



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

87/H

DV

ICTR-98-44D-AR91

27th April 2012

{87/H - 81/H}

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Fausto Pocar
Judge Liu Daqun
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Decision of: 27 April 2012

ICTR Appeals Chamber

Date: 27th April 2012
Action: R. Gunn
Copied To: all concerned

DV

CALLIXTE NZABONIMANA

v.

THE PROSECUTOR

Case No. ICTR-98-44D-AR91

DECISION ON CALLIXTE NZABONIMANA'S APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON MOTION FOR RULE 91 PROCEEDINGS AGAINST PROSECUTION INVESTIGATORS

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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NAME / NOM: *CONSTANT HOMERONNE*

SIGNATURE: *[Signature]* DATE: *22-04-2012*

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 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of an appeal filed by Callixte Nzabonimana on 27 December 2011¹ against a decision issued on 25 November 2011 by Trial Chamber III of the Tribunal ("Trial Chamber").² The Prosecution responded on 5 January 2012.³ Mr. Nzabonimana's reply was filed on 10 January 2012.⁴

A. Background

2. The present proceedings arise from the testimony given by Jean-Marie Vianney Mporanzi during Mr. Nzabonimana's trial in May 2010. Witness Mporanzi testified that, on 25 August 1998, a Tribunal Prosecution investigator who interviewed him in Gitarama prefecture, Rwanda, told him to collect a travel allowance from a sub-prefect of Gitarama prefecture named "Marguerite", and that he received about 2,000 Rwandese Francs from that person.⁵

3. In response to these claims, the Prosecution filed two motions on 10 August 2010⁶ and 21 January 2011,⁷ respectively, which appended statements designated as "affidavits" from the Prosecution Chief of Investigations, Alfred Kwende,⁸ and the investigators who had interviewed Witness Mporanzi, namely, Adamou Allagouma and Almahamoud Sidibe.⁹ In these statements (collectively, "Statements"), the investigators affirmed that Witness Mporanzi had not been instructed to collect payments from any other person, that he was directly reimbursed for travel and meal expenditures in accordance with standard Tribunal practice, and that there never was any

¹ Nzabonimana's Appeal of the Trial Chamber's "Decision on the Defence Motion for Proceedings Against OTP Investigators," Rendered on 25 November 2011, 27 December 2011 ("Appeal"). See also Nzabonimana's Notice to Appeal the Trial Chamber's Decision on the Defence Motion for Proceedings Against OTP Investigators, Rendered on 25 November 2011, 12 December 2011 ("Notice of Appeal"). A corrigendum to the Notice of Appeal was filed on 27 December 2011. See Nzabonimana's Corrigendum to the Notice to Appeal the Trial Chamber's "Decision on the Defence Motion for Proceedings Against OTP Investigators," Rendered on 25 November 2011, 27 December 2011.

² *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for Proceedings Against OTP Investigators, 25 November 2011 ("Impugned Decision").

³ Prosecutor's Response to Nzabonimana's Appeal of the Trial Chamber's "Decision on the Defence Motion for Proceedings Against OTP Investigators," Rendered on 25 November 2011, 5 January 2012 ("Response").

⁴ Nzabonimana's Reply to Prosecutor's Response to Nzabonimana's Appeal of the Trial Chamber's Decision on the Defence Motion for Proceedings Against OTP Investigators, Rendered on 25 November 2011, 10 January 2012 ("Reply").

⁵ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, T. 26 May 2010 pp. 30-33, 52-62 (closed session, in part), T. 27 May 2010 pp. 5-11.

⁶ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Motion for the Admission of Marguerite Mukansanga and Alfred Kwende's Affidavits Pertaining to the Testimony of Jean Vianney Mporanzi, 10 August 2010 ("Prosecution Motion for Admission").

⁷ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi, 21 January 2011 (confidential) ("Prosecution Motion for Recall").

⁸ Prosecution Motion for Admission, Annex B.

arrangement with Rwandan authorities to assist in the payment of such expenses.¹⁰ The Prosecution repeatedly referred to the Statements as “affidavits” in its submissions to the Trial Chamber.¹¹ Documents disclosed by the Prosecution on 28 March 2011 indicate that, on 25 August 1998, Adamou Allagouma gave 245,000 Rwandese Francs to Immaculée Mukamasabo, a sub-prefect of Gitarama prefecture, for the “treatment of witnesses”, and that, on 27 August 1998, the Finance Section of the Tribunal provided this same amount to Adamou Allagouma for travel-related costs of witnesses in relation to investigations in the *Nzabonimana* case.¹²

4. On 13 October 2011, Mr. Nzabonimana filed a motion requesting the Trial Chamber to issue, pursuant to Rule 91(C)(ii) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), an order in lieu of an indictment against Adamou Allagouma and Almahamoud Sidibe for providing false testimony.¹³ Alternatively, he requested the appointment of an *amicus curie* pursuant to Rule 91(B) of the Rules to investigate the conduct of Alfred Kwende, Adamou Allagouma, and Almahamoud Sidibe.¹⁴

5. The Trial Chamber denied these requests in the Impugned Decision.¹⁵ With respect to the requested order in lieu of an indictment, it reasoned that “the Defence has ignored the plain wording and structure of the relevant Rules, which clearly envision the appointment of an *amicus curiae* under Rule 91 (B) (ii) before any prosecution may be commenced pursuant to Rule 92 (C) (ii) [sic].”¹⁶ In assessing the request for investigations by an *amicus curiae*, the Trial Chamber observed that “Black’s Law Dictionary defines an ‘affidavit’ as ‘[a] written or printed declaration or statement of facts, made voluntarily, and confirmed by oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.’”¹⁷ The Trial Chamber noted that the Statements were labelled “affidavits” but that there was no evidence that they had been “witnessed by any person whatsoever, let alone solemnly affirmed before a

⁹ Prosecution Motion for Recall, Annex A, para. 5; Prosecution Motion for Recall, Annex B, para. 5.

¹⁰ Prosecution Motion for Admission, Annex B, paras. 3-5; Prosecution Motion for Recall, Annex A, paras. 9-14; Prosecution Motion for Recall, Annex B, paras. 9-14.

¹¹ See, e.g., Prosecution Motion for Admission, paras. 9, 29; Prosecution Motion for Recall, para. 30; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor’s Response to Nzabonimana’s Motion Against OTP Investigators Alfred Kwende, Adamou Allagouma, Almahamoud Sidibe and Djibo Moumouni, 18 October 2011 (confidential), paras. 2, 24.

¹² See Exhibit D125 (confidential); Impugned Decision, para. 6.

¹³ *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana’s Motion Against OTP Investigators Alfred [sic] Kwende, Adamou Allagouma, Almahamoud Sidibe and Djibo Moumouni, 13 October 2011 (confidential) (“Trial Motion”), paras. 1, 41, 47, p. 13.

¹⁴ Trial Motion, paras. 1, 41, 44, 48, 49, p. 13. Additionally, Mr. Nzabonimana reiterated a prior request for the initiation of contempt proceedings against Prosecution investigator Djibo Moumouni for disclosing protected witness information. See Trial Motion, paras. 2, 50, p. 14. The Trial Chamber dismissed this request as moot. See Impugned Decision, para. 19. Mr. Nzabonimana has not appealed this finding. See Notice of Appeal, para. 31; Appeal, para. 55.

¹⁵ Impugned Decision, p. 9.

¹⁶ Impugned Decision, para. 20.

¹⁷ Impugned Decision, para. 23, referring to Black’s Law Dictionary, 6th ed., 1990.

competent official.”¹⁸ The Trial Chamber therefore found that the Statements “are not affidavits containing solemn declarations for the purpose of Rule 91” of the Rules and that Mr. Nzabonimana had accordingly failed to demonstrate the existence of “strong grounds” to believe that Alfred Kwende, Adamou Allagouma, and Almahamoud Sidibe provided false testimony within the meaning of that rule.¹⁹

6. Mr. Nzabonimana appealed the Impugned Decision pursuant to Rule 91(I) of the Rules.²⁰

B. Submissions

7. Mr. Nzabonimana submits that the Trial Chamber erred in finding that the Statements do not amount to false testimony within the scope of Rule 91 of the Rules.²¹ He argues that this provision is not restricted to formal affidavits, but rather covers false averments in any document containing an oath or solemn declaration,²² and he further maintains that the Statements are solemn declarations.²³ In any event, he contends, since both the Prosecution and the Trial Chamber treated the Statements as “affidavits” in other instances, the Trial Chamber is “estopped” from denying that they are affidavits in Rule 91 proceedings.²⁴ Mr. Nzabonimana further submits that the Trial Chamber erroneously failed to address the obvious falsity of the Statements.²⁵ He also contends that the Trial Chamber erred in finding that it could not issue an order in lieu of an indictment without first appointing an *amicus curiae*.²⁶ Mr. Nzabonimana asserts that these errors greatly prejudiced his right to a fair trial.²⁷

8. The Prosecution responds that the Statements do not meet the threshold requirements of either Rules 91(B) or 91(H) of the Rules.²⁸ It further contends that there is no evidence that the investigators knowingly and wilfully provided incorrect information.²⁹ In any event, the

¹⁸ Impugned Decision, para. 24.

¹⁹ Impugned Decision, para. 24. The Trial Chamber noted that it had considered the Prosecution investigators’ “affidavits” in dispensing with previous interlocutory motions but held that “this practice is fully consonant with the Chamber’s prerogative under Rule 89 (C) to ‘admit any relevant evidence which it deems to have probative value’.” Impugned Decision, para. 25.

²⁰ Notice of Appeal, para. 27; Appeal, paras. 1, 43.

²¹ Appeal, paras. 77, 85. *See also* Appeal, paras. 56, 57.

²² Appeal, paras. 80, 81, 85. *See also* Reply, paras. 34-36.

²³ Appeal, paras. 58-60, 82, 83.

²⁴ Appeal, paras. 89-92.

²⁵ Appeal, paras. 63-76, 86-88. *See also* Appeal, paras. 61, 62; Reply, paras. 15-26.

²⁶ Appeal, paras. 94-97.

²⁷ Appeal, paras. 56, 98-103. *See also* Reply, paras. 27-33, 38, 39.

²⁸ Response, paras. 1, 3, 15-29.

²⁹ Response, paras. 2, 4, 30-35, 42.

Prosecution argues, the Statements were incapable of causing harm to Mr. Nzabonimana's case, thus rendering Rule 91 proceedings unnecessary.³⁰

9. In reply, Mr. Nzabonimana submits that the Prosecution's narrow interpretation of Rule 91 of the Rules "in effect means that persons whose statements are admitted under Rule 89 (C) have a license to offer to the Chamber falsehoods in all hues".³¹

C. Standard of Review

10. The Impugned Decision concerns allegations of false testimony and relates to the general conduct of trial proceedings. Such decisions fall within the discretion of the trial chamber, to which the Appeals Chamber must accord deference.³² 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.³³ Consequently, the trial chamber's discretionary decision will only be reversed where it is found to be: (i) based on an incorrect interpretation of the governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.³⁴

D. Discussion

11. The Appeals Chamber notes that Rules 91(B) and 91(C) of the Rules, which provide the basis for initiating proceedings for false testimony, apply to the oral testimony of a witness who has appeared before the Tribunal.³⁵ Rule 91(H) of the Rules extends the application of these rules

³⁰ Response, paras. 2, 36-42.

³¹ Reply, para. 12. See also Reply paras. 8-11, 13, 14, 37.

³² *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR.91, Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony" and on Motion for Oral Arguments, 22 January 2009, para. 13. See also *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 (public redacted version), para. 7.

³³ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion", 14 May 2008, para. 6, referring to *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.

³⁴ *Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-AR73(C), Decision on Ngirabatware's Appeal of the Decision Reducing the Number of Defence Witnesses, 20 February 2012, para. 12; *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR72(C), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, para. 6.

³⁵ This follows from the fact that, pursuant to Rule 90(A) of the Rules, "[w]itnesses shall, in principle, be heard directly by the Chambers [...]" See also Rule 91(F) of the Rules ("No Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.") (emphasis added). The jurisprudence cited by Mr. Nzabonimana does not suggest otherwise. See Reply, para. 34, referring to *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R", rendered on 9 March 1998 and filed on 24 March 1998, p. 3 (noting that "it is generally accepted that false testimony may be defined as a false statement made in court under oath or solemn

mutatis mutandis to written statements “taken in accordance with Rule 92 *bis* [of the Rules] which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal”.

12. The Appeals Chamber observes that the Impugned Decision contains no reference to Rule 91(H) of the Rules. Rather than considering whether the Statements fell within the scope of Rule 91(H) of the Rules, the Trial Chamber appears to have focused on whether Rules 91(B) and 91(C) of the Rules alone applied and concluded that they did not because the Statements had not been witnessed by a competent official.³⁶ The Appeals Chamber considers that this line of reasoning is based on an incorrect interpretation of the law.

13. The Appeals Chamber finds that the Statements are not directly covered by Rules 91(B) and 91(C) of the Rules because they are not “testimony” within the meaning of these rules. The issue to be determined is therefore whether the Statements fall within the ambit of Rule 91(H) of the Rules as written statements taken in accordance with Rule 92*bis* of the Rules. Rule 92*bis*(B) of the Rules requires, *inter alia*, that the written statement in question contain a declaration as to the veracity of the contents by its author and that this declaration be witnessed by a person authorised to do so. While all of the Statements commence with a declaration that the undersigned are “aware of the penalties of false testimony under solemn declaration under [R]ule 91” of the Rules and that the facts “contained in this affidavit are true and accurate”,³⁷ there is no indication that they were witnessed by a person authorised under Rule 92*bis*(B) of the Rules. Accordingly, the Appeals Chamber finds that the Statements were not taken in accordance with Rule 92*bis* of the Rules and that, as such, they are not subject to the provisions of Rule 91 of the Rules.

14. In so finding, the Appeals Chamber is mindful of Mr. Nzabonimana’s argument that a narrow interpretation of the scope of Rule 91 of the Rules risks allowing persons who make statements that do not meet the formal requirements of Rule 92*bis* of the Rules to offer “falsehoods” without fear of repercussion.³⁸ The Appeals Chamber further notes that, as the Prosecution has itself acknowledged,³⁹ the documents disclosed on 28 March 2011 demonstrate that the Statements were incorrect. The Appeals Chamber expresses its concern that Prosecution

declaration”) (emphasis added); *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Decision on the Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness “E”, rendered on 10 March 1998 and filed on 31 March 1998, p. 3; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO, 3 October 2003, para. 8.

³⁶ Impugned Decision, paras. 23, 24.

³⁷ *Prosecution Motion for Admission, Annex B; Prosecution Motion for Recall, Annex A*, p. 1; *Prosecution Motion for Recall, Annex B*, p. 1.

³⁸ Reply, paras. 11, 12.

³⁹ Response, paras. 1, 13.

investigators, one of whom appears to have arranged for the reimbursement of Witness Mporanzi's travel costs through Rwandan authorities, provided inaccurate information to the Tribunal and that the Prosecution relied upon this information when due diligence should have led it to abstain from so doing. The Appeals Chamber also observes that the Trial Chamber imposed a warning on the Prosecution pursuant to Rule 46(A) of the Rules for submitting "written statements bearing the trappings of 'affidavits' which do not, strictly speaking, adhere to the formal requirements such juridical documents command".⁴⁰

15. However, the Appeals Chamber recalls that Rule 91 of the Rules is a criminal provision and, accordingly, is subject to the *nullum crimen sine lege* principle, which requires a narrow construction and leaves no room for an interpretation beyond the reasonable limits of acceptable clarification.⁴¹ The clear wording of Rule 91(H) of the Rules allows for the application of Rules 91(B) and 91(C) of the Rules only to written statements which fulfil the requirements stipulated in Rule 92*bis* of the Rules. This does not suggest that false information in such statements may be presented to the Tribunal with impunity. The Appeals Chamber underscores in this respect that Rule 77(A) of the Rules permits the Tribunal to hold in contempt "those who knowingly and wilfully interfere with its administration of justice".

16. In light of the above, the Appeals Chamber finds that while the Trial Chamber based its decision on an incorrect interpretation of the law because it carried out its analysis pursuant to Rules 91(B) and 91(C) of the Rules alone, its conclusion that the Statements could not be the subject of proceedings under Rule 91 of the Rules was correct. Consequently, Mr. Nzabonimana's remaining arguments have been rendered moot and are dismissed as such.


E. Disposition

17. For the foregoing reasons, the Appeals Chamber **DENIES** Mr. Nzabonimana's Appeal.

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

Done this 27th day of April 2012,
At The Hague,
The Netherlands.




Judge Theodor Meron
Presiding

⁴⁰ Impugned Decision, para. 27.

⁴¹ See, e.g., *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009, para. 670.