

ICTR-99-54-T
29-06-10
(7183-7178)

7183
PM



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 29 June 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVES
RECEIVED

2010 JUN 29 1P 2:19

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL
THE TRIAL CHAMBER'S DECISION ON
PROSECUTION MOTION TO VACATE THE TRIAL DATE**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. William Egbe
Mr. Patrick Gabaake
Mr. Iskandar Ismail
Mr. Michael Kalisa
Ms. Faria Rekkas

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
Ms. Chloé Gaden

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the “Chamber”);

BEING SEIZED of the “Defence Motion for Certification to Appeal the Trial Chamber’s Decision on Prosecution Motion to Vacate the Trial Date”, filed on 31 May 2010 (the “Motion”);

CONSIDERING:

- (a) The “Prosecutor’s Response to Defence Motion for Certification to Appeal the Trial Chambers Decision on Prosecution Motion to Vacate the Trial Date”, filed on 4 June 2010 (the “Response”);
- (b) The “Corrigendum to the: Prosecutor’s Response to Defence Motion for Certification to Appeal the Trial Chambers Decision on Prosecution Motion to Vacate the Trial Date.”, filed on 4 June 2010 (the “Corrigendum”); and
- (c) The “Defence Reply to the Prosecution Response to the Defence Motion for Certification to Appeal the Trial Chamber’s Decision on Prosecution Motion to Vacate the Trail Date”, filed on 8 June 2010 (the “Reply”);

CONSIDERING also the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Motion pursuant to Rule 73 (B) of the Rules.

INTRODUCTION

1. On 15 April 2010, the Trial Chamber issued a Scheduling Order in which it required the Prosecution to state, not later than 30 April 2010, whether Witness ANAC would be available to testify at the next trial session scheduled to commence on 21 June 2010. If the Witness remained unavailable, the Chamber ordered that the Defence case would be scheduled to commence at the next trial session.¹

2. On 29 April 2010, the Prosecution stated that Witness ANAC would be unavailable to testify starting on 21 June 2010. The Prosecution also moved the Chamber for leave to drop Witness ANAC from its list and to add Witnesses ANAV, AHJ and DBN to rebut anticipated Defence alibi evidence.²

¹ Decision on Prosecution Motion to Vacate the Trial Date (TC), 24 May 2010 (“Impugned Decision”), para. 11, citing Scheduling Order Pursuant to Rule 54 of the Rules of Procedure and Evidence (TC), 15 April 2010, p. 3.

² Impugned Decision, para. 13.



3. On 10 May 2010, the Prosecution requested leave to withdraw its motion of 29 April 2010. It also moved to reschedule the trial date to 14 July 2010, and to permit the Prosecution to call up to three as-yet-unidentified witnesses to rebut the anticipated alibi evidence.³

4. In its Decision of 24 May 2010 (the "Impugned Decision"), the Chamber granted in part the motion of 10 May 2010, and ordered that, if the Prosecution intends to take steps to vary its witness list in order to rebut the alibi, it should file an appropriate motion by 24 June 2010. If the Prosecution fails to do so, its case-in-chief will be deemed closed. The Chamber further ordered that the Defence case be scheduled to commence on 15 November 2010.⁴

SUBMISSIONS OF THE PARTIES

Defence Motion

5. The Defence requests certification to appeal the Impugned Decision, and submits that the issues at stake warrant certification pursuant to Rule 73 (B) of the Rules.⁵

6. The Defence argues that the extension of time granted to the Prosecution is an issue which significantly affects the fair and expeditious conduct of the proceedings as well as the outcome of the trial. The Impugned Decision undermines the equality of arms by prolonging the Prosecution's case, while the Chamber has denied similar requests made by the Defence. The Defence claims that this disparity demonstrates a bias towards the Prosecution.⁶

7. Moreover, the Decision to vacate the trial date based on a speculative search for alibi witnesses has prolonged the Prosecution's case unnecessarily, infringing upon Ngirabatware's right to be tried without undue delay.⁷

8. The Defence further alleges that the Prosecution intends to call witnesses not only to rebut the Defence of alibi but also to charge Ngirabatware with new crimes.⁸

9. Finally, the Defence submits that an immediate resolution of these issues by the Appeals Chamber will materially advance the proceedings. If the Appeals Chamber reverses the Impugned Decision, the Prosecution's case would be completed and the Defence case could commence within a reasonable time. This relief would help protect the principle of equality of arms, as well as the right to be tried without undue delay.⁹

³ See *id.*, para.17.

⁴ *Id.*, p. 9.

⁵ Motion, paras. 19-50.

⁶ *Id.*, paras. 22-28, 30, 38, 45-47.

⁷ *Id.*, paras. 34-38, 45.

⁸ *Id.*, paras. 29-33.

⁹ *Id.*, paras. 37, 39-44, 48-49.



Prosecution Response

10. The Prosecution considers that the Defence has failed to meet either prong of Rule 73 (B), and requests that the Chamber dismiss the Defence motion.¹⁰

11. The Prosecution disputes that the Impugned Decision abrogates the principle of equality of arms, and submits that the Chamber should decide motions based on substance and not on statistics.¹¹

12. The Prosecution also notes that the Impugned Decision grants the Defence additional time to prepare for its case-in-chief, and that the Defence is not precluded from filing a motion for extension of time. Furthermore, the Impugned Decision adequately addressed Defence concerns regarding the rights of Ngirabatware.¹²

13. With regards to the Defence allegation that the Prosecution intends to bring witnesses who will charge Ngirabatware with new crimes, the Prosecution asserts that this allegation is speculative and is not grounded in previous Prosecution submissions.¹³

Defence Reply

14. The Defence claims that it has been prejudiced by the Impugned Decision because the Prosecution will have nearly four months to present its case, whereas the Defence case is scheduled to last only two months. The Defence resubmits that the extension of time for the Prosecution's case-in-chief undermines Ngirabatware's right to be tried without undue delay.¹⁴

15. The Defence is unable to prepare for witnesses whose identities are unknown.¹⁵

16. The Prosecution's suggestion that the Defence may simply request more time for its case-in-chief is speculative, particularly because the Chamber has dismissed numerous Defence motions for additional time, despite their merit. The Defence construes this pattern of dismissals as clear evidence of bias.¹⁶

DELIBERATIONS

17. Rule 73 (B) of the Rules requires that two criteria be satisfied before a Trial Chamber may grant an application for certification to appeal: (a) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) an immediate resolution of the

¹⁰ Response, paras. 14, 16-18.

¹¹ *Id.*, paras. 9, 14-16.

¹² *Id.*, paras. 6-9, 13-17; Corrigendum.

¹³ Response, paras. 10-12.

¹⁴ Reply, paras. 5, 14-18.

¹⁵ *Id.*, para. 8.

¹⁶ *Id.*, paras 11, 13.

issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.¹⁷

18. In applying Rule 73 (B), case law has emphasised the word “significantly,” suggesting that an issue which may have only a small impact on the fair and expeditious conduct of the proceedings, or on the outcome of the trial, may not be appropriate for certification.¹⁸ Moreover, where alternative remedies are available to protect the rights invoked by the Accused, the issue’s impact on the proceedings is not “significant,” and where an allegation has not been substantiated, its certification will not “materially advance the proceedings.”¹⁹

19. Even where both requirements of the Rule are satisfied, certification is not automatic, but it remains at the discretion of the Trial Chamber. Moreover, even when both factors are present, “certification to appeal must remain exceptional.”²⁰

20. The Chamber recalls that when determining whether to grant leave to appeal, it is not concerned with the correctness of its impugned decision. All considerations such as whether there was an error of law or abuse of discretion in the decision at stake are for the consideration of the Appeals Chamber after certification to appeal has been granted, and therefore irrelevant to the decision for certification. Insofar as the Parties have made such arguments, the Trial Chamber will not consider them.²¹

21. The Defence alleges bias, submits that its case-in-chief may occupy less time than the Prosecution’s, and suggests an inability to prepare adequately to cross-examine any newly added witnesses. The Chamber considers that remedies other than certification are available to the Defence, such as a motion specifically addressing these issues. A request to certify for appeal the Impugned Decision is not the appropriate vehicle for these claims.

¹⁷ Decision on Defence Motion for Certification to Appeal the Trial Chamber’s Decision of 25 March 2009 on Defence Motion to Vary Trial Date (TC), 15 April 2009 (“Decision of 15 April 2009”), para. 16.

¹⁸ Decision on Defence Motion for Certification of the Chamber’s Oral Rulings of 29 and 30 September 2009 (TC), 2 December 2009 (“Decision of 2 December 2009”), para. 19, citing *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal the “Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible” (TC), 18 March 2004, para. 16.

¹⁹ Decision of 2 December 2009, para. 19; Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision Dated 17 September 2009 (TC), 5 October 2009, para. 21.

²⁰ Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber’s Decision on the Trial Date Rendered on 15 July 2009 (TC), 10 August 2009, para. 11, quoting *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Application for Certification to Appeal Decision on 24th Rule 66 Violation (TC), 20 May 2009, para. 2; Decision of 15 April 2009, para. 17.

²¹ Decision of 15 April 2009, para. 18, citing *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding (TC), 20 June 2005, para. 4; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicomumpaka’s Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 “Decision on the Motion of Bicomumpaka and Mugenzi for Disclosure of Relevant Material.” (TC), 4 February 2005, para. 28.

22. As for whether the Impugned Decision unduly delays Ngirabatware's trial by allowing the Prosecution to call witnesses in rebuttal of the alibi during its case-in-chief, the Chamber recalls that the Prosecution could request leave to bring witnesses to rebut the alibi after the close of the Defence case-in-chief. The Defence has not substantiated that hearing rebuttal evidence before the Defence case-in-chief, rather than afterwards, may amount to undue delay. The Chamber concludes that this claim falls short of fulfilling Rule 73 (B).

23. Finally, the Defence's concern that any alibi rebuttal witnesses will bring new charges against Ngirabatware is speculative and does not satisfy Rule 73 (B).

24. After considering the issues raised in the Motion and the circumstances of the case, the Chamber considers that the criteria for granting certification under Rule 73 (B) have not been met. Accordingly, the Chamber denies the Motion.

25. The Chamber further recalls that issues relating to the alibi notification pursuant to Rule 67 (A)(ii)(a) were the reason behind the rescheduling. A timely notice of alibi that meets the requirements of this Rule helps "[t]o ensure a good administration of justice and efficient judicial proceedings."²²


FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

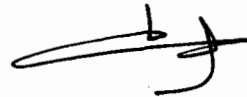
Arusha, 29 June 2010



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]



²² Impugned Decision, para. 31, quoting *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 243.