



United Nations
International Criminal Tribunal for Rwanda

ICTR-98-44-T
14-6-2007
(29054-29049)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

THE BUREAU

Before: Judge Khalida Rachid Khan
Judge William H. Sekule
Judge Erik Møse

Registrar: Adama Dieng

Date: 14 June 2007

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KARERA

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

**DECISION ON MOTION TO VACATE DECISIONS AND FOR
DISQUALIFICATION OF JUDGES BYRON AND KAM**

Office of the Prosecutor:

Don Webster
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Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera

Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ndirumpatse

Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera

Peter Robinson and Patrick Niny Mayidika Ngimbi

ZCP

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA.

SITTING as the Bureau, composed of Judges Khalida Rachid Khan, William H. Sekule, and Erik Møse, in accordance with Rule 23 (A) of the Rules of Procedure and Evidence (the "Rules");

NOTING the President's Internal Memorandum dated 11 June 2007, referring Joseph Nzirorera's Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam to the Bureau in accordance with Rule 15 (B) of the Rules;

BEING SEIZED of "Joseph Nzirorera's Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam", filed on 4 June 2007 (the "Motion");

CONSIDERING the "Prosecutor's Response to Joseph Nzirorera's Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam", filed on 8 June 2007;

CONSIDERING the "Reply Brief: Joseph Nzirorera's Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam", filed on 11 June 2007;

HEREBY DECIDES the Motion.

INTRODUCTION

1. Pursuant to Rule 23 (A), the Bureau is composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers. Judge Dennis C.M. Byron, the President of the Tribunal, has recused himself from consideration of the current Motion since the decision at issue involved him. The Bureau is therefore presently composed of Judges Khalida Rachid Khan, Vice-President of the Tribunal and Presiding Judge of Trial Chamber III, William H. Sekule, Presiding Judge of Trial Chamber II, and Erik Møse, Presiding Judge of Trial Chamber I.

2. The *Karemera et al.* trial started on 19 September 2005 before Trial Chamber III composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam. On 19 January 2007, Judge Short withdrew from the case.

3. Under Rule 15 *bis* (D) of the Rules, the remaining Judges decided to continue the proceedings with a substitute judge.¹ On 20 April 2007, the Appeals Chamber affirmed that Decision.² The then President of the Tribunal authorized the remaining judges - Judges Byron and Kam - to conduct routine matters, such as the delivery of decisions, in the absence of the substitute judge, in accordance with Rule 15 *bis* (F).³

¹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (IC), 6 March 2007.

² *Karemera et al.*, Decision on Appeals Pursuant to Rule 15 *bis* (D) (AC), 20 April 2007.

³ See Rules of Procedure and Evidence, Rule 15 *bis* (F); and Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007.



4. Judge Vagn Joensen was appointed by the Secretary-General as an *ad litem* judge to form part of the bench in the *Karemera et al.* case.⁴ However, according to Rule 15 *bis* (D), he could only join the bench after he certified that he had familiarised himself with the record of the proceedings, which he did on 8 June 2007.⁵

5. On 31 May 2007, the Appeals Chamber vacated one of the decisions delivered under Rule 15 *bis* (F) on the basis that the issues decided therein were not "routine matters" as contemplated under that Rule.⁶

6. The Defence for Joseph Nzirorera now requests that the Bureau disqualify Judges Byron and Kam from the decision-making process in the re-hearing of five motions and one additional matter: (i) the motion underlying the decision vacated by the Appeals Chamber Decision; (ii) four other motions decided by Judges Byron and Kam acting under Rule 15 *bis* (F); and (iii) the matter of a scheduling order rendered by the remaining judges. The Defence requests that the decisions on these four additional motions should be vacated and the motions re-heard as a result of the Appeals Chamber Decision. In addition, the Defence requests that the scheduling order be vacated and the issue re-visited. The Defence submits that Judges Byron and Kam should be disqualified on the basis of actual bias, or, alternatively, a reasonable apprehension of bias pursuant to Rule 15 of the Rules because, having decided these motions, they are incapable of hearing them afresh.

7. The Prosecution does not oppose Mr. Nzirorera's request that four of the five decisions be vacated and re-heard, but submits that disqualification is improper and that these motions should only be re-heard by Judges Byron, Kam and Joensen. The Prosecution submits that there is no basis for apprehending bias on the part of Judges Byron and Kam.

DISCUSSION

8. As a preliminary matter, the Bureau notes that Mr. Nzirorera requests that the five additional decisions decided by Judges Byron and Kam pursuant to Rule 15 *bis* (F) be vacated. This request is beyond the scope of the Bureau's authority, which is limited by Rule 15 (B) to determining whether judges should be disqualified.

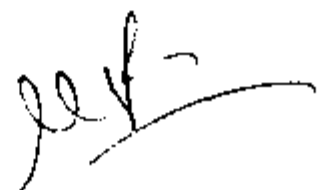
9. Rule 15 (A) provides that a Judge may not "sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality." This provision has been interpreted broadly to permit any ground of impartiality to be raised before the Bureau as a basis for disqualification.⁷ The requirement of

⁴ Judge Joensen was sworn in on 2 May 2007

⁵ *Karemera et al.*, Certification of the Familiarization with the Record of the Proceedings (Judge Vagn Joensen), 8 June 2007.

⁶ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.9, Decision on Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining Prior Statements of Prosecution Witnesses after they have Testified (AC), 31 May 2007 (the "Appeals Chamber Decision").

⁷ *Prosecutor v. Ntahobali*, Case No. ICTR-97-21-T, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 8 (citing *Prosecutor v. Blagojević et al.*, Case No. IT-02-60, Decision on Blagojević's Application Pursuant to Rule 15 (B) (Bureau), 19 March 2003, para. 10; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-I, Determination of the Bureau Pursuant to Rule 15 (B) (Bureau), 20 February 2002, paras. 9-11; *Prosecutor v. Nahimana et al.*, T. 19 September 2000 p. 6).



impartiality is violated not only where the decision-maker is actually biased, but also where there is an appearance of bias.⁸ An appearance of bias is established if (a) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of the case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁹

10. The apprehension of bias test reflects the maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."¹⁰ Although the standpoint of the accused is a relevant consideration, the decisive question is whether a perception of lack of impartiality is objectively justified.¹¹ A mere feeling or suspicion of bias by the accused is insufficient; what is required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances.¹²

11. Judges of this Tribunal enjoy a presumption of impartiality, based on their oath of office and the qualifications for their selection in Article 12 of the Statute, and the moving party bears the burden of displacing this presumption, which has been described by the Appeals Chamber as imposing a "high threshold".¹³ The reason for this threshold is that while any real appearance of bias on the part of a judge undermines confidence in the administration of justice, it would be equally a threat to the interests of the impartial and fair administration of justice if judges were to be disqualified on the basis of unfounded and unsupported allegations of bias.¹⁴ As noted by the Appeals Chamber:

⁸ *Prosecutor v. Furundžija*, Case No. IT-95-17/I-A, Judgment (AC), 21 July 2000, paras. 181-88. See also *Prosecutor v. Brđanin and Talić*, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, paras. 9-14.

⁹ *Furundžija*, Judgment (AC), 21 July 2000, para. 189.

¹⁰ *Furundžija*, Judgment (AC), 21 July 2000, para. 195 (quoting *R v. Sussex Justices* (1923), [1924] 1 K.B. 256, 259 (Lord Hewart)); *Brđanin and Talić*, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, para. 9; *Prosecutor v. Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (Sierra Leone AC), 13 March 2004, para. 16; *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9.

¹¹ See e.g., *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9 (citing *Furundžija*, Judgment (AC), 21 July 2000, para. 185).

¹² This "objective test" has, in substance, been adopted in a number of decisions before this Tribunal: *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Disqualification of Judges (Bureau), 28 May 2007, para. 7; *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 9; *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 9; *Prosecutor v. Nzirorera et al.*, Re. Application for the Disqualification of Judge Mehmet Ghney (Bureau), 26 September 2000, paras. 8-9; *Prosecutor v. Nuhimana et al.*, Oral Decision (TC), T. 19 September 2000, p. 10; *Nyiramasuhuko and Ntahobali*, Determination of the Bureau in Terms of Rule 15 (B) (Bureau), 7 June 2000, p. 5; *Prosecutor v. Kabirigi*, Decision on the Defence's Extremely Urgent Motion for Disqualification and Objection Based on Lack of Jurisdiction (TC), 4 November 1999, para. 8.

¹³ *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9 (quoting *Prosecutor v. Delalić*, Judgment (AC), para. 707).

¹⁴ See e.g., *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 9 (citing *Prosecutor v. Delalić*, Judgment (AC), para. 707).

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.¹⁵

12. In this case, the Accused does not allege that any interest or association of the Judges gives rise to an apprehension of bias or that the reasoning or results of the decisions in question reveal a pattern of bias, actual or reasonably apprehended, against him. Given that the Accused does not suggest that bias is evidenced by the substance of the Chamber's decisions, the Bureau need not examine their contents.¹⁶

13. The Defence stresses that it "is not claiming that Judges Byron and Kam are biased against him on the merits of his case."¹⁷ Rather, the Defence submits that, having rendered prior decisions and an order on the same matters, they are incapable of deciding them afresh, and should therefore be disqualified. Mr. Nzirorera contends, "Any reasonable observer would conclude that the remaining Judges have made up their minds on the issues which are the subject of the vacated decision and are therefore not impartial as relates to the fresh deliberation and decision that now must be undertaken." "Absent disqualification", Mr. Nzirorera submits, "the remedy of vacating the decisions and deciding them as a Trial Chamber with the substitute Judge would be a hollow one" because regardless of the substitute Judge's conclusions on the motions, "he is already outvoted."¹⁸

14. The Bureau has consistently held that in order to show bias through judicial decisions, "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law [...] or to the assessment of the relevant facts."¹⁹ Here, Mr. Nzirorera concedes that there is no bias attributable to a pre-disposition against him, but submits that Judges Byron and Kam have a pre-disposition related to the application of law and assessment of facts with respect to the five decisions and one order brought to the attention of the Bureau.

15. Mr. Nzirorera has not demonstrated that Judges Byron and Kam will be partial against him when (i) re-hearing the motion underlying the decision vacated by the Appeals Chamber Decision, or (ii) when determining whether to vacate the other four decisions and

¹⁵ *Delalic*, Judgement (AC), para 707 (quoting *Re: JRL. Ex parte CJL* (1986) 161 CLR 342, 352 (Aus)).

¹⁶ Conversely, where the defence alleges that the rulings themselves reveal a pattern of bias against an accused, the Bureau has a duty to examine the content of the judicial decisions cited as evidence of bias. See *Bagosora et al.*, Decision on Motion for Disqualification of Judges (Bureau), 28 May 2007, para. 10; *Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 12; *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 12; *Karemera et al.*, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 13; *Blagojević et al.*, Decision on Blagojević's Application Pursuant to Rule 15 (B) (Bureau), 19 March 2003, para. 14. Each of these Bureau decisions noted the Bureau's obligation to examine the

¹⁷ Motion, para. 12.

¹⁸ Motion, paras. 8-9.

¹⁹ *Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, para. 12; *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, para. 12; *Karemera et al.*, Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, para. 13; *Karemera et al.*, Decision on Motion by Nzirorera for Disqualification of Judges (Bureau), 17 May 2004, para. 14.

one scheduling order referred to in his Motion, or (iii) when possibly re-hearing the matters underlying those four decisions and one order. The possibility that, having previously decided the relevant issues on the merits, Judges Byron and Kam are pre-disposed to apply the law and assess the facts in the same manner is insufficient as a matter of law to displace the presumption of impartiality and show bias, either actual or reasonably apprehended.

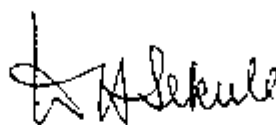
FOR THESE REASONS, THE BUREAU

DENIES the Motion.


Arusha, 14 June 2007



Chaita Pachid Khan
Vice-President;
Presiding Judge,
Trial Chamber III



William H. Sekule
Presiding Judge,
Trial Chamber II



Erik Mose
Presiding Judge,
Trial Chamber I

