



UNITED NATIONS
NATIONS UNIES

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23-09-2009
(33106-33101)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Emile Francis Short
Lee Gacuiga Muthoga

Registrar: Adama Dieng

Date: 23 September 2009

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

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**DECISION ON MUGIRANEZA'S REQUEST FOR CERTIFICATION TO APPEAL
AND MUGENZI'S AND BIZIMUNGU'S REQUESTS FOR RECONSIDERATION OF
THE DECISION ON THE OBJECTIONS OF MUGIRANEZA AND BICAMUMPAKA
TO THE ENGAGEMENT OF MR. EVERARD O'DONNELL AS A CHAMBERS
CONSULTANT DATED 28 AUGUST 2009**

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justus Bwonwonga
Ms. Ndeye Marie Ka

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Andrea Valdivia for **Casimir Bizimungu**
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**
Mr. Michel Croteau for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Cynthia Cline for **Prosper Mugiraneza**

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INTRODUCTION

1. By Decision dated 28 August 2009, the Trial Chamber rejected objections made by the Mugiraneza and Bicomupaka Defence teams to the possible engagement of Mr. Everard O'Donnell, former Deputy Registrar of the Tribunal, as a consultant or legal officer working with the Judges of this Chamber.¹

2. On 2 September 2009, Mugiraneza filed a request for certification to appeal the Impugned Decision.² On 9 September 2009, Mugenzi filed a request for reconsideration of the Impugned Decision on the basis of information that had come to its attention after the delivery of that Decision.³ On 15 September 2009, Bizimungu filed a "response" joining the Mugenzi Motion.⁴

DISCUSSION

The Request(s) for Reconsideration

3. The Chamber has an inherent power to reverse or revise a prior decision where new material circumstances have arisen that did not exist at the time of the original decision, or where the decision was erroneous or constituted an abuse of the Chamber's authority and has caused prejudice or injustice to a party.⁵ The onus is on the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.⁶

4. Mugenzi's request for reconsideration of the Impugned Decision is based on two statements made by Mr. O'Donnell at an International Symposium held in Geneva, Switzerland

¹ Decision on the Objections of the Mugiraneza and Bicomupaka Defence Teams to the Engagement of Mr. Everard O'Donnell as a Chambers Consultant, 28 August 2009 ("Impugned Decision").

² Prosper Mugiraneza's Motion for Certification to File Interlocutory Appeal from the Decision of 28 August 2008 (*sic*), filed 2 September 2009 ("Mugiraneza Motion").

³ Motion for the Trial Chamber to Reconsider the Decision of 28 August 2009 Entitled "Decision on the Objections of the Mugiraneza and Bicomupaka Defence Teams to the Engagement of Mr. Everard O'Donnell as a Chambers Consultant", filed 9 September 2009 ("Mugenzi Motion").

⁴ Réponse et Argumentation du Dr Casimir Bizimungu à La Requête de Justin Mugenzi Intitulée: "Motion to Reconsider the Decision of 28 August 2009...", filed 15 September 2009 ("Bizimungu Motion").

⁵ Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government (TC), 26 April 2007, para. 7; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Second Motion for Reconsideration of Sanctions, 8 November 2007, para. 6; *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera et al.*, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karemera et al.*, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph).

⁶ See *Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago, 10 October 2003, para 6.



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on 9, 10 and 11 July 2009.⁷ Mugenzi submits that he did not become aware of these statements until after the delivery of the Impugned Decision.⁸ The Chamber accepts Mugenzi's submission that he was not aware of the statements at issue until after the rendering of the Impugned Decision, and that these statements constitute new material circumstances for the purpose of considering the merits of the Mugenzi Motion.

5. According to Mugenzi, these statements exhibited bias against the Accused as former members of the Rwandan government ("first statement") and displayed a personal view held by Mr. O'Donnell on a legal matter relevant to these proceedings ("second statement"), respectively.⁹ Bizimungu joins Mugenzi's Motion.¹⁰

6. According to Mugenzi, the first statement, which concerned alleged activities of members of the former Rwandan government while imprisoned at the United Nations Detention Facility ("UNDF"), showed that Mr. O'Donnell incorrectly believed that the members of the former Rwandan Interim Government were still "purporting to act as a Government" in prison and "that Mr. O'Donnell regards this behaviour as extraordinary and at best ridiculous."¹¹ Mugenzi claims that this statement shows Mr. O'Donnell has formed a conclusion contrary to the interests of the Accused in these proceedings.¹² According to Mugenzi, the issue the Chamber must consider is the appearance of its appointment of Mr. O'Donnell given these statements.¹³

7. The Chamber does not consider that the first statement displays any predisposition against the Accused concerning the matters at issue in this trial. Indeed, regardless of its truth or falsity, the first statement concerns the behavior of detainees at the UNDF and is irrelevant to the matters at issue in this trial. Moreover, the Chamber does not consider that the first statement displays a personal bias against any of the Accused.

8. As Mugenzi correctly acknowledges, the ultimate decision as to the guilt or innocence of the Accused in this case will be made by the three Judges sitting as the Trial Chamber and not by consultants or legal officers.¹⁴ Thus, contrary to the submissions of the Mugenzi Motion, any reasonable person or observer would be aware that neither Mr. O'Donnell nor any other consultant or legal officer in the Chamber's Support Section will "sit in judgement" of the Accused in this case or in any other case adjudicated by this Tribunal.¹⁵

9. The Chamber's ultimate decision will be made solely on the basis of the evidence adduced in this case and the applicable law. The Chamber will not consider any post-1994 activities of any of the Accused, or the personal opinions or beliefs of legal officers or

⁷ The full title of the International Symposium was: "International Criminal Tribunal for Rwanda: Model or Counter-Model for International Criminal Justice? The Perspectives of the Stakeholders" ("International Symposium").

⁸ Mugenzi Motion, para. 8.

⁹ Mugenzi Motion, paras. 9-23.

¹⁰ Bizimungu Motion, paras. 3, 11.

¹¹ Mugenzi Motion, para. 12.

¹² Mugenzi Motion, para. 18.

¹³ Mugenzi Motion, para. 17.

¹⁴ Mugenzi Motion, para. 21.

¹⁵ Mugenzi Motion, para. 20.



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consultants regarding any of the Accused or such activities. Indeed, it is assumed that judges can “disabuse their minds of any personal beliefs or predispositions”.¹⁶ If this is assumed regarding a judge’s own personal beliefs or pre-dispositions, then, in the Chamber’s view, there must be an even stronger presumption that judges will disregard the personal beliefs or predispositions of any legal officers or consultants that they may become aware of in the course of their working relationship. To hold otherwise would render meaningless the presumption of impartiality enjoyed by judges of this Tribunal as well as the presumption that they will disabuse their minds of their own personal beliefs or predispositions when determining matters before them. Thus, the Chamber does not consider that a reasonable observer would conclude that the opinions or beliefs of a legal officer or consultant concerning such extraneous matters as the alleged activities of detainees in the UNDF may influence the ultimate findings of the Chamber in this case.

10. The second statement concerns Mr. O’Donnell’s opinion, also expressed at the International Symposium, regarding the length of pre-trial detentions at this Tribunal.¹⁷ The Chamber recalls that, in his closing brief, Mugenzi raised the issue of the length of detention as a factor for the Chamber to consider in mitigation if it were to find him guilty pursuant to any of the Counts in the Indictment. It is clear that Mr. O’Donnell was not expressing an opinion on this issue as it relates to Mugenzi’s submissions in his closing brief, as the Chamber has yet to render any decision concerning these issues. Moreover, the Chamber does not consider that Mr. O’Donnell’s opinion regarding this issue is one that would lead any reasonable observer to believe that he was biased against the Accused. To the extent this statement expresses a predisposition that Mr. O’Donnell may have concerning the specific issue of the length of pre-trial detentions, the Chamber notes that Mugenzi has not shown that the judges possess any predisposition or provided any basis to overcome the presumption that the judges will disregard any predisposition held by legal officers or consultants.

11. The Chamber therefore declines to reconsider the Impugned Decision on the basis of the Mugenzi and Bizimungu Motions.

The Request for Certification to Appeal

12. Pursuant to Rule 73 (B) of the Rules of Procedure and Evidence,¹⁸ leave to file an interlocutory appeal of a decision may be granted if the issue involved “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” and where “an immediate resolution by the Appeals Chamber may materially advance the proceedings”. Even where these criteria are met, the decision to certify is discretionary and should remain exceptional.¹⁹

¹⁶ *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgment (AC), 21 July 2000, para. 196 (quoting *President of the Republic of South Africa and Others v. South African Rugby Union Football and Others*, Judgement on Recusal Application, 1999 7 BCLR 725 (CC), 3 June 1999, para. 48).

¹⁷ Mugenzi Motion, para. 22.

¹⁸ Unless otherwise specified, all further references to Rules in this Decision are to the Rules of Procedure and Evidence.

¹⁹ *Bizimungu et al*, Decision on Casimir Bizimungu’s Request for Certification to Appeal the Decision on Casimir Bizimungu’s Motion in Reconsideration of the Trial Chamber’s Decision Dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government, 22 May 2007, para. 6, (“Decision on Casimir



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13. In deciding whether to grant leave to appeal, Trial Chambers do not consider the merits of the challenged decision. Rather, a Chamber's inquiry under Rule 73 (B) will involve only a consideration of whether the criteria outlined in the sub-Rule have been satisfied.²⁰

14. Mugiraneza submits that, if the Appeal were not allowed and the Appeals Chamber ultimately agreed with the Defence regarding the issues determined in the Impugned Decision, the judgement "likely would be void" and all three judges "likely would be disqualified." This would, in turn, require a retrial which would affect the expeditious conduct of the trial and would implicate, amongst other things, the Accused's right to trial without undue delay.²¹

15. The remainder of the Mugiraneza Motion concerns factual background and arguments on the merits, which the Chamber need not address for the purposes of Rule 73 (B).

16. The Chamber accepts that Mugiraneza has shown that the issues involved in the Impugned Decision may indirectly affect the expeditious conduct of the proceedings, and that immediate resolution of this matter by the Appeals Chamber will materially advance the proceedings. The Chamber therefore grants leave to appeal the Impugned Decision.

17. The Chamber notes that the issues raised by the Impugned Decision are relevant to all the Parties to these proceedings, and thus grants all Parties leave to appeal. In addition, the Chamber considers that the reasons expressed in this Decision for the denial of Mugenzi's and Bizimungu's request for reconsideration of the Impugned Decision are also relevant to the Appeals Chamber's consideration of the issues raised by the Impugned Decision and therefore grants leave to appeal the relevant portions of this Decision.

18. The Chamber notes that it shall not engage Mr. O'Donnell as a consultant or legal officer while this appeal is pending.

FOR THESE REASONS, the Chamber

DENIES the Mugenzi and Bizimungu Motions;

GRANTS the Mugiraneza Motion;

Bizimungu's Request"); *See Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing (TC), 14 March 2007, para. 4.

²⁰ Decision on Casimir Bizimungu's Request, para. 7; *see e.g.*, *Bizimungu et al.*, Decision on Bicumampaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 'Decision on the Motion of Bicumampaka and Mugenzi for Disclosure of Relevant Material' (TC), 4 February 2005, para. 28 ("Decision on Bicamumpaka's Request for Certification"); *see also*, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding (TC), 20 June 2005, para. 4.

²¹ Mugiraneza Motion, para. 3.



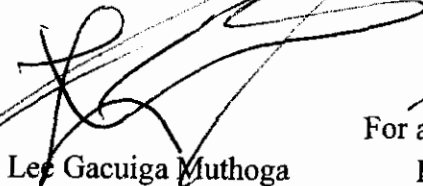
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GRANTS leave for all Parties to the *Bizimungu et al.* proceedings to appeal the Impugned Decision as well as the relevant portions of this Decision concerning the Mugenzi and Bizimungu Motions.

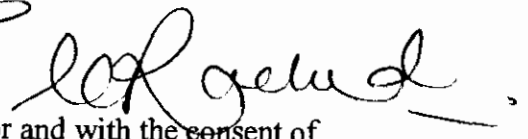
Arusha, 23 September 2009



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



For and with the consent of
Emile Francis Short
Judge

