



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

127/H

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ICTR-02-78-AR73.2  
23<sup>rd</sup> March 2010  
{127/H – 123/H}

**IN THE APPEALS CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Andréia Vaz

**Registrar:** Mr. Adama Dieng

**Decision of:** 23 March 2010

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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NAME / NOM: KEFFEL KUMELIC A. AFANDE  
SIGNATURE: *[Signature]* DATE: 23 March 2010

**GASPARD KANYARUKIGA**

v.

**THE PROSECUTOR**

Case No. ICTR-02-78-AR73.2

**DECISION ON GASPARD KANYARUKIGA'S INTERLOCUTORY APPEAL  
OF A DECISION ON THE EXCLUSION OF EVIDENCE**

**Counsel for the Appellant:**

Mr. David Jacobs  
Mr. Claver Sindayigaya  
Mr. Marc Nerenberg

**Office of the Prosecutor:**

Mr. Hassan Bubacar Jallow  
Ms. Holo Makwaia  
Ms. Althea Alexis-Windsor  
Mr. Cheikh Tidiane Mara

ICTR Appeals Chamber  
Date: 23<sup>rd</sup> March 2010  
Action: R. Juma  
Copied To: Concerned Judges,  
Parties, Judicial Archives,  
LOs LSS *[Signature]*

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 Gaspard Kanyarukiga ("Kanyarukiga") on 16 February 2010,<sup>1</sup> against the "Decision on Defence Motion for a Stay of the Proceedings, or Exclusion of Evidence Outside the Scope of the Indictment" issued on 15 January 2010 ("Impugned Decision") by Trial Chamber II of the Tribunal ("Trial Chamber").<sup>2</sup> The Prosecution responded on 25 February 2010,<sup>3</sup> and Kanyarukiga replied on 1 March 2010.<sup>4</sup>

#### A. Background

2. Kanyarukiga stands charged before the Tribunal with genocide, or alternatively, complicity in genocide, and extermination as a crime against humanity in relation to the alleged attack on Tutsis taking refuge at Nyange church in Kivumu commune, Kibuye prefecture.<sup>5</sup> His trial commenced on 31 August 2009.

3. On 18 December 2009, Kanyarukiga filed a motion requesting a stay of the proceedings or the exclusion of evidence.<sup>6</sup> On 15 January 2010, the Trial Chamber dismissed the request for a stay of the proceedings, granted the exclusion of some evidence, reserved its decision in respect of some evidence sought to be excluded, and denied the remainder of the motion.<sup>7</sup> In particular, the Trial Chamber denied Kanyarukiga's request to exclude Witness YAU's testimony that Kanyarukiga threw on the ground food brought for those seeking refuge in Nyange church on the basis that it may assist it in assessing Kanyarukiga's state of mind.<sup>8</sup>

<sup>1</sup> Appeal of the 15 January 2010 Trial Chamber II 'Decision on Defence Motion for a Stay of Proceedings, or Exclusion of Evidence Outside the Scope of the Indictment', 16 February 2010 ("Appeal").

<sup>2</sup> *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on Defence Motion for a Stay of the Proceedings or Exclusion of Evidence Outside the Scope of the Indictment, 15 January 2010.

<sup>3</sup> The Respondent's Response to the Defence Appeal of the 15 January 2010 Trial Chamber II 'Decision on Defence Motion for a Stay of Proceedings, or Exclusion of Evidence Outside the Scope of the Indictment', 25 February 2010 ("Response").

<sup>4</sup> Appellant's Reply to "The Respondent's Response to the Defence Appeal of the 15 January 2010 Trial Chamber II 'Decision on Defence Motion for a Stay of Proceedings, or Exclusion of Evidence Outside the Scope of the Indictment'", 1 March 2010 ("Reply").

<sup>5</sup> *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-I, Amended Indictment, 14 November 2007 ("Indictment"), paras. 7-20.

<sup>6</sup> *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-T, Motion for a Stay of Proceedings, or Exclusion of Evidence Outside the Indictment, 18 December 2009.

<sup>7</sup> Impugned Decision, p. 12. See also *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on Defence Motion for Certification to Appeal the Trial Chamber's 15 January 2010 Decision on Stay of Proceedings or Exclusion of Evidence, 9 February 2010 ("Certification Decision"), p. 6 (clarifying the disposition of the Impugned Decision).

<sup>8</sup> Impugned Decision, paras. 38, 40.

4. On 9 February 2010, the Trial Chamber certified for appeal the question whether it erred in so holding.<sup>9</sup>

### B. Submissions

5. Kanyarukiga requests the exclusion of Witness YAU's evidence regarding Kanyarukiga allegedly throwing on the ground food intended for refugees in Nyange church.<sup>10</sup> He submits that *mens rea* is an essential element of the crimes alleged which must be proven in order to enter a conviction.<sup>11</sup> As such, he contends that facts which the Prosecution alleges to prove the *mens rea* are material facts which must be specifically pleaded in the Indictment.<sup>12</sup> He asserts that the Prosecution led the impugned evidence with the intention that his *mens rea* be inferred from it.<sup>13</sup> He submits that there is no mention in the Indictment of the material facts underpinning the *mens rea* of the alleged crimes or of the allegation that he spoiled food intended for refugees.<sup>14</sup>

6. The Prosecution responds that the Appeal should be dismissed in its entirety.<sup>15</sup> It recalls that the relevant state of mind may be pleaded either by pleading the evidentiary facts from which the state of mind may be inferred or the relevant state of mind itself as a material fact.<sup>16</sup> It contends that the Indictment pleads the relevant intent as a material fact.<sup>17</sup> It argues that the impugned evidence does not constitute a material fact but rather evidence which proves a material fact.<sup>18</sup> It submits that Witness YAU's evidence did not support any new charge and did not prejudice Kanyarukiga.<sup>19</sup> In any event, it asserts that Kanyarukiga was on notice of this evidence which had been communicated to him five years before the start of the Prosecution's case.<sup>20</sup>

### C. Standard of Review

7. Decisions by Trial Chambers on the admission of evidence are discretionary decisions to which the Appeals Chamber must accord deference.<sup>21</sup> The Appeals Chamber's examination is

<sup>9</sup> Certification Decision, p. 6.

<sup>10</sup> Appeal, Prayer; Reply, p. 4.

<sup>11</sup> Appeal, paras. 22-27; Reply, para. 9.

<sup>12</sup> Appeal, paras. 22, 27, 30-32; Reply, paras. 6-9, 12.

<sup>13</sup> Appeal, para. 29. *See also* Appeal, para. 21, *citing* Impugned Decision, para. 40.

<sup>14</sup> Appeal, para. 30; Reply, paras. 2-4, 10, 11.

<sup>15</sup> Response, paras. 2, 20, 21.

<sup>16</sup> Response, para. 15.

<sup>17</sup> Response, para. 12, *referring to* Indictment, paras. 4, 7, 8.

<sup>18</sup> Response, paras. 11, 17.

<sup>19</sup> Response, para. 17.

<sup>20</sup> Response, para. 18.

<sup>21</sup> *See, e.g., Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009 ("*Karemera et al. Decision*"), para. 7; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.13, Decision on Jadranko Prlić's Consolidated Interlocutory Appeal Against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009 ("*Prlić et al. Decision*"), para. 5.

therefore limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error.<sup>22</sup> The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.<sup>23</sup>

#### D. Discussion

8. The Appeals Chamber notes that all the allegations in the Indictment relate to Kanyarukiga's participation in the attack at Nyange church.<sup>24</sup> However, his purported role in throwing on the ground the refugees' food at the church is not specifically pleaded. Nonetheless, the Trial Chamber found that this evidence "goes to *mens rea* and may assist the Chamber in assessing the Accused's state of mind at the time of the events in question".<sup>25</sup>

9. The Appeals Chamber recalls that there are two ways in which *mens rea* may be pleaded: (i) either the specific state of mind itself should be pleaded as a material fact, in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred, should be pleaded.<sup>26</sup>

10. In the present case, the Indictment pleads as a material fact the specific state of mind alleged in relation to the counts of genocide and complicity in genocide, in particular that Kanyarukiga acted "with the intent to destroy the Tutsi population in whole [or] in part".<sup>27</sup> Given that the Indictment pleads as a material fact the specific state of mind alleged, the facts by which his *mens rea* is to be established are matters of evidence and need not be pleaded.<sup>28</sup>

11. Therefore, as the Trial Chamber correctly determined, the evidence of Kanyarukiga allegedly throwing on the ground food intended for refugees at Nyange church is admissible since it

<sup>22</sup> *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents, 19 February 2010 ("*Kanyarukiga* Decision of 19 February 2010"), para. 9; *Karemera et al.* Decision, para. 7; *Prlić et al.* Decision, para. 5.

<sup>23</sup> *Kanyarukiga* Decision of 19 February 2010, para. 9; *Karemera et al.* Decision, para. 7; *Prlić et al.* Decision, para. 5.

<sup>24</sup> Indictment, paras. 7-20.

<sup>25</sup> Impugned Decision, para. 40.

<sup>26</sup> *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), para. 347; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 219.

<sup>27</sup> Indictment, para. 4. *See also* Indictment, paras. 7 ("Gaspard KANYARUKIGA, with intent to destroy, in whole or in part, the Tutsi racial or ethnic group, or knowing that other people intended to destroy, in whole or in part, the Tutsi racial or ethnical group..."), 8 ("Gaspard KANYARUKIGA, with intent to destroy in whole or in part, the Tutsi racial or ethnical [*sic*] group, or knowing that other people intended to destroy, in whole or in part, the Tutsi racial or ethnic group, and knowing that his assistance would contribute to the crime of genocide...").

may be relevant to the proof of the material fact of his *mens rea* as pleaded in the Indictment.<sup>29</sup> Accordingly, the Appeals Chamber finds no error on the part of the Trial Chamber in declining to exclude the impugned evidence.

#### E. Disposition


12. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal in its entirety.

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

Done this twenty-third day of March 2010,  
At The Hague,  
The Netherlands.



[Seal of the Tribunal]

  
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Judge Patrick Robinson  
Presiding

<sup>28</sup> *Nahimana et al.* Appeal Judgement, para. 347; *Blaškić* Appeal Judgement, para. 219.

<sup>29</sup> See *Arsène Shalom Ntahobali and Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-97-21-AR73, Decision on the Appeals By Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004, paras. 14, 15.