

ICTR-02-78-I
28-08-2009
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER II

Before Judges: Taghrid Hikmet, Presiding
Seon Ki Park
Joseph Masanche

Registrar: Adama Dieng

Date: 28 August 2009

JUDICIAL RECORDS ARCHIVES
2009 AUG 28 P 1:26

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-I

**DECISION ON THE EXTREMELY URGENT DEFENCE MOTION FOR A
STAY OF THE PROCEEDINGS**

Office of the Prosecutor:

Holo Makwaia
Althea Alexis-Windsor
Mara Tidiane
Lasana Dumbuya

Defence Counsel:

David Jacobs
Claver Sindayigaya
Marc Nerenberg

INTRODUCTION

1. The Accused, Gaspard Kanyarukiga, was arrested in South Africa on 19 July 2004.¹
2. The trial in this case is scheduled to commence on 31 August 2009.²
3. On 7 August 2009, the Defence filed a motion pursuant to Rule 68(A) of the Rules of Procedure and Evidence ("the Rules"), requesting that the Prosecution disclose and return exculpatory documents seized from the Accused during his arrest.³ The Defence contended that, at the time of his arrest, the Accused possessed three Rwandan laissez-passers, which were seized by officers of the Tribunal and are currently in the custody of the Prosecution.⁴
4. On 11 August 2009, the Prosecution filed a response to the Defence motion, arguing that it does not have custody of the laissez-passers requested by the Defence.⁵ The Prosecution further submitted that it is not required under Rule 68(A) to disclose material of which it does not have knowledge or possession.⁶
5. On 18 August 2009, the Chamber issued an Interim Order, instructing the Prosecutor to provide further information regarding the arrest of the Accused and the seizure, inventory and custody of the Accused's possessions.⁷
6. The Prosecutor filed a response to the Chamber's Interim Order on 21 August 2009.⁸ The Prosecutor concedes that the Accused made notations on the 10 September 2004 inventory, indicating that certain seized items were missing.⁹ The Prosecutor also acknowledges that certain items included in the 19 July 2004 inventory are not accounted for in the 10 September 2004 inventory.¹⁰ The Prosecution provided several possible explanations regarding the inconsistencies in the two inventories.¹¹ Finally, the Prosecution indicates that it has contacted authorities in South Africa regarding the items seized from the Accused at the time of his arrest.¹²

¹ See Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009.

² *Prosecutor v Kanyarukiga*, Case No ICTR-2002-78-I, Scheduling Order (TC), 7 July 2009.

³ Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009.

⁴ Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 7 August 2009, paras. 2, 4-6.

⁵ Prosecutor's Response to the Motion for the Prosecution to Disclose and Return Exculpatory Documents Seized from the Accused, filed on 11 August 2009.

⁶ *Ibid*, para. 2.

⁷ Interim Order Concerning the Defence Request for Rule 68 Disclosure (TC), 18 August 2009.

⁸ Prosecutor's Response to the Interim Order of the Trial Chamber Concerning the Defence Request for Rule 68 Disclosure, filed on 21 August 2009.

⁹ *Ibid*, para. 12.

¹⁰ *Ibid*, para. 14.

¹¹ *Ibid*, para 11.

¹² *Ibid*, para. 5.

7. On 25 August 2009, the Defence for Gaspard Kanyarukiga filed an extremely urgent motion for a stay of the proceedings in this case.¹³ The Defence submits that a fair trial is not possible in this case due to the disappearance of three laissez-passers, which the Defence contends were seized from the Accused at the time of his arrest.¹⁴
8. In light of the imminent commencement of the case, the Chamber issued an Interim Order on 25 August 2009, instructing the Prosecution to file its response to the Defence motion for a stay of the proceedings, if any, by the close of business on Wednesday, 26 August 2009, and the Defence to file its reply, if any, by close of business on Thursday, 27 August 2009.¹⁵
9. On 27 August 2009, the Prosecutor filed a response to the Defence motion, arguing that it is not in breach of his obligations under the Rules of Procedure and Evidence ("the Rules") and that a stay of the proceedings is not an appropriate remedy in this case.¹⁶
10. On 28 August 2009, the Defence filed a reply.¹⁷

DELIBERATIONS

11. Article 19(1) and Article 20 of the ICTR Statute guarantee the Accused the right to a fair and expeditious trial. As elaborated by the Trial Chamber in the *Media* case, Article 19 (1) of the Statute mirrors the corresponding guarantee provided for in international and regional human rights instruments, including the International Covenant on Civil and Political Rights (1966) ("ICCPR"), the European Convention on Human Rights (1950), and the American Convention on Human Rights (1969).¹⁸
12. Concerning stays of proceedings, the Appeals Chamber held the following in *Barayagwiza*:

Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process. The House of Lords summarised the abuse of process doctrine as follows:

[P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also

¹³ Extremely Urgent Defence Motion for a Stay of Proceedings Due to the Impossibility of Having a Fair Trial Following the Disappearance of Exculpatory Evidence in the Hands of the Prosecutor, filed on 25 August 2009.

¹⁴ Extremely Urgent Defence Motion for a Stay of Proceedings Due to the Impossibility of Having a Fair Trial Following the Disappearance of Exculpatory Evidence in the Hands of the Prosecutor, filed on 25 August 2009, para. 1.

¹⁵ Interim Order (TC), 25 August 2009.

¹⁶ Prosecutor's Response to the Extremely Urgent Defence Motion for a Stay of Proceedings Due to the Impossibility of Having a Fair Trial Following the Disappearance of Exculpatory Evidence in the Hands of the Prosecutor, filed on 26 August 2009.

¹⁷ Defence Reply to the Prosecutor's Response to the Extremely Urgent Defence Motion for a Stay of Proceedings, filed on 28 August 2009.

¹⁸ *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003, para. 4.

where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.

It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.¹⁹

13. The abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.²⁰

14. If an accused claims that an abuse of process has occurred, it is important that he show that he has suffered prejudice.²¹ The burden of showing that there has been an abuse of process rests with the accused, and establishing such abuse will depend on the circumstances of the case.²²

15. In this case, the Defence submits that, "the Prosecutor is in fundamental breach of his obligations under the Statute, the Rules, the norms of international law and his own standards. ... The conduct of the Prosecutor is grave and must fatally undermine the confidence in this administration of justice in this matter should the Prosecution be permitted to proceed with its case."²³

16. The Defence further argues that, "The Prosecutor's failure to act for the past five years has *irremediably impaired* the ability of Mr. Kanyarukiga to make full answer and defence, since critical exculpatory evidence which was in the hands of the Prosecutor or his agents has *disappeared without a trace* ... and without a search. ... It is submitted that a stay of proceedings and dismissal of the charges is the *only* suitable and reasonable remedy in these circumstances."²⁴

17. The Chamber appreciates the seriousness of the issues raised in the Defence motion. It is to be noted, however, that the existence of the laissez-passers among the items seized from the Accused has not been established. In fact the missing item is a medicine bag, the contents of which were not itemised. The Chamber recalls, however, that, under Rule 41(A) of the Rules, the Prosecutor is responsible for the preservation, storage and security of information and physical evidence obtained in the course of his investigations. The Chamber also recalls that the Prosecutor has an ongoing obligation under Rule 68(A) to disclose to the Defence any material, which in the actual knowledge

¹⁹ *Barayagawiza v. Prosecutor*, Case No. ICTR-99-52A-A, Decision (AC), 3 November 1999, para. 74.

²⁰ *Ibid*, para. 77.

²¹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Dismiss for Abuse of Process: Payments to Prosecution Witnesses and "Requete de Mathieu Ngirumpatse en Retrait de L'Acte D'Accusation" (TC), 27 October 2008, para. 3; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement (AC), 1 June 2001, para. 340.

²² *Ibid*.

²³ Extremely Urgent Defence Motion for a Stay of Proceedings Due to the Impossibility of Having a Fair Trial Following the Disappearance of Exculpatory Evidence in the Hands of the Prosecutor, filed on 25 August 2009, para. 3.

²⁴ *Ibid*, para. 13.

of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence.

18. In view of these obligations, the Chamber orders the Prosecutor to continue his search for the medicine bag and to immediately report any findings, as well as any information obtained from authorities in South Africa, to the Chamber.

19. Nevertheless, even assuming that the laissez-passers exist, the Chamber is not convinced that their absence would warrant a stay of proceedings or the dismissal of all charges against the Accused. Indeed, those documents would only be part of a defence of alibi, which could still be effectively presented through other means, including witness testimony placing the Accused at the locations where he allegedly was during the events in question. Moreover, the Defence is not prevented from putting its case—that the Accused was absent from the crime scene—to the Prosecution witnesses in accordance with Rule 90(G)(ii). If necessary, the Chamber shall consider any appropriate remedy, taking into account all circumstances.

FOR THESE REASONS, the Chamber:

DENIES the Defence motion;

REMINDS the Prosecutor of his obligation under Rule 41 to preserve, store and secure information and physical evidence obtained during the course of his investigations and to draw up an inventory of all materials seized from the accused;

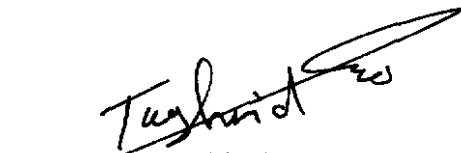
REMINDS the Prosecutor of his ongoing obligation under Rule 68(A) to disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence;

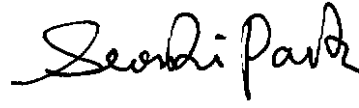
REMINDS the Prosecutor to report back to the Chamber with any information regarding the items missing from the second inventory list, including any response to the inquiries made of authorities in South Africa;

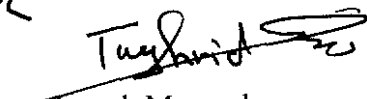
REMAINS seised of the matter.

Arusha, 28 August 2009

[read and approved by]


Taghrid Hikmet
Presiding Judge


Seon Ki Park
Judge


Joseph Masanche
Judge
[absent at the time
of signature]

