



**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

1345/H

**ICTR-98-41-A
29th January 2010
{1345/H – 1337/H}**

IN THE APPEALS CHAMBER

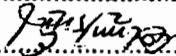
Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 28 January 2010

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CERTIFIED TRUE COPY OF THE ORIGINAL SENT BY ME
COPIE CERTIFIÉE CONFORMÉ À L'ORIGINAL PAR MOI

NAME / NOM: KSEFI... KUMELIC... A... AFANDE
SIGNATURE:  DATE: 29 Jan. 2010

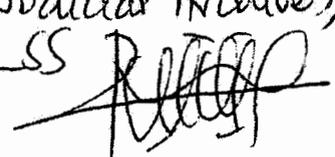
**Théoneste BAGOSORA
Aloys NTABAKUZE
Anatole NSENGIYUMVA**

v.

THE PROSECUTOR

Case No. ICTR-98-41-A

ICTR Appeals Chamber

Date: 29th January 2010
Action: R. J. J. J.
Copied To: Concerned Judges,
Parties, Judicial Archives,
LAs, LSS 

**DECISION ON ANATOLE NSENGIYUMVA'S MOTION FOR LEAVE TO
AMEND HIS NOTICE OF APPEAL**

Counsel for Théoneste Bagosora

Raphaël Constant
Richard Perras

Counsel for Aloys Ntabakuze

Peter Erlinder
André Tremblay

Counsel for Anatole Nsengiyumva

Kennedy Ogetto
Gershom Otachi Bw'Omanwa

Office of the Prosecutor

Hassan Bubacar Jallow
Alex Obote-Odora
George W. Mugwanya
Inneke Onsea
Renifa Madenga
Abubacarr Tambadou
Madeleine Schwarz
Evelyn Kamau
William Mubiru
Priyadarshini Narayanan
Aisha Kagabo

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 "Nsengiyumva's Urgent Motion for Leave to Amend the Notice of Appeal" filed by Anatole Nsengiyumva ("Nsengiyumva") on 15 January 2010 ("Motion").

A. PROCEDURAL BACKGROUND

2. In its Judgement pronounced on 18 December 2008 and filed in English on 9 February 2009, Trial Chamber I of the Tribunal convicted Théoneste Bagosora, Aloys Ntabakuze, and Nsengiyumva of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and sentenced them to life imprisonment.¹

3. On 2 March 2009, the Pre-Appeal Judge denied Nsengiyumva's request for an extension of time to file his notice of appeal but granted him leave to file his appeal brief within 45 days of the filing of the French translation of the Trial Judgement.² Nsengiyumva filed his initial notice of appeal on 13 March 2009.³ On 16 April 2009, he was ordered to file a revised version of his initial notice of appeal in full compliance with Rule 108 of the Rules of Procedure and Evidence of the Tribunal ("Rules") and the Practice Direction on Formal Requirements for Appeals from Judgement,⁴ which he did on 23 April 2009.⁵ Pursuant to a further decision of the Pre-Appeal Judge,⁶ Nsengiyumva filed a second amended version of his notice of appeal on 26 May 2009.⁷

4. The French translation of the Trial Judgement was filed on 10 December 2009. Due to the late service of the French translation of the Trial Judgement, the Pre-Appeal Judge granted Nsengiyumva an extension of time until 1 February 2010 to file his appeal brief.⁸

¹ *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, 2277-2279.

² Decision on Anatole Nsengiyumva's Motion for Extension of Time for Filing Appeal Submissions, 2 March 2009 ("2 March 2009 Decision"), p. 6. This extension of time for filing Nsengiyumva's appeal brief was granted on the ground that it was "in the interests of justice to allow [him] adequate time to read the Trial Judgement in a language he understands and to consult with his Counsel before filing his [appeal brief]". See 2 March 2009 Decision, p. 5.

³ Nsengiyumva's Notice of Appeal, 13 March 2009.

⁴ Decision on Prosecution Motion Requesting Compliance with Requirements for Filing Notices of Appeal, 16 April 2009, para. 25.

⁵ Amended Nsengiyumva's Notice of Appeal, confidential, 23 April 2009.

⁶ Decision on Prosecution Motion Regarding Nsengiyumva's Amended Notice of Appeal Filed on 23 April 2009, 25 May 2009.

⁷ Nsengiyumva's Second Amended Notice of Appeal, 26 May 2009 ("Notice of Appeal").

⁸ Decision on Anatole Nsengiyumva's Motion for Extension of Time for Filing his Appeal Brief, 11 January 2010, p. 3.

5. Nsengiyumva filed his Motion on 15 January 2010, together with the Proposed Amended Notice of Appeal.⁹ On 19 January 2010, the Pre-Appeal Judge ordered Nsengiyumva to supplement his Motion by the filing of a version of his Notice of Appeal in which all proposed amendments would be clearly indicated.¹⁰ He further ordered the parties to conclude the briefing related to the Motion in an expedited manner, on the ground that it would be in the interests of justice that the Motion be decided prior to the filing of Nsengiyumva's appeal brief.¹¹

6. Nsengiyumva filed the supplement to his Motion on 20 January 2010.¹² On 22 January 2010, the Prosecution filed its response objecting to the Motion,¹³ to which Nsengiyumva replied on 25 January 2010.¹⁴

B. SUBMISSIONS

7. Nsengiyumva requests leave to amend his Notice of Appeal "to reorder the grounds for purposes of cogency and coherence".¹⁵ He submits that there is good cause for the proposed amendments since they arise from his review of the recently filed French translation of the Trial Judgement.¹⁶ Since there is no substantive change to the grounds of appeal, he argues, the proposed amendments would cause no prejudice to the Prosecution.¹⁷ Nsengiyumva adds that the Motion is submitted in a timely fashion as it follows his consultations with his Counsel subsequent to the availability of the French translation of the Trial Judgement.¹⁸

8. The Prosecution responds that Nsengiyumva does not advance any adequate reasons for the proposed amendments and that his submission that the proposed amendments would add clarity to the Notice of Appeal is insufficient.¹⁹ In its view, the proposed amendments are "superfluous and a waste of the Tribunal's resources".²⁰ The Prosecution objects to Nsengiyumva's approach but "leaves the matter in the discretion of the Appeals Chamber".²¹

⁹ Nsengiyumva's Third Amended Notice of Appeal ("Proposed Amended Notice of Appeal"), annexed to the Motion.

¹⁰ Order for Filing Supplement to Nsengiyumva's Motion for Leave to Amend the Notice of Appeal and for Expedited Filing, 19 January 2010 ("Order for Filing Supplement and for Expedited Filing"), p. 3.

¹¹ Order for Filing Supplement and for Expedited Filing, pp. 2, 3.

¹² Nsengiyumva's Filing of Supplement to his Motion Seeking to Amend his Notice of Appeal, 20 January 2010 ("Supplement").

¹³ Prosecution Response to Motion for Amendment of Notice of Appeal, 22 January 2010 ("Response"), para. 4.

¹⁴ Nsengiyumva's Reply to the Prosecution's Response to Motion for Amendment of Notice of Appeal, 25 January 2010 ("Reply").

¹⁵ Motion, para. 32.

¹⁶ Motion, paras. 1, 32. Nsengiyumva cites in this context the Pre-Appeal Judge's Decision of 2 March 2009 that, if good cause is shown, leave could be granted to amend the notice of appeal after the French version of the Judgement becomes available. See Motion, para. 2, referring to 2 March 2009 Decision.

¹⁷ Motion, paras. 1, 32.

¹⁸ Motion, para. 32.

¹⁹ Response, para. 2.

²⁰ Response, para. 3.

²¹ Response, para. 4.

9. Nsengiyumva replies that such clarity of the Notice of Appeal could not have been attained earlier as most of the sought amendments emerged in the course of the drafting of the appeal brief and pursuant to instructions to Counsel “after receipt of the Judgement”.²²

C. DISCUSSION

1. Applicable Standard

10. In accordance with Rule 108 of the Rules, the Appeals Chamber may, on good cause being shown by motion, authorize a variation of the grounds of appeal set out in the notice of appeal. Motions for variation of the notice of appeal should be submitted as soon as possible after the moving party has identified the alleged error or after discovering other basis for seeking variation.²³ Generally, the motion must explain precisely what amendments are being sought and show, with respect to each amendment, that the “good cause” requirement is satisfied.²⁴ The “good cause” requirement encompasses both good reason for including the proposed new or amended grounds of appeal and good reason as to why the proposed amendments were not included in the original notice of appeal.²⁵

11. In its previous determinations as to which proposed variations to a notice of appeal may be authorized within the scope of the good cause requirement, the Appeals Chamber has considered the following factors to be of relevance: (i) the variation is minor but clarifies the notice of appeal without affecting its content; (ii) the opposing party has not opposed the variation or would not be prejudiced by it; (iii) the variation would bring the notice of appeal into conformity with the appeal brief; (iv) the variation does not unduly delay the appeal proceedings; or (v) the variation could be of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if it is excluded.²⁶

²² Reply, para. 2.

²³ See, e.g., *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Protais Zigiranyirazo’s Motion for Leave to Amend Notice of Appeal, 18 March 2009 (“*Zigiranyirazo Decision*”), para. 4; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Decision on Bajrush Morina’s Application for a Variation of the Grounds of Appeal, 19 March 2009 (“*Morina Decision*”), para. 5; *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Decision on “Accused Tharcisse Muvunyi’s Motion for Leave to Amend his Grounds for Appeal and Motion to Extend Time to File his Brief on Appeal” and “Prosecutor’s Motion Objecting to ‘Accused Tharcisse Muvunyi’s Amended Grounds for Appeal’”, 19 March 2007 (“*Muvunyi Decision*”), para. 6.

²⁴ See, e.g., *Zigiranyirazo Decision*, para. 4; *Muvunyi Decision*, para. 6; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant’s Brief, 17 August 2006, para. 9. See also Practice Direction on Formal Requirements for Appeals from Judgement, dated 4 July 2005, paras. 2, 3.

²⁵ See, e.g., *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Milan Lukić’s Motion to Amend his Notice of Appeal, 16 December 2009 (“*Lukić Decision*”), para. 10; *Morina Decision*, para. 5; *Muvunyi Decision*, para. 6.

²⁶ See, e.g., *Lukić Decision*, para. 10; *Zigiranyirazo Decision*, para. 4; *Muvunyi Decision*, para. 7.

2. Analysis

12. The Appeals Chamber observes that Nsengiyumva's proposed amendments encompass, in his view, a re-ordering of the grounds of appeal to improve the flow of argument, the deletion of repetition, the transfer of certain arguments to other grounds, the summarization and combination of certain paragraphs for greater clarity, and the deletion of a number of paragraphs which are subsumed in others.²⁷

13. The Appeals Chamber does not accept Nsengiyumva's submission that these proposed amendments arise out of the recent availability of the French translation of the Trial Judgement and Nsengiyumva's subsequent consultations with his Counsel. All of the proposed amendments are allegedly intended solely to clarify or streamline the Notice of Appeal. They do not touch upon the merits of the arguments, which, the Appeals Chamber considers, would be at the heart of an appellant's instructions to his Counsel, especially in such a fact-intensive case. The Appeals Chamber is not persuaded that Nsengiyumva's instructions to Counsel arising from his reading of the Trial Judgement could have generated the proposed amendments. Accordingly, the Appeals Chamber finds that the availability of the French translation of the Trial Judgement does not constitute good cause for the requested amendments.

14. However, the Appeals Chamber observes that, according to Nsengiyumva, the proposed amendments are designed to improve legibility and streamline the structure of the Notice of Appeal and thus of the forthcoming appeal brief.²⁸ It further notes Nsengiyumva's submission that he does not intend to introduce new grounds of appeal or any other substantial variation which could cause prejudice to the Prosecution.²⁹

15. Noting that Nsengiyumva has yet to file his appeal brief, the Appeals Chamber considers that allowing minor changes at this stage of the proceedings would not unduly delay the appeal proceedings as Nsengiyumva would be in a position to make any necessary amendments to his appeal brief prior to its filing. In these circumstances, the Appeals Chamber finds *proprio motu* that, despite Nsengiyumva's failure to bring his Motion in a timely manner, it is in the interests of justice to authorize those proposed amendments which clarify his grounds of appeal and serve to improve the legibility and structure of his Notice of Appeal without affecting its substance, thereby causing no prejudice to the Prosecution. The Appeals Chamber turns to consider whether Nsengiyumva's proposed amendments satisfy these requirements.

²⁷ See Motion, paras. 1, 5-32; Reply, para. 2.

²⁸ Motion, paras. 1, 5-32.

²⁹ Motion, paras. 1, 32.

(a) Proposed amendments of Ground 2

16. The Appeals Chamber finds that the proposed change of the title of Ground 2³⁰ as well as the proposed re-ordering of the sequence of the sub-grounds³¹ add to the clarity of this ground of appeal without affecting its content. These proposed amendments are therefore authorized.

17. Regarding Nsengiyumva's request to delete paragraphs 9 and 10 of his Notice of Appeal as they are subsumed in paragraph 7,³² the Appeals Chamber notes that such amendment would in fact delete a number of arguments which specify Nsengiyumva's general argument in paragraph 7. These deletions would not have the effect of clarifying the ground of appeal or improving its legibility but would actually affect the substance of the Notice of Appeal. Accordingly, the Appeals Chamber denies the proposed deletion of paragraphs 9 and 10 of the Notice of Appeal.

18. The Appeals Chamber further denies the proposed move of the allegation contained in paragraph 24 from Ground 6 to Ground 2³³ since it considers that this would not clarify or improve the legibility of the Notice of Appeal but would in fact affect the substance of the Notice of Appeal.

(b) Proposed amendments of Grounds 3 and 4

19. The Appeals Chamber considers that none of the proposed changes to these grounds of appeal³⁴ would add to the clarity or legibility of the Notice of Appeal. The Appeals Chamber is of the opinion that by way of the proposed deletions, Nsengiyumva would in fact withdraw particular arguments which clarify his general submissions, thereby affecting the substance of his Notice of Appeal. The Appeals Chamber denies the proposed amendments.

(c) Proposed amendments of Ground 5

20. The Appeals Chamber is satisfied that the deletion of the first sentence of paragraph 21 and of paragraph 22³⁵ in its entirety improves the legibility of the Notice of Appeal without affecting its content. These proposed amendments are therefore authorized.

³⁰ Motion, para. 5.

³¹ Motion, para. 7.

³² Motion, para. 6.

³³ Motion, paras. 11, 19; Proposed Amended Notice of Appeal, para. 10; Supplement, para. 24. The Appeals Chamber notes that Nsengiyumva mistakenly referred to Ground 3 in paragraph 11 of his Motion.

³⁴ Motion, paras. 8-10, 12-15.

³⁵ Motion, paras. 16, 17.

(d) Proposed amendments of Ground 6

21. The Appeals Chamber finds that the proposed summary of paragraph 23 in the Proposed Amended Notice of Appeal³⁶ has the effect of streamlining the argument, thereby improving the legibility of this ground of appeal. It is therefore authorized.

22. However, the proposed summary and combination of paragraphs 26 and 27³⁷ would delete a number of arguments which clarify Nsengiyumva's general submission, and, as such, would affect the substance of his Notice of Appeal. This proposed amendment is accordingly denied.

23. For the reasons set out above,³⁸ the proposed deletion of paragraph 24 from this ground of appeal³⁹ is also denied.

(e) Proposed amendments of Ground 7

24. The Appeals Chamber finds the deletion of sub-title 1 and paragraph 32, as well as the inclusion of the relevant part of paragraph 32 in paragraph 40,⁴⁰ to be of a clarifying nature and, as such, authorizes these amendments.

25. Nsengiyumva also proposes to delete the third bullet-point of paragraph 33 and to summarize and combine paragraphs 34 and 35, as well as paragraphs 36 to 38 of his Notice of Appeal for clarity.⁴¹ The Appeals Chamber observes that the proposed amendments do not constitute a mere summary and in fact withdraw certain substantive submissions from the Notice of Appeal, thereby affecting its substance. The Appeals Chamber accordingly denies these proposed amendments. However, it authorizes the proposed deletion of the second sentence of paragraph 34 on the ground that it repeats almost verbatim an allegation already made at paragraph 12 under Ground 3 of the Notice of Appeal.⁴²

(f) Proposed amendments of Ground 14

26. The Appeals Chamber notes Nsengiyumva's proposal to rephrase paragraph 46 and effectively delete paragraphs 47, 48, and 49 of his Notice of Appeal relating to the Trial Chamber's

³⁶ Proposed Amended Notice of Appeal, para. 21; Supplement, para. 23. *See* Motion, para. 18.

³⁷ Motion, para. 20; Proposed Amended Notice of Appeal, para. 23; Supplement, paras. 26, 27.

³⁸ *See supra*, para. 18.

³⁹ Motion, paras. 11, 19.

⁴⁰ Motion, para. 22. *See also* Supplement, p. 13; Proposed Amended Notice of Appeal, para. 17, third bullet, p. 11. The Appeals Chamber notes that the Prosecution's contention that the addition in the third bullet of paragraph 17 of the Proposed Amended Notice of Appeal was not identified as a proposed amendment is misconceived. This amendment is identified at paragraph 22 of the Motion. *See also* Supplement, para. 32; Reply, para. 5.

⁴¹ Motion, paras. 23, 25, 26. Nsengiyumva also specifies that "the aspect on alternative inferences [contained in paragraph 38] is subsumed by Ground 2". *See* Motion, para. 27.

⁴² *See* Motion, para. 24.

alleged failure to determine the elements of the crime of genocide.⁴³ It also notes his proposal to delete paragraphs elucidating his argument pertaining to the alleged failure of the Trial Chamber to determine the elements of the remaining crimes of which he was convicted.⁴⁴ The Appeals Chamber finds that the proposed deletions contain a number of specific arguments, clarifications, and specifications of a substantive nature. As such, they would affect the substance of the Notice of Appeal. Accordingly, the Appeals Chamber denies these proposed amendments.

27. The Appeals Chamber observes that paragraphs 50 and 53, as well as the part of paragraph 56 relating to cumulative convictions, raise allegations of error which are not relevant to Ground 14 as set out in the Notice of Appeal and agrees that their removal from Ground 14 would contribute to streamlining this ground of appeal.⁴⁵ However, the Appeals Chamber finds that these allegations clarify and specify Nsengiyumva's general arguments under other grounds of appeal and that, as such, their deletion would affect the substance of the Notice of Appeal. The Appeals Chamber therefore denies the proposed deletions of paragraphs 50 and 53 and of the part of paragraph 56 relating to cumulative convictions.

(g) Proposed re-ordering and re-numbering of the grounds of appeal

28. The Appeals Chamber accepts the proposed re-ordering and re-numbering of Nsengiyumva's grounds of appeal as it serves to ensure a better flow of the arguments.⁴⁶

3. Conclusion

29. As a result, the Appeals Chamber:

- (i) grants leave to Nsengiyumva to amend his Notice of Appeal as proposed in paragraphs 5, 7, 16-18, 22, 24, and 31 of the Motion; but
- (ii) denies the amendments proposed in paragraphs 6, 8-15, 19-21, 23, 25-30 of the Motion.

30. In the course of its careful review of Nsengiyumva's proposed amendments, the Appeals Chamber has also noted a number of variations between the Notice of Appeal and the Proposed Amended Notice of Appeal which Nsengiyumva failed to outline, despite the Pre-Appeal Judge's related observation⁴⁷ and having had the opportunity to file a Supplement.⁴⁸ Leave has not been

⁴³ Motion, paras. 28, 29; Proposed Amended Notice of Appeal, paras. 33, 34.

⁴⁴ Motion, paras. 29, 30.

⁴⁵ Motion, para. 29.

⁴⁶ Motion, para. 31.

⁴⁷ Order for Filing Supplement and for Expedited Filing, p. 3: "NOTING further that the proposed amendments are not consistently explained and outlined in the Motion".

requested for any of these variations, which are accordingly rejected. The Appeals Chamber stresses that Nsengiyumva is authorized to amend his Notice of Appeal only to the extent specified above.

D. DISPOSITION

31. For the foregoing reasons, the Appeals Chamber

GRANTS IN PART Nsengiyumva's Motion to the extent specified in paragraph 29 of the present Decision;

DENIES the remainder of the Motion;

ORDERS Nsengiyumva to file a revised version of his Notice of Appeal containing exclusively the amendments as authorized above no later than 1 February 2010; and

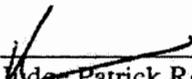
REMINDS Nsengiyumva that pursuant to paragraph 4 of the Practice Direction on Formal Requirements for Appeals from Judgement, the grounds of appeal and the arguments in his appeal brief must be set out and numbered in the same order as in the revised version of his Notice of Appeal.

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

Done this twenty-eight day of January 2010
At The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Patrick Robinson
Presiding

⁴⁸ For instance, *compare* Proposed Amended Notice of Appeal, heading V.1, p. 6 *with* Notice of Appeal, heading VIII.2, p. 13; *compare* Proposed Amended Notice of Appeal, para. 13 *with* Notice of Appeal, para. 33.