



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-05-82-A
08th February 2011
{233/H - 227/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Registrar: Mr. Adama Dieng
Decision of: 8 February 2011

Dominique NTAWUKULILYAYO

v.

THE PROSECUTOR

Case No. ICTR-05-82-A

DECISION ON MOTION FOR DISQUALIFICATION OF JUDGES

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ICTR Appeals Chamber
Date: 08th February 2011
Action: R. Jammeh
Copied To: Concerned Judges,

Parties, Judicial Archives,
LOs, LSS [Signature]

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: KDEPI, KUMELIO, A., AFANDE
SIGNATURE: [Signature] DATE: 08 Feb. 2011

1. **I, Patrick Robinson**, Presiding Judge of 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) am seized of the “Motion for the Disqualification of Judges Meron, Güney, Vaz and Agius”, filed by Dominique Ntawukulilyayo (“Ntawukulilyayo”) on 6 December 2010 (“Motion”).¹

A. Background

2. On 3 August 2010, Trial Chamber III of the Tribunal convicted Ntawukulilyayo of genocide under Article 6(1) of the Statute for aiding and abetting and ordering the killings of Tutsis at Kabuye hill, and sentenced him to 25 years of imprisonment.² Ntawukulilyayo filed his notice of appeal on 6 September 2010 and an amended version thereof on 18 January 2011.³ On 23 August 2010, I issued an order assigning myself, as well as Judges Mehmet Güney, Andréia Vaz, Theodor Meron, and Carmel Agius to the bench of the appeal proceedings in this case.⁴

3. The Motion seeks the disqualification of Judges Güney, Vaz, Meron, and Agius from the appeal proceedings on the basis of an alleged appearance of bias resulting from their previous involvement as Judges in the appeal proceedings in *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A (“*Kalimanzira* case”).⁵ On 15 December 2010, the Prosecution filed a response to the Motion, arguing that it should be rejected.⁶ Ntawukulilyayo did not reply.

B. Applicable Law

4. Rule 15(A) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) provides that:

A Judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where the Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.

¹ The Motion was originally filed in French. The English translation of the Motion was filed on 30 December 2010.

² *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Judgement and Sentence, dated 3 August 2010, filed 6 August 2010 (“Trial Judgement”), paras. 457, 460, 461, 479.

³ *Acte d’appel*, 6 September 2010; *Acte d’appel amendé*, 18 January 2011.

⁴ Order Assigning Judges to a Case Before the Appeals Chamber, 23 August 2010.

⁵ Motion, paras. 3-10, 28. The appeal judgement in the *Kalimanzira* case was rendered on 20 October 2010. See *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 (“*Kalimanzira* Appeal Judgement”).

⁶ Prosecution Response to Ntawukulilyayo’s “*Requête en récusation des Juges Meron, Güney, Vaz et Agius*”, 15 December 2010 (“Response”).

5. The Appeals Chamber has held that:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

(i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

(ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁷

6. With respect to the reasonable observer prong of this test, the Appeals Chamber has held that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."⁸

7. The Appeals Chamber has also emphasized that there is a presumption of impartiality that attaches to any Judge of the Tribunal.⁹ Accordingly, the party who seeks the disqualification of a Judge bears the burden of adducing sufficient evidence that the Judge is not impartial.¹⁰ In this respect, the Appeals Chamber has consistently held that there is a high threshold to reach to rebut the presumption of impartiality.¹¹ The party must demonstrate "a reasonable apprehension of bias by reason of prejudgement" that is "firmly established".¹² The Appeals Chamber has explained that this high threshold is required because "it would be as much of a potential threat to the interests of

⁷ *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("Rutaganda Appeal Judgement"), para. 39, quoting *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("Furundžija Appeal Judgement"), para. 189. See also *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR15bis.2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004, para. 66; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001 ("Akayesu Appeal Judgement"), para. 203; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("Čelebići Appeal Judgement"), para. 682.

⁸ *Rutaganda Appeal Judgement*, para. 40, quoting *Furundžija Appeal Judgement*, para. 190. See also *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("Nahimana et al. Appeal Judgement"), para. 50; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("Galić Appeal Judgement"), para. 40; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgment (Reasons), 1 June 2001 ("Kayishema and Ruzindana Appeal Judgement"), para. 55; *Čelebići Appeal Judgement*, para. 683.

⁹ *Nahimana et al. Appeal Judgement*, para. 48; *Galić Appeal Judgement*, para. 41; *Rutaganda Appeal Judgement*, para. 42; *Kayishema and Ruzindana Appeal Judgement*, para. 55; *Akayesu Appeal Judgement*, para. 91; *Čelebići Appeal Judgement*, para. 700; *Furundžija Appeal Judgement*, para. 196.

¹⁰ *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("Karera Appeal Judgement"), para. 254; *Nahimana et al. Appeal Judgement*, para. 48; *Galić Appeal Judgement*, para. 41; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("Niyitegeka Appeal Judgement"), para. 45; *Rutaganda Appeal Judgement*, para. 42; *Akayesu Appeal Judgement*, para. 91; *Furundžija Appeal Judgement*, para. 197. See also *Čelebići Appeal Judgement*, para. 707.

¹¹ *Karera Appeal Judgement*, para. 254; *Galić Appeal Judgement*, para. 41; *Rutaganda Appeal Judgement*, para. 42; *Akayesu Appeal Judgement*, para. 91; *Furundžija Appeal Judgement*, para. 197. See also *Čelebići Appeal Judgement*, para. 707.

¹² *Niyitegeka Appeal Judgement*, para. 45; *Čelebići Appeal Judgement*, para. 707; *Furundžija Appeal Judgement*, para. 197.

the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias".¹³

8. Furthermore, Rule 15(B) of the Rules provides that:

Any party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a case upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau, if necessary, shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

C. Submissions

9. Ntawukulilyayo submits that Judges Güney, Vaz, Meron, and Agius have already expressed their position regarding his guilt in the *Kalimanzira* case.¹⁴ In particular, Ntawukulilyayo contends that at paragraphs 81, 83, 102, 105, and 220 of the *Kalimanzira* Appeal Judgement, the Judges confirmed the Trial Chamber's findings regarding his culpable role in crimes committed in Gisagara and Kabuye on 23 April 1994.¹⁵ In addition, he contends that, at paragraph 121 of the *Kalimanzira* Appeal Judgement, the Judges accepted the reliability of Witnesses BDC and BCF and that these witnesses also testified in his trial.¹⁶ Accordingly, and "without calling into question the high moral character of [Judges Güney, Vaz, Meron, and Agius]", Ntawukulilyayo seeks their disqualification "because of the *objective* appearances of bias and in order to protect his right to a fair trial."¹⁷

10. The Prosecution responds that Ntawukulilyayo fails to discharge his burden to rebut the presumption of impartiality of the Judges.¹⁸ It contends that the mere mention of Ntawukulilyayo in the context of the assessment of the evidence in the *Kalimanzira* case does not demonstrate the appearance of bias for the disqualification of the Judges.¹⁹ It further argues that Ntawukulilyayo's guilt or innocence was not at issue in the *Kalimanzira* case and that the final adjudication of facts in that case is not binding in Ntawukulilyayo's case.²⁰ Accordingly, the Prosecution requests that the Motion be denied because no reasonable observer would apprehend bias under the circumstances.²¹

¹³ *Čelebići* Appeal Judgement, para. 707.

¹⁴ Motion, paras. 4, 6-10, 28.

¹⁵ Motion, paras. 6, 7. *See also ibid.*, para. 9.

¹⁶ Motion, para. 8.

¹⁷ Motion, para. 4 (emphasis in the original). *See also ibid.*, para. 28, p. 10.

¹⁸ Response, paras. 2, 5.

¹⁹ Response, paras. 6, 9.

²⁰ Response, paras. 7, 8.

²¹ Response, paras. 10, 11.

D. Discussion

11. On 17 January 2011, pursuant to Rule 15(B) of the Rules, I conferred with Judges Güney, Vaz, Meron, and Agius regarding the Motion. Each Judge considered that there was no merit in the request for his or her disqualification from the present case.

12. As evidence of an appearance of bias, Ntawukulilyayo points to paragraph 121 of the *Kalimanzira* Appeal Judgement, wherein he contends that the Judges accepted the reliability of two witnesses who also appeared in his own trial.²² I note, however, that the Judges did not accept these witnesses' reliability, but rather the propriety of the exercise of the Trial Chamber's discretion in assessing their testimonies.²³ As the Appeals Chamber has recognized previously, Judges of this Tribunal are sometimes involved in trials which, by their very nature, cover overlapping issues.²⁴ In this regard, the Appeals Chamber has held that:

It is assumed, in the absence of evidence to the contrary, that, by virtue of their training and experience, the Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case. The Appeals Chamber agrees with the [International Criminal Tribunal for Former Yugoslavia ("ICTY")] Bureau that "a judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases".²⁵

13. The fact that the same Judges heard the same witnesses in two separate trials does not in itself demonstrate an appearance of bias on their part.²⁶ Similarly, the fact that Judges Güney, Vaz, Meron, and Agius did not overturn the Trial Chamber's findings regarding the testimony of two witnesses in the *Kalimanzira* case who also appeared in Ntawukulilyayo's trial does not in itself provide a sufficient basis for their disqualification.

14. As additional evidence of an appearance of bias, Ntawukulilyayo points to paragraphs 81, 83, 102, 105, and 220 of the *Kalimanzira* Appeal Judgement, which he contends demonstrate that the Judges have pre-determined his guilt by confirming certain findings by the Trial Chamber in the *Kalimanzira* case.²⁷ In this respect, he points out, *inter alia*, that the Bureau of the ICTY has held

²² Motion, para. 8.

²³ Paragraph 121 of the *Kalimanzira* Appeal Judgement reads, in relevant part: "The Appeals Chamber also concludes that the Trial Chamber acted within the scope of its discretion in accepting the testimony of Witnesses BDC, BCF, and BWO[.] [...] The discrepancies between the[ir] testimonies [...] do not obscure their fundamental similarities".

²⁴ *Karera* Appeal Judgement, para. 378; *Nahimana et al.* Appeal Judgement, para. 78. See also *Akayesu* Appeal Judgement, para. 269.

²⁵ *Karera* Appeal Judgement, para. 378, citing *Nahimana et al.* Appeal Judgement, para. 78 (internal citations omitted), referring to *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-PT, Decision of the Bureau, dated 4 May 1998, filed 5 May 1998, p. 2. See also *Akayesu* Appeal Judgement, para. 269; *Čelebići* Appeal Judgement, para. 700.

²⁶ See *Karera* Appeal Judgement, para. 378.

²⁷ Motion, paras. 6, 7.

that “Judges may be subject to disqualification if they make a ruling on the ultimate issue of an individual’s culpability in a connected prosecution”.²⁸

15. I note that, at paragraphs 81,²⁹ 83,³⁰ and 102³¹ of the *Kalimanzira* Appeal Judgement, the Judges did not express any opinions or conclusions, but merely recalled and summarized the Trial Chamber’s findings. These passages can therefore not constitute a pronouncement on Ntawukulilyayo’s culpability.

16. At paragraphs 105 and 220, I note that the Judges expressed certain conclusions. Paragraph 105 of the *Kalimanzira* Appeal Judgement reflects that the Judges were “satisfied that the Trial Chamber’s findings concerning Kalimanzira’s actions at the Mukabuga roadblock allowed it to reasonably conclude that Kalimanzira was aware that Sub-Prefect Ntawukulilyayo’s promises of safe refuge at Kabuye hill were false.” Paragraph 220 reflects that the Judges were “not convinced that Kalimanzira’s tacit approval of Sub-Prefect Ntawukulilyayo’s call for Tutsis to go to Kabuye hill, and his leading assailants to Kabuye hill, are sufficient to require that the legal qualification of his overall conduct be elevated to ‘committing’.”

17. While these passages make reference to Ntawukulilyayo’s conduct, I do not consider that they evince a pronouncement on his culpability. Rather, they affirm the reasonableness of some of the Trial Chamber’s findings relating to the actions of Callixte Kalimanzira (“Kalimanzira”) at the Gisagara marketplace and Kabuye hill on 23 April 1994.³² The standard by which the Appeals Chamber assesses the reasonableness of a Trial Chamber’s findings is different from the standard of proof beyond reasonable doubt by which Trial Chambers are required to enter their findings.

18. Therefore, a pronouncement by the Appeals Chamber on the reasonableness of the finding that Kalimanzira was aware that Ntawukulilyayo’s promises of safe refuge were false does not constitute a ruling on Ntawukulilyayo’s culpability. The Trial Chamber in the *Kalimanzira* case

²⁸ Motion, para. 20, quoting *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on Galić’s Application Pursuant to Rule 15(B), 28 March 2003, para. 16.

²⁹ Paragraph 81 of the *Kalimanzira* Appeal Judgement reads, in relevant part: “The Trial Chamber further found that, later that day, Kalimanzira was present when Sub-Prefect Dominique Ntawukulilyayo instructed Tutsis at the Gisagara marketplace to seek refuge at Kabuye hill. According to the Trial Chamber, Kalimanzira’s presence showed tacit approval of, and gave credence to, the sub-prefect’s false assurances of safety.” (Internal citations omitted).

³⁰ Paragraph 83 of the *Kalimanzira* Appeal Judgement reads, in relevant part: “The Trial Chamber also explicitly concluded that Kalimanzira possessed genocidal intent based on several factors. First, the Trial Chamber concluded that, on 23 April 1994, Kalimanzira became enraged on learning that the Tutsis at Kabuye hill successfully defended themselves and had not been killed and that he asked to be shown where the Tutsis were. Second, it found that he demonstrated ‘tacit approval of [Sub-Prefect] Ntawukulilyayo’s expulsion of Tutsis from the Gisagara marketplace to Kabuye hill.’” (Internal citations omitted).

³¹ Paragraph 102 of the *Kalimanzira* Appeal Judgement reads, in relevant part: “[The Trial Chamber] concluded that on 23 April 1994 Kalimanzira stood next to Sub-Prefect Ntawukulilyayo as the latter told Tutsis gathered at the Gisagara marketplace to travel to Kabuye hill and promised them protection there.”

³² See also *Kalimanzira* Appeal Judgement, para. 126.

found Kalimanzira's awareness in this respect to be demonstrated by a series of actions at Mukabuga roadblock which did not involve Ntawukulilyayo.³³ By concluding that this finding was reasonable,³⁴ Judges Güney, Vaz, Meron, and Agius did not impute such awareness to Ntawukulilyayo, and his contention that he was found to be a co-perpetrator in the *Kalimanzira* case is therefore a mischaracterization.³⁵

19. I therefore consider that the Motion is without merit.


E. Disposition

20. For the foregoing reasons, and pursuant to Rule 15 of the Rules, I hereby **DENY** the Motion.

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

Done this eighth day of February 2011,
At The Hague,
The Netherlands.





Judge Patrick Robinson
Presiding

[Seal of the Tribunal]

³³ See *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Judgement, 22 June 2009, para. 392.

³⁴ *Kalimanzira* Appeal Judgement, paras. 105, 126.

³⁵ Motion, paras. 6, 9.