimonies of QBZ and RV was granted because the Chamber was of the view that the issue of admissibility of testimonies of Prosecution Witnesses significantly affect the outcome of the trial against the accused.

**HAVING DELIBERATED**

13. The Chamber recalls Rule 73 (B), which stipulates:

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.

14. The Chamber, recalling its jurisprudence<sup>9</sup> notes that decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the

<sup>7</sup> *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T (TC) Decision on Nyiramasuhuko's Appeal on the Admissibility of Evidence, of 4 October 2004

<sup>8</sup> *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T (TC) Decision on Nyiramasuhuko's Appeal on the Admissibility of Evidence, of 4 October 2004

<sup>9</sup> *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004 paras. 12 - 16; *Prosecutor v. Ntahobali and Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Ntahobali's



very limited circumstances stipulated in Rule 73 (B). The Chamber may grant certification to appeal if both conditions of Rule 73 (B) are satisfied.<sup>10</sup> Both of these conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered.

15. Having reviewed the submissions of the Parties, the Chamber is of the opinion that in its Motion, the Defence has generally revisited the thrust of its previous arguments which led to the Impugned Decision rather than demonstrating the conditions required for the Chamber to grant certification to appeal the Impugned Decision.
16. Moreover, the Chamber recalls the Appeals Chamber opinion<sup>11</sup> and underscores that matters concerning admissibility of evidence are the responsibility of the Trial Chamber, as triers of facts, and therefore the Appeals Chamber may not assume this responsibility.
17. The Chamber finds therefore that the Defence has failed to satisfy the criteria for the grant of certification under Rule 73(B) and denies the Motion accordingly

**FOR THE ABOVE REASONS, THE TRIBUNAL,**

**DENIES** the Motion.

Kigali, 5 October 2006



William H. Sekule  
Presiding Judge



Arlette Ramarason  
Judge



Solomy Balungi Bossa  
Judge

[Seal of the Tribunal]



---

and Nyiramasuhuko's Motions 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, paras. 14 - 17.

<sup>10</sup> Under the first limb of Rule 73(B), the applicant must show how an appellate review would significantly affect (a) a fair and expeditious conduct of the proceeding, or (b) the outcome of the trial. This condition is not determined on the merits of the appeal. Second, the applicant has the burden of convincing the Chamber that an "immediate resolution by the Appeals Chamber may materially advance the proceedings."

<sup>11</sup> See Para. 5 of the Appeals Chamber Decision of 4 October 2004 in *Nyiramasuhuko*.