Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Patrick Robinson, Presiding** **Judge Fausto Pocar** **Judge Liu Daqun** **Judge Theodor Meron** **Judge Carmel Agius**
Registrar:	**Mr. Adama Dieng**
Decision of:	**11 November 2009**

THE PROSECUTOR

v.

THARCISSE MUVUNYI

Case No. ICTR-2000-55A-AR98bis

DECISION ON APPEAL OF DECISION DENYING THE MOTION FOR JUDGEMENT OF ACQUITTAL

Office of the Prosecutor	**Counsel for the Appellant**
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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 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal filed by Tharcisse Muvunyi on 7 September 2009[1] challenging the Trial Chamber's Decision on Motion for Judgement of Acquittal.[2] The Prosecution filed its response on 11 September 2009,[3] to which Mr. Muvunyi replied on 18 September 2009.[4]

I. BACKGROUND

2. On 12 September 2006, Trial Chamber II convicted Mr. Muvunyi of genocide, direct and public incitement to commit genocide, and other inhumane acts as a crime against humanity.[5] On 29 August 2008, the Appeals Chamber reversed all of his convictions and ordered a retrial in respect of the allegation concerning Mr. Muvunyi's speech at the Gikore Centre, as set out in paragraphs 3.24 and 3.25 of the Indictment.[6]

3. On 17 June 2009, the Prosecution opened its case in the retrial of Mr. Muvunyi for direct and public incitement to commit genocide. At the close of the Prosecution's case, Mr. Muvunyi moved for a judgement of acquittal, pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence of the Tribunal ("Rules"), on the basis that the Indictment alleges that the culpable conduct occurred in early May 1994 while the evidence adduced concerned activities in late May or early June.[7] Trial Chamber III of the Tribunal ("Trial Chamber") denied the Motion for Acquittal.[8] It agreed that there was a variance between the pleading and the evidence and thus found that the Indictment was defective with respect to the date range of the alleged culpable conduct.[9] However, it concluded that this defect had been cured by the Prosecution through the provision of adequate

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[1] Accused Tharcisse Muvunyi's Appeal of Denial of Motion for Judgement of Acquittal Persuant [*sic*] to Rule 98*bis*, 7 September 2009 ("Appeal").

[2] Decision on Motion for Judgement of Acquittal (Rule 98*bis* of the Rules of Procedure and Evidence), 18 August 2009 ("Impugned Decision").

[3] The Prosecution's Response to Tharcisse Muvunyi's Appeal of Denial of Motion for Judgemnt [*sic*] of Acquittal Pursuant to Rule 98*bis*, 11 September 2009 ("Response").

[4] Accused Tharcisse Muvunyi's Reply to Prosecutor's Response to his Appeal of Denial of Motion for Judgement of Acquittal Pursuant to Rule 98*bis*, 18 September 2009 ("Reply").

[5] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Judgement and Sentence, 12 September 2006 ("*Muvunyi* Trial Judgement").

[6] *Tharcisse Muvunyi v. The Prosecutor,* Case No. ICTR-2000-55A-A, Judgement, 29 August 2008 ("*Muvunyi* Appeal Judgement"), para. 171.

[7] Accused Tharcisse Muvunyi's Motion for Judgement of Acquittal Persuant [*sic*] to Rule 98 *bis*, 6 July 2009 ("Motion for Acquittal"), paras. 1-25.

[8] Impugned Decision, p. 9.

notice.[10] Consequently, it found that the evidence led by the Prosecution, if believed, was capable of sustaining a finding of guilt beyond reasonable doubt on the charge of direct and public incitement to commit genocide.[11] On 2 September 2009, the Trial Chamber granted Mr. Muvunyi's request for certification to appeal.[12]

II. SUBMISSIONS OF PARTIES

4. Mr. Muvunyi requests the Appeals Chamber to grant his Motion for Acquittal pursuant to Rule 98 *bis* of the Rules and to order his immediate release.[13] He submits that he was charged in paragraphs 3.24 and 3.25 of the Indictment with speaking at a meeting in early May 1994 at the Gikore Centre and that no evidence was adduced in support of this allegation.[14] He asserts that the evidence adduced was in relation to other meetings in April, late May, and late June 1994 and not in relation to a meeting in early May at the Gikore Centre.[15] He argues that he cannot be convicted on the basis of this evidence when he was charged in relation to a meeting in early May.[16] Although he acknowledges that in certain circumstances the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity, he contends that this is not the case here as he was only charged in relation to the early May meeting, despite the evidence of other meetings.[17] In this regard, he submits that where the Indictment sets out a specific timeframe and the evidence relates to different timeframes, an essential element of the crime charged has not been proven and the Prosecution has failed to meet its burden.[18]

5. He further submits that the Trial Chamber erred in considering the variance between the pleading and the evidence to be a matter of notice[19] and asserts that this error resulted in a violation of his right to a fair trial and a denial of due process.[20] He recalls that the possibility of curing defects in the Indictment is not unlimited, and submits that in this case only a formal amendment of

[9] Impugned Decision, paras. 10, 11.
[10] Impugned Decision, paras. 15-19.
[11] Impugned Decision, para. 20.
[12] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Decision on Motion for Certification to Appeal: Decision Denying Motion for Judgement of Acquittal (Rule 73(B) of the Rules of Procedure and Evidence), 2 September 2009 ("Decision on Certification to Appeal"). *See also The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Accused Tharcisse Muvunyi's Motion Pursuant to Rule 73(B) for Certification to Appeal the Decision of Trial Chamber III Denying Motion for Judgement of Acquittal, 24 August 2009.
[13] Appeal, p. 12.
[14] Appeal, paras. 16, 19, 21-23, 37.
[15] Appeal, paras. 20, 24, 28.
[16] Appeal, para. 25.
[17] Appeal, paras. 24, 28.
[18] Appeal, paras. 27, 36, 39.
[19] Appeal, paras. 31, 37, 38.
[20] Appeal, paras. 34, 38.

the Indictment pursuant to the Rules would have been sufficient.[21] In this regard, he points to the fact that the Prosecution never sought to amend the Indictment, despite acknowledging that it had never proffered any evidence in support of a meeting in early May.[22] Furthermore, he argues that the Trial Chamber erred in finding that the fact that the timeframe of the meeting at the Gikore Centre was addressed on appeal indicated that he received adequate notice of the evidence to be adduced on retrial.[23] Similarly, he avers that the Trial Chamber erred in finding that he was put on notice of the material facts at retrial on the basis of submissions filed in his first trial.[24]

6. The Prosecution responds that Mr. Muvunyi's Appeal should be dismissed in its entirety.[25] It submits that the Trial Chamber erred in certifying Mr. Muvunyi's Appeal because the Trial Chamber's decision in this case did not fall outside the realm of its discretion.[26] It further submits that Mr. Muvunyi simply seeks to re-litigate arguments rejected by the Trial Chamber in deciding on his original motion.[27] The Prosecution asserts that the sole basis of the Motion for Acquittal was an alleged defect in the form of the Indictment and the question of whether the defect was cured through adequate notice.[28] In this regard, it argues that Rule 98 *bis* of the Rules is not the appropriate provision for raising such challenges[29] and posits that they should be raised under Rule 73 *bis* of the Rules.[30]

7. The Prosecution further submits that, in any event, the discrepancy between the timeframe of early May and late May and early June is not significant enough to undermine the required notice, and that Mr. Muvunyi received timely, clear, and consistent information of the relevant timeframe.[31] In this respect, it points to its pre-trial brief from the retrial which places the meeting "between the middle and the end of May 1994"[32] as well as the summaries of the anticipated testimony of Witnesses FBX, CCP, AMJ, and CCS and the testimony of Witnesses FBX and

[21] Appeal, paras. 32-34.
[22] Appeal, para. 29.
[23] Appeal, para. 35.
[24] Appeal, para. 38.
[25] Response, para. 1, p. 9.
[26] Response, paras. 3, 4.
[27] Response, para. 7.
[28] Response, paras. 6, 12.
[29] Response, paras. 6, 13, 14.
[30] Response, paras. 13, 14, *citing The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 7; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Defence Motions for Acquittal under Rule 98*bis*, 16 December 2004, paras. 73-75; *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Defence Motion Pursuant to Rule 98 *bis* (Rule 98 *bis* of the Rules of Procedure and Evidence), 21 February 2007, paras. 27, 28.
[31] Response, paras. 15, 17.
[32] Response, para. 15, *citing* The Prosecutor's Pre-Trial Brief, 4 May 2009 ("Prosecutor's Pre-Trial Brief (Retrial)"), para. 14.

AMJ.[33] It asserts that Mr. Muvunyi did not object to this timeframe.[34] Finally, it recalls that the pleading of dates does not have to be exact and that the use of the phrase "on or about" has been upheld by the Appeals Chamber in *The Prosecutor v. Sylvestre Gacumbitsi,*[35] while the Trial Chamber in *The Prosecutor v. Callixte Kalimanzira* found that the discrepancy between the pleading of "late April or early May 1994" and the evidence of "late May or early June" did not undermine the accused's ability to prepare his defence in that case.[36]

8. In his Reply, Mr. Muvunyi objects to the Prosecution's characterization of the issue at hand as having to do with indictment defects and lack of notice.[37] He argues that a Rule 98 *bis* motion must be granted where there is no evidence of one or more of the required elements of a crime charged, which in this case is the early May timeframe of the Gikore meeting.[38] Despite his assertions that notice issues are irrelevant, Mr. Muvunyi nevertheless addresses the Prosecution's arguments in this regard, maintaining that the variance in the pleading of the date and the evidence is a defect which is incapable of being cured.[39] He further challenges the Prosecution's understanding of the *Gacumbitsi* jurisprudence, and submits that the Trial Chamber's finding in *Kalimanzira* relied upon by the Prosecution was an error.[40]

III. DISCUSSION

9. Paragraph 3.24 of the Indictment, under which Mr. Muvunyi is being retried, alleges that "at the Gikore Center sometime in early May 1994", he participated in a meeting and incited the local population to perpetrate massacres against the Tutsis. The case presented by the Prosecution at retrial was that sometime between mid-May and June 1994, Mr. Muvunyi attended a meeting at the Gikore Centre where he encouraged the local population to kill Tutsis.[41] In filing his Motion for Acquittal, Mr. Muvunyi argued that he had no case to answer because none of the evidence adduced by the Prosecution went to prove that he participated in a meeting "at the Gikore Center sometime in early May", and as the time of the alleged meeting constitutes an essential element of the crime of incitement to commit genocide, he is entitled to be acquitted.

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[33] Response, para. 16, *citing* witness summaries in the Prosecutor's Pre-Trial Brief (Retrial); T. 17 June 2009 p. 6; T. 18 June 2009 p. 22.
[34] Response, para. 17.
[35] Response, para. 18, *citing Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement"), paras. 12, 13.
[36] Response, para. 18, *citing The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Judgement, 22 June 2009, paras. 22, 23.
[37] Reply, paras. 2, 11-17.
[38] Reply, paras. 7-10.
[39] Reply, paras. 18-20.
[40] Reply, paras. 21-25.
[41] *See* Impugned Decision, paras. 7, 8.

10. In rejecting Mr. Muvunyi's Motion for Acquittal,[42] the Trial Chamber considered the evidence of five witnesses who testified that they had attended a public meeting at the Gikore Centre and heard Mr. Muvunyi encourage the crowd to kill Tutsis, and that after the meeting there were massacres of Tutsis.[43] In this respect, the Trial Chamber noted that "[t]he witnesses were unable to specify the exact date of the meeting, but generally gave a range instead".[44] While the Trial Chamber accepted Mr. Muvunyi's contention that the evidence did not show that the meeting occurred in early May as pleaded in the Indictment, it nonetheless concluded that the evidence could support the allegation that Mr. Muvunyi incited the local population at the Gikore Centre to perpetrate massacres against the Tutsis.[45] With respect to the discrepancy in the timeframe alleged in the Indictment and the evidence adduced by the Prosecution, the Trial Chamber found the Indictment to be defective with respect to the date of the meeting.[46] In drawing this conclusion, the Trial Chamber took into consideration that "[t]he Prosecution acknowledge[d] that paragraph 3.24 of the Indictment pleads the relevant timeframe incorrectly as it should have alleged that the meeting occurred in late May or early June 1994, rather than early May."[47] It then considered whether this defect had been sufficiently cured by the provision of clear, timely, and consistent notice and concluded that it had been.[48] It found that Mr. Muvunyi was given sufficient notice that the Gikore Centre meeting was alleged to have occurred in mid-to-late May 1994 and not early May 1994 as the Indictment alleged.[49]

11. Following this decision, Mr. Muvunyi moved the Trial Chamber for certification to appeal, arguing that the Trial Chamber had "erred in concluding that the Prosecution's failure to lead evidence on each element of the crime could be cured through disclosure by the Prosecution of new criminal conduct".[50] The Trial Chamber accepted this submission and granted certification to appeal the Impugned Decision. In so doing it acknowledged that:

> … if any defect in the Indictment has not been cured by the Prosecution, it would be fatal to the Prosecution as the charge, and the case, would be dismissed. In such circumstances, the Chamber

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[42] Impugned Decision, p. 9.
[43] Impugned Decision, para. 7.
[44] Impugned Decision, para. 8, *citing* Witness FBX, T. 17 June 2009 p. 6 (meeting in "mid-May"); Witness AMJ, T. 18 June 2009 pp. 22, 55 ("It was in May 1994 between the 22nd and the 24th of May 1994"); Witness CCP, T. 18 June 2009 p. 60 ("if it was not in May, then it would have been in June"); Witness CCS, T. 22 June 2009 p. 9 ("in the middle of May -- well , in any event, it was in May, towards the middle."). The Trial Chamber did not cite the evidence of Witness YAI in the Impugned Decision, T. 19 June 2009 pp. 23, 24 ("The meeting took place on the 18th or thereabouts. […] 18th of April"). *See also* Impugned Decision, para. 9.
[45] Impugned Decision, para. 9.
[46] Impugned Decision, para. 13.
[47] Impugned Decision, para. 10, *citing* Prosecutor's Response to Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98*bis*, 9 July 2009, para. 26.
[48] Impugned Decision, paras. 15-19.
[49] Impugned Decision, para. 19.
[50] Decision on Certification to Appeal, para. 4.

> finds that the resolution of the issues raised in the Impugned Decision significantly affect the outcome of the trial and an immediate resolution by the Appeals Chamber will materially advance the proceedings.[51]

Accordingly, the issue in this appeal is whether the Trial Chamber exercised its discretion correctly in finding that the Indictment was defective with respect to the date of the alleged meeting, and was cured through the provision of timely, clear, and consistent notice.

12. In assessing the Trial Chamber's finding that the Indictment was defective, the Appeals Chamber observes that in remanding aspects of Muvunyi's case for retrial, the *Muvunyi* Appeal Judgement specifically considered the question of whether paragraph 3.24 of the Indictment was defective. The Appeals Chamber found that "[f]rom the Indictment alone, Muvunyi would have known that he was being charged with inciting genocide at the Gikore Center in 'early May 1994'."[52] It concluded that "Muvunyi has failed to demonstrate that the Indictment is defective with respect to the location and approximate date of the crime."[53] In this context, the *Muvunyi* Appeal Judgement noted the Trial Chamber's failure to reconcile discrepancies in the witnesses' testimony.[54]

13. The *Muvunyi* Appeal Judgement therefore already considered whether paragraph 3.24 of the Indictment was defective and determined that it was not. Consequently, the question of whether this portion of the Indictment was defective is *res judicata*.

14. In light of the above, the Trial Chamber erred in contradicting the *Muvunyi* Appeal Judgement by concluding that paragraph 3.24 of the Indictment was defective. The question of whether a "defect" in the Indictment was cured is thus moot.

IV. DISPOSITION

15. For the aforementioned reasons, the Appeals Chamber:

GRANTS the Appeal, in part; and

[51] Decision on Certification to Appeal, para. 5.
[52] Appeal Judgement, para. 140.
[53] Appeal Judgement, para. 140.
[54] Appeal Judgement, paras. 143-144.

REMANDS the matter to the Trial Chamber to consider whether the disparity between the Indictment and the evidence prevents it from finding such evidence sufficient to enter a conviction, should this evidence be proven beyond a reasonable doubt.

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

Dated this the eleventh day of November 2009,	____________________________
at The Hague,	Judge Patrick Robinson
The Netherlands.	Presiding

[Seal of the Tribunal]