



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

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ICTR-97-31-A

18th May 2010

{1080/H -1074 /H}

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 18 May 2010

ICTR Appeals Chamber
Date: 18th May 2010
Action: R. Juncal
Copied To: Concerned Judges,

Tharcisse RENZAHO

v.

Parties, Judicial Archives, THE PROSECUTOR
LOs, LSS
Case No. ICTR-97-31-A

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SENT BY THE
CORE CERTIFICATE FOR STORAGE AT ORIGINAL PAR 1080/S
NAME / NOM: AGIUS, CARMEL A. ALFONSO
SIGNATURE: [Handwritten Signature] DATE: 18 May 2010

DECISION ON RENZAHO'S MOTION TO AMEND NOTICE OF APPEAL

Counsel for Mr. Tharcisse Renzaho:

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Barnabé Nekuie

Office of the Prosecutor:

Alex Obote-Odora
Alphonse Van
Abdoulaye Seye
Clair Duffy
Florida Kabasinga

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 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of the "*Requête en modification de la notice d'appel*" ("Motion") filed by Tharcisse Renzaho ("Renzaho") on 5 May 2010. The Prosecution responded on 10 May 2010.¹

I. INTRODUCTION

2. Trial Chamber I pronounced its judgement against Renzaho on 14 July 2009 and issued its opinion in writing on 14 August 2009.² Renzaho filed his Notice of Appeal on 2 October 2009,³ and his Appellant's Brief on 2 March 2010.⁴ The Prosecution filed its Respondent's Brief on 13 April 2010.⁵ Renzaho filed his Brief in Reply on 5 May 2010.⁶

3. In his Appellant's Brief, Renzaho argues, *inter alia*, that the Trial Chamber erred in law in its treatment of his alibi under Grounds of Appeal 5, 6, and 11.⁷ In its Respondent's Brief, the Prosecution requested the dismissal of Renzaho's arguments concerning alibi on the basis that they were not included in Ground of Appeal 5 or Ground of Appeal 11 of his Notice of Appeal, in contravention of Rule 108 of the Rules of Procedure and Evidence of the Tribunal ("Rules").⁸ In the alternative, the Prosecution responded to Renzaho's arguments.⁹ The Brief in Reply contained arguments concerning Renzaho's alibi.¹⁰

4. In the Motion, Renzaho seeks leave to amend his Notice of Appeal to include a new ground of appeal concerning alibi ("Ground of Appeal 14").¹¹ He submits that after reviewing the

¹ Prosecutor's Response to Appellant's Motion for Leave to Amend Notice of Appeal, 10 May 2010 ("Prosecution Response").

² *The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-T, Judgement and Sentence, dated 14 July 2009 and filed on 14 August 2009 ("Trial Judgement").

³ *Acte d'Appel*, 2 October 2009 ("Notice of Appeal"). See also *Réponse à la demande de la Chambre d'Appel du 14 octobre 2009*, 23 October 2009.

⁴ *Mémoire d'Appel*, 2 March 2010 (confidential) ("Appellant's Brief"). See also *Livre d'appel de l'appelant*, 2 March 2010 (confidential); *Mémoire d'Appel Public*, 2 April 2010; *Erratum – Requête en rectification d'erreur matérielle Mémoire d'Appel*, 7 April 2010.

⁵ Prosecutor's Respondent's Brief, 13 April 2010 ("Respondent's Brief").

⁶ *Réplique de l'appelant. Art. 113 RPP*, 5 May 2010 ("Brief in Reply").

⁷ Appellant's Brief, paras. 208-211, 218-221, 571-581.

⁸ Respondent's Brief, paras. 107, 231. The Prosecution did not object to Renzaho's alibi argument in Ground of Appeal 6, although it was not included in the Notice of Appeal. See Respondent's Brief, para. 136; Notice of Appeal, paras. 77-83.

⁹ Respondent's Brief, paras. 107, 126-128, 231, 232, 259-262.

¹⁰ See Brief in Reply, paras. 94, 206, 207.

¹¹ Motion, paras. 5, 17.

Zigiranyirazo Appeal Judgement,¹² which was delivered after he filed his Notice of Appeal, he realised that an argument on this subject was necessary to his appeal.¹³ Renzaho argues that the *Zigiranyirazo* Appeal Judgement developed the Tribunal's jurisprudence regarding alibi and that such a jurisprudential development constitutes good cause for amending his Notice of Appeal pursuant to Rule 108 of the Rules.¹⁴

5. Renzaho concedes that he should have sought to amend his Notice of Appeal before filing his Appellant's Brief, but argues that his failure to do so should not prevent him from amending his Notice of Appeal now.¹⁵ Renzaho further submits that all of the arguments he intends to raise concerning alibi are already included in his Appellant's Brief and therefore granting the Motion will not delay the proceedings.¹⁶ He also notes that the Prosecution responded to his arguments in its Respondent's Brief.¹⁷ Renzaho maintains that an alibi is an essential element of a defence, with "primordial" importance, and that he has fulfilled the conditions to amend his Notice of Appeal.¹⁸

6. The Prosecution responds that the Motion should be dismissed.¹⁹ The Prosecution contends that Renzaho has failed to demonstrate good cause within the meaning of Rule 108 of the Rules.²⁰ It argues that, contrary to Renzaho's submissions, the *Zigiranyirazo* Appeal Judgement did not raise new features in the jurisprudence concerning alibi evidence.²¹ It further notes that Renzaho failed to cite any portion of the *Zigiranyirazo* Appeal Judgement where the law with respect to alibi changed.²²

7. The Prosecution also submits that seven months have passed since Renzaho filed his Notice of Appeal, and six months have passed since the filing of the *Zigiranyirazo* Appeal Judgement.²³ The Prosecution argues that a "demonstration of 'good cause' must necessarily require due diligence on the part of the moving party."²⁴

¹² *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Judgement, 16 November 2009 ("*Zigiranyirazo* Appeal Judgement").

¹³ Motion, paras. 6, 7.

¹⁴ Motion, paras. 6, 8.

¹⁵ Motion, para. 9.

¹⁶ Motion, paras. 11, 12, 14, 18.

¹⁷ Motion, para. 13.

¹⁸ Motion, paras. 15, 16, referring to *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* Decision").

¹⁹ Prosecution Response, paras. 3, 9.

²⁰ Prosecution Response, para. 3.

²¹ Prosecution Response, para. 5.

²² Prosecution Response, para. 5.

²³ Prosecution Response, para. 6.

²⁴ Prosecution Response, para. 6.

8. Finally, the Prosecution maintains that since it responded to the substance of Renzaho's arguments on alibi in its Respondent's Brief, an amendment to the Notice of Appeal is not strictly necessary.²⁵ As Renzaho included the substance of his arguments on alibi under other grounds of appeal, an amendment to the Notice of Appeal at this late stage of the proceedings could give rise to confusion, or require supplementary submissions by both parties, thus unnecessarily delaying the proceedings.²⁶

II. DISCUSSION

9. Rule 108 of the Rules provides that the Appeals Chamber "may, on good cause being shown by motion, authorise a variation of the grounds of appeal." Such a motion should be submitted as soon as possible after identifying the new alleged error of the Trial Chamber or after discovering any other basis for seeking a variation to the notice of appeal.²⁷ Generally, "a request to amend a notice of appeal must, at least, explain precisely what amendments are sought and why, with respect to each amendment, the 'good cause' requirement of Rule 108 is satisfied."²⁸ The concept of "good cause" encompasses both good reason for including new or amended grounds in a notice of appeal and good reason for failing to include grounds or correctly phrase them in the initial filing of the notice of appeal.²⁹ An appellant has the burden to demonstrate that each proposed amendment meets the requirements of Rule 108 of the Rules.³⁰ The good cause requirement is to be interpreted more restrictively at later stages in the appeal proceedings when variations to the grounds of appeal may substantially affect the efficient administration of justice.³¹

10. The Appeals Chamber notes that Renzaho failed to bring the Motion as soon as possible after discovering the basis for seeking to amend his Notice of Appeal. As the *Zigiranyirazo* Appeal Judgement was issued in November 2009, the Motion should have been brought well before

²⁵ Prosecution Response, para. 7.

²⁶ Prosecution Response, para. 8.

²⁷ *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Decision on Defence Extremely Urgent Motion to Vary the Grounds of Appeal Contained in its Notice of Appeal, 26 July 2007 ("*Seromba* Decision"), para. 6; *Nahimana* Decision, para. 9.

²⁸ *Nahimana* Decision, para. 9, quoting *Prosecutor v. Vidaje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Dragan Jokić's Request to Amend Notice of Appeal, 14 October 2005, para. 7.

²⁹ *Seromba* Decision, para. 6; *Nahimana* Decision, para. 9; *Prosecutor v. Vidaje 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. 7.

³⁰ *Seromba* Decision, para. 6; *Nahimana* Decision, para. 14.

³¹ *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski's Motion for Leave to Present Appellate Arguments in Order Different from that Presented in Notice of Appeal, to Amend the Notice of Appeal, and to File Sur-Reply, and on Prosecution Motion to Strike, 26 March 2009, para. 18; *Nahimana* Decision, para. 11; *Blagojević* Decision, para. 8.

Renzaho filed his Appellant's Brief in March 2010. Although Renzaho acknowledges this,³² he provides no explanation for his failure to bring the Motion in a timely manner.

11. With respect to good cause, the Appeals Chamber accepts that a development of the Tribunal's jurisprudence subsequent to the filing of a notice of appeal may, in some circumstances, constitute good cause for an amendment. However, apart from asserting that the *Zigiranyirazo* Appeal Judgement develops the jurisprudence in a manner which impacts upon the current proceedings, Renzaho does not provide any support for this contention. In particular, he fails to provide any specific references to the *Zigiranyirazo* Appeal Judgement or explain how the analysis contained therein is pertinent to his appeal. Notably, Ground of Appeal 14 fails to reference the *Zigiranyirazo* Appeal Judgement.³³

12. In his Appellant's Brief, Renzaho references the *Zigiranyirazo* Appeal Judgement for points of law,³⁴ but again fails to argue that the *Zigiranyirazo* Appeal Judgement changed the jurisprudence in a way that reveals an error of the Trial Chamber in this case or impacts upon his convictions or sentence. The Appeals Chamber considers that while the *Zigiranyirazo* Appeal Judgement provided a concise summary of the basic principle relevant to alibi evidence, it did not alter that law.³⁵ In short, the Appeals Chamber does not accept that Renzaho was not able to raise his arguments concerning alibi prior to the *Zigiranyirazo* Appeal Judgement.

13. The Appeals Chamber also notes that Renzaho appears to argue that the Prosecution will not be prejudiced by his proposed amendment as it has responded to his alibi arguments in its Respondent's Brief.³⁶ However, while the absence of prejudice for the opposing party is an important factor to be taken into account by the Appeals Chamber, it does not, on its own, constitute good cause.³⁷ The Appeals Chamber therefore finds that Renzaho has not shown good cause for amending his Notice of Appeal.

14. However, the Appeals Chamber notes that it has, under limited circumstances, permitted amendments even where there was no good cause shown for failure to include the new or amended grounds in the notice of appeal, such as where the failure resulted from counsel's negligence or inadvertence. In such instances, the Appeals Chamber has permitted amendments which are of

³² Motion, para. 9.

³³ See Motion, para. 17.

³⁴ Appellant's Brief, para. 578, fns. 146, 289, 291, 293.

³⁵ See *Zigiranyirazo* Appeal Judgement, paras. 16-20.

³⁶ Motion, para. 13.

³⁷ *Seromba* Decision, para. 101; *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Decision on "Prosecutor's Motion for Variation of Notice of Appeal Pursuant to Rule 108", 17 August 2006, para. 11 ("Granting leave to amend a notice of appeal just because the amendment would cause no prejudice would circumvent Rule 108 of the Rules, the time-limits it imposes, and the 'good cause' requirement.").

substantial importance to the success of the appeal such as to lead to a miscarriage of justice if the grounds were excluded.³⁸ In these exceptional cases, the Appeals Chamber has reasoned, the interests of justice require that an appellant not be held responsible for the failures of his or her counsel.³⁹

15. Renzaho does not offer any explanation as to why Ground of Appeal 14 is of substantial importance to the success of his appeal such that not including it would lead to a miscarriage of justice. Nonetheless, the Appeals Chamber notes that should Renzaho's arguments concerning alibi succeed, it would have the effect of overturning several of his convictions. The Appeals Chamber therefore finds that the exclusion of Renzaho's arguments concerning alibi could lead to a miscarriage of justice.

16. However, the Appeals Chamber notes that Ground of Appeal 14 does not conform to the provisions of Rule 108 or the Rules or the relevant Practice Direction.⁴⁰ In particular, it fails to identify with precision the nature of the errors, provide any reference to the challenged findings, or specify the relief sought. Moreover, Renzaho does not specify which paragraphs of the Appellant's Brief he considers to be relevant to Ground of Appeal 14, which could complicate the appeal. It also appears that Ground of Appeal 14 exceeds the arguments contained in the Appellant's Brief.

17. In such circumstances, the Appeals Chamber will not permit an amendment to the Notice of Appeal. However, having found that the exclusion of the alibi arguments could lead to a miscarriage of justice, and in light of the fact that the Prosecution has had an opportunity to and did in fact respond, the Appeals Chamber finds that it is in the interests of justice to consider the arguments on alibi already contained in the Appellant's Brief. Consequently, the Appeals Chamber will also consider the arguments concerning alibi contained in the Respondent's Brief and the Brief in Reply.

³⁸ *Seromba* Decision, para. 8; *Nahimana* Decision, para. 12; *Blagojević* Decision, para. 9.

³⁹ *Nahimana* Decision, para. 12; *Blagojević* Decision, para. 9.

⁴⁰ Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005 ("Practice Direction"), para. 1.

III. DISPOSITION

18. For the foregoing reasons, the Appeals Chamber

DISMISSES the Motion;

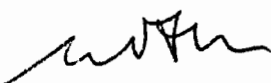
FINDS that, on the merits of Renzaho's appeal, it will consider the arguments concerning alibi contained in the Appellant's Brief, the Respondent's Brief, and the Brief in Reply.

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

Done this eighteenth day of May 2010,
at The Hague,
The Netherlands.



[Seal of the Tribunal]


Judge Carmel Agius
Presiding