



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

114/H

0137

ICTR-2002-78-11bis
1 September 2008
(114/H - 109/H)

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. Adama Dieng

Order of: 1 September 2008

JUDICIAL RECORDS ARCHIVES
2008 SEP - 01 2:24:22

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-R11bis

ICTR Appeals Chamber

Date: 1 September 2008

Action: P.T.

Copied To: Col. Carnaud, Judges
Tribes, ELOS, LSS, ALD

LST, Archives

**DECISION ON REQUEST TO ADMIT ADDITIONAL EVIDENCE
OF 1 AUGUST 2008**

Counsel for Gaspard Kanyarukiga

Mr. Ernest Midagu Bahati
Ms. Camille Yuma Kamili

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Bongani Majola
Mr. Alex Obote-Odera
Mr. Richard Karegyesa
Mr. Dior Fall
Mr. Neville Weston
Ms. Beatrice Chapaux
Mr. Ignacio Tredici

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: KOFFI... KUMENI... A... AFRANDE...
SIGNATURE: DATE: 01 SEPT. 2008

pu

113/H

1. 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 Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of a motion filed on 1 August 2008 by Gaspard Kanyarukiga ("Kanyarukiga") to admit additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules").¹ The Prosecution filed its response on 5 August 2008,² and Kanyarukiga replied on 7 August 2008.³

BACKGROUND

2. On 6 June 2008, a Trial Chamber designated under Rule 11*bis* of the Rules issued a decision denying the Prosecution's request to refer Kanyarukiga's case to Rwanda pursuant to Rule 11*bis* of the Rules.⁴ The Prosecution appealed this decision, filing its Notice of Appeal on 23 June 2008⁵ and its Appeal Brief on 8 July 2008.⁶ Kanyarukiga filed his response on 18 July 2008⁷ and the Prosecution replied on 22 July 2008.⁸

3. In the Motion, the Defence requests permission, pursuant to Rule 115 of the Rules, to file a report published by Human Rights Watch in July 2008 entitled "Law and Reality – Progress in Judicial Reform in Rwanda" ("Report"). The Defence submits that the Report, published after the rendering of the 11*bis* Decision, should be admitted as additional evidence of the weaknesses in the Rwandan judicial system that would impair Kanyarukiga's fair trial rights if he were to be transferred to Rwanda.⁹

4. The Prosecution responds that Rule 115 of the Rules is not designed to allow a party that succeeded in the first instance to present additional evidence to support a point that was decided in their favour, and that Kanyarukiga has failed to identify the specific finding of fact made by the

¹ Defence Extremely Urgent Addendum to Defence Appeal Motion Seeking Leave to Present Additional Evidence (Rule 115 of the Rules of Procedure and Evidence), 1 August 2008.

² Prosecutor's Response to "Requête en extrême urgence de la Défense en complément à celle introduite à l'effet d'obtenir l'autorisation de verser de preuves supplémentaires (Article 115 RPP)", 5 August 2008 ("Response").

³ Réplique de la Défense à la réponse du Procureur relative à la production des preuves additionnelles (Art. 115 RPP), 7 August 2008 ("Reply").

⁴ Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008 ("11*bis* Decision").

⁵ Prosecutor's Notice of Appeal (Rule 11*bis* (H)), 23 June 2008.

⁶ Prosecutor's Appeal Brief (Rule 11*bis* (H)), 8 July 2008.

⁷ Defence Brief in Response to the Prosecutor's Appeal Brief (Rule 11*bis* of the Rules of Procedure and Evidence), 18 July 2008. See also Corrigendum to the Defence Brief in Response to the Prosecutor's Appeal Brief, 29 July 2008.

⁸ Prosecutor's Reply to "Mémoire de la Défense en réponse à l'appel du Procureur (Article 11*bis* RPP)", 22 July 2008.

112/H

Trial Chamber to which the additional evidence is directed.¹⁰ The Prosecution further submits that the Report is not new evidence, as the research presented in the Report formed the basis of the *amicus curiae* brief that Human Rights Watch submitted during the referral proceedings.¹¹ The Prosecution also argues that fees associated with the Motion should not be paid to Counsel for Kanyarukiga.¹²

5. Kanyarukiga replies that during the referral proceedings, Human Rights Watch had primarily made submissions about the judicial system of Rwanda, whereas the Report focuses on witness protection issues. He submits that the Report therefore contains new information that would assist the Appeals Chamber.¹³

DISCUSSION

6. Rule 115 of the Rules provides a mechanism for admission of additional evidence on appeal where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial.¹⁴ According to Rule 115(A) of the Rules, a motion for additional evidence shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. In addition, Rule 115(B) of the Rules provides that the additional evidence must not have been available at trial and must be relevant and credible. When determining the availability at trial, the Appeals Chamber will consider whether the party tendering the evidence has shown that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence [...] before the Trial Chamber."¹⁵ Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine in accordance with Rule 115(B) of the Rules whether it could have been a decisive factor in reaching the decision at trial.

⁹ Motion, paras. 1-7.

¹⁰ Response, paras. 7-9.

¹¹ Response, paras. 10, 11.

¹² Response, para. 13.

¹³ Reply, paras. 10-12.

¹⁴ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on a Request to Admit Additional Evidence, 27 April 2007, para. 6 ("*Muvunyi* Decision"); *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 4 ("*Nahimana et al.* Rule 115 Decision").

¹⁵ See *Muvunyi* Decision, para. 6 and *Nahimana et al.* Rule 115 Decision, para. 5, quoting *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9 (internal references omitted).

111/H

7. Furthermore, in accordance with established jurisprudence, where the proffered evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party can establish that its exclusion *would* amount to a miscarriage of justice.¹⁶ That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.¹⁷

8. The Appeals Chamber considers that Kanyarukiga has not satisfied the requirements of Rule 115 of the Rules in respect of the proposed additional evidence. As noted by the Prosecution, the Report indicates that "[b]ased on the research presented in this report, Human Rights Watch took the position that Rwandan courts were not certain to be able to provide fair trials, a position presented in *amicus curiae* briefs submitted to the ICTR chambers deciding on the transfers".¹⁸ The Report refers to the *amicus curiae* brief submitted by Human Rights Watch in *The Prosecutor v. Kayishema*,¹⁹ which was the same brief as the one submitted during Kanyarukiga's referral proceedings, and relied on by the Trial Chamber in its 11*bis* Decision.²⁰ In the Appeals Chamber's view, therefore, the research which formed the basis of the Report was available at trial. Therefore, it can only be admissible if the Appeals Chamber is satisfied that it is relevant, credible and, if adduced at trial, would have had an impact on the verdict.

9. The Appeals Chamber finds that Kanyarukiga has identified, with sufficient particularity, the specific finding of fact to which the additional evidence is directed. The evidence is directed towards the Trial Chamber's finding that it was not satisfied that Kanyarukiga would receive a fair trial if he was transferred to Rwanda, and, in particular, its finding that Kanyarukiga's right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses

¹⁶ *Muvunyi* Decision, para. 7; *Nahimana et al.* Rule 115 Decision, para. 6 (with further references).

¹⁷ *Muvunyi* Decision, para. 7; *Nahimana et al.* Rule 115 Decision, para. 6.

¹⁸ Report, p. 95; Response, para. 11.

¹⁹ Report, fn. 315, referring to *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2001-67-I, Brief of Human Rights Watch as *Amicus Curiae* in Opposition to Rule 11*bis* Transfer, 3 January 2008 ("Human Rights Watch *Amicus Curiae* Brief").

²⁰ See Decision on *Amicus Curiae* Request, para. 4, where the Trial Chamber stated "In the Chamber's decision of 22 February 2008, Human Rights Watch was invited to provide written submissions no later than 7 March 2008. The organization has attached the brief it provided in the other Rule 11*bis* proceedings to its current Request. The Chamber will consider this brief in connection with its deliberation in the present case". Moreover, contrary to Kanyarukiga's submissions, the *amicus curiae* brief submitted by Human Rights Watch addressed witness protection issues as well as issues relating to the Rwandan judicial system. Human Rights Watch *Amicus Curiae* Brief, paras. 25-40 ("Right to Present Witnesses") and paras. 85-105. The information contained in the corresponding section of the Report ("Right to Present Witnesses") closely parallels that contained in the brief. See Report, pp. 73-78. The Trial Chamber also referred to the brief several times in its assessment of whether witnesses would receive adequate protection in Rwanda. See 11*bis* Decision, paras. 63-75.

RM

110/H

called by the Prosecution cannot be guaranteed in Rwanda.²¹ The Appeals Chamber is also satisfied that the Report, which addresses the capacity of the Rwandan legal system to ensure a fair trial, and is issued by a non-governmental organization which was granted *amicus curiae* status during the referral proceedings on the basis of its expertise in this area,²² is relevant and credible.

10. However, Kanyarukiga has failed to demonstrate that if the proposed additional evidence had been adduced at trial, it would have had an impact on the verdict. As the Trial Chamber decided in Kanyarukiga's favour and denied the Prosecution request to refer his case to Rwanda in part on the basis that it was not satisfied that Kanyarukiga would receive a fair trial there at the present time, the Report would not have had an impact on the verdict.

11. The Appeals Chamber is therefore of the view that the requirements of Rule 115 of the Rules have not been met with respect to the proposed additional evidence.

12. The Prosecution additionally submits that if the Motion is dismissed, fees should not be paid to Counsel for Kanyarukiga. Rule 73(F) of the Rules provides that the Appeals Chamber may impose sanctions, which may include non-payment in whole or in part of the fees associated with a motion, against Counsel if Counsel brings a motion that is frivolous or an abuse of process.²³ The Prosecution has advanced no arguments to demonstrate why the Motion is frivolous or an abuse of process. The Appeals Chamber recalls that the power to impose sanctions should be exercised cautiously,²⁴ and finds that, in the circumstances of this case, there is no basis for it to conclude that the Motion is frivolous or abusive. The Appeals Chamber therefore does not consider that any sanctions against Counsel for Kanyarukiga are warranted.

DISPOSITION

For the foregoing reasons, the Appeals Chamber,

DISMISSES the Motion;

²¹ *Ibid* Decision, para. 104.

²² Decision on Defence Request to Grant *Amicus Curiae* Status to Four Non-Governmental Associations, 22 February 2008; Decision on *Amicus Curiae* Request by Human Rights Watch, 29 February 2008 ("Decision on *Amicus Curiae* Request").

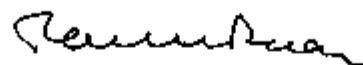
²³ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Hassan Ngeze's Motion Requesting Immediate Action in Respect of Alleged Falsification of the Prosecutor's Request for a Further Extension of the Restrictive Measures of 12 December 2005, 27 February 2006 (confidential), para. 12; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 10.

²⁴ *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Motion to Vacate Sanctions, 23 February 2005, para. 6.

109/H

DENIES the Prosecution's request for non-payment of the fees associated with the Motion to Counsel for Kanyarukiga.

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



Judge Fausto Pocar
Presiding

Dated this 1st day of September 2008,
at The Hague, The Netherlands.



[Seal of the Tribunal]