



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

213/H

ICTR-98-41-A
16th April 2009
{213/H – 206/H}

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Pre-Appeal Judge

Registrar: Mr. Adama Dieng

Decision of: 16 April 2009

ICTR Appeals Chamber
Date: 16 April 2009
Action: R.J.
Copied To: *Condemned Judges, SLOs, LOs, ALOs, Parties, CMS, LSS.*

**Théoneste BAGOSORA
Aloys NTABAKUZE
Anatole NSENGIYUMVA**
v.

THE PROSECUTOR

Case No. ICTR-98-41-A

JUDICIAL RECORDS ARCHIVES
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**DECISION ON PROSECUTION MOTION REQUESTING COMPLIANCE
WITH REQUIREMENTS FOR FILING NOTICES OF APPEAL**

Defence Counsel

Raphaël Constant for Théoneste Bagosora
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *KOFFI KUMENDO A. AFANDE*
SIGNATURE: *[Handwritten Signature]* DATE: *16 April 2009*

1. I, **MEHMET GÜNEY**, Judge of 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 (“Tribunal”) and Pre-Appeal Judge in this case, am seized of the “Prosecution Motion Requesting Defence Compliance with the Requirements for Filing Notices of Appeal” filed on 19 March 2009 (“Prosecution Motion”), in which the Prosecution requests the Appeals Chamber to order Aloys Ntabakuze (“Ntabakuze”) and Anatole Nsengiyumva (“Nsengiyumva”) to file revised versions of their notices of appeal.¹

A. Procedural Background

2. In its judgement pronounced on 18 December 2008 and filed on 9 February 2009, Trial Chamber I of the Tribunal convicted Théoneste Bagosora, Ntabakuze and Nsengiyumva of genocide, crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II and sentenced them to life imprisonment.²

3. On 11 and 13 March 2009 respectively, Ntabakuze and Nsengiyumva filed their notices of appeal against the Trial Judgement.³

4. The Prosecution filed its Motion on 19 March 2009, to which Ntabakuze and Nsengiyumva responded on 25 and 30 March 2009, respectively.⁴ The Prosecution replied to Ntabakuze Response on 30 March 2009⁵ and to Nsengiyumva Response on 3 April 2009.⁶

¹ Prosecution Motion, paras. 2, 11.

² *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, signed on 18 December 2008, filed on 9 February 2009 (“Trial Judgement”), paras. 2258, 2277, 2278, 2279.

³ Notice of Appeal in the interest of Major Aloys Ntabakuze, 11 March 2009 (“Ntabakuze Notice of Appeal”); Notice of Appeal Pursuant to Article 24, Rule 108 of the Rules of Procedure and Evidence, 13 March 2009 (“Nsengiyumva Notice of Appeal”).

⁴ Motion for Leave to File Addendum and Addendum to Ntabakuze Notice of Appeal, 25 March 2009 (“Ntabakuze Response”); Nsengiyumva’s Response to Prosecutor’s Motion Requesting Compliance with the Requirements for Filing Notices of Appeal Pursuant to Article 24 and Rule 108 of the Rules of Procedure and Evidence, and Request to File Amended Notice, 30 March 2009 (“Nsengiyumva Response”). See also Corrigendum to Nsengiyumva’s Response to Prosecutor’s Motion Requesting Compliance with the Requirements for Filing Notices of Appeal Pursuant to Article 24 and Rule 108 of the Rules of Procedure and Evidence, and Request to File Amended Notice, Filed 30 March 2009, 1 April 2009.

I note that Ntabakuze submits that his filing of 25 March 2009 may be considered as a response to the Prosecution’s Motion or, in the alternative, as a separate motion: Ntabakuze Response, para. 3. Given its content, I elected to treat it as a response to the Prosecution Motion.

⁵ Prosecution Reply to Ntabakuze Response on Compliance with the Requirements for Filing Notices of Appeal and Addendum to the Notice of Appeal, 30 March 2009 (“Prosecution Reply to Ntabakuze Response”).

⁶ Prosecution Reply to Nsengiyumva’s Response on Compliance with the Requirements for Filing Notices of Appeal and Request to File Amended Notice of Appeal, 3 April 2009 (“Prosecution Reply to Nsengiyumva Response”).

5. On 3 April 2009, Ntabakuze filed additional submissions in response to both the Prosecution Motion and the Prosecution Reply to Ntabakuze Response.⁷ Pursuant to paragraph 13 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal,⁸ a response to a motion filed during an appeal from judgement shall be filed within ten days of the filing of the motion. Ntabakuze's submissions in response to the Prosecution Motion filed on 3 April 2009, 15 days after the Prosecution Motion was filed, are therefore untimely and cannot be considered as validly filed. As regards Ntabakuze's submissions in response to the Prosecution Reply to Ntabakuze Response, I emphasize that no provision of the Rules of Procedure and Evidence of the Tribunal ("Rules") or the Practice Direction for the Filing of Written Submissions authorizes a party to file a rejoinder. However, insofar as Ntabakuze Response was formally filed as a motion⁹ and contains a specific request to file an addendum to which the Prosecution responded in its reply, Ntabakuze Reply is accepted to the extent that it refers to Ntabakuze's request to file an addendum.

B. Discussion

6. In its Motion, the Prosecution submits that Ntabakuze Notice of Appeal and Nsengiyumva Notice of Appeal do not comply with the requirements of Rule 108 of the Rules and the Practice Direction on Formal Requirements for Appeals from Judgement.¹⁰ It requests the Appeals Chamber to order Ntabakuze and Nsengiyumva to file revised versions of their notices of appeal in full compliance with Rule 108 and the Practice Direction on Formal Requirements within a week of the filing of the Motion.¹¹ The Prosecution further requests that the existing schedules for filing the appeal briefs remain unaffected by the filing of the revised notices of appeal.¹²

⁷ Reply to Prosecution Motions Requesting Compliance with Requirements for Filing Notices of Appeal of March 19 and 30, 2009, 3 April 2009 ("Ntabakuze Reply").

⁸ Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 15 June 2007 ("Practice Direction for the Filing of Written Submissions").

⁹ See fn. 4 *supra*.

¹⁰ Prosecution Motion, paras. 2, 3, 6-11, referring to the Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005 ("Practice Direction on Formal Requirements"). See also Prosecution Reply to Nsengiyumva Response, fn. 6. The Appeals Chamber notes that, in his response, Nsengiyumva refers to a practice direction dated 15 June 2007 (Nsengiyumva Response, para. 1 and fn. 1.). I observe that the practice directions to which the Prosecution and Nsengiyumva refer are identical and that Nsengiyumva's confusion as to the date of the Practice Direction on Formal Requirements arises from the erroneous mention of "15 June 2007" entered at the bottom of the page of the versions of the Practice Direction on Formal Requirements available in the "Basic Documents" and on the Tribunal's website.

¹¹ Prosecution Motion, paras. 2, 11.

¹² *Idem*.

7. Before turning to the discussion of the parties' submissions, I recall that Rule 108 of the Rules and paragraph 1(c)(iii) and (iv) of the Practice Direction on Formal Requirements provide that a party seeking to appeal from a judgement of a Trial Chamber should identify in the notice of appeal "the finding or ruling challenged in the judgement, with specific reference to the page number and paragraph number"¹³ and any other "order, decision, or ruling challenged with specific reference to the date of its filing, and/or the transcript page".¹⁴

1. Ntabakuze Notice of Appeal

8. The Prosecution submits that the Ntabakuze Notice of Appeal fails to identify specific findings of the Trial Chamber in respect of which errors are alleged, and to indicate appropriate paragraph and page references of the specific findings or rulings challenged in the Trial Judgement.¹⁵

9. In response, Ntabakuze requests leave to file a proposed "Addendum to Notice of Appeal" attached to his response ("Ntabakuze Addendum"), which, he submits, "responds appropriately to all [Prosecution's] objections" by providing precise references to pages and paragraphs of the Trial Judgement as they relate to the 38 grounds upon which his appeal is based.¹⁶

10. The Prosecution objects to the filing of the Ntabakuze Addendum on the ground that the approach followed by Ntabakuze casts the burden on the Prosecution and the Appeals Chamber to assign the respective references contained in the addendum to the different paragraphs of the Ntabakuze Notice of Appeal.¹⁷ It argues that the cumulative filing of several deficient submissions does not meet the requirements and objectives of Rule 108 and the Practice Direction on Formal Requirements.¹⁸

11. Ntabakuze submits in reply that his Notice of Appeal together with the proposed Addendum "far exceeds the specificity necessary to put the Prosecutor on notice of the issues that will be raised in [the] Appellant's Brief, and the portions of the [Trial] Judgement the Brief will impugn under Rule 108".¹⁹ He further argues that the document to which the Prosecution must respond, *i.e.* his

¹³ Practice Direction on Formal Requirements, para. 1(c)(iii).

¹⁴ Rule 108 of the Rules; Practice Direction on Formal Requirements, para. 1(c)(iv).

¹⁵ Prosecution Motion, para. 7.

¹⁶ Ntabakuze Response, paras. 2, 3.

¹⁷ Prosecution Reply to Ntabakuze Response, para. 4.

¹⁸ *Idem.*

¹⁹ Ntabakuze Reply, para. 11 (emphasis omitted).

appeal brief, will set forth arguments, jurisprudence and specific page and paragraph numbers in the Trial Judgement.²⁰

12. In several instances, the Ntabakuze Notice of Appeals fails to identify the specific finding or ruling challenged with specific reference to the page and paragraph number of the decision or Trial Judgement.²¹ I therefore find that the Ntabakuze Notice of Appeal does not conform to Rule 108 and the Practice Direction on Formal Requirements.

13. I observe that the Ntabakuze Addendum provides the references omitted in the Ntabakuze Notice of Appeal. However, I agree with the Prosecution that the addition of an addendum containing the necessary references will require both the Prosecution and the Appeals Chamber to assign the respective references to the different arguments of the Ntabakuze Notice of Appeal, a burden which properly falls on the appellant. Further, as the instrument marking the commencement of the appeal and delineating its contours, a notice of appeal should consist of a single document containing all the necessary information. Accordingly, I find that the Ntabakuze Addendum does not adequately cure the defects of the Ntabakuze Notice of Appeal and therefore reject its filing.

14. As a result, Ntabakuze should file a revised version of the Ntabakuze Notice of Appeal referencing each alleged error of fact or law to the paragraph and page numbers of the decision or Trial Judgement containing the alleged error.

2. Nsengiyumva Notice of Appeal

15. The Prosecution submits that the Nsengiyumva Notice of Appeal does not provide complete references to specific findings or rulings challenged in the Trial Judgement in relation to grounds 2, 3, 4, 5, 6, 7, 13 and 14.²² It further contends that some of the references provided for grounds 2, 3, 6, 7 and 14 are not complete since they are accompanied by the phrase “for instance”, which suggests that the listing of the challenged portions of the Trial Judgement is not exhaustive.²³

16. Nsengiyumva responds that the Prosecution Motion should be dismissed because, *inter alia*, (i) the level of specificity in his notice of appeal is sufficient to inform the Prosecution of the errors challenged and therefore the notice of appeal complies with Rule 108 and the Practice Direction on

²⁰ Ntabakuze Reply, para. 12.

²¹ See in particular Ntabakuze Notice of Appeal, Grounds 1, 2, 3, 4, 6, 7, 14, 15, 16, 17, 20, 32, 35, 37.

²² Prosecution Motion, para. 8, referring as examples to Nsengiyumva Notice of Appeal, paras. 7, 9, 12-33.

²³ Prosecution Motion, para. 9, referring specifically to Nsengiyumva Notice of Appeal, paras. 5, 11, 26, 34 and 47.

Formal Requirements;²⁴ (ii) a reading of the notice of appeal as a whole shows that details of the impugned parts of the Trial Judgement are identified;²⁵ and (iii) he contests the methodology employed in the Trial Judgement by pointing out obvious but inexhaustive examples.²⁶ Nonetheless, in the alternative and in order to avoid “unnecessary litigation”, Nsengiyumva requests leave to file the proposed “Amended Nsengiyumva Notice of Appeal” annexed to his response (“Nsengiyumva Amended Notice of Appeal”), which, he submits, provides the details sought by the Prosecution.²⁷

17. In reply, the Prosecution submits that neither Nsengiyumva Notice of Appeal nor his Amended Notice of Appeal complies with the requirements of Rule 108 of the Rules and the Practice Direction on Formal Requirements.²⁸ The Prosecution argues that, although the Nsengiyumva Amended Notice of Appeal provides page and paragraph references to the Trial Judgement in relation to the grounds of appeal, it remains deficient since: (i) it contains several grounds and sub-grounds of appeal which allege different errors of law and fact for which specific references are not systematically provided;²⁹ and (ii) it persists in the use of the phrase “for instance” instead of providing a complete exhaustive list of relevant references.³⁰ The Prosecution further submits that Nsengiyumva’s “approach of giving general notice of the grounds of appeal without specific and exhaustive references at this stage and reserving his right to raise further violations at a later stage” does not comply with the requirements applicable on appeal.³¹ As a result, the Prosecution objects to the filing of the Nsengiyumva Amended Notice of Appeal.³²

18. The Nsengiyumva Notice of Appeal fails in most instances to identify the specific findings or rulings challenged with specific reference to the page and paragraph numbers.³³ Accordingly, I find that the Nsengiyumva Notice of Appeal does not conform to the requirements of Rule 108 and the Practice Direction on Formal Requirements.

19. I note Nsengiyumva’s efforts to provide the required information in his Amended Notice of Appeal. However, I observe that in some instances, the Nsengiyumva Amended Notice of Appeal fails to identify the specific finding or ruling challenged with reference to the page and paragraph

²⁴ Nsengiyumva Response, para. 1.

²⁵ Nsengiyumva Response, paras. 2, 3.

²⁶ Nsengiyumva Response, paras. 4, 5.

²⁷ Nsengiyumva Response, para. 7, p. 3.

²⁸ Prosecution Reply to Nsengiyumva Response, paras. 3, 9(i).

²⁹ Prosecution Reply to Nsengiyumva Response, paras. 4, 5.

³⁰ Prosecution Reply to Nsengiyumva Response, paras. 4, 6.

³¹ Prosecution Reply to Nsengiyumva Response, para. 7.

³² Prosecution Reply to Nsengiyumva Response, para. 9(ii).

³³ See Nsengiyumva Notice of Appeal, paras. 5, 7-17, 20-21, 23-34, 37, 39-49, 52-59.

number in relation to each alleged error³⁴ or to exhaustively identify the challenged findings with references to page and paragraph numbers.³⁵ In these specific instances, I am not satisfied that the Nsengiyumva Amended Notice of Appeal complies with the formal requirements applicable to the filing of a notice of appeal. In providing incomplete references or referencing the title of a ground of appeal instead of referencing each alleged error pleaded under that ground of appeal, Nsengiyumva fails to properly inform the respondent and the Appeals Chamber of the exact scope of his appeal. Accordingly, I find that the Nsengiyumva Amended Notice of Appeal does not comply with Rule 108 of the Rules and the Practice Direction on Formal Requirements.

20. As a result, Nsengiyumva should file a revised version of the Nsengiyumva Notice of Appeal clearly identifying all rulings or findings challenged and referencing each alleged error of fact or law to the paragraph and page numbers of the decision or Trial Judgement containing the alleged error.

21. In addition, Nsengiyumva is reminded that he is not entitled to raise any allegation of error outside his notice of appeal. His apparent consideration that he can “reserve[] his right to plead further violations in his appeals brief” is ill-founded.³⁶ Should Nsengiyumva wish to raise alleged errors not set out in his notice of appeal, he would be first required to seek leave from the Appeals Chamber to vary his notice of appeal pursuant to Rule 108 of the Rules.

3. Timeline

22. The Prosecution initially requested the Appeals Chamber to direct Ntabakuze and Nsengiyumva to file revised versions of their notices of appeal within a week of the filing of its Motion.³⁷ In its reply, because the seven day period had already elapsed, the Prosecution requested instead that Ntabakuze and Nsengiyumva be ordered to file their revised notices of appeal “as soon as possible”,³⁸ so as to “mitigate the prejudice it is suffering from having to work from such deficient filings”.³⁹ The Prosecution also requests that the existing briefing schedule as previously determined by the Rules and the Appeals Chamber be maintained on appeal.⁴⁰

³⁴ I specifically refer to the following paragraphs of the Nsengiyumva Amended Notice of Appeal: 5, 9 (Ground 2); 11, 12 (Ground 3); 26-30 (Ground 6); 37 (Ground 7); 39 (Ground 8); 40 (Ground 9); 41 (Ground 10); 42 (Ground 11); 43 (Ground 12); 46, 48, 52, 54, 56 (Ground 14).

³⁵ Nsengiyumva Amended Notice of Appeal, paras. 26 (Ground 6), 47, 49, 55 (Ground 14).

³⁶ Nsengiyumva Notice of Appeal, para. 22; Nsengiyumva Amended Notice of Appeal, para. 22.

³⁷ Prosecution Motion, para. 11(iii).

³⁸ Prosecution Reply to Ntabakuze Response, para. 7 (ii); Prosecution Reply to Nsengiyumva Response, para. 9 (iii).

³⁹ Prosecution Reply to Ntabakuze Response, fn. 9; Prosecution Reply to Nsengiyumva Response, fn. 14.

⁴⁰ Prosecution Motion, paras. 2, 11(iv).

23. I agree that Nsengiyumva and Ntabakuze should be ordered to file the revised versions of their notices of appeal as soon as possible. I consider that a period of seven days from the filing of the present decision would favor an expeditious resolution and also allow the necessary time for Nsengiyumva and Ntabakuze to prepare filings in full compliance with Rule 108 of the Rules and the Practice Direction on Formal Requirements. This shall not affect in any way the existing schedule for the filing of the appeal briefs.

24. As regards the general briefing schedule, I observe that, under the Practice Direction on the Length of Briefs and Motions on Appeal of 8 December 2006, the Prosecution may elect to file a consolidated brief in response to all three appeal briefs. Because the time limit for filing such a consolidated brief would run only from the filing date of the last appeal brief,⁴¹ this would result in a substantial delay in the consideration of the appeals in this case. Although the issues raised in Ntabakuze's and Nsengiyumva's appeals are to a certain extent interrelated and may well be interrelated with those that Théoneste Bagosora may raise, they can be easily responded to in separate response briefs. With expeditious and fair appeal proceedings in mind, I would therefore strongly encourage the Prosecution to respond to all three respective appeal briefs in separate response briefs.

C. Disposition

25. For the foregoing reasons, I **GRANT** the Prosecution Motion and **ORDER** Ntabakuze and Nsengiyumva to file revised versions of their notices of appeal in full compliance with Rule 108 of the Rules and the Practice Direction on Formal Requirements within seven (7) days of the filing of the present decision, that is no later than 23 April 2009. The existing schedule for the filing of the appeal briefs remains unchanged.

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

Done this sixteenth day of April 2009,
At The Hague, The Netherlands



[Seal of the Tribunal]

Mehmet Güney
Pre-Appeal Judge

⁴¹ Practice Direction on the Length of Briefs and Motions on Appeal, para.1(b).