Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-02-78-A
24 February 2011
{195/H – 188/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding

Registrar: Mr. Adama Dieng

Decision of: 24 February 2011

Gaspard KANYARUKIGA

v.

THE PROSECUTOR

Case No. ICTR-02-78-A

DECISION ON GASPARD KANYARUKIGA'S MOTION TO DISQUALIFY JUDGE VAZ

ICTR Appeals Chamber
Date: 24th February 2011
Action: R. Juniel
Copied To: Concerned Judges, SLOs, LOs, ALOs, LSS
Parties, CMS.

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Mr. David Jacobs
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Mr. Steffen Wirth

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: KOFFI KUMELIO A. AFANDE
SIGNATURE: .... DATE: 24 February 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 seised of a "Confidential Urgent Motion to Disqualify Judge Vaz", filed by Gaspard Kanyarukiga ("Kanyarukiga") on 17 December 2010 ("Motion").

A. Background

2. On 1 November 2010, Trial Chamber II of the Tribunal ("Trial Chamber") convicted Kanyarukiga of genocide and extermination as a crime against humanity for planning the destruction of the Nyange Parish Church and the resulting killing of approximately 2,000 Tutsi civilians and imposed a sentence of 30 years' imprisonment.[1] The Trial Chamber relied on, *inter alia*, Kanyarukiga's participation in a meeting with Athanase Seromba, Grégoire Ndahimana, Fulgence Kayishema, Télesphore Ndungutse, Joseph Habiyambere, and others, which was held on 16 April 1994 at Nyange Parish.[2]

3. On 9 December 2010, Kanyarukiga filed his "Notice of Appeal"; and, on 10 December 2010, the Prosecution filed the "Prosecutor's Notice of Appeal". On 13 December 2010, I issued an order assigning, among others, Judge Andrésia Vaz to the Bench of the appeal proceedings in *Gaspard Kanyarukiga v. The Prosecutor*.[3]

4. Kanyarukiga seeks the disqualification of Judge Vaz from the Bench seised of his appeal.[4] He bases his Motion on Judge Vaz's prior involvement as the Presiding Judge of the Trial Chamber in *The Prosecutor v. Athanase Seromba* ("*Seromba* Trial Chamber") which, in his view, made findings of fact about the same events that arise in his appeal, including relating to his activities.[5] He submits that, as a consequence of her involvement in the *Seromba* case, Judge Vaz is biased and that, at the very least, "her findings raise a reasonable apprehension of bias".[6] Kanyarukiga requests that, if Judge Vaz does not choose to recuse herself, she be disqualified by an order of the Bureau.[7] On 23 December 2010, the Prosecution filed a confidential response to the Motion, arguing that it

[1] *The Prosecutor v. Gaspard Kanyarukiga*, Case No. 02-78-T, Judgement and Sentence, dated 1 November 2010, filed on 9 November 2010 ("Trial Judgement"), paras. 654, 666-668, 688.
[2] Trial Judgement, paras. 587, 644, 645.
[3] Order Assigning Judges to a Case Before the Appeals Chamber, 13 December 2010.
[4] Motion, paras. 1, 25.
[5] Motion, para. 2. The trial judgement in the *Seromba* case was rendered on 13 December 2006. *See The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-T, 13 December 2006 ("*Seromba* Trial Judgement").
[6] Motion, para. 23.
[7] Motion, paras. 1, 25.

should be rejected.[8] Kanyarukiga confidentially filed a reply to the Response on 31 December 2010.[9]

5. I note that all submissions were filed confidentially. However, I find that no exceptional reasons justify the confidential status of the Motion, Response, and Reply.

B. Applicable law

6. 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.

7. 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.[10]

8. 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."[11]

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[8] Prosecution's Response to Motion to Disqualify Judge Vaz, 23 December 2010 ("Response"), confidential.

[9] Defence Reply to Prosecution Response to Confidential Urgent Motion to Disqualify Judge Vaz, 31 December 2010 ("Reply"), confidential.

[10] *See Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Decision on Motion for Disqualification of Judges, 8 February 2011 ("Decision of 8 February 2011"), para. 5 *referring inter alia, to 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.

[11] *See* Decision of 8 February 2011, para. 6, *referring to, inter alia, Rutaganda* Appeal Judgement, para. 40, *quoting Furundžija* Appeal Judgement, para. 190; *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; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 683.

9. The Appeals Chamber has also emphasised that there is a presumption of impartiality that attaches to any Judge of the Tribunal.[12] Accordingly, the party who seeks the disqualification of a Judge bears the burden of adducing sufficient evidence that the Judge is not impartial.[13] In this respect, the Appeals Chamber has consistently held that there is a high threshold to reach to rebut the presumption of impartiality.[14] The party must demonstrate "a reasonable apprehension of bias by reason of prejudgement" that is "firmly established".[15] 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 the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias".[16]

10. 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

11. Kanyarukiga submits that Judge Vaz has prejudged matters central to his appeal as she already made findings in the *Seromba* case: (i) about his participation in an alleged planned meeting on 16 April 1994 that is "flatly incompatible" with his alibi;[17] (ii) of facts relating to material events that are subject of his appeal;[18] and (iii) concerning credibility of witnesses whose testimony is the subject of challenge on appeal.[19] He also submits that she has heard evidence implicating him in allegations not included in the trial record in his case.[20] He argues that it is "asking too much" of a Judge to maintain a completely open mind, especially on the reasonableness of findings similar to the ones that the Judge has already made, when that same Judge participated in a prior trial, adjudicated the outcome, and made findings relying on "the very witnesses relating to many of the

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[12] *See* Decision of 8 February 2011, para. 7, *referring to, inter alia, Nahimana et al.* Appeal Judgement, para. 48; *Galić* Appeal Judgement, para. 41; *Rutaganda* Appeal Judgement, para. 42; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgment (Reasons), 1 June 2001, para. 55.
[13] *See* Decision of 8 February 2011, para. 7, *referring to, inter alia, 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; *Rutaganda* Appeal Judgement, para. 42.
[14] *See* Decision of 8 February 2011, para. 7, *referring to, inter alia, Karera* Appeal Judgement, para. 254; *Galić* Appeal Judgement, para. 41; *Rutaganda* Appeal Judgement, para. 42.
[15] *See* Decision of 8 February 2011, para. 7, *referring to, inter alia, Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement"), para. 45; *Čelebići* Appeal Judgement, para. 707; *Furundžija* Appeal Judgement, para. 197.
[16] *See* Decision of 8 February 2011, para. 7, *citing Čelebići* Appeal Judgement, para. 707.
[17] Motion, paras. 6, 15. *See also* Reply, para. 4.
[18] Motion, paras. 6, 15. *See also* Reply, para. 4.
[19] Kanyarukiga refers to witnesses CBR, CNJ, CDL, CDK, CBS, CBK, CBN, and YAU. *See* Motion, paras. 6, 10.
[20] Motion, paras. 8, 15. Kanyarukiga refers in particular to Witness YAT who did not testify in Kanyarukiga's trial. *See* Motion, para. 8.

very issues at stake"[21] and relating to the same events.[22] Accordingly, and without suggesting that "Judge Vaz is biased [...] based on any animus or hostility or motive to harm him",[23] Kanyarukiga contends that a reasonable observer would apprehend bias should Judge Vaz remain assigned to the appeal proceedings in his case.[24]

12. The Prosecution responds that the Motion should be dismissed.[25] It submits that Kanyarukiga fails to rebut the presumption of impartiality by failing to provide evidence that Judge Vaz would not be able to disabuse her mind from her experience in *Seromba*.[26] It adds that Kanyarukiga fails to show any significant overlap between his case on appeal and the *Seromba* case.[27] In its view, the alleged overlap based on the "alleged 16 April 1994 meeting is, at best, marginal".[28] Because of the marginal significance of this meeting in the *Seromba* case,[29] it contends that it cannot reasonably be assumed that Judge Vaz reached any conclusion "at all about Kanyarukiga's guilt or innocence".[30] With respect to the credibility of witnesses, the Prosecution argues that the *Seromba* Trial Chamber found certain witnesses to be credible, but that they did not give evidence that went to a live issue on appeal.[31]

13. Kanyarukiga replies that the operative questions are (i) whether the findings are incidental to his appeal, rather than their significance in the *Seromba* case,[32] and (ii) whether Judge Vaz reached decisions inconsistent with his appeal position, rather than any conclusion reached by her on his guilt or innocence in the *Seromba* case.[33] He submits that the finding made beyond reasonable doubt by Judge Vaz that Kanyarukiga was in Nyange and at a meeting with Seromba on

[21] Motion, para. 16.
[22] Motion, paras. 5, 22. Kanyarukiga is referring to events that took place in Kivumu Commune from 6 to 10 April 1994 and at Nyange between 10 and 16 April 1994.
[23] Motion, para. 3.
[24] Motion, para. 16.
[25] Response, para. 1.
[26] Response, paras. 2, 3.
[27] Response, para. 9.
[28] Response, para. 6.
[29] The Prosecution argues that the meeting "did not factor into Seromba's convictions [...][but on] Seromba's conduct in encouraging and advising the bulldozer driver to destroy the church". *See* Response, para. 5.
[30] Response, para. 6.
[31] The Prosecution points out that some of the witnesses gave evidence about the 16 April 1994 meeting at Nyange Parish. Response, para. 7. For the reasons articulated in this decision, I find that this is not determinative of the Motion.
[32] Reply, para. 5. Kanyarukiga argues that the factual findings in the *Seromba* case—that he participated as a communal authority in a meeting with Seromba in Nyange on 16 April 1994 shortly before the church was destroyed—are material at the appeal stage because he challenges: (i) the reasonableness of findings about his attendance at meetings with Seromba; (ii) his status as an authority; and (iii) his whereabouts on 16 April 1994. *See* Reply, para. 6.
[33] Reply, para. 7.

16 April 1994 would leave an impression on Judge Vaz.[34] He adds that the witnesses impugned in his appeal were found credible by Judge Vaz and were not testifying on different issues.[35]

D. Discussion

14. On 19 January 2011, and pursuant to Rule 15(B) of the Rules, I consulted with Judge Vaz regarding the Motion. She considered that there was no merit to the request that she withdraw or be disqualified from the appeal proceedings in this case.

15. I note at the outset that the *Seromba* Trial Chamber was concerned exclusively with determining Seromba's criminal responsibility and that it made no findings concerning Kanyarukiga's culpability.[36] With regard to the purported finding of fact in the *Seromba* case which mentions Kanyarukiga, Kanyarukiga refers to a specific passage in paragraph 239 of the *Seromba* Trial Judgement.[37] In this paragraph, the Trial Chamber was making a finding on the credibility of Witness CDL's evidence concerning, *inter alia*, a meeting held on 16 April 1994. Accordingly, in the original French text, the Trial Chamber used the conditional tense, which shows that in the passage it was not making conclusive factual findings based on the beyond reasonable doubt standard.[38] I consider that Kanyarukiga's name, like those of other persons, was mentioned in paragraph 239 only as background and that the text is focused on Seromba's role in the events. In its conclusive factual findings on this point, the Trial Chamber did not specifically identify any person present at the meeting, but stated as follows:

> The Chamber, however, finds that the Prosecution has proved beyond a reasonable doubt that Athanase Seromba was informed by the *authorities* of their decision to destroy the church and that he accepted the decision.[39]

Accordingly, I consider that no factual finding was made regarding Kanyarukiga in this respect.

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[34] Reply, para. 8.
[35] Reply, para. 9. Kanyarukiga submits that in both cases he and Seromba were charged with conspiring together with respect to the same atrocity. *See* Reply, para. 9.
[36] *See Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision of the Bureau, 28 March 2003 ("*Galić* Decision"), para. 16.
[37] Paragraph 239 of the *Seromba* Trial Judgement reads: "The Chamber considers that Witness CDL is also credible as to two other alleged events: first, the meeting held by Athanase Seromba, Kayishema, Ndahimana, Kanyarukiga, Habarugira and other persons, during which Seromba approved the decision to destroy the church, saying: 'If you have no other means of doing it, bring these bulldozers and destroy the church', and secondly, the advice that Seromba gave to the drivers concerning the fragile side of the church."
[38] Paragraph 239 of the French original version of the *Seromba* Trial Judgement reads: "*La Chambre considère [que] le témoin CDL est également crédible sur deux faits : l'entretien entre Athanase Seromba, Kayishema, Ndahimana, Kanyarukiga, Habarugira et d'autres personnes et au cours de laquelle Seromba* ***aurait accepté*** *la décision de détruire l'église et* ***aurait dit*** *: « Si vous n'avez plus d'autres moyens, amenez ces bulldozers et détruisez l'église », d'une part, et les indications données par Seromba aux conducteurs sur le côté fragile de l'église, d'autre part*" (emphasis added). *See The Prosecutor v. André Ntagerura et al.*, Case No. ICTR 99-46-A, Judgement, para. 174 (referring to the different stages of the fact-finding process which a Trial Chamber undertakes before it can enter a conviction).
[39] *Seromba* Trial Judgement, para. 268 (emphasis added). *See also ibid*, para. 269.

16. With respect to the asserted similarity of witnesses and events in the *Seromba* and *Kanyarukiga* cases, the Appeals Chamber has recognised previously that Judges of this Tribunal are sometimes involved in cases which, by their very nature, cover overlapping issues.[40] 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] 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".[41]

17. The fact that a Judge, as a Trial Judge, has previously assessed the credibility of a witness and has to assess on appeal credibility findings concerning that same witness that were made by a different Trial Chamber in a different case is not a sufficient basis, in and of itself, to require his or her disqualification from that appeal.[42] A reasonable, informed observer would know that, when hearing an appeal, Judges assess credibility findings without any preconceived position and strictly within the context of the case in which such findings were made, not on the basis of extraneous information.

18. I consider that the presumption of impartiality has not been rebutted by showing actual bias or a reasonable apprehension of bias arising from Judge Vaz's involvement in the *Seromba* trial. I therefore consider that the Motion is without merit.

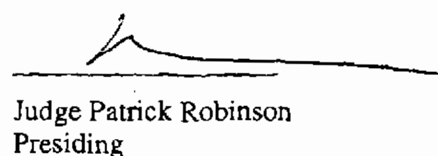
[40] *Karera* Appeal Judgement, para. 378; *Nahimana et al.* Appeal Judgement, para. 78. *See also The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001 ("*Akayesu* Appeal Judgement"), para. 269.
[41] *Karera* Appeal Judgement, para. 378, *citing Nahimana et al.* Appeal Judgement, 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.
[42] *Cf. Karera* Appeal Judgement, para. 378.

E. Disposition

19. For the foregoing reasons and pursuant to Rule 15 of the Rules, I hereby **DENY** the Motion and **DIRECT** the Registrar of the Tribunal to lift the confidential status of the Motion, Response, and Reply.

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

Done this twenty-fourth day of February 2011
At The Hague
The Netherlands



Judge Patrick Robinson
Presiding

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