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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

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ICTR-05-88-A
05th March 2010
{372/H - 366/H}

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Carmel Agius

ICTR Appeals Chamber
Date: 05th March 2010
Action: R. J. J. J.
Copied To: Concerned Judges,
Parties, Judicial Archives,
LDs, LSS
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Registrar: Mr. Adama Dieng

Decision of: 5 March 2010

THE PROSECUTOR

v.

Callixte KALIMANZIRA

Case No. ICTR-05-88-A

**DECISION ON CALLIXTE KALIMANZIRA'S
MOTION FOR LEAVE TO AMEND HIS NOTICE OF APPEAL**

Counsel for Callixte Kalimanzira

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: ROSETTE MUZIGO-MORRISON
SIGNATURE: *[Handwritten Signature]* DATE: 5/3/10

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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 seised of the "Motion for Amendment of Notice of Appeal" filed by Callixte Kalimanzira ("Kalimanzira") on 25 January 2010 ("Motion").¹

I. PROCEDURAL BACKGROUND

2. On 22 June 2009, Trial Chamber III of the Tribunal ("Trial Chamber") convicted Kalimanzira of genocide and direct and public incitement to commit genocide, and sentenced him to 30 years of imprisonment.² On 20 July 2009, the Pre-Appeal Judge denied Kalimanzira's request for a 30-day extension of time for the filing of his notice of appeal from the service of the French translation of the Trial Judgement, originally filed in English.³ Kalimanzira and the Office of the Prosecutor ("Prosecution") filed their notices of appeal on 21 and 22 July 2009, respectively.⁴

3. On 31 August 2009, the Pre-Appeal Judge granted a 75-day extension of time for the filing of Kalimanzira's Appellant's brief from the filing of the French translation of the Trial Judgement, on the ground that Kalimanzira does not speak English and that the main working language of his Counsel is French.⁵ At the same time, the Pre-Appeal Judge denied Kalimanzira's anticipated request for leave to amend his Notice of Appeal following the receipt of the French translation of the Trial Judgement.⁶ On 5 October 2009, the Prosecution filed its Appellant's brief.⁷ The French translation of the Trial Judgement was filed on 16 November 2009.

4. Together with his Motion, Kalimanzira filed the Proposed Amended Notice of Appeal⁸ and a chart detailing the suggested reorganisation of his Notice of Appeal.⁹ On 1 February 2010, the

¹ Originally filed in French, English version filed without the annexes on 22 February 2010.

² *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Judgement, 22 June 2009 ("Trial Judgement"), paras. 739, 756.

³ Decision on Callixte Kalimanzira's Motion for an Extension of Time for the Filing of Notice of Appeal, 20 July 2009 ("20 July 2009 Decision"), p. 2. This extension of time for the filing of Kalimanzira's Notice of Appeal was denied on the ground that his Counsel had indicated his ability to work in English. *Ibid.*

⁴ Notice of Appeal, originally filed in French on 21 July 2009, English translation filed on 27 August 2009 ("Notice of Appeal"); Prosecutor's Notice of Appeal, 22 July 2009.

⁵ Decision on Callixte Kalimanzira's Motion for Leave to File an Amended Notice of Appeal and for an Extension of Time for the Filing of his Appellant's Brief, 31 August 2009 ("31 August 2009 Decision"), paras. 3, 5-7.

⁶ 31 August 2009 Decision, para. 4, where the Pre-Appeal Judge noted that, as already stated in the 20 July 2009 Decision, "Mr. Kalimanzira may seek leave to amend his Notice of Appeal after receipt of the French translation of the Trial Judgement if good cause is shown". See also *ibid.*, para. 7.

⁷ Prosecutor's Appellant's Brief, 5 October 2009.

⁸ *Requête visant à amender l'acte d'appel*, 25 January 2010. "Annexe A - Acte d'appel amendé" ("Proposed Amended Notice of Appeal").

⁹ *Requête visant à amender l'acte d'appel*, 25 January 2010. "Annexe B - Réorganisation de l'acte d'appel".

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Prosecution filed its response objecting to the Motion.¹⁰ The same day, Kalimanzira filed his Appellant's brief corresponding to the Proposed Amended Notice of Appeal.¹¹ Kalimanzira has not replied to the Response.

II. SUBMISSIONS

5. Kalimanzira seeks leave to amend his Notice of Appeal pursuant to Rule 108 of the Rules of Procedure and Evidence of the Tribunal ("Rules") in order to clarify and reorganise it, and add grounds of appeal concerning his identification at three locations.¹² In support of his request, Kalimanzira submits that his original Notice of Appeal was drafted on the basis of the English version of the Trial Judgement, whereas the working language of his Defence team, as well as his own, is French.¹³ He contends that, in these circumstances, the Defence was "not in a position to do its work *effectively* and to exercise its rights within the minimum conditions warranted by the seriousness of the matter".¹⁴ Kalimanzira also argues that the proposed reorganisation is sought for purposes of clarity and effectiveness, and to bring the original Notice of Appeal into conformity with the structure of the anticipated Appellant's brief.¹⁵ As regards the additional grounds of appeal, Kalimanzira asserts that their inclusion will not prejudice the Prosecution since it has been "timely made and its objective is clear and concise".¹⁶ In his view, the exclusion of the additional grounds of appeal would lead to a miscarriage of justice.¹⁷ He further submits that his request will have no effect on the procedural time-limits.¹⁸ Finally, Kalimanzira contends that it is in the interests of justice to allow him to replace his original Notice of Appeal with the Proposed Amended Notice of Appeal so as "to enable [him] to fully exercise his rights on appeal".¹⁹

6. The Prosecution responds that the Motion should be dismissed in its entirety on the grounds that: (i) Kalimanzira fails to demonstrate any good cause for the proposed amendment; (ii) the Motion is late and the delay manifestly unjustified; and (iii) the Motion constitutes an abuse of procedure and causes prejudice to the Prosecution.²⁰ In particular, the Prosecution notes that the Motion was filed more than two months after the filing of the French translation of the Trial

¹⁰ *Réponse du Procureur à la "Requête visant à amender l'acte d'appel" de l'intimé Callixte Kalimanzira*, 1 February 2010 ("Response"), paras. 2, 8, 16.

¹¹ *Mémoire d'appel pour Callixte Kalimanzira*, filed confidentially on 1 February 2010 ("Appeal Brief").

¹² Motion, para. 3. See also *ibid.*, paras. 8, 11, p. 3 (referring to Kalimanzira's identification in Kabuye, at the Jaguar roadblock and the Gisagara marketplace).

¹³ Motion, para. 7.

¹⁴ Motion, para. 7 (emphasis in the original).

¹⁵ Motion, para. 8.

¹⁶ Motion, para. 11.

¹⁷ Motion, para. 11.

¹⁸ Motion, para. 10.

¹⁹ Motion, para. 12.

²⁰ Response, paras. 2, 8-16.

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Judgement and seven days before the deadline for filing Kalimanzira's Appellant's brief.²¹ The Prosecution also argues that Kalimanzira does not propose a mere reorganisation of his Notice of Appeal but a completely different notice of appeal and that, by filing two different notices of appeal, Kalimanzira does not fulfill his obligation to inform the Prosecution of the scope of his appeal.²² It adds that the Motion gives rise to confusion, runs contrary to judicial economy, and unduly consumes the Prosecution's time.²³

III. DISCUSSION

A. Applicable Standard

7. In accordance with Rule 108 of the Rules, the Appeals Chamber may, on good cause being shown by motion, authorise 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 bases for seeking variation.²⁴ 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.²⁵ 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.²⁶

8. In its previous determinations as to which proposed variations to a notice of appeal may be authorised within the scope of the good cause requirement, the Appeals Chamber has considered the following factors to be of relevance: (i) the proposed 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

²¹ Response, paras. 12, 14, 15.

²² Response, paras. 10, 15.

²³ Response, para. 14.

²⁴ See, e.g., *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Leave to Amend His Notice of Appeal, dated 28 January 2010, filed 29 January 2010 ("*Bagosora Decision*"), para. 10; *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; *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.

²⁵ See, e.g., *Bagosora Decision*, para. 10; *Zigiranyirazo Decision*, para. 4; *Muvunyi Decision*, para. 6. See also Practice Direction on Formal Requirements for Appeals from Judgement, dated 4 July 2005, paras. 2, 3.

²⁶ See, e.g., *Bagosora Decision*, para. 10; *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, para. 10; *Muvunyi Decision*, para. 6.

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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.²⁷

B. Analysis

9. The Appeals Chamber notes Kalimanzira's submission that the variations contained in the Proposed Amended Notice of Appeal arise from the unavailability of the French version of the Trial Judgement at the time the Notice of Appeal was drafted. The Appeals Chamber recognises that working solely on the basis of the English language version of the Trial Judgement may have affected the work of Kalimanzira's Defence team, given that its primary working language is French. However, it notes that Kalimanzira submitted this Motion more than two months after he and his Defence team were served with the French translation of the Trial Judgement, without any explanation as to the reasons why it was not filed earlier.

10. The Appeals Chamber also observes that Kalimanzira filed his Motion only one week before the expiry of the time-limit for filing his Appellant's brief, effectively preventing the Appeals Chamber from ruling on his Motion before he filed his Appeal Brief. Thus any discrepancy between the Appeal Brief and Notice of Appeal is a function of Kalimanzira's delay in filing the Motion, and does not justify his request to amend the Notice of Appeal. His argument that the variations would bring the Notice of Appeal into conformity with the Appeal Brief is therefore rejected.

11. Furthermore, the Appeals Chamber rejects Kalimanzira's assertion that his Motion has no impact on the briefing schedule. By failing to make a timely request to amend the Notice of Appeal and by filing an Appellant's brief based on the Proposed Amended Notice of Appeal for which no leave has been granted, Kalimanzira materially impairs the expeditiousness of the appeal proceedings. Should the Appeals Chamber deny Kalimanzira's Motion, he would have to re-file an Appellant's brief in conformity with the original Notice of Appeal, and the time-limit for the filing of the Prosecution's Respondent's brief would only start running from the filing date of the amended Appellant's brief. Should the Appeals Chamber grant the present Motion, fairness would require that the Prosecution be granted additional time to respond to an Appellant's brief premised on an amended notice of appeal containing additional grounds of appeal.

12. Turning to the substance of the Proposed Amended Notice of Appeal, the Appeals Chamber observes that the vast majority of Kalimanzira's proposed variations are minor; the proposed reformulation and restructuring essentially clarify and improve the comprehensibility of the original

²⁷ See, e.g., *Bakosora* Decision, para. 11; *Zigiranyirazo* Decision, para. 4; *Muvunyi* Decision, para. 7.

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Notice of Appeal without altering its substance. The Proposed Amended Notice of Appeal also includes information which was missing in the original Notice of Appeal.²⁸

13. Some proposed variations, however, go beyond restructuring and reformulating and amount to substantive changes. Most of these variations appear to arise from defects in the original Notice of Appeal. While they do affect the substance of the Notice of Appeal, they nonetheless contribute to clarifying and specifying otherwise vague or broad allegations of errors contained in the original Notice of Appeal.²⁹ The remaining proposed substantive variations, however, constitute new grounds of appeal. They do not only consist of new grounds of appeal relating to identification issues as submitted by Kalimanzira, but also concern the addition of new grounds of appeal relating to: (i) the Trial Chamber's alleged failure to provide reasoning concerning genocidal intent; and (ii) alleged errors regarding the legal qualification of aiding and abetting genocide.³⁰

14. The Appeals Chamber considers that Kalimanzira's failure to file his Motion earlier and to properly outline in his Motion all the substantive changes contained in the Proposed Amended Notice of Appeal would in itself justify the summary dismissal of his Motion. The Appeals Chamber reminds Kalimanzira that he is not free to change his Notice of Appeal and essentially restart the appeal process at will.³¹ However, in the interest of protecting Kalimanzira's right to a fair appeal and to ensure that he is not prejudiced by the failures of his Counsel, the Appeals Chamber has considered whether the proposed additional grounds of appeal could be of substantial importance to the success of Kalimanzira's appeal, such as to lead to a miscarriage of justice if denied.³² Without pronouncing itself on the merits of Kalimanzira's appeal, the Appeals Chamber concludes that the addition of the new grounds of appeal identified above could be of substantial importance to the success of his appeal and should be allowed.

²⁸ The Proposed Amended Notice of Appeal clearly indicates the findings challenged, with reference to relevant paragraphs of the Trial Judgement, whereas the original Notice of Appeal often provides only reference to relevant sections of the Trial Judgement. *Compare, e.g.*, Notice of Appeal, paras. 20, 21. *with* Proposed Amended Notice of Appeal, paras. 13, 15, 16. *Compare, e.g.*, Notice of Appeal, paras. 33-37. *with* Proposed Amended Notice of Appeal, para. 8.

²⁹ *Compare, e.g.*, Notice of Appeal, paras. 30, 31, *with* Proposed Amended Notice of Appeal, paras. 25, 41, 46, 63, 69; *Compare, e.g.*, Notice of Appeal, paras. 41-43, *with* Proposed Amended Notice of Appeal, paras. 26, 39, 51, 52, 58, 64, 65, 71. The Appeals Chamber has also identified variations which abandon certain grounds of appeal. *Compare* Proposed Amended Notice of Appeal, *with* Notice of Appeal, paras. 26-29 and 71, bullets 2-6.

³⁰ *See* Proposed Amended Notice of Appeal, paras. 17, 27, 35.

³¹ *See, e.g.*, *The Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Dragoljub Ojdanić's Second Motion to Amend His Notice of Appeal, 4 December 2009 ("*Šainović et al.* Decision"), para. 8; *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 ("*Nahimana et al.* Decision"), para. 11; *Prosecutor v. Viduje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006 ("*Blagojević* Decision"), para. 8.

³² *See, e.g.*, *Šainović et al.* Decision, para. 7; *Nahimana et al.* Decision, para. 12; *Blagojević* Decision, para. 9.

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15. The Appeals Chamber does not find that the exclusion of the remaining proposed variations could lead to a miscarriage of justice. However, as discussed above, these variations would clarify the scope of Kalimanzira's appeal and substantially improve the comprehensibility and structure of his Notice of Appeal. The Appeals Chamber also considers that, since they do not affect the substance of Kalimanzira's original Notice of Appeal or, where they do, serve to clarify the allegations set out therein, these variations are not prejudicial to the Prosecution. Finally, the Appeals Chamber notes that these additional amendments will not further affect the briefing schedule. For the foregoing reasons, the Appeals Chamber finds that it is in the interests of justice to allow all the proposed remaining variations.

16. Accordingly, the Appeals Chamber finds that, despite Kalimanzira's failure to bring his Motion in a timely manner, it is in the interests of justice to allow him to vary his Notice of Appeal by replacing it with the Proposed Amended Notice of Appeal. As a result, Kalimanzira is not required to re-file his Appeal Brief. In order to remedy any prejudice to the Prosecution arising from having to respond to the new grounds of appeal, the Prosecution is allowed an additional 15 days to respond to Kalimanzira's Appeal Brief. The Appeals Chamber further considers that for the sake of clarity of the record, Kalimanzira should file his Proposed Amended Notice of Appeal as a single document entitled Amended Notice of Appeal.

IV. DISPOSITION

17. For the foregoing reasons, the Appeals Chamber,

GRANTS the Motion;

INSTRUCTS Kalimanzira to file the Amended Notice of Appeal as a single document no later than 8 March 2010;

ALLOWS the Prosecution a 15-day extension of time to file its Respondent's brief, which should therefore be filed no later than 29 March 2010; and

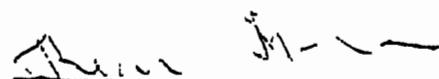
REMINDS Kalimanzira's Counsel to exercise greater diligence in preparing submissions before the Appeals Chamber.

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

Done this fifth day of March 2010
At The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Theodor Meron
Presiding