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IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

ICTR-99-52-A
15.01.2007
(9761/A-9757/A)

Registrar: Mr. Adama Dieng

Decision of: 15 January 2007

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

JUDICIAL RECORDS ARCHIVES
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**DECISION ON THE APPELLANT HASSAN NGEZE'S MOTION REQUESTING
A POSTPONEMENT OF THE APPEAL HEARING**

Counsel for Jean-Bosco Barayagwiza

Mr. D. Peter Herbert
Ms. Tanoo Mylvaganam

Counsel for Ferdinand Nahimana

Mr. Jean-Marie Biju-Duval
Ms. Diana Ellis

Counsel for Hassan Ngeze

Mr. Bharat B. Chadha
Mr. Dev Nath Kapoor

Office of the Prosecutor

Mr. James Stewart
Mr. Neville Weston
Mr. Abdoulaye Seye
Ms. Linda Bianchi
Mr. Alfred Orono Orono

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 Serious Violations Committed in the Territory of Neighboring States, between 1 January and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively),

NOTING the Notice of Appeal filed by Counsel for Hassan Ngeze (“Appellant”) on 9 February 2004,¹ as amended on 9 May 2005;² the Appellant’s Brief filed on 2 May 2005;³ and the Reply Brief filed by him on 15 December 2005;⁴

NOTING the “Scheduling Order for Appeals Hearing and Decision on Hassan Ngeze’s Motion of 24 January 2006” rendered on 16 November 2006 (“Scheduling Order”) scheduling the Appeals Hearing in this case for 16, 17 and 18 January 2007;

NOTING the Decision for the Withdrawal of Mr. Behram Shroff as Co-Counsel of the Accused Hassan Ngeze signed by the Registrar of the Tribunal (“Registrar”) on 4 January 2007 and filed on 5 January 2007 (“Registrar’s Decision on Withdrawal”), by which the Registrar withdrew the assignment of Mr. Behram Shroff as Co-Counsel of the Appellant (“former Co-Counsel”) and directed the Appellant’s Lead Counsel to submit a request for appointment of a new Co-Counsel;⁵

BEING SEIZED OF the “Appellant Hassan Ngeze’s Extremely Urgent Motion Requesting a Postponement of the Appeal Hearing” filed by the Appellant on 5 January 2007 (“Motion”), in which the Appellant requests to postpone the Appeals Hearing “for 60 days pending the assignment of his new Co-Counsel so as to enable him to prepare himself for the oral hearing”;⁶

NOTING the “Corrigendum in the Appellant Hassan Ngeze’s Extremely Urgent Motion Requesting a Postponement of the Appeal Hearing on 5th January 2006” filed on 8 January 2007, by

¹ Defence Notice of Appeal (Pursuant to Rule 108 of the Rules of Procedure and Evidence), 9 February 2004.

² Confidential Amended Notice of Appeal, 9 May 2005 (“Notice of Appeal”).

³ Confidential Appellant’s Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), 2 May 2005 (“Appellant’s Brief”).

⁴ Appellant Hassan Ngeze’s Reply Brief (Article 113 of the Rules of Procedures and Evidence), 15 December 2005 (“Reply Brief”).

⁵ While the Registrar noted that the former Co-Counsel provided “unsatisfactory and unconvincing” explanations for being unable to submit a medical certificate in due form, the Decision was taken considering that that the former Co-Counsel was unable to “attend the final hearing [...] for poor health conditions rendering impossible for him to undertaken [sic] a long journey to Arusha”. By the same Decision, the Registrar declared that the former Co-Counsel “is no longer eligible for assignment to an accused/suspect of the Tribunal”.

The Appeals Chamber notes that no medical certificates have been to date submitted by the former Co-Counsel to prove his medical condition. The Appeals Chamber has also been informed by the DCDMS that the former Co-Counsel explained to them by e-mail of 13 December 2006 that he would most probably not be in a position to submit these documents before early February upon his return from “a nature cure centre” in South India.

⁶ Motion, preambulatory para. a.

which the Appellant requests that the Registrar's Decision on Withdrawal be treated as part of Annex I to the Motion;

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NOTING the "Prosecutor's Response to the 'Appellant Hassan Ngeze's Extremely Urgent Motion Requesting a Postponement of the Appeal Hearing" filed by the Prosecution on 9 January 2007 ("Response"), opposing the Motion "as there has been no acceptable reason advanced by the Appellant that could justify an adjournment of the oral hearing of the Appeal at this late stage";⁷

NOTING the letter from the Defence Counsel and Detention Management Section of the Tribunal ("DCDMS") dated 9 January 2007 ("Letter of Assignment") assigning Mr. Dev Nath Kapoor as the Appellant's Co-Counsel effective 15 January 2007 ("current Co-Counsel") "for the specific purpose of assisting Counsel on the hearing date and on the understanding that Counsel has had enough time to prepare for the hearing of the appeal";⁸

NOTING the "Reply to Prosecutor's Response to 'the Appellant [sic] Extremely Urgent Motion Requesting a Postponement of the Appeal Hearing'" filed by the Appellant on 10 January 2007 ("Reply");

NOTING that the Appellant submits that "it is humanly impossible for the incoming co-counsel to give his proper and efficient contribution in the presentation of oral arguments on the strength of ground work done by the Lead Counsel without familiarizing with all aspects of his case in such short time";⁹

⁷ Response, para. 2.

⁸ The Appeals Chamber notes that the assignment was accepted by the current Co-Counsel on the same date (*cf.* Statement of Availability, 9 January 2007).

The Appeals Chamber also notes that several requests for appointment of the current Co-Counsel were made by the Appellant, including "Request of Your Medical Report Connected to Number of Heart Surgery Which You Underwent during the past [sic] Years, as You Stated in the Status Conference on December 2004, so that the Registrar _ (DCMDS) Can Proceed with the Speed Assignment of the Co-Counsel in the Name of (Mr. Dav - Nath - Kapoor) Who Will Replace Behram N. Shroff Who Has Tended his Resigned [sic] Due to Severe Illness that Prevent him from Walking, Touching, Thinking and Working" filed on 21 December 2006; "New Request of the Urgent Appointment of Counsel (Mr. Dav - Nath - Kapoor) for the Presentation and Arguing my Case before the Appeals Chamber, the Present Request Replaces the One Pending before your Office Titled: Request of Urgent appointment of Counsel David Danielson (USA) and Have Him for Presenting and Arguing my Case before the Appeals Chamber during the Oral Hearing. He Be Selected among Other Counsel Namely: Professor Lenox (New York USA); Counsel Simone Monasebian (New Jersey USA) Alfred Pognon (Benin) He is to Replace Professor Behram N. Shroff Who Has Resigned' and filed on 15th December 2006" filed on 21 December 2006; and "My Response to Your Letter Dated December 20th 2006, with Reference ICTR/11-5-2-06/4657/dfm. with my Second Request of Having Assigned me with the Co-Counsel Mr. Dav - Nath - Kapoor Who Will Present and Argue my Case during the Oral Hearing, Alongside Counsel Chada [sic], Further to the Medical Report of my Lead Counsel which I Have Received, and Is Being Sent to You Accordingly" filed on 29 December 2006.

⁹ Motion, para. 4.

NOTING that the Appellant submits that his former Co-Counsel “failed to contribute in any manner in the preparation of his appeal”,¹⁰ and that, if the Motion is not granted, the current Co-Counsel “will also be unable to provide any effective legal assistance to him”;¹¹

NOTING that, according to the Appellant, his prior undertaking before the DCDMS that the replacement of the former Co-Counsel will not affect the scheduled Appeals Hearing “lost its meaning” in the current situation considering “the time lost in getting the official appointment”,¹² and that the verbal undertaking given by the current Co-Counsel “is of no significance to [his ability] to prepare for the Appeal [H]earing”;¹³

NOTING that the Prosecution responds that the Appellant’s Lead Counsel has been assigned to the case since May 2004, was the author of the Appellant’s Brief “filed some 19 months ago” and is thoroughly familiar with issues related to Witness EB, and therefore, would not need any assistance from a new Co-Counsel at this stage of the proceedings;¹⁴

NOTING that the Appellant replies that the requested postponement of the Appeals Hearing would allow the current Co-Counsel to be “in a position to assist Lead Counsel in responding to the Prosecution and the Judges of the Appeals Chamber during oral submissions, assist in the evidentiary hearing of Witness EB and to take over proceedings entirely should Lead Counsel become unable to participate”;¹⁵

CONSIDERING that, pursuant to Article 15 of the Directive on the Assignment of Defence Counsel (“Directive”), the Lead Counsel “shall deal with all stages of procedure” and “has primary responsibility for the Defence”, while the Co-Counsel may intervene “under the authority of Lead Counsel”;

CONSIDERING that the Appellant’s Lead Counsel was put on notice of the date of the Appeals Hearing on 16 November 2006, and that he has not to date informed the Appeals Chamber of any justified unavailability for the Appeals Hearing;

RECALLING that the Letter of Assignment was offered to the current Co-Counsel by the DCDMS on the understanding that this would not result in any delay of the appellate proceedings;

¹⁰ Reply, para. 10.

¹¹ *Id.*

¹² *Id.*

¹³ Reply, para. 14. He further specifies that the current Co-Counsel’s undertaking “was given [...] before his appointment as co-Counsel, at which time he had no idea of the complexity of the work involved” and that his “contractual, ethical and other obligations arose on appointment only” (*ibid.*, para. 15).

¹⁴ Response, paras 5-6.

¹⁵ Reply, paras 2 and 6.

CONSIDERING that the Lead Counsel, who, in the absence of any assistance from the former Co-Counsel, has had ample time to prepare for the Appeals Hearing in the present case,¹⁶ and is in a position to brief the current Co-Counsel as to matters that may require his assistance during the Appeals Hearing;

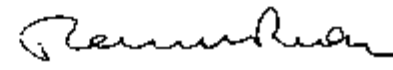
CONSIDERING that, in light of the fact that the current Co-Counsel is a qualified lawyer, the Appellant's argument that the verbal undertaking of the current Co-Counsel is of no significance to the latter's ability to prepare for the Appeals Hearing is a mere assertion;¹⁷

CONSIDERING, therefore, that the Appellant has not shown that any postponement of the Appeals Hearing as scheduled by the Scheduling Order is required in the interests of justice;

FOR THE FOREGOING REASONS,

HEREBY DISMISSES the Motion;

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



Judge Fausto Pocar
Presiding

Dated this 15th day of January 2007,
At Arusha, Tanzania.

[Seal of the Tribunal]



¹⁶ The Appeals Chamber notes that Mr. Bharat Chudha was assigned to the Appellant's case on 5 May 2004 as Co-Counsel and was appointed Lead Counsel on 17 November 2004.

¹⁷ See the Appellant's arguments on p.4 para.2.