



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

379/H

ICTR-98-44D-AR77

28th October 2010

{379/H - 373/H}

IN THE APPEALS CHAMBER

Before:

Judge Patrick Robinson, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrézia Vaz
Judge Carmel Agius

Registrar:

Mr. Adama Dieng

Decision of:

28 October 2010

CALLIXTE NZABONIMANA

v.

THE PROSECUTOR

Case No. ICTR-98-44D-AR77

**DECISION ON CALLIXTE NZABONIMANA'S INTERLOCUTORY
APPEAL OF THE TRIAL CHAMBER'S DECISION DATED 9 JULY 2010**

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ICTR Appeals Chamber
Date: 28th October 2010
Action: R. Juma
Copied To: Concerned Judges, SLOs, LOs, ALOs,
Parties, CMS, LSS.

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**
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NAME / NOM: KARIEL KUMELIO A. ABANDA
SIGNATURE: DATE: 28 Oct. 2010

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 an interlocutory appeal ("Appeal"),¹ filed by Callixte Nzabonimana ("Nzabonimana"), concerning a decision of Trial Chamber III of the Tribunal ("Trial Chamber"), rendered on 9 July 2010 ("Impugned Decision").² On 26 July 2010, Nzabonimana filed a Notice of Appeal pursuant to Rule 77(J) of the Rules of Procedure and Evidence of the Tribunal ("Rules").³ The Prosecution filed its response to the Appeal on 17 August 2010.⁴ Nzabonimana replied on 24 August 2010.⁵

A. Background

2. On 19 May 2010, Nzabonimana filed an urgent motion requesting that the Trial Chamber appoint an *amicus curiae* to investigate contempt based on an alleged violation of protective measures and interference and intimidation of Defence Witness T36 and to order supplementary protective measures in respect of Witness T36.⁶

3. Nzabonimana attached to the 19 May 2010 Motion a statement in French by Witness T36, in which he indicated that, on several occasions, Prosecution Witness CNAI attempted to convince

¹ Interlocutory Appeal on the Decision on Nzabonimana's Urgent Motion for Appointment of *Amicus Curiae* to Investigate Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36, 10 August 2010.

² *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Urgent Motion for Appointment of *Amicus Curiae* to Investigate Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36, 9 July 2010.

³ Notice of Appeal on the Decision on Nzabonimana's Urgent Motion for Appointment of *Amicus Curiae* to Investigate Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36, 26 July 2010 ("Notice of Appeal").

⁴ Prosecutor's Response to Interlocutory Appeal on the Decision on Nzabonimana's Urgent Motion for the Appointment of an *Amicus Curiae* to Investigate Purported Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36, 17 August 2010 ("Prosecution Response").

⁵ Reply to Prosecutor's Response to Interlocutory Appeal on the Decision on Nzabonimana's Urgent Motion for Appointment of *Amicus Curiae* to Investigate Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36, 24 August 2010 ("Reply").

⁶ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Urgent Motion for Appointment of an *Amicus Curiae* to Investigate Contempt by Witness CNAI and for Supplementary Protection Measures for Witness T36, 19 May 2010 ("19 May 2010 Motion"), paras. 11, 13, 14, 23, Prayer. See *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Strictly Confidential Annex "A" to Nzabonimana's Urgent Motion for Appointment of an *Amicus Curiae* to Investigate Contempt by Witness CNAI and for Supplementary Protection Measures for Witness T36, 19 May 2010 (confidential) ("Witness T36's Statement"). See also *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Urgent Motion for the Appointment of an *Amicus Curie* [sic] to Investigate Purported Contempt by Witness CNAI and for Supplementary Protective Measures for Witness T36, 21 May 2010; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Reply to Prosecutor's Response to Nzabonimana's Urgent Motion for Appointment of an *Amicus Curiae* to Investigate Contempt by Witness CNAI and for Supplementary Protection [sic] Measures for Witness T36, 31 May 2010 ("Reply to the 21 May 2010 Prosecution Response"). Defence Witness T36 is a protected witness. See *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Urgent Defence Motion for Protective Measures, 18 February 2010. See also 19 May 2010 Motion, para. 1.

him to testify against Nzabonimana,⁷ by promising him a reward,⁸ or by intimidating him.⁹ On one occasion, Witness CNAI was accompanied by an unidentified Rwandan national.¹⁰ Both were aware of Witness T36's status as a Defence witness before the Tribunal.¹¹ In the 19 May 2010 Motion, Nzabonimana submits that Witness T36 felt intimidated and that he was reluctant to testify on behalf of the Defence.¹²

4. On 9 July 2010, the Trial Chamber rendered the Impugned Decision denying the 19 May 2010 Motion.¹³ The Trial Chamber explained that Witness T36's Statement could not "replace a properly sworn affidavit",¹⁴ and concluded that "it lack[ed] sufficient information to warrant the appointment of *amicus curiae* to investigate [the] allegations [raised in the 19 May 2010 Motion]".¹⁵ The Trial Chamber also considered that "should the Defence choose to pursue this issue, it must obtain from Witness T36 an affidavit providing further details" on Witness CNAI's alleged interference with Witness T36¹⁶ and the alleged prior relationship between Witness T36 and Witness CNAI,¹⁷ as well as details on whether Witness T36 advised any person or persons of his plans to testify for the Defence.¹⁸ The Trial Chamber also required the Defence to obtain affidavits from its investigators or any other person corroborating certain aspects of Witness T36's allegations.¹⁹

B. Standard of Review

5. The decision on a motion requesting the investigation of alleged contempt pursuant to Rule 77 of the Rules is a discretionary one.²⁰ Where an appeal is filed against a discretionary decision of a Trial Chamber, the issue on appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with it, but rather whether the Trial Chamber has correctly exercised its discretion in rendering the decision.²¹ Consequently, the Trial Chamber's exercise of discretion will only be reversed where it is demonstrated that the Trial Chamber committed a

⁷ 19 May 2010 Motion, paras. 4, 5, 7, 8; Witness T36's Statement, paras. 3, 6, 7, 10, 14, 18, 19.

⁸ Witness T36's Statement, paras. 7, 14. *See also* 19 May 2010 Motion, para. 5.

⁹ Witness T36's Statement, paras. 10, 19. *See also* 19 May 2010 Motion, para. 7.

¹⁰ Witness T36's Statement, para. 2. *See also* 19 May 2010 Motion, para. 4. This unidentified person tried to dissuade Witness T36 from testifying on behalf of the Defence and alluded to money he could earn if he decided to testify against Nzabonimana. *See* 19 May 2010 Motion, para. 5; Witness T36's Statement, paras. 6, 7.

¹¹ 19 May 2010 Motion, paras. 4, 5, 9; Witness T36's Statement, paras. 4, 6, 19, 22.

¹² 19 May 2010 Motion, paras. 9, 27; Witness T36's Statement, paras. 27, 30, 31.

¹³ Impugned Decision, Disposition.

¹⁴ Impugned Decision, para. 14.

¹⁵ Impugned Decision, para. 19.

¹⁶ Impugned Decision, para. 15(i).

¹⁷ Impugned Decision, para. 15(iv).

¹⁸ Impugned Decision, para. 15(ii).

¹⁹ Impugned Decision, para. 15(iii).

²⁰ *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR91.2, Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision not to Prosecute Witness BTH for False Testimony, 16 February 2010 ("Karemera et al. Decision not to Prosecute Witness BTH for False Testimony"), para. 15:

²¹ *Karemera et al. Decision not to Prosecute Witness BTH for False Testimony*, para. 15.

discernible error in rendering the Impugned Decision, based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or where the Impugned Decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.²²

C. Submissions

6. In his Appeal, Nzabonimana requests the Appeals Chamber to set aside the Impugned Decision, and order the Trial Chamber to appoint an *amicus curiae* to investigate contempt based on a violation of protective measures and interference with and intimidation of Witness T36.²³ He submits that the Trial Chamber erred in law and in fact by (i) misunderstanding the standard threshold for the appointment of an *amicus curiae*;²⁴ and (ii) abusing its discretion.²⁵ In addition, Nzabonimana submits that the Trial Chamber erred in fact by failing to acknowledge the filing of his Reply to the 21 May 2010 Prosecution Response.²⁶

7. Nzabonimana claims that the Trial Chamber's conclusion that it lacked "sufficient information" to warrant the appointment of an *amicus curiae* to investigate the allegations of contempt does not conform with the legal standard of Rule 77(C)(ii) of the Rules which only requires a finding that there was reason to believe that a person may be in contempt of the Tribunal.²⁷ He submits that the additional pieces of information and the affidavit required by the Trial Chamber are not necessary at this preliminary stage for the "reason to believe" standard to be satisfied.²⁸ He also contends that he has already provided much of the requested additional information.²⁹ Nzabonimana argues that the absence of any express reference to the words "reason to believe" in the reasoning of the Impugned Decision reveals that the Trial Chamber did not consider the proper standard in reaching its decision.³⁰ He further submits that the Trial Chamber abused its discretion by failing to accept Witness T36's Statement because it was not in the form of an affidavit, while it had given weight to statements filed in support a Prosecution motion relating to allegations of contempt which were formally similar.³¹ Finally, he maintains that neither the

²² *Karemera et al. Decision not to Prosecute Witness BTH for False Testimony*, para. 15.

²³ Appeal, Prayer.

²⁴ Notice of Appeal, para. 7; Appeal, paras. 7-18. Nzabonimana argues that the threshold of "reason to believe" is lower than other standards in criminal law, such as "sufficient grounds to institute proceedings" under Rule 77(C) or "beyond a reasonable doubt". See Appeal, para. 9. See also Reply, para. 9.

²⁵ Notice of Appeal, para. 8; Appeal, paras. 19-26.

²⁶ Notice of Appeal, para. 8; Appeal, para. 27.

²⁷ Appeal, para. 10.

²⁸ Appeal, para. 10; Reply, para. 10.

²⁹ Appeal, paras. 11, 14.

³⁰ Appeal, para. 9.

³¹ Appeal, paras. 21-23, referring to *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on the Prosecution's Urgent Motion Alleging Contempt of the Tribunal, 15 December 2009 ("15 December 2009 Decision"); *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Urgent Motion for Prohibition of Conduct Contrary to Rule 77(C) of the Rules of Procedure and Evidence, 2 December 2009 (confidential) ("2 December 2009 Prosecution Motion") and annexes A, B, C, and D.

Rules nor the jurisprudence provides for such a formal requirement and that such formalism is contrary to the spirit of the Rules and the objectives of the procedure under Rule 77 of the Rules.³²

8. The Prosecution responds that Nzabonimana has not met the standard on appeal.³³ It submits that a Trial Chamber has the discretion to verify whether contempt allegations are substantiated so as to satisfy the threshold standard set in Rule 77(C) of the Rules.³⁴ It also argues that, according to Rule 77(C)(ii) of the Rules, it rests within a Trial Chamber's discretion not to appoint an *amicus curiae*, even where it has reason to believe that a contempt of the Tribunal may have occurred.³⁵ Furthermore, according to the Prosecution, the Trial Chamber did not conclusively deny the 19 May 2010 Motion, but, upon finding that the allegations presented were not adequately substantiated, merely requested both further information from Witness T36 and affidavits from Nzabonimana's investigators.³⁶ According to the Prosecution, Nzabonimana can submit a new request pursuant to Rule 77(C)(ii) of the Rules once he satisfies the set conditions,³⁷ none of which would amount to an abuse of the Trial Chamber's discretion.³⁸ As a consequence, the Prosecution argues that Nzabonimana has not been prejudiced by the Impugned Decision.³⁹

D. Discussion

9. As a preliminary matter, the Appeals Chamber notes that because the Impugned Decision, *inter alia*, denies Nzabonimana's request to order the appointment of an *amicus curiae* to investigate allegations of contempt, an appeal against it lies as of right under Rule 77(J) of the Rules. The Appeals Chamber further notes that the Trial Chamber's denial of Nzabonimana's request for supplementary protective measures for Witness T36 is not at issue on appeal.

10. The Appeals Chamber recalls that, according to Rule 77(C)(ii) of the Rules, when a Trial Chamber has reason to believe that a person may be in contempt of the Tribunal, it may direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings.

11. Having reviewed the materials submitted by Nzabonimana, the Trial Chamber concluded that it "lack[ed] sufficient information to warrant the appointment of *amicus curiae* to investigate"

³² Appeal, paras. 24, 25.

³³ Prosecution Response, paras. 25-38, 62, 63.

³⁴ Prosecution Response, paras. 53, 54, referring to *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Certain Allegations Made in Motion Number 23, 20 November 2003. See also Prosecution Response, para. 55.

³⁵ Prosecution Response, paras. 46, 47.

³⁶ Prosecution Response, paras. 56, 57, 60.

³⁷ Prosecution Response, para. 58.

³⁸ Prosecution Response, para. 61. See also Prosecution Response, para. 59.

³⁹ Prosecution Response, paras. 16, 61.

the allegations⁴⁰ and listed the information it considered to be lacking in the 19 May 2010 Motion.⁴¹ Thus, the Trial Chamber implicitly found that “the reason to believe standard”, under Rule 77(C)(ii) of the Rules, had not been met. The Appeals Chamber considers that it was within the Trial Chamber’s discretion to deny the 19 May 2010 Motion due to a lack of information with respect to the alleged interference with Witness T36.

12. The Appeals Chamber considers, however, that it would have been preferable for the Trial Chamber to explain its reasons for requiring Nzabonimana to submit a “properly sworn affidavit” to support any further motion. Such reasoning was particularly important given that the Trial Chamber had not required similar substantiation from the Prosecution in support of its 2 December 2009 Prosecution Motion for the initiation of contempt proceedings.⁴² However, the imposition of such a requirement in the present case was within its discretion. Moreover, because the Trial Chamber did not preclude the possibility of Nzabonimana making a further request for the initiation of an investigation, the Appeals Chamber finds that the Trial Chamber’s failure to provide reasons in this respect did not amount to an abuse of its discretion.

13. Finally, it is not contested that Nzabonimana’s Reply to the 21 May 2010 Prosecution Response was filed in an untimely manner.⁴³ While it would have been preferable for the Trial Chamber to explicitly acknowledge the late filing and make a ruling on its admissibility,⁴⁴ in the absence of a request by Nzabonimana for an extension of time, the Trial Chamber was not under any obligation to consider the late Reply to the 21 May 2010 Prosecution Response. Therefore, the Appeals Chamber dismisses this argument.

⁴⁰ Impugned Decision, para. 19.

⁴¹ Impugned Decision, para. 15.

⁴² See 15 December 2009 Decision. See also 2 December 2009 Prosecution Motion, annexes A, B, C and D. The Appeals Chamber notes that, although described as “affidavits”, the witnesses’ statements annexed to the 2 December 2009 Prosecution Motion were merely signed by the witnesses. The Appeals Chamber recalls that an affidavit is “[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths”. See Blacks’s Law Dictionary, Ninth Edition, 2009.

⁴³ Nzabonimana acknowledges that the Reply to the 21 May 2010 Prosecution Response was filed after “the 3-day deadline established by the Chamber”(Appeal, para. 27).

⁴⁴ See Impugned Decision, para. 3, which indicates that “[t]he Defence did not file a reply”.


E. Disposition

14. For the aforementioned reasons, the Appeals Chamber **DENIES** Nzabonimana's Appeal.

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

Done this 28th day of October 2010,
at The Hague,
The Netherlands.





Judge Patrick Robinson
Presiding

[Seal of the Tribunal]