

108/H

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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

0138

ICTR-2002-78-R11bis
1 September 2008
(108/H - 103/H)

IN THE APPEALS CHAMBER

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

Registrar: Mr. Adama Dieng

Order of: 1 September 2008

JUDICIAL
RECORDS
2008 SEP -2 P 12:26

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-R11bis

ICTR Appeals Chamber
Date: 1 September 2008
Action: P.F.
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**DECISION ON REQUEST TO ADMIT ADDITIONAL EVIDENCE
OF 18 JULY 2008**

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107/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 18 July 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 22 July 2008,² and Kanyarukiga filed his reply on 28 July 2008.³

BACKGROUND

2. On 6 June 2008, a Trial Chamber designated under Rule 11bis of the Rules issued a decision denying the Prosecution's request to refer Kanyarukiga's case to Rwanda pursuant to Rule 11bis 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 his Motion, Kanyarukiga requests permission to file affidavits from his investigators regarding the refusal of potential Defence witnesses to testify before Rwandan courts.⁹ Kanyarukiga also wishes to file the transcript of the status conference of 13 July 2007 which, in his view, reflects the delay incurred in his trial despite an undertaking made by the Prosecution.¹⁰ The Prosecution responds that Kanyarukiga has not met the requirements of Rule 115 of the Rules, as he has not specified the additional evidence that he wants to present, identified the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, or demonstrated that the additional evidence is relevant.¹¹ It further submits that Rule 115 of the Rules is not designed to

¹ Defence Appeal Motion Seeking Leave to Present Additional Evidence (Rule 115 of the Rules of Procedure and Evidence), 18 July 2008 ("Motion").

² Prosecutor's Response to "Requête en appel de la Défense tendant à solliciter l'autorisation de produire des preuves supplémentaires (Article 115 RPP)", 22 July 2008 ("Response").

³ Reply by the Defence to Prosecutor's Response to Defence Appeal Motion Seeking Leave to Present Additional Evidence (Rule 115 of the Rules of Procedure and Evidence), 28 July 2008 ("Reply").

⁴ Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008 ("11bis 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 11bis 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 11bis RPP)", 22 July 2008.

⁹ Motion, para. 5; Reply, para. 12.

¹⁰ Motion, para. 5; Reply, para. 12.

¹¹ Response, paras. 3-7.

106/H

allow a party that succeeded at first instance to present additional evidence that it failed to present at trial in order to support a point made in its favour.¹²

4. Kanyarukiga replies that the Trial Chamber found that the evidence regarding the interference of Rwandan security services in the administration of justice was not sufficient, and that additional evidence would help to clarify this issue before the Appeals Chamber.¹³ He claims that the purpose of the additional evidence is to further enlighten the Appeals Chamber about the functioning of the current regime in Rwanda, the judicial system and the fear of witnesses to testify in Rwanda.¹⁴ Kanyarukiga further submits that the Defence obtained the additional evidence only after the referral proceedings were completed.¹⁵

DISCUSSION

5. 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.¹⁶ 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."¹⁷ 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.

¹² Response, para. 6, citing *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Confidential Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006, para. 5; *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005, p. 3.

¹³ Reply, paras. 10, 11.

¹⁴ Reply, para. 16.

¹⁵ Reply, para. 13.

¹⁶ *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").

¹⁷ 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).

105/H

6. 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.¹⁸ That is, it must be demonstrated that had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.¹⁹

7. With respect to the request of Kanyarukiga to tender as additional evidence on appeal the transcript of the status conference of 13 July 2007, the Appeals Chamber notes that that transcript is part of the record on appeal. As such, it does not constitute additional evidence and there is no need for the Appeals Chamber to consider it further.²⁰

8. With respect to the request of Kanyarukiga to tender affidavits from his investigators regarding the refusal of potential Defence witnesses to testify before Rwandan courts, Kanyarukiga submits that the affidavits are relevant to the Trial Chamber's finding that the Defence evidence with respect to the interference of the security services with the administration of justice in Rwanda was not sufficient. In the 11bis Decision, the Trial Chamber held that the "submissions do not show that Rwandan judicial officials will disregard witness protection orders",²¹ and that it did not find that "witnesses will, in general, face risks if they testify in transfer proceedings".²² However, the Trial Chamber did find that the Defence may face problems in obtaining witnesses residing both

¹⁸ *Muvunyi* Decision, para. 7; *Nahtmana et al.* Rule 115 Decision, para. 6 (with further references).

¹⁹ *Muvunyi* Decision, para. 7; *Nahtmana et al.* Rule 115 Decision, para. 6.

²⁰ However, the Appeals Chamber notes that in its view, the transcript of the status conference is not relevant to any of the issues on appeal. Kanyarukiga submits that the transcript of the status conference is directed towards the excessive delay of the Prosecution in light of an undertaking given at the status conference. He submits that the transcript of the status conference reflects "the delay incurred in the trial of the Accused, despite the promises made by the Prosecutor during the hearing of 13 July 2007" and argues that "the Prosecutor is therefore responsible for the undue delay in respect of Kanyarukiga's trial because there elapsed basically 10 months before a decision was entered by the Trial Chamber on 6 June 2008" (Response, paras. 12, 14). However, the only undertakings made by the Prosecution at the status conference were that it would be in a position to set the date of trial at a status conference in September or October 2007, and that if the case was not transferred, it would be in a position to complete the case by the end of the following year (September 2008). See T. 13 July 2007 pp. 2, 9, 13. The Prosecution filed its request to transfer the case to Rwanda on 7 September 2007. See Prosecutor's Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007. It is therefore not clear to the Appeals Chamber how the Prosecution failed to comply with any undertakings made during the status conference or contributed to the ten months that elapsed between the request for referral and the 11bis Decision. Moreover, while Kanyarukiga raised the issue of delay in the referral proceedings, the Trial Chamber did not make a finding on this issue. See *Réponse de la Défense à la requête du Procureur portant transfert de l'Accusé Gaspard Kanyarukiga au Rwanda*, 16 November 2007, paras. 11, 83. The Appeals Chamber notes that Kanyarukiga has not appealed against the 11bis Decision. It therefore considers that the transcript of the status conference is not relevant to any of the issues on appeal.

²¹ 11bis Decision, para. 66.

²² 11bis Decision, para. 69.

GM

104/H

within and outside Rwanda because they will be afraid to testify. This finding formed one of the bases upon which it denied the request for referral.²³

9. The affidavits that Kanyarukiga seeks to have admitted may be relevant to establishing that the witnesses' fear about testifying is not simply subjective, but that there is evidence of actual interference by the Rwandan security services in the administration of justice, and thus that the Trial Chamber erred in finding that witnesses will not generally face risks if they testify. However, Kanyarukiga has not attached the affidavits to his Motion, nor has he described the content of these affidavits in sufficient detail which would allow the Appeals Chamber to assess whether they are relevant to demonstrating actual interference in the administration of justice, or whether they simply address the witnesses' subjective fears, which would be relevant only in the sense of supporting the Trial Chamber's findings rather than in showing that it erred. The Appeals Chamber also does not have enough information to assess the credibility of the affidavits.²⁴

10. Furthermore, as Kanyarukiga has failed to explain why affidavits from his own investigators with respect to the unwillingness of potential witnesses to testify in Rwanda could not have been obtained during the first instance proceedings, the Appeals Chamber is not satisfied that Kanyarukiga has demonstrated that the proposed additional evidence was not available at trial or could not have been discovered through the exercise of due diligence.

11. In light of the Appeals Chamber's findings above, the affidavits would only be admissible under Rule 115 of the Rules if Kanyarukiga demonstrated that they would have an impact on the verdict, which he has failed to do. As the Trial Chamber decided in Kanyarukiga's favour and denied the Prosecution request to refer his case to Rwanda, partly because it was concerned that he would face problems in obtaining witnesses to the extent and in a manner that would ensure a fair trial because they would be afraid to testify, the proposed additional evidence would not have had an impact on the verdict.

²³ 11bis Decision, paras. 73, 75, 104.

²⁴ The Appeals Chamber notes that a party seeking the admission of additional evidence on appeal must provide to the Appeals Chamber the evidence sought to be admitted to allow it to determine whether the evidence meets the requirements of relevance and credibility. See Muvunyi Decision, para. 8; *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. 18; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 14 February 2005, p. 3. See also *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, "Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to Be Taken Pursuant to Rule 94(B)", 8 May 2001, para. 5.

103/H

12. In light of the above, the Appeals Chamber is not satisfied that Kanyarukiya has established that the purported additional evidence meets the requirements of Rule 115 of the Rules.

DISPOSITION

For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion.

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