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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-04-81-A
2 July 2010
{185/H – 180/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 2 July 2010

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: KEFFI KUMELLO A. AFANDÉ
SIGNATURE: *[Handwritten signature]* DATE: 02 JULY 2010

ICTR Appeals Chamber
Date: 2nd July 2010
Action: R. Juma
Copied To: Concerned Judges,
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THE PROSECUTOR

v.

Ephrem SETAKO

Case No. ICTR-04-81-A

DECISION ON THE PROSECUTION'S MOTION TO DISMISS EPHREM SETAKO'S
NOTICE OF APPEAL

Counsel for Mr. Ephrem Setako:

Prof. Lennox Hinds

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Deborah Wilkinson

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 seized of a motion filed on 19 April 2010 by the Prosecution to dismiss Ephrem Setako’s Notice of Appeal (“Motion”).¹ Mr. Setako filed his response on 29 April 2010,² and the Prosecution replied on 3 May 2010.³ On 13 May 2010, the Appeals Chamber requested the Registrar, pursuant to Rule 33(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), to submit written submissions on the matter,⁴ which the Registrar filed on 20 May 2010.⁵

1. Background

2. Trial Chamber I of the Tribunal pronounced the Trial Judgement in the present case on 25 February 2010⁶ and issued the Trial Judgement in writing on 1 March 2010.⁷ On 29 March 2010, the Prosecution filed its Notice of Appeal.⁸ On 31 March 2010, Mr. Setako sent his Notice of Appeal⁹ by e-mail to a staff member of the Registry (“Staff Member”) for filing.¹⁰ Setako’s Notice of Appeal was filed upon this Staff Member’s return to the office on 12 April 2010.¹¹ The Prosecution filed its Appellant’s brief on 14 June 2010.¹²

¹ Motion to Dismiss Defendant’s Notice of Appeal, 19 April 2010. *See also* Corrigendum to Motion to Dismiss Defendant’s Notice of Appeal, 20 April 2010 (“Corrigendum”), through which the Prosecution provided Annexes 1 to 7 of the Motion.

² Response to Prosecutor’s Motion to Dismiss Appellant’s Notice of Appeal, 29 April 2010 (“Response”).

³ Prosecutor’s Reply to Defendant’s Response to Motion to Dismiss Defendant’s Notice of Appeal, 3 May 2010 (“Reply”).

⁴ Order to the Registrar, 13 May 2010 (“Order to the Registrar”).

⁵ Submissions by the Registrar under Rule 33(B) of the Rules of Procedure and Evidence in respect of the Appeals Chamber Order to the Registrar dated 13 May 2010, 20 May 2010 (“Registrar’s Submissions”).

⁶ *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, T. 25 February 2010.

⁷ *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Judgement and Sentence, dated 25 February 2010 and filed on 1 March 2010 (“Trial Judgement”). The Trial Judgement was served on Defence Counsel and Prosecution on 2 March 2010. It was served to Mr. Setako himself on 3 March 2010. *See The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Proof of Service – Arusha, dated 2 March 2010; *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Proof of Service To Detainees, signed on 3 March 2010. *See also* Registrar’s Submissions, para. 3.

⁸ Notice of Appeal, 29 March 2010 (“Prosecution Notice of Appeal”). *See also* Corrigendum to Prosecutor’s Notice of Appeal, 31 March 2010 (“Corrigendum”).

⁹ Notice of Appeal, dated 30 March 2010 and filed on 12 April 2010 (“Setako’s Notice of Appeal”).

¹⁰ *See* Motion, para. 8; Corrigendum, Annex 5. On 10 April 2010, Mr. Setako also sent to the Staff Member, by e-mail, a motion for an extension of time to file his Appellant’s brief. *See* Motion, para. 9; Corrigendum, Annex 6 and Annex 7, para. 1. *See also* Motion for an Extension of Time to File Appellant’s Brief, 12 April 2010. This motion will be the subject of a separate decision.

¹¹ *See* Motion, para. 10; Corrigendum, Annex 7 (Memorandum from Mr. Diallo, CMS Coordinator for Trial Chamber I, to Mr. Koffi Afande, Ref. ICTR/JUD-11-6-1-10/021, 12 April 2010, para. 2).

¹² Prosecutor’s Appellant’s Brief, 14 June 2010. On 16 June 2010, Mr. Setako filed a motion seeking an extension of time to file his Respondent’s brief, which is pending before the Appeals Chamber. *See* Motion for an Extension of Time to File Respondent’s Brief, 16 June 2010.

2. Discussion

3. The Prosecution contends that Mr. Setako failed to comply with the established procedure for the filing of a notice of appeal and requests the Appeals Chamber to dismiss Setako's Notice of Appeal on the ground that it was filed after the filing deadline expired.¹³

(a) Whether Mr. Setako Failed to Comply With Established Procedure for Filing a Notice of Appeal

4. The Prosecution contends that, by sending his Notice of Appeal by e-mail, Mr. Setako used a mode of transmission that is not contemplated by the Rules or by the Directive for the Registry of the Tribunal for the delivery of documents to the Court Management Section ("CMS").¹⁴ In addition, the Prosecution submits that Mr. Setako failed to address his Notice of Appeal to the Registry Officer in charge of his case.¹⁵

5. Mr. Setako responds that he followed the established practice of the Tribunal, which contemplates the transmission of official documents by e-mail.¹⁶ He also submits that the CMS Staff Member, to whom he sent his Notice of Appeal, is designated as the only contact person for the Appeals Chamber in Arusha on the Tribunal's Transmission Sheet for Filing of Documents with CMS ("CMS1 Form").¹⁷

6. The Registrar confirms that it has been a general practice within CMS, since 2003, to accept documents filed by e-mail¹⁸ and that, since 2006, the trial and appeal proceedings of every case have been handled by the same CMS team.¹⁹ As a consequence, the coordinator of each CMS team acts as Appeals Officer under Article 45(4) of the Directive for the Registry,²⁰ and all filings on appeal must be addressed to this CMS team.²¹ The Registrar acknowledges, however, that the

¹³ Motion, paras. 2, 8, 9, 11, 12, 16

¹⁴ Motion, paras. 11, 12, referring to Directive for the Registry of the International Criminal Tribunal for Rwanda, 8 June 1998, Article 27(1) ("Directive for the Registry").

¹⁵ Motion, para. 8, referring to Correspondence dated 17 March 2010 addressed by Mr. Diallo to Professor Hinds ("17 March Correspondence"). See Corrigendum, Annex 4.

¹⁶ Response, para. 15.

¹⁷ Response, para. 15. According to Mr. Setako, it is now the Registry's practice to send a notification when a staff member is out of the office and identify who should be contacted in his or her absence. See Response, para. 16. In addition, Mr. Setako argues that the 17 March Correspondence informed him that "the Trial Team would continue to service issues pertaining to the Appeal, but it did not state, suggest, or imply that the team members should be copied when filing documents". See Response, para. 17.

¹⁸ Registrar's Submissions, para. 11.

¹⁹ Registrar's Submissions, para. 12.

²⁰ Registrar's Submissions, para. 12. The Registrar clarifies that "Mr. Diallo, Legal Officer and Coordinator for Trial Chamber I is acting as Appeals Officer for the submissions filed on appeal in the *Setako* case". See Registrar's Submissions, para. 13. See also Directive for the Registry, Article 45(4).

²¹ Registrar's Submissions, para. 8, referring to 17 March Correspondence.

CMS1 Form still identifies the CMS Staff Member as the focal point for the Appeals Chamber in Arusha.²²

7. The Appeals Chamber considers that the transmission of submissions for filing by e-mail has been an accepted practice since 2003 and that the CMS1 Form indicates the CMS Staff Member as “Head of Appeals Unit/Team IV” at the time of the filing. In light of the Registrar’s Submissions, the Appeals Chamber finds that Mr. Setako properly transmitted his Notice of Appeal for filing by e-mail.²³

(b) Timeliness of Setako’s Notice of Appeal

8. The Prosecution submits that the filing of the Notice of Appeal was untimely, as it was filed two days after the expiration of the time limit prescribed by Rule 108 of the Rules.²⁴ It notes that Mr. Setako did not provide any justification for the late filing or for the failure to request an extension of the time limit.²⁵

9. Mr. Setako responds that, although the jurisprudence on this matter is unclear,²⁶ the time limit for filing a notice of appeal runs from the date of the filing of the written judgement, not from the pronouncement of the oral judgement.²⁷ Some case-law suggests that the time limit begins to run from the date of the oral pronouncement of a judgement,²⁸ while other case-law suggests that this time limit runs from the date of the written judgement.²⁹ However, in his view, the latter

²² Registrar’s Submissions, para. 9. The Registrar submits that the Staff Member is also mentioned in the ICTR Contact Sheet as “Head of Appeals Unit/Team IV”. He also acknowledges that the Staff Member, who was out of office when Mr. Setako sent her his Notice of Appeal, transmitted it to Mr. Diallo upon reporting for duty on 12 April 2010. See Registrar’s Submissions, paras. 9, 10.

²³ The Appeals Chamber considers that Article 27(1) of the Directive for the Registry should be amended to include e-mail among the accepted means of delivery of documents to CMS. The Appeals Chamber considers that parties who send documents by e-mail should also deliver the signed original document within a reasonable period of time. See Directive for the Registry, Article 28(2).

²⁴ Motion, paras. 11, 12.

²⁵ Motion, para. 15.

²⁶ Response, para. 13.

²⁷ Response, paras. 9, 13, 14.

²⁸ Response, para. 13, referring to *The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-A, Decision on Tharcisse Renzaho’s Motion for Extension of Time for the Filing of Notice of Appeal and Brief in Reply, 22 September 2009 (“Renzaho Decision”); *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-A, Decision on Prosecution’s Motion for Extension of Time to File a Notice of Appeal, 11 December 2009 (“Nsengimana Decision”), p. 3; *The Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-A, Decision on Motions for Extension of Time for Filing of Notices of Appeal, 11 November 2008 (“Nchamihigo Decision”), p. 3.

²⁹ Response, paras. 10-12, referring to *The Prosecutor v. Juvénal Kajelijeli*, ICTR-98-44A-A, Decision on Prosecution Urgent Motion for an Extension of Time to File Notice of Appeal, 17 December 2003, p. 2; *Emmanuel Ndingabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Decision on Emmanuel Ndingabahizi’s Motion for an Extension of Time, 26 August 2004, p. 2; *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Decision on Callixte Kalimanzira’s Motion for an Extension of Time for the Filing of Notice of Appeal, 20 July 2009, paras. 2, 4.

approach is “more in conformity with a reading together” of Rule 108 of the Rules and paragraph 1(c)(iii) of the Practice Direction.³⁰

10. Rule 108 of the Rules provides that a party seeking to appeal a judgement or sentence must file a notice of appeal, setting forth the grounds, “not more than thirty days from the date on which the judgement or sentence was pronounced”.

11. The Appeals Chamber has previously held that the time limit for filing a notice of appeal begins to run from the date of the oral pronouncement of the trial judgement, rather than from the date of the written trial judgement, when these two dates are different.³¹ However, paragraph 1(c)(iii) of the Practice Direction requires a notice of appeal to identify “the findings or ruling challenged in the judgement, *with specific reference to the page number and paragraph number*” (emphasis added). The Appeals Chamber acknowledges that this requirement cannot be met if the time limit to file a notice of appeal begins to run from the date of the oral pronouncement of a trial judgement. Therefore, the Appeals Chamber considers that “cogent reasons in the interests of justice” require a departure from its previous decisions.³²

12. The Appeals Chamber holds that the time limit to file a notice of appeal against a trial judgement runs from the date of the trial Judgement’s filing. Accordingly, the Appeals Chamber finds that Mr. Setako sent his Notice of Appeal before the expiration of the time limit.³³

³⁰ Response, para. 13. *See also* Response, para. 10. Mr. Setako submits that the Appeals Chamber has granted extensions of the time limit to file a notice of appeal within thirty days of the issuance of a written judgement, based on the reasoning that parties must be able to examine the written judgement in order to draft a notice of appeal in accordance with the Rules and Practice Direction, *referring to Nsengimana Decision*, p. 3; *Nchamihigo Decision*, p. 3. *See also* Practice Direction on Formal Requirements for Appeals from Judgment, 4 July 2005 (“Practice Direction”).

³¹ *See, e.g., Nsengimana Decision*, p. 2; *Renzaho Decision*, para. 3; *Nchamihigo Decision*, p. 2; *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Order Concerning the Filing of the Notice of Appeal, 22 March 2007, p. 3; *The Prosecutor v. Tharcisse Muvunyi*, ICTR-00-55A-A, Decision on the Prosecution Motion for Extension of Time for Filing the Notice of Appeal, 22 November 2006, p. 2.

³² *See Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 107.

³³ The Appeals Chamber considers that the time limit for the filing of Setako’s Notice of Appeal began to run from 2 March 2010, the date on which the written Trial Judgement was served on his Defence Counsel.


For the foregoing reasons, the Appeals Chamber **DENIES** the Motion.

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

Done this 2nd day of July 2010,
at The Hague,
The Netherlands.



[Seal of the Tribunal]



Judge Patrick Robinson
Presiding