



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

169/H

[Handwritten mark]

ICTR-98-41A-A

01st September 2011

{169/H - 165/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 1 September 2011

ICTR Appeals Chamber
Date: 01st September 11
Action: R. Guener
Copied To: Concerned Judges,
Secy for Aloy, Muntari,
CPS, LSS,
[Handwritten signature]

Aloys NTABAKUZE

v.

THE PROSECUTOR

Case No. ICTR-98-41A-A

**DECISION ON PETER ERLINDER'S MOTION TO RECONSIDER
ORDER IMPOSING SANCTIONS**

Counsel for Peter Erlinder

Ramsey Clark

Counsel for Aloys Ntabakuze

André Tremblay

Office of the Prosecutor

Hassan Bubacar Jallow
James J. Arguin
George W. Mugwanya
Inneke Onsea
Renifa Madenga
Abubacarr Tambadou
Evelyn Kamau
Christiana Fomenky
William Mubiru
Aisha Kagabo
Ndeye Marie Ka

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: *KOFFI... KUMELIA... A... AFANDE...*
SIGNATURE: *[Handwritten signature]* DATE: 01 Sept. 2011

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),

NOTING the appeal lodged by Aloys Ntabakuze (“Ntabakuze”) against the Trial Judgement rendered in the *Bagosora et al.* case by Trial Chamber I of the Tribunal on 18 December 2008;¹

NOTING the Scheduling Order issued on 27 January 2011, which set the dates of the appeal hearing in the *Bagosora et al.* case, of which this case was then a part, for 30 March, 31 March, and 1 April 2011, in Arusha, Tanzania;²

NOTING that, on 25 March 2011, Ntabakuze’s Lead Counsel, Peter Erlinder (“Erlinder”), informed the Appeals Chamber by a confidential and *ex parte* letter that he would not appear at the appeal hearing due to his medical condition;³

NOTING that, on 29 March 2011, the Appeals Chamber considered that, in the interests of justice, Ntabakuze ought to be represented by Counsel and accordingly ordered that Ntabakuze’s oral arguments be heard at a later date due to the unavailability of Ntabakuze’s Counsel to present the appeal as scheduled;⁴

NOTING that, on 30 March 2011, by oral decision, the Appeals Chamber ordered the severance of Ntabakuze’s case from that of Théoneste Bagosora and Anatole Nsengiyumva;⁵

NOTING that, on 21 April 2011, the Appeals Chamber sanctioned Erlinder by refusing him audience before the Tribunal and instructed the Registrar, pursuant to Rule 46(C) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), to replace him as Ntabakuze’s Lead Counsel;⁶

NOTING that, on 27 April 2011, the Registrar withdrew Erlinder’s assignment as Lead Counsel for Ntabakuze;⁷

¹ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, signed on 18 December 2008, filed on 9 February 2009 (“Trial Judgement”); Public Amended Notice of Appeal in the Interest of: Major Aloys Ntabakuze, 18 May 2009; Amended Appeal Brief in the Interest of: Major Aloys Ntabakuze, 24 June 2009; Prosecutor’s Brief in Response to Aloys Ntabakuze’s Appeal, 7 September 2009; Ntabakuze Brief in Reply, 6 October 2009.

² *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Scheduling Order, 27 January 2011, p. 2.

³ *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Letter from Peter Erlinder to Judges of the Appeals Chamber dated 25 March 2011, confidential and *ex parte*, 25 March 2011 (“Confidential and Ex Parte Letter of 25 March 2011”).

⁴ *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Further Scheduling Order, 29 March 2011, p. 2.

BEING SEISED OF “Motion to Reconsider Order of 21 April 2011: (A) Illness and Medical Treatment Caused Counsel’s Non-Appearance; (B) Sanctions Were Imposed Without Rule 46 Warnings; (C) Sanctions were Premised on Misunderstood Medical Facts; and, for Leave for Counsel to Withdraw *Nunc Pro Tunc*” filed by Ramsey Clark (“Clark”) on behalf of Erlinder on 24 June 2011 (“Motion”), in which Erlinder requests the Appeals Chamber to reconsider the sanction imposed in the Impugned Order and seeks leave to withdraw as Counsel before the Tribunal *nunc pro tunc*;⁸

BEING FURTHER SEISED OF “Petition for *In Locus Standi* of Ramsey Clark, Esq. on Behalf of Former Lead Counsel Prof. Peter Erlinder, Re: Motion for Reconsideration and Leave to Withdraw *Nunc Pro Tunc*” filed by Clark on 24 June 2011 (“Petition”), to which is annexed a Power of Attorney from Erlinder granting Clark authority to represent him in this matter;⁹

NOTING that, in support of his Motion, Erlinder submits, *inter alia*, that: (i) the Appeals Chamber overlooked that he intended to represent his client at the appeal hearing until his medical condition prevented him and that he could not have informed the Appeals Chamber of his inability to attend the hearing any earlier;¹⁰ (ii) the Appeals Chamber misunderstood the medical report annexed to the Confidential and *Ex Parte* Letter of 25 March 2011;¹¹ (iii) illness does not constitute a “conduct” subject to sanction under Rule 46(A) of the Rules and imposing sanctions for failure to appear due to a documented medical condition is a miscarriage of justice;¹² (iv) the sanction was imposed without warning;¹³ (v) his safety concerns were not unfounded,¹⁴ and the Appeals Chamber erred in sanctioning him “for declining to violate both a conflict-of-interest and candor with the Chamber”;¹⁵ and (vi) his “effective disbarment” from the Tribunal is “unnecessary and harmful” to both himself and the Tribunal;¹⁶

NOTING that Ntabakuze indicated that he does not take a position on the Petition and Motion,¹⁷ and that the Prosecution did not respond;

⁵ *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, AT. 30 March 2011 p. 2.

⁶ Order Imposing Sanctions on Ntabakuze’s Lead Counsel, 21 April 2011 (“Impugned Order”), p. 3.

⁷ Decision on the Withdrawal of the Assignment of Mr. Peter Erlinder, Counsel for Aloys Ntabakuze, dated 27 April 2011, filed on 28 April 2011.

⁸ Motion, p. 8.

⁹ Petition, para. 1, Annex.

¹⁰ Motion, paras. 3-8, 11(b), 14, referring to Annexes A, B, F.

¹¹ Motion, paras. 11(a), 14, referring to Annex A.

¹² Motion, paras. 11(c), 13, 20-23, referring to Annexes A and B. See also Motion, para. 12.

¹³ Motion, paras. 15-19.

¹⁴ Motion, para. 11(d), referring to Annex C.

¹⁵ Motion, para. 11(e), referring to Annex D.

¹⁶ Motion, para. 10.

¹⁷ E-mail from André Tremblay to the Registrar and Deputy Registrar concerning the Petition and Motion, dated 27 June 2011, filed on 28 June 2011.

CONSIDERING that the Appeals Chamber may reconsider a previous non-final decision pursuant to its inherent discretionary power if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice;¹⁸

CONSIDERING that Erlinder was not sanctioned for his non-appearance at the appeal hearing of his former client due to his medical condition but rather on the basis of his failure to inform the Appeals Chamber in a timely manner of his inability to fulfil his professional obligations, considered in the circumstances of his multiple efforts to avoid travelling to Arusha;¹⁹

CONSIDERING that Erlinder does not demonstrate that the Appeals Chamber erred in finding and relying on the fact that Erlinder made multiple efforts to avoid travelling to Arusha, that it misunderstood the medical information submitted before it, or that it erred in considering that Erlinder could have informed it earlier of the situation which ultimately prevented him from fulfilling his duties as Counsel;

CONSIDERING further that Erlinder does not demonstrate that his failure to inform the Appeals Chamber in a timely manner of his inability to fulfil his professional obligations does not constitute a "conduct" which "obstructs the proceedings, or is otherwise contrary to the interests of justice" within the meaning of Rule 46(A) of the Rules;²⁰

CONSIDERING that the Appeals Chamber had previously warned Erlinder twice about his duty to adhere to his professional obligations as Counsel assigned by the Tribunal;²¹

¹⁸ See, e.g., *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-2001-70-A, Decision on Reconsideration of the Decision on the Filing of Emmanuel Rukundo's Reply Brief, 4 May 2010, para. 5; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Scheduling of the Appeal Hearing, 19 January 2010, para. 10. See also *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on Motion on Behalf of Veselin Šljivančanin Seeking Reconsideration of the Appeals Chamber's Decision of 8 December 2009, 22 January 2010, p. 2.

¹⁹ Impugned Order, p. 2. The Appeals Chamber recalls that Erlinder's contentions regarding an alleged conflict of interest and safety concerns have already been addressed and rejected. See *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Stay of Proceedings, 27 January 2011 ("27 January 2011 Decision"), paras. 10-13; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Video-Conference Participation of Lead Counsel in the Appeal Hearing and for the Withdrawal of Registrar's Public Decision, 15 March 2011 ("15 March 2011 Decision"), paras. 12-14. The Appeals Chamber declines to address again these contentions in the present decision.

²⁰ See Impugned Order, p. 2 ("CONSIDERING further that Lead Counsel's failure to inform the Appeals Chamber in a timely manner of his inability to attend the appeal hearing due to non-emergency medical reasons amounted to an obstruction of the proceedings and was contrary to the interests of his client"). The Appeals Chamber emphasises that it did not sanction Erlinder pursuant to Rule 46 of the Rules on the ground that his conduct "remain[ed] offensive or abusive" within the meaning of Rule 46(A) of the Rules.

²¹ See 27 January 2011 Decision, para. 14; 15 March 2011 Decision, para. 15. See also Impugned Order, p. 2. The Appeals Chamber emphasises that the reliance on the 15 March 2011 warning in the Impugned Order should not be interpreted as suggesting that the Appeals Chamber ultimately imposed sanction for failure to appear. As made clear in the Impugned Order, the Appeals Chamber relied on this warning to the extent that it reminded Erlinder of his duty to adhere to his professional obligations as Counsel assigned by the Tribunal. See Impugned Order, p. 2.

FINDING that Erlinder has not shown any error of reasoning in the Impugned Order or that reconsideration is necessary to prevent an injustice;


HEREBY GRANTS Clark standing to represent Erlinder in this matter; and

DISMISSES the Motion in its entirety.

Done this first day of September 2011,
At The Hague,
The Netherlands.



[Seal of the Tribunal]



Judge Patrick Robinson
Presiding Judge